SUPREME COURT COPY

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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. WILLIAM CLINTON CLARK Defendant and Appellant.	)	No. S066940 (Orange County Superior Court No. 94CF0821)

AUTOMATIC APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF ORANGE COUNTY
Honorable John J. Ryan, Judge

APPELLANT'S OPENING BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

DOCKETED CASES

MISCELLANEOUS

STATEMENT OF THE CASE

By an amended information filed on June 30, 1995, appellant was charged with the murder of Kathy Lee on October 18, 1991. (California Penal Code § 187(a)). Appellant was also charged with commercial burglary at Comp USA, as well as second degree robbery of Peter Lee, William Doehr and Arlen Nydam. Appellant was also charged with the murder of Ardell Williams on March 13, 1994. (California Penal Code § 187(a)). Appellant was charged with entering into a conspiracy to commit the murder of Ardell Williams. The sole coconspirator alleged was Antoinette Yancey. (CT 274).

It was further alleged that the murder of Kathy Lee (1) was committed during the commission of the crime of burglary (see Cal. Penal Code §190.2(a)(17)(vii)); and (2) was committed during the commission of the crime of robbery (see Cal. Penal Code §190.2(a)(17)(i)). It was further alleged that the murder of Antoinette Yancey was committed (1) while lying in wait (see Cal. Penal Code §190.2(a)(15)); (2) and that Ardell Williams was a witness to a crime who was intentionally killed for the purpose of preventing her testimony in a criminal proceeding and in retaliation for her testimony in a criminal proceeding (see Cal. Penal Code §190.2(a)(10)). It was further alleged that appellant was convicted of more than one offense of murder in the

first or second degree (see Cal. Penal Code §190.2(a)(3)). (CT 276)

It was further alleged that in the commission of all crimes, a principal was vicariously armed with a firearm, and knew that another principal was personally armed. (See Cal. Penal Code 12022(d)). It was also alleged that in the commission and attempted commission of conspiracy to murder Ardell Williams and the murder of Ardell Williams, Antoinette Yancey personally used a firearm. (See Cal. Penal Code §§1203.06(a)(1), 12022.5(a)). (CT 276).

Jury selection began on January 16, 1996. (RT 3341). On May 21, 1996 the jury found appellant guilty of all charges. The special circumstances and enhancement were found to be true. (RT 11234-11250).

The penalty phase began on June 24, 1996. The prosecution presented additional evidence of prior felony convictions. (RT 11340-11345). The prosecution also introduced victim-impact evidence from family members of both victims. (RT 11346-11349; 11351-11356). The defense presented seventeen witnesses to testify on appellant's behalf. (RT 11371-11593; 11702-11856). Appellant did not testify. On July 26, 1994, the jury announced a deadlock. (RT 12046-12058). The jury was split with seven favoring death and five favoring life without parole. (RT 12059).

On July 26, 1996, the prosecutor elected to retry the penalty phase. (RT 12064). Lead trial counsel Jack Earley was relieved on his own motion due to

a conflict of interest. (RT 12064-12076). *Keenan* counsel Robison Harley was appointed as lead counsel. (RT 12073-12076). The retrial of the penalty case was set to trail the Antoinette Yancey trial, which was given priority. (RT 12064).

Jury selection for the penalty phase retrial began on September 8, 1997. (RT 12445). The trial commenced with opening statements on September 15, 1997. (RT 13088). Trial counsel had made it known that he intended to present a lingering doubt defense. (*See, e.g.*, RT 12415-12420). The prosecutor thus presented virtually all of the evidence he had presented in the guilt phase, in order to combat the lingering doubt defense as well as to provide the new penalty phase jury with context of the crimes committed. (RT 12167-12174). On October 27, 1997, the jury returned a verdict of death. (RT 16173).

The sentencing hearing pursuant to § 190.4(e) was held on December 29, 1997. Trial counsel provided written motions for reduction of sentence and for new trial as well as brief oral argument. (CT 5214-5225; CT 5226-5270; RT 16721-16735). The trial court did not modify the verdict and formally pronounced a sentence of death. (RT 16790).

This appeal is automatic.

FACTUAL HISTORY

The relevant factual history began long before the crimes charged and the trial. The following is an overview of the facts relevant to understanding and evaluating the fairness of appellant's trial.

Lewis Clark, appellant's father, met appellant's mother Joyce when she was only 19. (RT 11431). He married Joyce because she got pregnant. They weren't ready for marriage but it was the "righteous thing to do." (RT 11433). He almost backed out on the day of the wedding, but instead he drank a pint of liquor and went through with it. (RT 11434). Their relationship was tumultuous at best. Appellant was born December 15, 1953.

Sometime in 1965 or 1966, Lewis was hospitalized at Metropolitan State Hospital for mental illness. He was thirty years old. (RT 11432). Lewis spent three to four weeks there. His mother, appellant's paternal grandmother, had been hospitalized for mental illness when she was approximately 38-40 years old. (RT 11375, 11432). Lewis's moods alternated from depression to being highly energized. (RT 11440). When energized, he would completely remodel the house, or focus on fixing his lawn. (RT 11440). Other times, he would build large amounts of furniture. (RT 11441). When Joyce got mad, she would destroy the furniture Lewis made.

There was both verbal and physical abuse between Lewis and Joyce.

(RT 11435). Lewis drank a lot. They lived in South Central Los Angeles. After they moved to a duplex there, gangs started moving into the area, including the Crips and the Bloods. (RT 11444). Joyce was not a good housekeeper. The house was cluttered and there was frequently moldy food in the refrigerator. Lewis spent his time running his own business from 1967-1975. He was a workaholic. (RT 11415). He spent considerable spare time at the race track. (RT 11416). One of their fights culminated in Joyce throwing boiling water on Lewis. Lewis sustained third degree burns on his face. (RT 11438).

Lewis didn't understand the negative effect on their sons John and Bill from witnessing the violence between Lewis and Joyce. (RT 11442). The violence intensified when Lewis drank. (RT 11376). Lewis was a heavy drinker. (RT 11415). He also broke things when he was drunk. (RT 11428). Lewis eventually left Joyce and his sons, although he saw them on weekends. Appellant was eight years old when his parents divorced. (RT 11393). Later he moved to Fresno for business, while Joyce and the kids stayed in Los Angeles. (RT 11444). The relationship had been so bad and violent that Joyce was actually relieved by the divorce. (RT 11377).

Lewis admitted that he was better with his second family– he was a better father to his sons Eric and Jason. (RT 11443). He had to be both a

father and a mother to Eric and Jason. (RT 11423). With this second family, he stopped running around with women, and stopped drinking and smoking. (RT 11443). Lewis and Joyce had simply married too young. (RT 11414). While they were married, Lewis was frequently seen in the company of other women. (RT 11417).

When appellant was young, he was hit in the head with a champagne bottle. (RT 11578). He went into convulsions. A scar remained for life. While still a child, he on at least one occasion been unable to stop his arm from shaking uncontrollably. (RT 11582).

Joyce always spoke well of her children John and Bill. She portrayed them as always being the best at whatever they did. (RT 11377, 11443). Her life was troubled– she suffered from weight problems, had an early hysterectomy and was plagued with rashes. She often took tranquilizers and had two miscarriages. (RT 11378). At the time of her bragging, appellant was receiving therapy for his problems. (RT 11380).

Joyce was remarried for approximately 6 years. She married Jerry Watkins, a social worker, in 1969, when appellant was about 14 years old. (RT 11541-42). Joyce was argumentative, and conflicts would escalate, with her ultimately getting physical. Jerry couldn't deal with it and had to leave. (RT 11545).

As a teenager and young adult, appellant was involved in sports and worked with neighborhood children. (RT 11445). He always helped his aunt by putting together Christmas toys for her children. (RT 11373, 11494). He also babysat for his cousins frequently. (RT 11406). When one of his cousins was raped, appellant provided comfort and tried to help her through the ordeal. (RT 11496).

Appellant was active in block committees and organizations. He tried to keep gangs out of the neighborhood. (RT 11481). He was an active volunteer, helping children and senior citizens. (RT 11482). He also helped his mother manage apartments, collect rent and make deposits. (RT 11483).

Appellant first attended college at University of California at Los Angeles, and then attended Fresno State University. (RT 11381). While in school, he ran several businesses. (RT 11461). He suffered severe injuries in a car accident while in Fresno, and moved back to the Los Angeles area. (RT 11446). Later, he had an accident while in Los Angeles and suffered a broken neck. (RT 11383). He spent considerable time encased in a body cast while recuperating. (RT 11461).

In 1971, Jeanette Moore was convicted of using a bogus California Driver's License to cash a bad check. (RT 2488-2493, 13478-13483). This was a crime of moral turpitude. It would not be the last such crime she would

commit, as shown below.

Appellant was a whirlwind of activity, although many of his plans never came to fruition. On one occasion, he tried to build a large aquarium in his apartment. When it leaked into his downstairs neighbor's apartment, he abandoned the endeavor. (RT 11465, 11583). Appellant often signed up for classes, but would inevitably become frustrated with what he saw as the slow pace of the classes, and ended up "teaching himself" instead. (RT 11467).

After returning to Los Angeles, appellant engaged in a series of businesses. The Olympics were held in Los Angeles in 1984. Around that time, appellant created and ran a company which sought to create and distribute various Olympics-related products, including stuffed animals and T-shirts. Appellant's brother Jonathan did much of the artwork. (RT 11588). Appellant often had many ideas for businesses, but was unable to transform those ideas into reality. (RT 11446). Oftentimes, he would come up with good ideas, but wouldn't follow through on his ideas with the necessary planning and hard work. (RT 11464).

Appellant thought that his Olympics company would succeed, and he got in over his head. Observers noted that while the offices were plush, it didn't seem like much work was actually being done. (RT 11584). Appellant thought that he could always do things better than others, however. (RT

11585). He had an offer to sell the company to Beatrice Foods, but thought that he could successfully market the company worldwide and turned down the purchase offer. (RT 11447). He was convinced the business would become a world-wide success. (RT 11468). Ultimately, the appellant's dreams failed to materialize and the company failed and went out of business. (RT 11448).

Appellant felt like a complete failure once the business failed. (RT 11459). Members of his family had invested large sums of money in the business, and that money was gone forever. His Aunt Gloria Cooper lost approximately $350,000 in the venture. (RT 11385). His mother lost her house. Family and friends didn't see appellant as much after the failure of his Olympics business. (RT 11386, 11417, 11429). He felt guilty for his family's loss of money, and some family members were mad at him for their loss. (RT 11417). He took a turn for the worse when the business failed. (RT 11585). He always thought that he would make his family's money back for them. (RT 11470). He avoided his family and started hanging around with other people. (RT 11475).

Further darkening appellant's outlook, his grandmother died just around the time of the 1984 Olympics. She was the matriarch of the family. When she died, appellant's depression deepened. (RT 11471).

Other members of his family were achieving success, while he had just

endured what seemed a catastrophic failure. His brother Jonathan was on his way up at Motown, working as a record executive. (RT 11450). Bill had always been close to Jonathan (RT 11407), who was now a success. His half-brothers Eric and Jason were doing well playing basketball. Appellant entered a depression during this period, while attempting to maintain a T-shirt producing business. (RT 11451). He wanted to be able to impress others with his success and money. (RT 11418).

The failure of the business destroyed the life he shared with his wife and children. (RT 11474). Appellant changed after the failure, and entered a deep depression. (RT 11469). He was never mean or abusive to his wife, although they were ultimately divorced. (RT 11470). They had three children together who, at the time of his trial, were eight, nine and 14. He was an involved parent when not incarcerated. (RT 11397, 11479).

In 1988, appellant started a T-shirt and graphic design business called the Canopy Group. (RT 10327, 10339). This company did silk screening for T-shirts. The company sold bulk quantities of custom T-shirts to various customers. (RT 10339).

In May 1990, appellant and Ardell Williams began a relationship. He had separated from his wife. They were dating at the time they traveled to Las Vegas. (RT 2166).

In 1990, Jeanette Moore met Gary Jackson. (Muni RT 756). Gary Jackson had a long criminal history with two to three dozen convictions including burglary, lying to police, petty theft and drug possession and sales. (Muni RT 751). They began a relationship. (RT 1990). They had a romantic relationship. (RT 7768). At some point, they lived together. (Muni RT 824). They both used drugs. Moore used rock cocaine, while Jackson used rock cocaine and heroin. (Muni RT 830). They had several dealers, and bought whatever they could. (Muni RT 831).

Some time in 1990 or 1991, Elizabeth White lost her license. The name "Elizabeth White" and a fraudulent license would later be used in a check cashing scheme including Ardell Williams. (RT 9544-9547) (See below).

In November 1990, Ardell Williams was working as a cashier at Softwarehouse. (RT 8545-8548). She allowed two individuals to go through her register with approximately $15,000 worth of merchandise. (RT 8586-8594, 8612-8620). She ultimately pled guilty to the crime in March 1991 and was placed on probation and ordered to pay restitution. (RT 8823-8827). She was also fired from that job.

In May 1991, Jeanette Moore met Bill Clark on Mother's Day. They met at Gary Jackson's father's house. (RT 7756, 13294). Moore received a business card from appellant which contained information about The Canopy

Group. (RT 13297). Moore wanted to use Clark's business address to receive her mail. (RT 15304).

On May 17, 1991, Jeanette Moore illegally obtained a fraudulent California Driver's License in the name of Dena Carey. (RT 7776-7779, 9425-9431, 15391). On July 22, 1991, she obtained a second fraudulent license in the same name. (RT 7849-7851, 13339-13347).

Subsequently, Jeanette Moore used the Dena Carey license to purchase clothes with fake credit cards. The license was used to reactivate Dena Carey's closed accounts at Saks, Broadway, Circuit City and Robinson's May Company, unbeknownst to Ms. Carey. (RT 8680). Moore purchased items at Saks and Robinson's May Company. (RT 8852, 13413-13432). She bought bags of clothes. (RT 15305-15308). She then traded or sold those clothes for cocaine and money. (Muni RT 841). She bought the clothes with Ricky, one of her drug dealers. (RT 15306). In August or September 1991, Ricky also offered her money to rent a truck for him. (RT 15307).

Appellant and Ardell Williams traveled to Las Vegas, Nevada. While there, they were arrested for attempting to cash stolen traveler's checks. Ardell Williams signed checks in the name "Elizabeth White" and presented a false driver's license in that name. (RT 8871-8881, 8942-8948).

Appellant bailed himself out while Ardell remained in jail. (RT 8954).

Ardell was contacted by Las Vegas Police Officer John Hillenbrand, who encouraged her to cooperate. (RT 8948). She agreed to cooperate with law enforcement in order to help herself. (RT 8955-8956). She was still on probation for the Softwarehouse crimes. (RT 8971-8972). She was not hesitant in implicating appellant in the Las Vegas crimes, or in testifying against appellant in that case. (RT 8971).

In order to benefit herself, Ardell started to work as a criminal informant with the FBI. FBI Agent Todd Holliday was working on cases involving thefts of traveler's checks and fraudulent cashier's checks. (RT 9083). She spoke and met with Holliday on at least ten occasions. (RT 9088). She worked with Holliday in the hope that her cooperation would benefit her in her Las Vegas Case. (RT 8954-8958).

On October 3, 1991, Jeanette Moore fraudulently rented a U-Haul truck with the illegally-obtained "Dena Carey" Driver's License. (RT 7660-7664, 7879-7885). She was supposed to return the truck the following day. (RT 7886-7890).

Appellant managed a musical group called Full Swing. On October 18, 1991, appellant had booked studio time at Aire LA Studios in Glendale for Full Swing. Appellant was there at 8:30 p.m. (RT 10411-10415, 10466-10469). They were supposed to be mixing recordings they had made the

previous weekends. They were unable to do the mixing because there was no engineer present. (RT 10416).

On October 18, 1991 at 10 p.m., there was an attempted robbery at the Comp USA store in Torrance. Kathy Lee was shot by Nokkuwa Ervin during that crime. Officer Rakitis was the first officer to respond to the scene. He saw a silver BMW fleeing the scene with two male blacks inside, neither of whom matched appellant's description. (RT 7922-7935, 7960-7970). The silver BMW was either a 500 or 600 series. (RT 15512). He described the driver as 20-24 years old. Appellant was approximately 38 at the time. The passenger had longer hair with Jheri curls. Appellant was never described by anyone as wearing such curls. Rakitis apprehended Ervin at the scene. (RT 7935-7938).

On October 22, 1991, the U-Haul truck rented by Jeanette Moore was found near the Comp USA. (RT 7993-7998, 8250-8285, 8366-8373). None of the prints found on the U-Haul matched appellant or the others later charged with the Comp USA crimes (Eric Clark, Damian Wilson and Nokkuwa Ervin).

Appellant had purchased a BMW from a dealer in 1991. On October 24, 1991, appellant had the same dealer sell that bronzette BMW 735i at an auction. (RT 8977-8982). Appellant began to serve a prison sentence for crimes unrelated to Comp USA on November 1, 1991, one week after selling

his BMW. (RT 10329).

In November 1991, Matthew Weaver told his girlfriend Tina Jones about his involvement in the Comp USA crimes. He told her that a friend asked him to help move some computers, and that while they did so, a woman who came to pick up her son was shot and killed. (RT 2344-2350).

In 1992, Nokkuwa Ervin was prosecuted for his role as the shooter of Kathy Lee. At his trial, Ervin testified on his own behalf. He testified under oath that he was kidnaped by Crips gangmembers and forced to perform the Comp USA robbery. (RT 2847-2851). Ervin never mentioned Clark as involved in the Comp USA crimes. Ervin specifically named two people responsible for his kidnaping and the Comp USA robbery, neither of whom was Mr. Clark or in any way related to him.

On January 8, 1992, Ardell Williams pled guilty to a misdemeanor for the Las Vegas crimes. She was allowed to plead to a misdemeanor because of her cooperation with law enforcement. She could have been convicted of 85 felony counts based on the 85 fraudulent checks. Each felony count carried a maximum term of ten years. (RT 13712-13723).

Ochun Farlice, Eric Clark's ex-girlfriend, also owned a bronzette BMW. (RT 14377). Eric owned the car before her. Officers ran a DMV report on Eric and found tickets in his name while driving Ochun's car. (RT

14404). On January 9, 1992, Detective Williams contacted Ochun Farlice about her BMW on January 8, 1992. (RT 15507-15511, 15556-15560).

On January 28, 1992, an anonymous letter was sent to the police. It was received shortly after the postmark of that date. (RT 2204-2207). The letter stated that appellant and his brother Eric were involved in the Comp USA robbery, along with Matt Weaver, who played basketball with Eric, Marc, who was identified as Eric's cousin, and Warren, a friend. (RT 2221-2224; CT 830-831). The letter was postmarked in Marina Del Rey, CA, where Ochun Farlice lived. (RT 16755-58). This letter was not disclosed to the defense until the retrial of appellant's penalty phase; i.e., after appellant had already been convicted of the charged crimes. (RT 15556-15560)

Ardell Williams had violated her probation by simply going to Las Vegas in September 1991. (RT 2308). She told her probation officer that Las Vegas police were going to go easy on her because of her cooperation. (RT 2313). Her conviction in Las Vegas also violated her probation. (RT 2315). She had a probation violation hearing on March 24, 1992 based on these violations, as well as on the fact that she was behind in her required restitution. (RT 2316-2318). She received no additional punishment then or in the future, although additional hearings were necessary based on her continued failure to pay required restitution. (RT 2318-19). Her probation officer had

recommended jail time for these violations.

On March 30-31, 1992, Jeannette Moore gave statements to law enforcement implicating appellant in the Comp USA crimes. Despite the eventual discovery of her complicity in this crime and the use of fraudulent licenses, she is never arrested or subject to prosecution for any of her crimes., despite the fact that she was an accomplice in the Comp USA crimes.

On June 3, 1992, Officer Rakitis, who was the first officer at the Comp USA scene, was shown a photo lineup. Appellant was the only black person in the six-pack lineup. Rakitis could not identify anyone as being present at the scene. (RT 2617-2622, 7970-7972).

On June 22, 1992, Frank Grasso met with appellant in jail. Grasso created a false transcript of an interview with Nokkuwa Ervin as a ruse. In this fake transcript, Ervin identified appellant as being involved in the Comp USA robbery. Grasso knew that this fake transcript was not true. (RT 9021-9030). Grasso gained nothing as a result of this ruse.

On July 16, 1992, Grasso had Officer Rakitis travel to the Comp USA parking lot at night and view a BMW in order to see if it was similar to the car which Rakitis saw the night of the crimes. Rakitis was shown a single, bronzette BMW which was a 700-series car, although Rakitis had clearly identified the suspect car as a silver BMW of either the 500- or 600-series.

Rakitis was never shown a silver BMW or a 500- or 600-series BMW, despite his clear identification of that type of car.

On August 12, 1992, Matt Weaver was interviewed by Frank Grasso. Weaver told Grasso that he had never met Bill Clark. Weaver told Grasso that he didn't even know that Eric Clark had a brother. Later, on August 17, Matt Weaver told Grasso that Bill Clark was the driver of the car. Weaver's statement was in start contrast to Officer Rakitis's description of events.

On September 23 and 24,1992, Ardell Williams and Matt Weaver testified before the grand jury about the Comp USA robbery. Matt Weaver would subsequently receive a grant of judicial immunity for the perjury he committed before the grand jury. (RT 2610-2616, 7628). Appellant was subsequently indicted by the grand jury. The grand jury also asked the prosecutor whether they could indict Matt Weaver as well. The prosecutor was forced to answer that they could, but added that he was not seeking charges against Weaver. After his statements, the issue was dropped. Around this time, Jeanette Moore left California.

On September 23, 1992, Jack Early was appointed to represent appellant. Alan Clow was appointed as Early's private investigator. Both would ultimately be called by the prosecutor to give testimony against appellant's interests. Between October 1993 and February 1994, Clow made

numerous attempts to interview Ardell Williams. She generally gave him the run-around, including cancelling interviews at the last minute and refusing to answer her door.

Between January and March, 1994 three-way phone conversations were held between appellant, his attorney Jack Earley, Antoinette Yancey and appellant's investigators. They discussed defense strategy and investigation plans. The substance of these conversations would later be explored at the penalty phase retrial when the prosecutor had Earley and Clow testify against Mr. Clark. Nothing was discussed about killing Ardell Williams during these conversations.

On the afternoon of February 10, 1994, Ardell Williams was working at a Disney Store in Torrance. Disney employees confronted her about missing merchandise, and she confirmed that she had given merchandise to friends who did not pay for it. (RT 2404-2407). Her employment was terminated and she agreed to pay restitution. (RT 2411-2415). She said she was afraid of incarceration and being taken away from her son.

On February 10, 1994, the father of Ardell Williams, Tony Mills, returned their son to the Williams home. Mills and Williams were having a hotly contested legal dispute over custody of their child. After Ardell was killed, one of her sisters thought that Mills may have been responsible. (RT

1254). There was evidence that Mills had threatened to slit Ardell Williams's throat. (RT 6748-6768). They also had a dispute which ended with Mills running the car Williams was traveling in off the road. Despite the intense animosity, Mills came into the house and used the bathroom, which was highly unusual. (RT 9058-9061, 9350-9354).

Fifteen minutes after Mills left, Carolyn delivered flowers to Ardell Williams at the house. Ardell was home at the time of the flower delivery and accepted the flowers. (RT 9300-9304). Carolyn claimed that she was pregnant an asked to use the bathroom, where she stayed for an unusually long amount of time. (RT 9306-9307). Ardell, her sisters and her mother found it odd, and politely steered Carolyn out of the house. (RT 9307). After Carolyn left, the Williams family found a dollar bill had been left in the bathroom. There was speculation that perhaps the bill was some sort of signal between Mills and Yancey, since both used the bathroom, which struck the Williams as odd.

After Ardell Williams's death, the Williams family identified Antoinette Yancey as Carolyn. (RT 9308-9310, 9448).

Shortly after the flower delivery, Ardell's mother Angelita Williams began to receive phone calls from Janet. Janet told Angelita that she was looking for her daughter Liz, and had gotten the phone number from a hair

salon Liz had previously worked at. (RT 9241-9245, 9450-9455). They began to chat and had several conversations. They discussed religion, and Angelita invited Janet to her church. (RT 9454-9456). During one conversation, Janet mentioned that her daughter Ardell was in the hospital, which surprised Angelita because her daughter's name was Ardell. (RT 9455-9456). In a later conversation, Janet mentioned that her uncle had a company involved in design and was looking to hire an artistic person. Angelita thought that Ardell might be interested and put Ardell on the phone with Janet. In February and March, 1994, Janet and Ardell spoke on the phone several times. (RT 9458-9465). A job interview at Continental Bindery was set up for early in the morning of Sunday, March 13, 1994.

On March 9, 1994, Bill Clark wrote a letter to Antoinette Yancey. He expressed his love for her. There was no mention of any plot to kill anyone.

On March 13, 1994, Ardell Williams drove to Continental Bindery for a job interview. Sometime between 6:30 and 8:00 a.m., Ardell Williams was shot and killed with a single bullet to the head. (RT 1239-1248). No physical evidence was recovered at the scene which linked Antoinette Yancey to the crime. (RT 9523-9532, 9950-9960). Appellant was in Orange County Jail at the time Ardell Williams was killed. (RT 1232).

On March 13, 1994, between 8:30 and 9:45 a.m., Antoinette Yancey

visited appellant at the Orange County Jail. (RT 2555-2560, 8729-8730). She was subsequently arrested on March 17, 1994 while trying to visit appellant. (RT 1217-1220, 1269, 1323-1326).

On March 18, 1994, officers played an audiotape of several voices for Angelita and Nena Williams. (RT 9580-9587). There were several voices on the tape, although Antoinette Yancey's voice was the only soft voice. (RT 9387-9392, Muni RT 1618-1623). The other voices were all recorded from telephone calls, while Antoinette Yancey's voice was recorded at an in-person interview. Antoinette Yancey's tape also included Detective Guzman's voice, which was well known to the Williams family. They identified Antoinette Yancey as Janet. (Muni RT 1618-1623, RT 9223-9233).

On June 13, 1994, Jeanette Moore and Matt Weaver testified at Eric Clark's trial. Jeanette Moore perjured herself by denying that she used Dena Carey's identification to purchase merchandise on credit. Matt Weaver continued to perjure himself by denying that he knew anything was wrong at the Comp USA crime scene when he really knew that Kathy Lee had been shot and killed.

On July 18-19, 1994, Jeanette Moore was given a judicial grant of immunity for any involvement in crimes related to Comp USA. She testified at appellant's preliminary hearing, and continued to perjure herself by denying

that she used Dena Carey's identification to purchase merchandise on credit. (Muni RT 176-420).

On July 20 and 21, 1994, Matt Weaver testified at appellant's preliminary hearing. He continued to perjure himself by denying that he knew anything was wrong at the Comp USA crime scene when he really knew that Kathy Lee had been shot and killed. (Muni RT 492-663).

In August, 1994, the Williams made a second out-of-court voice identification of Yancey under circumstances identical to their first identification. This identification took place in the Orange County District Attorney's Office. No member of the defense team was present during the identification. (Muni RT 1372-1380). On August 14, 1994, Nena Williams was asked, during the preliminary hearing, to listen to a defense tape including Yancey's voice. The defense tape contained five voices, all recorded in person and not over the phone. All voices said the same words, and were not snippets of conversations with Guzman or anyone else. The Court allowed her to refuse, and she did. She eventually listened to the tape on August 15, and identified a voice which was not Yancey's voice. Angie Williams listened to the tape as well, and identified a voice other than Yancey's voice also. (Muni RT 1281-1400, 1721-1738, 1828-1832).

On August 30, 1994, appellant was held to answer in Superior Court.

(Muni RT 2364).

On March 28 and April 1, 1996, while testifying at appellant's trial, Jeanette Moore admitted that she committed perjury at the preliminary hearing. Judicial immunity proceedings were then conducted a second time in order to allow her to testify without being subject to punishment for repeated perjury. (RT 7640-7821).

On April 2, 1996, Matt Weaver was judicially granted immunity. (RT 8039-1-- 8039-4). He admitted that he previously committed perjury during grand jury testimony and at the preliminary hearing.

Appellant was housed at Orange County Jail between 1991 and 1997. As an older inmate, appellant advised other prisoners to avoid violence. He was often able to prevent hostilities. (RT 11534). He tried to prevent problems between the prisoners and was a calming influence. (RT 11512). Appellant also encouraged prisoners to educate themselves. (RT 11533). He explained to prisoners that they should be mad at themselves for their predicament, and not law enforcement. (RT 11538). He counseled prisoners on dealing with their anger without getting into trouble and ending up in solitary confinement, administrative segregation, etc. (RT 11551).

On May 21, 1996, appellant was convicted on all counts. (RT 11234-11250).

On July 11, 1996, the jury hung in the penalty phase 7-5 in favor of death. (RT 12041-12060).

On July 29, 1996, Jack Early declared a conflict of interest in the case. (RT 12073-12076). The Court relieved Early as defense counsel. Robison Harley, who had served as *Keenan* counsel in the first trial, accepted appointment as lead counsel. Ken Reed was appointed as *Keenan* counsel.

In the interim, the prosecutor tried Antoinette Yancey for the murder of Ardell Williams. She was convicted of murder, although the jury found the personal use of a firearm allegation to be not true. Because of that finding, the prosecutor declined to pursue the death penalty, despite the fact that the special circumstance of killing a witness was found true.

On September 15, 1997, the penalty phase retrial commenced with opening statements. (RT 13088). The prosecution presented virtually its entire guilt phase case, as evidence of the crimes committed and in order to combat and lingering doubt.

On October 27, 1997, the jury returned a verdict of death. (Muni RT 16713-16717).

On December 27, 1997, the trial court formally pronounced sentence. (RT 16790).

PRETRIAL CLAIMS

CLAIM 1
UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, APPELLANT'S RIGHTS WERE VIOLATED BY RESTRICTIONS PLACED ON HIS TELEPHONE CALLS FROM ORANGE COUNTY JAIL

On March 23, 1994, the prosecution moved that appellant be denied all phone calls, including calls to his attorney Jack Earley. (Muni RT 3). Appellant objected to that request. (Muni RT 3). Mr. Earley explained that such an order could affect either appellant or Ms. Yancey in seeking other counsel. (Muni RT 4-5). Alternatively, the prosecutor suggested that the defendants could have calls to their attorneys only, but that those calls would be monitored. (Muni RT 5). Mr. Earley objected to monitoring the conversations, which implicated appellant's rights to assistance from an attorney under the Sixth Amendment, suggesting that all the officers would need to do would be to dial the attorney's telephone numbers, and not monitor the calls. (Muni RT 6). Appellant was unable to call his attorney. (MUNI RT 22, 40-66).

The prosecution received an order prohibiting appellant's use of the telephone, including phone calls to his attorney Jack Earley. (CT 163). This

prohibition unconstitutionally infringed upon appellant's ability to confer with counsel and prepare his case in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, as well as associated provisions of the California Constitution and relevant state law.

California Penal Code § 2600 states that persons confined in state prisons may only "be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution and for the reasonable protection of the public." This statute protects those detained pending trial, and is thus binding on county jail authorities. *De Lancie v. Superior Court* (1982) 31 Cal.3d 865, 872. The "necessary" component of § 2600 requires that "a security measure be the least intrusive possible of inmates' rights yet flexible enough to satisfy the security need." *In re Arias* (1986) 42 Cal.3d 667, 691.

A.
Appellant's Ability to Confer with Counsel Was Critical to his Case

Appellant needed to consult with his trial attorney in order to adequately investigate his case, and make important decisions. The Sixth Amendment to the United States Constitution and the California Constitution "require counsel's diligence and active participation in the full and effective

preparation of his client's case. Criminal defense attorneys have a duty to investigate carefully all defenses of fact and of law that may be available to the defendant." *People v. Brown* (1986) Cal.App.3d 537, 538.

Implicit in counsel's duties are the need to confer with the client. Counsel's obligation "includes conferring with the client, without undue delay and as often as necessary to elicit matters of defense. Counsel should properly advise his client of his rights and take all actions necessary to preserve them." *Id.*

Appellant's ability to confer with counsel was severely restricted for almost an entire year. The Order prohibiting all phone contact was entered on March 24, 1994. (CT 163). It was not until March 17, 1995 that appellant was allowed to place calls to his trial counsel Jack Earley and his investigator Alan Clow. (CT 198; RT 646).

B.
Appellant's Ability to Prepare for his Guilt and Penalty Phases was Curtailed Because of this Order

Appellant is a black man who grew up in South Central Los Angeles. He was represented by white attorneys who retained a white investigator. Appellant had an alibi which required considerable investigation. He was at a recording studio in Burbank shortly before the Comp USA robbery. He was

there for a recording session which was supposed to last into the night, which would have made it impossible for appellant to travel from Burbank to Orange County by the time the robbery was to take place.

Investigation into several parts of appellant's life were also necessary in the guilt phase. His connection to computer crimes in general needed to be evaluated, as well as his personal relationships with Ardell Williams and Antoinette Yancey. His family relationships with his brother Eric also need to be investigated.

Because the prosecution sought the death penalty, the defense needed to investigate appellant's background, his upbringing, and any events which affected his life, so that they could be presented to the jury as mitigation. The defense also needed to investigate life in black neighborhoods in Los Angeles, including family relations between appellant and his brother Eric, who was also charged with the Comp USA crime. Numerous other crimes allegedly committed by appellant were also introduced in both phases.

Trial counsel explained to the trial court that it was common in such cases that court-appointed counsel would meet resistance from people in the community when the lawyer is seen as prying into family matters and community issues. (CT 188). This inability to investigate affected both the guilt and penalty phases. Counsel explained that it was necessary that there be

a liaison who was able to communicate with the community and appellant's family so that this information could be gathered. (CT 188). Because of the telephone restriction, appellant could not perform this critical role. Unlike his ability to speak via phone with his attorney and investigator, appellant's ability to speak with potential witnesses by phone was not reinstated by the Court's Order of March 17, 1995.

This inability to investigate prejudicial. As the first penalty phase demonstrated, the case for death was not overwhelming. Appellant's first penalty phase jury hung on the question of punishment by a vote of seven to five for death. The fact that five jurors were convinced that life in prison without the possibility of parole was the correct setence, even after convicting appellant of the murder of innocent bystander Kathy Lee and government witness Ardell Williams, demonstrates that the result of the penalty phase was not preordained. Had counsel been able to investigate more thoroughly, it is reasonably likely that the jury would have rejected a death sentence and sentenced appellant to life in prison without the possibility of parole.

Appellant had an absolute right under the Equal Protection Clauses and the Due Process Clauses of the United States and California Constitutions to have all the aspects of his case adequately investigated, prepared and presented to a jury. Under the Sixth Amendment, appellant was entitled to present a

defense in both the guilt and penalty phases. Appellant was also constitutionally entitled to present any relevant mitigating evidence during the penalty phase. These rights were violated by the telephone restriction put in place.

C.
Conclusion

Appellant's rights to confer with his counsel were violated by the telephone restriction. This violation affected the ability to prepare for both the guilt and penalty phases. Moreover, the restriction on phone calls prevented appellant from carrying out the role of facillitating interviews with family and community members. All this was done without any showing that an absolute restriction was necessary and the least restrictive means in order to protect the safety of the Orange County Jail or the public.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v.*

Alabama (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 2
APPELLANT'S RIGHT TO A SPEEDY PRELIMINARY HEARING WAS VIOLATED

On April 28, 1994, Antoinette Yancey moved to continue the preliminary hearing pursuant to Cal. Penal Code §1050, on the ground that her trial counsel, Gary Proctor, had just received considerable amounts of discovery. The prosecutor was ready to proceed with the preliminary hearing. (Muni RT 68). Appellant's counsel objected to the continuance. (Muni RT 68). He objected that by joining Ms. Yancey to appellant's case, the prosecution gained "the net effect of getting any additional time to do the investigation that they would need." (Muni RT 69). He added that "the net effect is a detriment to my client of being denied a speedy hearing at this time on a charge that I would characterize as being very weak against him." (Muni RT 69). The Court granted the continuance over appellant's objections. (Mun RT 71).

A defendant is entitled to a preliminary hearing within ten court days of the date he is arraigned or pleads. Cal. Penal Code § 859b; *People v. Gates* (1987) 43 Cal.3d 1168; *People* v. *Bucher, supra,* 175 Cal. App. 2d at p. 346; *Landrum v. Superior Court* (1981) 30 Cal. 3d 1, 6; *Serrato v. Superior Court* (1978) 76 Cal. App. 3d 459, 464. "Section 859b reflects a clear legislative intention to prevent prolonged incarceration prior to a preliminary

hearing." (*Landrum*, at p. 12; *People v. Kowalski* (1987) 196 Cal. App. 3d 174, 178.) Section 859b has been construed as *in pari materia* with section 859, which governs prompt arraignment. (*Ng v. Superior Court* (1992) 4 Cal. 4th 29, 38.) Both sections dovetail with the defendant's and the People's right to speedy trial. (Cal. Const., art. I, §§ 15, 29.) *See In re Samano* (1995) 31 Cal.App. 4th 984, 990.

In *People* v. *Castagnola* (1972) 28 Cal. App. 3d 882, the Court explained the critical nature of a speedy preliminary hearing:

> the principal purpose of the preliminary examination is to determine whether an offense triable in the superior court has been committed, and whether there is sufficient cause to believe that the defendant is guilty of having committed it. The procedures prescribed in the Penal Code for the conduct of the examination, however, are designed to assure that the rights of the accused are protected. In particular, they are intended to secure the accused's right to personal liberty by precluding the possibility that he will be detained in custody indefinitely or capriciously in order that a case may be developed or that circumstances may arise which will justify a trial. (*People* v. *Bucher[, supra,]* 175 Cal. App. 2d 343, 346, 346 P.2d 202.)

(28 Cal. App. 3d at p. 886.) A motion under Penal Code § 995 must be granted when the defendant has "not been legally committed by a magistrate," such as occurred here. *See, e.g., People v. Bucher*, at p. 347.

"Section 859b establishes an absolute right in favor of persons in custody charged with felonies to have the preliminary examination commenced within 10 court days after they have been arraigned upon, or entered a plea of

not guilty to, the criminal complaint, whichever occurs later . . . ." *Serrato* v. *Superior Court* (1978) 76 Cal.App.3d 459, 464. A *personal* waiver by the defendant is required or the case must be dismissed. *Irving* v. *Superior Court* (1979) 93 Cal.App.3d 596, 600; *Landrum* v. *Superior Court, supra*, at p. 6.

The burden of proof regarding waiver of a speedy trial is on the party alleging waiver– here, the prosecution. *In re Bishop* (1962) 201 Cal.App.2d 604; *Brewer v. Municipal Court*, 193 Cal.App.2d 510, 516. *See also Barker v. Wingo* (1972) 407 U.S. 514; *Dickey v. Florida* (1970) 398 U.S. 30. The burden is on the prosecution to show that appellant waived his constitutional right. *See, e.g., Tague* v. *Louisiana*, 444 U.S. 469, 470-471 (1980); *North Carolina* v. *Butler*, 441 U.S. 369, 373 (1979); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 236 (1973).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

The proper remedy, therefore, is to dismiss the information. Reversal

is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

CLAIM 3
PROSECUTION FOR ARDELL WILLIAMS'S MURDER IN ORANGE COUNTY VIOLATED APPELLANT'S RIGHT UNDER THE STATE AND FEDERAL CONSTITUTION TO BE TRIED BY A JURY DRAWN FROM THE LOCALITY WHERE THE CRIME OCCURRED

To render a valid judgment, a court must have jurisdiction over the subject matter and the person of the defendant. Jurisdiction of the subject matter is derived from law; it neither can be waived nor conferred by consent of the accused. Inherent in subject matter jurisdiction is the power to inquire into the facts, to apply the law and to declare the punishment. *Burris v. Superior Court* (1974) 43 Cal.App.3d 530, 537.

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions:

> the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law...

The Sixth Amendment includes both venue and vicinage, which both apply to the states via the Fourteenth Amendment. *See, e.g., Rideau v. Louisiana* (1963) 373 U.S. 723; *Irvin v. Dowd* (1961) 366 U.S. 717; *Pike v. Dickson* (9th Cir. 1963) 323 F.2d 856 & fn. 5; *United States v. Passodelis,* 615 F.2d 975, 977 n. 3 (3rd Cir.1980). Article I, § 15 of the California Constitution includes a right to be tried by a jury drawn from the locale in

which the crime occurred. *Price v. Superior Court* (2001) 25 Cal.4th 1046.

Because a right to a jury trial in serious criminal cases where the accused is subject to at least six months of incarceration is fundamental to the American scheme of justice, the right is made obligatory on the states by the Fourteenth Amendment. *Duncan v. Louisiana* (1968) 391 U.S. 145. Article III of the Constitution and the Sixth Amendment fix venue "in the State" and "district wherein the crime shall have been committed." The venue of trial is thereby predetermined, but those provisions do not furnish guidance for determination of the place of the crime. That place is determined by the acts of the accused that violate a statute.[1] This requirement of venue states the public policy that fixes the situs of the trial in the vicinage of the crime rather than the residence of the accused. *Cf. United States v. Anderson*, 328 U.S. 699, 705.

Penal Code section 777 provides: "except as otherwise provided by law, the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed." The jurisdictional territory is the county in which the crime occurred. *People v. Jones* (1964) 228

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[1] *See, e.g., Rumely v. McCarthy*, 250 U.S. 283; *United States v. Lombardo*, 241 U.S. 73; *Jones v. Pescor*, 8 Cir., 169 F.2d 853; *New York Central & H.R. Co., v. United States*, 2 Cir., 166 F. 267. *See also* cases cited in *United States v. Anderson*, 328 U.S. 699, 705, note 14.

Cal.App.2d 74. *See also People v. Sering* (1991) 232 Cal.App.3d 677, 684; *People v. Remington* (1990) 217 Cal.App.3d 423, 429 fn. 9. The burden is on the prosecution to establish the proper venue by a preponderance of evidence. *People v. Megladdery* (1940) 40 Cal.APp. 748, 764; *People v. Dorsey* (1969) 270 Cal.App.2d 423.

The March 13, 1994 shooting of Ardell Williams occurred at 407 West Compton Boulevard in Gardena, California, located in the County of Los Angeles. The shooting was investigated by the Los Angeles County Sheriff's Department. Under Penal Code § 790, the "jurisdiction of a criminal action for murder ... is in the county where the fatal injury was inflicted or in the county in which the party injured dies or in the county in which her body was found." The injury was inflicted in Los Angeles County, Ms. Williams died in Los Angeles County and her body was found in Los Angeles County. "[W]here the focus in quo of the offense can be precisely identified, under the general venue statute, the trial should of course be had in the county where it was committed, when such is not the case, alternative statutes must be applied or the offender cannot be tried at all." *People v. Goodwin* (1914) 263 Ill. 99, *as cited in People v. Bradford, supra*, 17 Cal.3d at 17.

Appellant recognizes that cases have held that § 790 is not exclusive and that § 781 also applies to murder charges. *See, e.g., People v. Douglas*

(1990) 50 Cal.3d 468, 493-494. Under § 781, an offense may be tried in a jurisdiction where prepatory acts were committed. *People v. Powell* (1967) 67 Cal.2d 32, 62; *People v. Price* (1991) 1 Cal.4th 324, 385. Trial counsel cited *Price* and *Campbell* to the trial court.

Yet the prepatory acts occurred in Los Angeles County. The flower delivery to the Williams house took place there. The phone calls from "Janet" took place in Los Angeles County. As trial counsel argued during the litigation regarding the Penal Code §995 motion, the only phone calls made by appellant alleged to be part of the conspiracy were made to Liz Fontenot in 1992, and at that time, appellant was not yet in Orange County. (RT 1129-1133). There is no proof of any conspiracy occurring in Orange County. No prepatory acts occurred in Orange County. Yancey's visit to Orange County jail between 8:45 and 9:35 a.m. on March 13, 1994 was a subsequent act which doesn't confer subject matter jurisdiction under § 781. *People v. Ballas* (1921) 55 Cal.App. 748, 750-751.

Vicinage refers to the right of a criminal defendant to be tried by a jury drawn from the area in which the crime occurred. *Hernandez v. Municipal Court* (1989) 49 Cal.3d 713, 716 & fn. 1; *People v. Guzman* (1988) 45 Cal.3d 915, 934; *People v. Gbadebo-Soda* (1995) 38 Cal.App.4th 160, 169. The constitutional right of vicinage is satisfied if the trial is held in any of the three

places specified in section 790. *People v. Martin* (1995) 38 Cal.App.4th 883, 886-889. Since the fatal injury was inflicted in Los Angeles County, the injured party died in Los Angeles County, and the body was found in Los Angeles County, the prosecution must have been conducted in Los Angeles County.

The right to a jury trial drawn from the vicinage of the crime is based on the Sixth and Fourteenth Amendments of the United States Constitution and on the California Constitution. *People v. Guzman, supra,* 45 Cal.3d at pp. 934-935. Trying appellant in Orange County for the Ardell Williams murder thus violated not only his right to proper venue, but his right to proper vicinage. Considering the makeup of downtown juries in Los Angeles, and those in Orange County, this violation was clearly harmful to appellant, a black man.[2] Blacks comprised 21.5% of Compton juries, while composing only 1.77% of the Orange County population. (RT 2853). Trial counsel correctly argued that these discrepancies would be prejudicial to appellant. (RT 1046). The Court denied the motion, simply stating that venue and vicinage were proper. (RT 2859).

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[2] Vicinage for the Comp USA crime would have been proper in Los Angeles. Many preparatory acts occurred in Los Angeles County. Those allegedly included obtaining a driver's license in the name Dena Carey, renting the U-Haul, and obtaining the help of accomplice Matt Weaver.

Defendant's trial for murder in Orange County for the death of Ardell Williams violated his rights under the state and federal constitutions. While the killing of Ms. Lee was no doubt tragic, the killing of Ardell Williams, a witness, was likely viewed as considerably more heinous. The prosecutor certainly relied heavily on it to show that appellant would pose a danger in the future. Without the improper joinder of these crimes in Orange County (see Claim 9), a jury would likely not have sentenced appellant to death. Appellant's conviction and death sentence must be reversed.

The denial of these rights was the deprivation of a fundamental structural trial right not subject to harmless error analysis, and thus reversal is mandated. *See, e.g., Arizona v. Fulminante* (1991) 499 U.S. 279; *People v. Cahill* (1993) 5 Cal.4th 478. It was a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante, supra*, at 310. Alternatively, reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The right to venue and vicinage, and their denial in this case, was the

denial of a state constitutional and statutory right. Denial of these rights amounts to a violation of a state protected liberty interest, which is itself a due process violation. *See, e.g.*, *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 4
APPELLANT'S RIGHT TO A FAIR TRIAL AND HEIGHTENED CAPITAL CASE RELIABILITY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WAS VIOLATED BY THE FAILURE TO RECUSE THE DISTRICT ATTORNEY'S OFFICE

Appellant was charged with the murder of Ardell Williams, a prosecution witness in the Comp USA case. (CT 274.) Prior to her death, Ms. Williams had informed the Orange County District Attorney's office that she had been the recipient of a variety of unusual contacts and calls which she felt were perhaps related to the Comp USA case. (MUNI RT 1630). She picked out Ms. Yancey as the person involved in the strange contacts.

Yancey was taken into custody several days after the homicide. (RT 1269, 1283.) She denied any knowledge of the killing, and was released. (CT 190). Although the homicide took place in Los Angeles County and was initially investigated by the LA County Sheriff's Office, Ms. Yancey was brought back to Orange County for a lengthy interview on March 21, 1994. (RT 1285, 2174.) After being advised of her *Miranda* rights, she repeatedly requested an attorney. Officers ignored her requests. (CT 864, 865).

Following the repeated violation of Yancey's rights, she made statements implicating appellant in Ms. Williams' death. (CT 941). Although the officers claimed that they were concerned about the safety of witness Jeanette Moore, very little of the interview concerned Moore. (CT 929).

Despite the fact that the homicide took place in Los Angeles County and was initially investigated by LA County, the case was joined with Comp USA and prosecuted in Orange County. Orange County investigator Frank Grasso had given Ms. Williams a gift for her baby. (RT 2242-2244).

As trial counsel reported in his motion to recuse the District Attorney's Office:

> On the first day in court, the District Attorney's office took a very hard-line stance and refused to give out any discovery information. Members of the office told defense counsel that they were fearful of the safety of other witnesses involved in the case. Deputy District Attorney Randolph Pawloski told defense counsel, in the presence of several investigators from the District Attorney's Office, that counsel had a conflict of interest (without telling him what the conflict was), announced that he would not give defense counsel any discovery **because he did not wish to see any more witnesses dead**, and intimated that defense counsel was responsible for Ardell Williams' death.

(Muni CT 131). The District Attorney's Office had personal feelings and involvement with Ardell Williams. Such feelings were natural, as she was a potential witnesses for them. They could not be impartial or unbiased in prosecuting this case, as their actions showed. Thus, they had a conflict of interest between their professional responsibilities and their personal feelings. Appellant saw this conflict and moved to recuse the Office (Muni CT 126), although this motion was denied. (Muni RT 131).

In denying the motion, the trial court relied in part on the fact that "the

District Attorney's Office does not have the same prosecuting attorney handling this case as handling the case originally involved in the prosecution of which the witness was killed." (MUNI RT 130). This statement ignored the bias of the office as a whole, which was the subject of the motion. The trial court also stated that "there's been no evidence to show any unusually close connection between this witness and a specific deputy district attorney or a group of deputy district attorneys." (MUNI RT 131). This statement ignored the gift given by Investigator Grasso, as well as the harsh statements made by the deputy DA assigned to the case blaming trial counsel for Ardell Williams' death, and corresponding refusal to turn over additional discovery. Recusal is necessary where it is "unlikely that defendant will receive fair treatment during all portions of the criminal proceedings." *People v. Conner* (1983) 34 Cal.3d 141, 148.

In California, all criminal prosecutions are conducted in the name of the People of the State of California and by their authority. (Gov. Code, § 100, subd. (b).) California law does not authorize private prosecutions. Instead, "[t]he prosecution of criminal offenses on behalf of the People is the sole responsibility of the public prosecutor .... [¶¶] [who] ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek. [Citation.] No private citizen, however personally

aggrieved, may institute criminal proceedings independently [citation], and the prosecutor's own discretion is not subject to judicial control at the behest of persons other than the accused." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 451

The district attorney of each county is the public prosecutor, vested with the power to conduct on behalf of the People all prosecutions for public offenses within the county. (Gov. Code, §26500; *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 240.) Subject to supervision by the Attorney General (Cal. Const., art. V, §13; Gov. Code, §12550), therefore, the district attorney of each county independently exercises all the executive branch's discretionary powers in the initiation and conduct of criminal proceedings. (*People* ex rel. *Younger v. Superior Court* (1978) 86 Cal.App.3d 180, 203; *People v. Municipal Court* (*Pellegrino*) (1972) 27 Cal.App.3d 193, 199-204.) The district attorney's discretionary functions extend from the investigation of and gathering of evidence relating to criminal offenses (*Hicks v. Board of Supervisors*, *supra*, 69 Cal.App.3d at p. 241), through the crucial decisions of whom to charge and what charges to bring, to the numerous choices the prosecutor makes at trial regarding "whether to seek, oppose, accept, or challenge judicial actions and rulings." (*Dix v. Superior Court*, *supra*, 53 Cal.3d at p. 452; see also *People v. Superior Court* (*Greer*) (1977) 19 Cal.3d

255, 267 [giving as examples the manner of conducting voir dire examination, the granting of immunity, the use of particular witnesses, the choice of arguments, and the negotiation of plea bargains].)

The importance, to the public as well as to individuals suspected or accused of crimes, that these discretionary functions be exercised "with the highest degree of integrity and impartiality, and with the appearance thereof" (*People v. Superior Court* (*Greer*), *supra*, 19 Cal.3d at p. 267) cannot easily be overstated. The public prosecutor "'is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.'" (*Id.* at p. 266, quoting *Berger v. United States* (1935) 295 U.S. 78, 88.)

The nature of the impartiality required of the public prosecutor follows from the prosecutor's role as representative of the People as a body, rather than as individuals. "The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of 'The People' includes the defendant and his family and those who care about him. It also

includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name." (Corrigan, *On Prosecutorial Ethics* (1986) 13 Hastings Const.L.Q. 537, 538-539.) Thus the district attorney is expected to exercise his or her discretionary functions in the interests of the People at large, and not under the influence or control of an interested individual. (*People v. Superior Court* (*Greer*), *supra*, 19 Cal.3d at p. 267.)

While the district attorney does have a duty of zealous advocacy, "both the accused and the public have a legitimate expectation that his zeal ... will be born of objective and impartial consideration of each individual case." (*People v. Superior Court* (*Greer*), *supra*, 19 Cal.3d at p. 267.) "Of course, a prosecutor need not be disinterested on the issue whether a prospective defendant has committed the crime with which he is charged. If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means. [Citation.] True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury-not the prosecutor. It is a bit easier to say what a disinterested prosecutor is not than what he is. He is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in

bringing a defendant to justice with respect to the crime with which he is charged." (*Wright v. United States* (2d Cir. 1984) 732 F.2d 1048, 1056.)

A conflict of interest exists under Cal. Penal Code §1424 whenever the circumstances of a case evidence a reasonable probability that the district attorney's office may not be able to exercise its discretionary function in an evenhanded manner. *People v. Conner* (1983) 34 Cal.3d 141, 148. There could be no more important discretionary act than the decision of whether to seek a death sentence. Under §1424, it is immaterial whether the conflict is "actual" or "apparent". The critical inquiry is whether the defendant will receive a fair trial. *Id.* at 147.

The protection of prosecutorial impartiality is a major purpose of the Court's recusal power. *See, e.g. People v. Hamilton* (1988) 46 Cal.3d 123, 139. Courts have recognized their power to recuse in order to assure fairness to the accused and to sustain public confidence in the integrity and impartiality of the criminal justice system. *People v. Conner, supra*; *People v. Alcocer* (1991) 230 Cal.App.3d 406, 414.

In *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 268, a case which pre-dated §1424, this Court expressed concerns with an "'appearance of impropriety'" that might adversely affect "'public ... confidence in the integrity and impartiality of our system of criminal justice.'" The Court held

that a District Attorney could be disqualified "when [a] judge determines that the attorney suffers from a conflict of interest which might prejudice him against the accused and thereby affect, or appear to affect, his ability to impartially perform the discretionary functions of his office." *Id.* at 269, fn. omitted. Although there were differences between *Greer* and §1424, this Court concluded that §1424 "contemplates both 'actual' and 'apparent' conflict when the presence of either renders it unlikely that defendant will receive a fair trial." *People v. Conner, supra*, 34 Cal.3d 141, 147.

The trial court has ample power to recuse the entire staff of a district attorney's office prosecuting a criminal case. *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 261-265. The primary concern in determining whether an office should be recused is whether it is reasonably possible, based on the evidence, that the office may employ its discretionary function to deprive the defendant of a fair trial. *People v. McPartland* (1988) Cal.App.3d 569, 574.

The recusal of an entire district attorney's office is appropriate where intense emotional involvement in the case on the part of one or more employees of the district attorney's office made a fair and impartial prosecution unlikely. *See, e.g., People v. Hernandez* (1991) 235 Cal.App.3d 674, 677. This agrees with the Court's observation in *People v. Superior*

Court of Santa Clara County (Martin) (1979) 98 Cal.App.3d 515, 521, that the conflict of interest which might prejudice the prosecutor against the accused will exist where in the course of his official duties he acquires a conflicting "personal" interest, or "personal or emotional involvement," or "emotional stake" in the case, or where there is "intense personal involvement" in his public duties, or where there is "personal, as opposed to purely professional involvement."

The conflict must be assessed in terms of whether the "defendant will receive fair treatment during all portions of the criminal proceedings?" *People v. Conner, supra*, 34 Cal.3d 141, 148. Consistently, in assessing the likelihood of prejudice, the Court referred to the conflict's effect on "the DA's discretionary powers exercised either before or after trial (e.g., plead bargaining or sentencing recommendations)." *Id.* at 149. *See also People v. Eubanks* (1997) 14 Cal.4th 580, 593; *People v. Lopez, supra*, 155 Cal.App.3d at 822.

Recusal is appropriate where, for example, there is substantial evidence that a deputy's animosity toward the accused may affect his colleagues. *People v. Conner, supra*, 34 Cal.3d at 148; *People v. Hamilton, supra*, 46 Cal.3d at 139. DDA Pawloski's obvious animosity toward appellant's trial counsel was so apparent that Pawloski was shirking his constitutionally

mandated discovery obligations because he was convinced that counsel was responsible for Ms. Williams' death.

The denial of a fair trial resulted from the intense personal and emotional involvement of members of the district attorney's office which resulted in bias and prejudice against appellant. The victim was an important witness in the Comp USA case with whom members of the office had established a relationship and for whose safety they had been concerned.

The victim's status as a prosecution witness made it impossible for members of the office to escape from intense personal involvement and sympathy for the victim, along with a corresponding bias against appellant. Mr. Pawloski's remarks and conduct in refusing to turn over discovery demonstrate as much. Other examples of misconduct in this case (violation of Yancey's *Miranda* rights, intimidation/coercion of Jeanette Moore, immunity agreements with Moore and Matt Weaver, etc.) show the lack of impartiality. The decision to prosecute a Los Angeles County homicide in Orange County, paid for by Orange County taxpayers, shows another level of personal feelings by the prosecutors.

Disqualification of the Orange County District Attorney's Office would not have imposed a substantial burden on the prosecution. The case could have been tried in Los Angeles County where it belonged. (See Claims 3 &

9). The failure to do so violated the requirements that the prosecution utilize its discretion in a fair and even-handed manner. Appellant's conviction and death sentence must be reversed.

The denial of these rights was the deprivation of a fundamental structural trial right not subject to harmless error analysis, and thus reversal is mandated. *See, e.g., Arizona v. Fulminante* (1991) 499 U.S. 279; *People v. Cahill* (1993) 5 Cal.4th 478. It was a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante, supra*, at 310.

Alternatively, reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S.

578, 584-85).

CLAIM 5
THE EIGHTH AMENDMENT FORBIDS MULTIPLE SPECIAL CIRCUMSTANCES ARISING FROM THE SAME SET OF FACTS AND AN INDIVISIBLE COURSE OF CONDUCT

A defendant who violated a particular special circumstance in more than one way is guilty of no more than one such special circumstance violation, although evidence supporting the alternative theories of violation would be properly before the jury and could properly be emphasized by the prosecutor. *People v. Allen* (1986) 42 Cal.2d 1222, 1273. Alleging more than one special circumstance for identical conduct can improperly inflate the risk that the jury will arbitrarily impose the death penalty. Such a result is inconsistent with the constitutional requirement that the capital sentencing procedure guide and focus the jury's objective consideration of the particularized circumstances of the offense and the individual offender. *Jurek v. Texas* (1976) 428 U.S. 262, 273-274.

As a result of the Comp USA incident, appellant was charged with the robbery-murder special circumstance and the burglary-murder special circumstance. Those charges arose from indivisible criminal conduct with a single criminal intent. The criminal activity underlying both the robbery and the burglary was the theft of computers from Comp USA. Nokkuwa Erwin entered the Comp USA and removed all of the remaining Comp USA staff to

the bathroom and handcuffed them together. (RT 8533.) He obtained keys from Alan Doehr, the Comp USA manager that would open the back roll up doors. (RT 8530). Ervin left the Comp USA employees and went to the warehouse roll up doors in order to remove computers from the store. (RT 8523). Although the theft was never completed, every action taken by Ervin was intended to result in a theft of computers. There is no evidence that any additional crime was intended other then theft of the computers. The robbery and burglary special circumstances could not each be considered as distinct aggravating factors at the penalty phase under Cal. Pen. Code § 190.3(a).

The plurality in *People v. Harris* (1984) 36 Cal.3d 36, 63-65 explained that where a burglary and murder were committed to facilitate the same robbery:

> the robbery and burglary special circumstances are necessarily overlapping because they describe virtually the same conduct. The use in the penalty phase of both these special circumstance allegations thus artificially inflates the particular circumstances of the crime and strays from the [United States Supreme Court's] mandate that the state tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. (*Godfrey v. Georgia* (1980) 446 U.S. 420 at p. 428). The [high court] requires that the capital-sentencing procedure must be one that guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death. (*Jurek v. Texas, supra*, 428 U.S. 262 at pp. 273-274.) "That requirement is not met in a system where the jury considers the same act or an indivisible course of conduct to be more than one special circumstance." (36 Cal.3d

at p. 63).

Although *People v. Harris* was subsequently found to be too broad in *People v. Melton* (1988) 44 Cal.3d 713, 766, the *Melton* Court only did so while explaining that its issues were distinct from those addressed in *Harris*. *See People v. Melton* at 765 & fn. 26. Moreover, the federal precedent relied upon in *Harris* remains good law.

Appellant is not challenging whether either single special circumstance was appropriate. Rather, he challenges the submission of both to the jury. To allow multiple special circumstance findings out of a single course of conduct violates the Eighth Amendment's prohibition of arbitrary and capricious death judgments. Such double-counting or stacking does not provide a principled means of distinguishing between murderers who are and are not candidates for the death penalty.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v.*

Alabama (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 6
THE WARRANTLESS SEIZURE OF DEFENDANT'S PERSONAL DOCUMENTS WHILE IN ORANGE COUNTY JAIL VIOLATED APPELLANT'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES

On July 7, 1994, Deputy Desens entered appellant's cell and seized personal documents. While appellant attended an attorney-bonds visit, Deputy Desens entered without permission into appellant's cell. (MUNI RT 1965, 1974.) Upon entering, the deputy picked up two letters that were lying on appellant's table. (MUNI RT 1967.) Based solely on the fact that the envelopes did not have a completed address, the deputy opened the private letters. (MUNI RT 1975.) The deputy read both letters. He threw one away and kept the other because he believed that it related to appellant's case. (MUNI RT 1974, 1976.) The deputy did not search any other part of the cell other than the letters in question. (MUNI RT 1974, 1976.) Appellant was not under any kind of special watch for health or security reasons. (MUNI RT 1974.) The deputy had no reason to enter appellant's cell other than to find evidence to buttress the prosecution's efforts. (MUNI RT 1975.) The Fourth Amendment to the Constitution and associated provisions of the California Constitution and law do not tolerate this seizure. The evidence should have been suppressed at trial, and its admission violated appellant's rights under the Fourth and Fourteenth Amendments to the United States Constitution, and

associated provisions of the California Constitution, and mandates reversal.

Section 2600 provides that a person sentenced to imprisonment in a state prison may, during any period of confinement, be deprived only such rights as necessary to provide for the reasonable security of the institution and the reasonable protection of the public. Under Equal Protection principles, pre-trial detainees retain rights at least equivalent to those guaranteed to state prisoners under §§ 2600, 2601. *De Lancie v. Superior Court* (1982) 31 Cal.3d 861, 872.

In *Donaldson v. Superior Court* (1983) ___ Cal.3d 24, 35 and *People v. Elwood* (1988) 199 Cal.App.3d 1365, 1369, the Supreme Court and the Court of Appeals relied on *De Lancie* to suppress evidence gathered for use in a criminal proceeding rather than to maintain security of the jail. Detainees still have a right to privacy guaranteed by the California Constitution. Cal.Const., art. I, § 1. The privacy clause of that section relating to inalienable rights, the Fourth Amendment of the United States Constitution and Cal.Const, art. I § 13 (relating to search and seizure) are coextensive when applied to police surveillance in the criminal context and apply wherever parties have a reasonable expectation of privacy. (*People v. Elwood* (1988) 149 Cal.App.3d 1365, 1371-1372.))

In order to restrain inmate correspondence, two criteria must be met.

First, the regulations or practice in question must further an important or substantial government interest unrelated to the suppression of expression, and the limitation on constitutional guarantees must be no greater than is necessary or essential to the protection of the particular governmental interest involved. *Procunier v. Martinez* (1974) 416 U.S. 396, 413. One obvious example of justifiable censorship would be refusal to send or deliver letters concerning escape plans. *People v. McCaslin* (1986) 178 Cal.App.3d 1, 7.

The policies and procedures relating to the handling of mail were not necessary for preserving jail security. There were no written policies, no posted notices, no informational videotapes or other means to alert jail inmates of the policies and procedures applicable. The practice of allowing deputies to rummage through the contents of appellant's envelopes in the hopes of seizing information which could benefit the prosecution is a greater limitation on defendant's constitutional rights than is necessary or essential to protect any proper governmental interest.

Defendant's right to be free from unreasonable searches and seizures was violated. Appellant and Ms. Yancey were charged as co-defendants and shared a preliminary hearing. During the preliminary hearing, appellant and Ms. Yancey sat at the defense table with their attorneys. (MUNI RT 1663.) In an attempt to communicate with her co-defendant Ms. Yancey passed

appellant transcripts. (MUNI RT 1606, 1607.) Appellant glanced through the transcripts and found a folded piece of paper written by Ms. Yancey. He began to read it and placed the letter on his knee. (MUNI RT 1607). The bailiff, then walked over to appellant and looked over his shoulder and demanded that appellant give him the letter. The letter was seized from appellant's person by the bailiff and the court was notified. (MUNI RT 1606).

Trial counsel argued that appellant was not stripped of his Fourth Amendment rights in all contexts just because he was in jail. (RT 1472). The officer assumed that they were kites and read them. Under *United States v. Hinckley* (1982) 672 F.2d 115 there is no iron curtain between the Constitution and jail. (RT 1473-1479).

The testimony showed violations of appellant's rights. Investigator Frank Grasso, on his own initiative, ordered a mail cover, which meant that all of his mail would be photocopied, regardless of content. (RT 1634-36). Grasso didn't discuss this step with even the prosecutor. (RT 1636). The trial court denied the motion because the jail followed its procedures. (RT 1480-1481). This ruling was erroneous, as discussed above.

The prosecutor repeatedly relied on the kites in trying to prove the conspiracy between appellant and Yancey. (See, e.g., RT 7535-7537, 8286, 13130). The reliance on the kites rendered the error prejudicial. The

prosecutor's case against appellant, particularly in regard to the Williams death, was entirely circumstantial. It required considerable speculation in order to convict appellant. The prosecutor was able to use the kites between appellant and appellant to speculate about the link between appellant and Yancey. The prosecutor argued that the correspondence between them showed an "intense personal relationship" which served as motive for Yancey to shoot Williams. While there was evidence of Yancey's connection in the shooting (although it required several inferences), there was no direct evidence of appellant's role in that crime. Instead, the prosecutor offered the "intense personal relationship" between appellant and Yancey as the basis for concluding that there must have been a conspiracy between Yancey can appellant which led Yancey's killing of Williams.

The seizure by the bailiff was a not reasonable. The proper remedy was to suppress the evidence. Since the evidence was not suppressed, the conviction must be reversed.

The United States Supreme Court, in *Wolff v. McDonnell*, 418 U.S. 539 (1974), reviewed procedures of Nebraska *prison* officials on various challenged rules on inmate attorney-client correspondence seizures, and recognized that the seizures did implicate *constitutional* concerns, by stating:

> "As to the Sixth Amendment, its reach is only to protect the attorney-client relationship from intrusion in the criminal

> setting, see *Black* v. *United States,* 385 U.S. 26 (1966); *O'Brien* v. *United States,* 386 U.S. 345 (1967); see also *Coplon* v. *United States,* 89 U.S. App. D.C. 103, 191 F.2d 749 (1951)..."(Emphasis supplied)

The Court in *Wolff*, dealing with the constitutional rights of *prison inmates*, found constitutional some limitation procedures involved, but did not issue definitive *bright line* rulings, especially where the inmates involved are in a county jail, *pending* trial, and in constant contact with their counsel through written materials. The *prison setting*, after a final felony conviction, involves much less concern with *current* attorney-client privileged materials.

Only recently, in a federal civil rights lawsuit, the Sixth Circuit Court Of Appeals reviewed a claimed violation of a jail inmate's privileged communications with his counsel in *Sallier v. Brooks et al*, ___ F.3d ___ (6th Cir, No. 01-1269, September 18, 2003). The Court of Appeals set out the law applicable to such situations, by holding:

> A prisoner's right to receive mail is protected by the First Amendment, but prison officials may impose restrictions that are reasonably related to security or other legitimate penological objectives. *See Knop v. Johnson*, 977 F.2d 996, 1012 (6th Cir. 1992).

Lavado v. Keohane, 992 F.2d 601, 607 (6th Cir. 1993). However, prison officials who open and read incoming mail in an arbitrary and capricious fashion violate a prisoner's First Amendment rights. *See Parrish v. Johnson*, 800 F.2d 600, 604 (6th Cir. 1986):

> Moreover, when the incoming mail is "legal mail," we have heightened concern with allowing prison officials unfettered discretion to open and read an inmate's mail because a prison's security needs do not automatically trump a prisoner's First Amendment right to receive mail, especially correspondence that impacts upon or has import for the prisoner's legal rights, the attorney-client privilege, or the right of access to the courts. *See Kensu v. Haigh*, 87 F.3d 172, 174 (6th Cir. 1996) ....In order to guard against the possibility of a chilling effect on a prisoner's exercise of his or her First Amendment rights and to protect the right of access to the courts, we hold that mail from a court constitutes "legal mail" and cannot be opened outside the presence of a prisoner who has specifically requested otherwise. *See Kensu*, 87 F.3d at 174; *Knop*, 977 F.2d at 1012....We find that the prisoner's interest in unimpaired, confidential communication with an attorney is an integral component of the judicial process and, therefore, that as a matter of law, mail from an attorney implicates a prisoner's protected legal mail rights. *See Kensu*, 87 F.3d at 174 (referring to a prisoner's right to protect the contents of correspondence with an attorney as a "fundamental right). There is no penological interest or security concern that justifies opening such mail outside of the prisoner's presence when the prisoner has specifically requested otherwise." (Emphasis supplied).

The Sixth Amendment right to counsel protects the integrity of the adversarial system of criminal justice by ensuring that all persons accused of crimes have access to effective assistance of counsel for their defense. The right is grounded in "the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense." *United States v. Levy,* 577 F.2d 200, 209 (3d Cir.1978). Although the Sixth Amendment right to counsel is distinguishable from the attorney-client privilege, the two concepts overlap in many ways. The right to counsel would be meaningless

without the protection of free and open communication between client and counsel. *See id.* The United States Supreme Court has noted that "conferences between counsel and accused ... sometimes partake of the inviolable character of the confessional." *Powell v. Alabama,* 287 U.S. 45, 61, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

Effective representation requires that a criminal defendant be permitted to confer in private with his or her attorney....Intrusion into private attorney-client communications violates a defendant's right to effective representation and due process. ... Even "high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of crime and his counsel." *State v. Garza*, 994 P.2d 868 (Wash. App. 2000)(citations omitted)(remanded for evidentiary hearing on defendant's motion to dismiss based upon jail officials' seizure and examination of defendant's legal documents during search of defendant's jail cell).

The seizure and dissemination of privileged communications constitutes an impermissible violation of appellant's constitutional right to counsel, the attorney-client privilege, and the work product doctrine; the constitutional right to due process. *See, e.g., U.S. Const.* amends, V, VI,XIV.

The intrusion into the attorney-client relationship violates appellant's constitutional right to counsel. In *Bishop v. Rose*, 701 F.2d 1150 (6th Cir.

1983), an inmate's cell was searched and among the items seized were handwritten notes of the inmate/defendant regarding his case which were intended to be given to counsel. The Sixth Circuit found that the seizure, review, dissemination and use of those notes at trial violated the defendant's Sixth Amendment right to counsel and ordered a new trial. That is similar to appellant's situation. *See also Carter v. State*, 817 A.2d 277 (Md. App. 2003) (Defendant's two pages of notes, prepared at request of his attorney, that were seized from defendant's cell when he was being moved to a different facility, were privileged and the seizure and use of the documents by the State violated Sixth Amendment. Defendant not required to take precautions to identify documents as "privileged".); *State v. Pecard*, 998 P.2d 453 (Az. App. 2000) (Seizure of legal materials from defendant's cell while defendant was not present constituted violation of Sixth Amendment rights, and State failed to rebut presumption of prejudice); *State v. Warner*, 722 P.2d 291 (Az. 1986)(government's pretrial seizure from defendant's jail cell of personal legal documents violated right to assistance of counsel; remanded for hearing on whether government can establish beyond a reasonable doubt that defendant could receive a fair trial).

Once the State has intruded into the attorney-client relationship and privileged material has been exposed, dismissal is the only available sanction

or remedy. *See, e.g.*, *Barber v. Municipal Court*, 24 Cal.3d 742, 157 Cal.Rptr. 658, 598 P.2d 818 (Cal. 1979) (the right to communicate privately with counsel was violated when a governmental agent in an undercover capacity was present at confidential attorney-client meetings and dismissal of the case was the only effective remedy, because the exclusionary rule was inadequate in that its enforcement would involve exceedingly difficult problems of proof for the aggrieved clients and because it would furnish no incentive for state agents to refrain from such violations in the future); *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978) (where there is a knowing invasion of the attorney-client relationship which results in disclosure to Government of confidential information, overwhelming considerations militate against a standard which tests the Sixth Amendment violation by weighing the degree to which disclosure was prejudicial to the defense and, as such, the only appropriate remedy for Sixth Amendment violation which occurred when law enforcement officials used a government informer to obtain information concerning defense strategy, including attorney-client confidences, was dismissal of the indictment); *Morrow v. Superior Court*, 30 Cal.App.4th 1252 (Cal. App. 1995) (prosecutor's orchestration of eavesdropping on privileged communications between criminal defendant and attorney in courtroom, resulting in acquisition of confidential information, required dismissal of indictment; prosecutor's

misconduct violated privilege against self-incrimination, right to counsel, right to due process, and right to privacy under state and Federal Constitutions; prosecutor's misconduct was not simple violation of Sixth Amendment by peace officer in field requiring showing of demonstrable prejudice or substantial threat of prejudice in order to dismiss indictment; rather, there was a substantial threat of demonstrable prejudice as a matter of law; and cause of action for § 1983 and disciplinary proceedings by California State Bar were insufficient remedies); *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995) (after concluding that no showing of prejudice is required where prosecution intentionally intrudes upon attorney-client communications with no legitimate purpose, the court held that prejudice was presumed where a deputy present for security during attorney-client meetings communicated substance of meetings to prosecution, reversed defendant's conviction, and remanded the case to the trial court to determine appropriate remedy which could require, for example, retrial by a new prosecutor).

In *Barber, supra*, this Court concluded that an exclusionary remedy was inadequate to protect the defendants' rights because, among other things: (1) such a remedy would not deter the state from such unlawful intrusions in the future; (2) the defendants no longer felt they could freely, candidly, and with complete confidence discuss their cases with their attorney which negatively

affected counsel's ability to adequately prepare for trial; (3) the enforcement of an exclusionary rule would involve exceedingly difficult problems of proof; and (4) enforcement of an exclusionary remedy would place an accused in a Catch-22 situation, because in order to protect his confidences, the client would have to permit them to be re-violated. 24 Cal.3d. at 757-759. The Court stated as follows:

> Finally, enforcement of an exclusionary remedy would place an accused in a Catch-22 situation, because in order to protect his confidences, the client would have to permit them to be re-violated. For a trial court to intelligently pass upon the question of whether the prosecution has met its burden of showing that certain proffered evidence is not a fruit of or tainted by the illegally obtained information, the court would have to be advised – by competent evidence on the record – as to the illegally obtained information. It would be unreasonable for a judge to rule on whether the tendered evidence is a fruit of illegally obtained information without knowing the substance of the illegal information . . . . Yet, advising the court on the record of the nature of the conversation or the illegally obtained information requires a re-disclosure of the confidential communication. . . . Clearly, an exclusionary remedy would be illusory, since the client could not be assured that he has been insulated from harm without requiring him to reopen the wound his adversary inflicted upon him in the first place.

Barber, 24 Cal.3d at 756 (footnotes omitted).

Based upon this violation, dismissal was the only appropriate sanction. Other possible sanctions would include: reduction or dismissal of specific charges (*see e.g. People v. District Court (Arapahoe)*, 656 P.2d 1287 (Colo. 1983)), preclusion of the death penalty as a possible punishment, or recusal of

the District Attorney's office, etc. However, once confidential information obtained as a result of an intrusion into the attorney-client relationship has been aired in the "public domain", the only effective remedy will be dismissal of all charges against Mr. [Defendant]. *See, e.g., United States v. Levy*, 577 F.2d 200, 210 (3rd Cir. 1978) (only appropriate remedy for Sixth Amendment violation which occurred when law enforcement officials used a government informer to obtain information concerning defense strategy, including attorney-client confidences, was dismissal of the indictment):

> Since in this case an actual disclosure of defense strategy occurred and since we reject the proposed rule that the damage done by such disclosure should be weighed on a case-by-case basis, we must consider what remedy is appropriate. In our judgment, the only appropriate remedy is the dismissal of the indictment. As a result of the district court's decision that no sixth amendment violation occurred, the same strike force group which originally handled the case was allowed to proceed with the trial. The disclosed information is now in the public domain. Any effort to cure the violation by some elaborate scheme, such as by bringing in new case agents and attorneys from distant places, would involve the court in the same sort of speculative enterprise which we have already rejected. Even if new case agents and attorneys were substituted, we would still have to speculate about the effects of the old case agents' discussions with key government witnesses. More important, public confidence in the integrity of the attorney-client relationship would be ill-served by devices to isolate new government agents from information which is now in the public domain. At least in this case, where the trial has already taken place, we conclude that dismissal of the indictment is the only appropriate remedy. We need not decide whether dismissal would be required when the defense strategy has been disclosed to government agents but has not become public information.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 7
THE IN-COURT IDENTIFICATION OF APPELLANT BY MATTHEW WEAVER WAS THE RESULT OF UNDULY SUGGESTIVE PROCEDURES IN VIOLATION OF THE FIFTH, EIGHT AND FOURTEENTH AMENDMENTS AND FEDERAL DUE PROCESS AND HEIGHTENED CAPITAL CASE RELIABILITY.

The procedures used to secure an identification of appellant by Matthew Weaver were grossly suggestive. The in-court identification was a direct result of that tainted identification. As Weaver's testimony was critical in convicting appellant, reversal is mandated.

A.
The Pretrial Identification by Matthew Weaver was Unduly Suggestive

The United States Constitution, through the Due Process Clause, prohibits the use of unnecessarily suggestive identification procedures. *Stovall v. Denno* (1967) 388 U.S. 293, 302. In *Neil v. Biggers* (1972) 409 U.S. 188, the Court identified the relevant question as whether the state court pretrial identification procedures were unconstitutionally suggestive by using the same standard used in cases on direct appeal: "'a very substantial likelihood of irreparable misidentification.'" *Id.*, at 198 (quoting *Simmons v. United States* (1968) 390 U.S. 377).

A pretrial identification procedure that is unnecessarily suggestive and

conducive to mistaken identification constitutes a denial of due process. "[J]udged by the 'totality of the circumstances,' the conduct of identification procedures may be 'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law." *Foster v. California* (1969) 394 U.S. 440, 442.

"The standard of review for a claim of undue suggestiveness remains unsettled, ..." *People v. Ochoa, supra,* 19 Cal.4th at p. 413. However, "for a witness identification procedure to violate the due process clauses, the state must, at the threshold, improperly suggest something to the witness– i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure. Due process does not forbid the state to provide useful further information in response to a witness's request, for the state is not suggesting anything.... 'A procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police.' [Citation.]" *Ibid.*

A procedure which suggests in advance the identity of the person suspected by police is unfair. *People v. Phan* (1993) 14 Cal.App.4th 1453, 1462. As was the case here, putting a picture of a black man in a sixpack photo lineup with five white men is unnecessarily suggestive and conducive to irreparable mistaken identification where the witness had described the person seen committing the crime as black. *People v. Hogan* (1968) 264

Cal.App.2d 254, 259-262. Putting appellant, a black man, in a photo lineup of five non-blacks was equally unfair and suggestive.

Weaver testified that his basketball teammate, Eric Clark, asked Weaver in October 1991 if he wanted to help Eric's brother move some computers from his brother's store in exchange for $100. (RT 8010). Weaver agreed. They eventually drove to the Comp USA store. (RT 8022). There, Weaver said he briefly met the person identified as Eric Clark's brother, and rode in that person's BMW. (RT 8029). That was the only occasion when Weaver saw the man identified as Eric Clark's brother.

In August of the following year, Investigator Grasso contacted Weaver. Weaver initially denied any knowledge of events. After deciding to come clean, Grasso showed Weaver a sixpack lineup and asked if Weaver recognized anyone. Eric Clark was in the #3 position. Eric Clark's photo was the only one with a dark background, while all the other photos had light backgrounds. (RT 2626). Most importantly, Weaver knew Eric Clark well, so identifying him was easy. (RT 2626). They played on the same college basketball team and saw each other on a near-daily basis. (RT 8009).

Immediately thereafter, Grasso showed Clark another sixpack and asked if he could identify anyone. (RT 2632). Appellant's photo was in the #3 position. His photo was the only one with a dark background, while the others

had light backgrounds. (RT 2625). Appellant was the only black man pictured in the lineup. (RT 2614). Weaver had described the person he was told was Eric's brother as a black man. Considering the description Weaver had given of the man he had met as being a black man, appellant's picture was the only picture which Weaver could possibly pick out. Under the "totality of the circumstances," this identification was unduly suggestive.

The defense argued that this ID was impermissible. They noted that it was cross-racial, as Weaver was white. Weaver only saw the man at Comp USA briefly, and provided no description of the suspect prior to viewing the lineup. Weaver was uncertain, and only said that appellant looked like the man. Weaver had severe credibility problems, including lying to the investigators when first contacted. (RT 2730-2739). It was also noted that Eric Clark, who Weaver knew well, had the only photo in his sixpack which had a dark background. Appellant's photo was the only one in his sixpack which contained a dark background. Weaver viewed Eric's sixpack before viewing appellants. (RT 2747). Thus, the message was telegraphed to Weaver that appellant's photo and Eric Clark's photo were linked. Since it was a given that Weaver would select the photo of Eric, who he knew well, it was also a given that Weaver would then select appellant's photo, because of its linkage to Eric's photo.

The Court denied the motion to exclude the identification on the grounds that it was not impermissibly suggestive. The Court found that it was not an issue of 5 whites and 1 black, because three sixpacks were shown in total. The Court stated that appellant's racial characteristics were not that apparent. In reviewing eighteen pictures together, it was not suggestive, according to the Court. (RT 2750-2753).

Matt Weaver, however, understood the suggestiveness of the sixpacks which he viewed. He testified that he was able to tell the difference between an African-American and an Asian or an Hispanic. (RT 13617). After looking at the sixpack he had been shown in which appellant's photo was included, he testified that none of the other five people included in that sixpack were African-American. (RT 13618). He testified that appellant's photo was the only photo of an African-American included in the sixpack. He also noted that appellant's photo showed the darkest background. (RT 13618). Investigator Grasso had asked him to look at the sixpack in order to identify Eric Clark's brother. (RT 13619). At the time, Weaver told Grasso appellant's photo looked like the man he was introduced to as Eric Clark's brother, but "I don't know for sure because I really didn't get a– all I did was I looked at him, and that reminds me a lot of him." (RT 13620). The sixpack he had been shown with Eric Clark's photo included all African-Americans. (RT 13626). Weave

and Eric played on a college basketball team together regularly. The first time he positively identified appellant was at the preliminary hearing in July, 1994. (RT 13631). He had only made tentative identifications from August 17, 1992 up to July, 1994. (RT 13631). He had considered the sixpack photo at least twice during that time. (RT 13632). At the preliminary hearing, appellant was wearing a jail jumpsuit. (RT 13632).

According to California Law, the following factors are relevant in assessing identiifcations:

> **CALJIC 2.92. Factors to Consider in Proving Identity by Eyewitness Testimony**
> Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:
> [The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;]
>
> [The stress, if any, to which the witness was subjected at the time of the observation;]
>
> [The witness' ability, following the observation, to provide a description of the perpetrator of the act;]
>
> [The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;]
>
> [The cross-racial [or ethnic] nature of the identification;]
>
> [The witness' capacity to make an identification;]
>
> [Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act;]
>
> [Whether the witness was able to identify the alleged perpetrator

in a photographic or physical lineup;]

[The period of time between the alleged criminal act and the witness' identification;]

[Whether the witness had prior contacts with the alleged perpetrator;]

[The extent to which the witness is either certain or uncertain of the identification;]

[Whether the witness' identification is in fact the product of [his] [her] own recollection;]
and Any other evidence relating to the witness' ability to make an identification.

The identification of Weaver failed under these factors as well. Weaver had a short amount of time to observe the man in the car. Although he initially claimed that he had met "Bill Clark" at the house in Los Angeles, he later changed his story and said that he only saw "Bill Clark" during the brief drive across the parking lot.

The circumstances, including fleeing the police, were extremely stressful. If Weaver is believed, he had no idea that anything wrong was going on. All of a sudden, he heard sirens and saw a police car coming at them. A man was trying to jump into the BMW, which, if Weaver is believed, would amount in his mind to an attempted car-jacking.

Weaver did not provide an accurate description of the man he allegedly saw. He was unable to describe what the man he met looked like. All he knew was that the man was black.

The identification was cross-racial. As the law makes clear, cross-racial

identifications are subject to greater doubt than those made by people of the same race. Law enforcement erroneously "adjusted" for this difficulty by creating a six-pack in which appellant's photo was the only photo of a person of the same race as the suspect.

Approximately ten months went by between the alleged viewing of appellant and the identification. This length of time cast further doubt on the veracity of the identification, particularly because Weaver had never seen the man before the night of the Comp USA robbery. No factors applied to indicate that this could be considered a reliable identification.

The reliability of Weaver's identification was called into question by the testimony of Officer Rakitis, who was the first officer who responded to the Comp USA scene. He testified that he saw a BMW drive off. The driver he saw was a black man between the ages of 20 and 24. (RT 13765). Rakitis saw only a single male passenger, who was a black male with collar length jeri curls. (RT 13766-67). Rakitis testified that Matt Weaver was not in the BMW the night of the Comp USA robbery. (RT 13767). Rakitis was shown the six-pack which included appellant's photo. He agreed that several of the others were not African-American. (RT 13776). The Court commented to the jury that all the other people included in that lineup were not African-American. (RT 13776). Rakitis testified that they were not African-American. (RT

13776).

The two witnesses to events at Comp USA, Weaver and Rakitis testified to several things. They both testified that the driver was black. Neither provided a significant description of the driver. They both recognized that only a single black person, appellant, was depicted in the six-pack shown to them.

Rakitis' testimony, however, differed from Weaver's in several important respects. Rakitis described the driver as a black man between the ages of 20 and 24. Appellant was significantly older than that. Rakitis could not, and did not, identify appellant as the driver. Rakitis also testified that the passenger was a black man with jeri curls, while Weaver testified that he was the passenger. Only Weaver testified that appellant was the driver, and he did so only after viewing the suggestive lineup several times, perjuring himself and receiving a grant of immunity.

B.
Weaver's Subsequent Identification of Appellant Was Impermissibly Tainted by the Prior Suggestive Identification

Once a pretrial identification procedure is found constitutionally defective, a subsequent identification by that witness is inadmissible unless the prosecution establishes that the subsequent identification has been purged of

the taint of prior illegality. The prosecution must establish this by "clear and convincing evidence." *People v. Martin* (1970) 2 Cal.3d 822, 833.

> "The phrase 'clear and convincing evidence' has been defined as 'clear, explicit, and unequivocal,' 'so clear as to leave no substantial doubt, and "sufficiently strong to demand the unhesitating assent of every reasonable mind." ' [Citation omitted]. The prosecution will bear the burden of producing through the witness the requisite level of proof. The lineup served to enhance their memories so that they could identify defendant at trial. They now must totally eliminate from recollection all observations at the lineup and convince 'Every reasonable mind' that they distinctly recall defendant from their fleeting impressions during the robbery. As suggested in Wade, this may be extremely difficult."

People v. Caruso (1968) 68 Cal.3d 183, 190.

The testimony of the witness that his in-court identification is independent from the prior suggestive identification is by itself insufficient to purge the taint. *People v. Nation* (1980) 26 Cal.3d 169, 181. "The mere fact that ... [the witness] testified at trial that her identification stemmed from her observation at the time and place of the street encounter begs the critical inquiry, i.e., 'How did her testimony as to her specific observations tend to show that her in-court identification was not infected with the taint of the illegal pretrial confrontation?'"

The sixpack could only have been more suggestive if appellant's photo was circled and accompanied by the note that "this is the guy." The 6-pack consisted of six men which range in age from early twenties to late fifties.

(P15). Appellant was the only black person in the 6-pack and was in the number three block which had a dark background. The remaining head shots consisted of Latino or Caucasian men with light backgrounds. (RT 2621). In addition to the 6-pack that included the appellant, Weaver was shown two other 6packs. (RT 2632). In both, the other suspects that Weaver knew were also placed in the same number three slot.

Matt Weaver was first shown the sixpack on August 17, 1992, approximately 8 months after the Comp USA robbery. He was shown it again on September 24, 1992 before the grand jury. (RT 2610-2615). On July 20, 1994, Weaver was shown the sixpack at appellant's preliminary hearing. Weaver also had the opportunity to view appellant in person at the preliminary hearing, where appellant was the only man in the courtroom wearing an orange jail jumpsuit. Thus, Matt Weaver was shown the sixpack at least three times before testifying at appellant's trial. Weaver was generally confused about when he saw the man identified as Eric's brother at all. He initially told the police that he had seen "Bill Clark" at the house in Los Angeles where they stopped before going to the Comp USA store. Then, he changed his story and said he only saw "Bill Clark" at the Comp USA store. (MUNI RT at 562-566).

As discussed above, the procedure used, where only one black man was contained in a lineup and the witness identified the suspect as being black,

suggested in advance the identity of the individual to be selected. The prosecution was then obligated to demonstrate, by clear and convincing evidence, that the in-court identification was not tainted by the prior suggestive lineups.

There was no showing that this taint was removed. Weaver testified that he had met the person identified as "Bill Clark" only minutes before the robbery commenced. They spoke little. (8040-8055). Moreover, events including being approached by police with sirens blaring and lights flashing, as well as seeing a shot victim, startled Weaver, making it harder for him to identify the other man. (8055-8063). Weaver testified as to his identifications during his interview with Grasso, but gave no indication how he was able to make those identifications, what features stuck out in his mind, and provided no information to show he was unaffected by the suggestiveness. (RT 8092-8098).

The identifications should have been suppressed. The lineup process was suggestive, and the prosecution never demonstrated that the taint of that suggestivity was removed.

The prejudice to appellant's case was severe, as his defense was that he was not at the scene or involved in the Comp USA robbery. The prosecutor used Weaver to identify appellant as being at the scene in closing argument.

(RT 10844-10846; 10860-10862; 11100-11105; 11109-11112; 11115-11120). Weaver was the sole eyewitness alleging that appellant was present at the scene. Officer Rakitis, the first officer on the scene, also saw the driver, but did not identify appellant as the driver. Rakitis saw the driver, who was a twenty to twenty-four year old black man. (RT 7956-7962). He did not identify appellant as the driver of the car, even though he was shown the same suggestive six-pack. (RT 7970-7976).

Appellant presented an alibi defense, and this suggestive ID severely prejudiced the credibility of that alibi. The failure to suppress this suggestive and tainted identification testimony violated appellant's rights to due process and freedom from arbitrary, cruel and unusual punishment.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth

Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 8
THE COMP USA COUNTS SHOULD HAVE BEEN SEVERED FROM THE ARDELL WILLIAMS COUNTS. FAILURE TO DO SO VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Penal Code §954 provides in part:

> An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts [p]rovided, that the Court in which a case is triable, in the interest of justice and for good cause shown, may in its discretion order that the different offense or counts set forth in the accusatory pleading be tried separately...

The primary reason for joinder is that it prevents repetition of evidence and saves time and expense to the state as well as to the defendant. (*People v. Scott* (1944) 24 Cal.2d 744, 778-779.) However, "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441 at 451-452.)

There are four factors to consider in deciding a motion to sever:

1. The presence, or lack of, cross-admissibility;
2. The inflammatory nature of the charges;
3. The relative strength or weakness of the charges; and
4. Whether joinder turns charges into a capital case or whether one case is already capital.

See, e.g., Williams v. Superior Court (1984) 36 Cal.3d 441 at 451-452.

Under *Williams v. Superior Court, supra*, improper refusal of a severance motion is prejudicial error. "Put simply, the joinder laws must never be used to deny a criminal defendant's fundamental rights to due process and a fair trial." (*Id.* at 447-48). The trial court in this case denied the defense motion to sever the Comp USA counts from the Ardell Williams counts. (RT 2912).

A.

The Crimes Charged Were Insufficiently Connected

A trial court must consider if the offenses are connected in their commission or if the offenses are of the same class. The killings, while of the same class, were not sufficiently related as to be cross admissible. The homicides occurred in different counties. One was early in the morning, the other late in the evening. They were separated by 2 ½ years: Kathy Lee was murdered October 18, 1991 and Ardell Williams was murdered March 13, 1994. (CT 27, 32). The Comp USA homicide was unintentional while the Ardell Williams homicide appeared intentional. (RT 9750). The weapons were different, the circumstances were different and the special circumstances were different. The weapon used in the murder of Lee was a semi-automatic revolver and was found at the scene. (RT 8379). The shooter in the William's killing did not abandon a firearm and the police never recovered one. (RT

1274). Kathy Lee was killed in the middle of a store robbery, in public and unplanned. (RT 13743). Ardell Williams was killed in an isolated place in conjunction with no other crime. The coroner as well as the police found no evidence of robbery or sexual assault.(1248). Appellant was purportedly at the scene of the Comp USA shooting, but was in Orange County Jail during the Ardell Williams shooting. (RT 1378).

The special circumstances were also significantly different for the two murders. The murder of Lee was conducted during a burglary and robbery while Ardell William was allegedly killed while the killer was lying in wait. (CT9).

The only relevant fact that shows motive in the Ardell Williams case was that she was a potential witness against appellant. (RT 1249). There would have been no need to establish the circumstances of the Comp USA crime in order to show motive. Doing so would necessitate undue consumption of time, create substantial danger of undue prejudice, confuse the issues, mislead the jury, and have de minimis probative value on the issue of motive, all in violation of Evid. Code §352. Even if relevant, the prosecution could have been limited to demonstrating that Ardell Williams was a witness against appellant without going into every detail of the Comp USA crime and the precise nature of her testimony.

It is an established principle of evidence law that evidence of other criminal acts or misconduct of a defendant may not be admitted at trial when the sole relevancy is to show defendant's criminal propensities or bad character as a means of creating an inference that defendant committed the charged offense. (Evid.Code § 1101(a); *People v. Sam* (1969) 71 Cal.2d 194). Such other-crimes evidence has been held admissible only when it was logically relevant to some material issue in the particular prosecution other than as character-trait evidence. (*People v. Durham* (1969) 70 Cal.2d 171; *People v. Schader* (1969) 71 Cal.2d 761).

This limited principle of admissibility is predicated on Evidence Code §1101(b) which provides that such evidence is admissible to "prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than . . . disposition to commit such acts."

Although relevant in the sense that it meets the definition of relevancy contained in Evidence Code §210, as having a tendency in reason to prove or disprove some disputed fact, the probative value of other-crimes evidence as character trait evidence is of slight or weak value when compared with the danger of its prejudicial effect. This explains the policy that undergirds the statutory provisions against admissibility contained in Evidence Code

§1101(a).

The same danger exists when othercrimes evidence is offered under §1101(b) because the jury is very apt to use such evidence to punish a defendant because he is a person of bad character, rather than focusing upon the question of what happened on the occasion of the charged offense. Thus, in *People v. Thornton* (1974) 11 Cal.3d 738, 756, where other-crimes evidence was offered on the issue of identify, the court remarked that "because the prejudicial effect of such evidence is always manifest, the court's discretion should be exercised in favor of exclusion if the inference of identity is weak." A similar principle is set forth in *People v. Schader* (1969) 71 Cal.2d 761, 772--773: "We exclude such evidence of other crimes not because it lacks probative value but because its prejudicial effect outweighs its probative value. We have thus reached the conclusion that the risk of convicting the innocent by the admission of evidence of other offenses is sufficiently imminent for us to forego the slight marginal gain in punishing the guilty." (Fns. omitted.) "We have elsewhere recognized the substantial prejudicial effect inherent in evidence of prior offenses . . .." (*People v. Sam* (1969) 71 Cal.2d 194, 206, 77 Cal.Rptr. 804, 810, 454 P.2d 700, 706.)

As one Court has opined:

> We recognize that even when the commission of a criminal Act is a disputed issue evidence of motive may become

relevant to that issue. Motive is itself a state-of-mind or state-of-emotion fact. Motive is an idea, belief or emotion that impels or incites one to act in accordance with his state of mind or emotion. Evidence of motive, therefore, meets the test of relevancy by virtue of the circumstantial-evidence-reasoning process that accepts as valid the principle one tends to act in accordance with his motive. Other-crimes evidence, admitted to prove a defendant's motive, is much closer to its use as character trait evidence than when it is offered solely to prove defendant's intent. In terms of prejudicial consequence, there is very little difference, however, between other-crimes evidence that is introduced to establish a defendant's motive and thence to the inference that the charged offense was committed by defendant in accordance with such motive, and other-crimes evidence as Character trait evidence that leads to the same inference– that a defendant acted in accordance with such character trait and committed the charged offense.

It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals. Of what value are the declarations of legal principles with respect to the admissibility of other-crimes evidence such as are found in *Thornton, Schader* and *Sam*, if we permit the violation of such principles in their practical application? We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner.

People v. Gibson (Cal.App. 2d 1976) 56 Cal.App.3d 119, 129-130.

Conversely, in a separate trial to prove appellant was involved in the Comp USA robbery, the killing of Ardell Williams would have been excluded by the mandate of Evid. Code § 352. The only theory for admissibility would have been consciousness of guilt. The probative value, however, would have been substantially outweighed by the prejudicial effect, the consumption of time and the likelihood of confusion resulting from days' worth of evidence to prove a tenuous showing of consciousness of guilt.

B.

The Inflammatory Effect of the Charged Crimes Rendered Joinder Unfair

The circumstances of the Ardell Williams shooting were particularly inflammatory. The prosecution alleged that she was lured out of her home by an employment ruse, and then coldly executed with a bullet to the back of the head. (RT 7523). Moreover, the prosecution harped on the fact that a witness was killed, implying that the entire justice system would be damaged if such acts were not subject to the death penalty. (RT 11913). The fact that appellant was in jail at the time of the killing was used as a way to show future dangerousness warranting death. (RT 11911). On the other hand, while Ms. Kathy Lee was clearly an innocent victim, her killing was apparently an

unintentional consequence of a robbery. (RT 7487). It did not engender the same visceral reaction as the planned execution of a potential witness.

C.

The Joinder of Two Weak Cases Created an Unconstitutional Spillover Effect

Appellant was not the direct perpetrator of either homicide. Appellant made no confessions. The case against him was entirely circumstantial.

In the Comp USA murder, Officer Rakitis described the people in the BMW which fled the scene, and appellant didn't match the description. He described a silver BMW which appellant did not have. The only witness to put appellant and his car at the scene of the Comp USA robbery was Matthew Weaver, an accomplice who committed perjury. (RT 13544).

The evidence against appellant in the Ardell Williams killing was even weaker. Appellant had the airtight alibi of being in Orange County Jail at the time Ms. Williams was shot. (RT 378). While evidence was produced showing that Antoinette Yancey attempted to make contact with Ms. Williams, no evidence was produced showing that appellant ever attempted to have Ms. Williams killed, or aided anyone in such an attempt. (RT 14827).

In addition to the spillover effect from these two crimes, additional bad

acts were introduced for the purposes of demonstrating either (1) a past criminal relationship between Ardell Williams and appellant, or (2) to show an interest in computers on appellant's part. Either of those purposes only related to one or the other shooting, but not both. Thus, by joining the cases, the prosecution was able to introduce other bad acts which would otherwise have been inadmissible, to further intensify the spillover effect.

D.

Both Killings Carried Special Circumstances Which Required Additional Safeguards

In *People v. Williams, supra*, 36 Cal.3d 441, 454, this Court held that a separate consideration in severance analysis is present where one of the charged crimes is a capital offense, carrying the gravest possible consequences. In such case, the court must analyze severance issues with a higher degree of scrutiny and care than in noncapital cases. This is a recognition of the longstanding maxim that "death is different." Severance was called for in *Williams*, where there was only one special circumstance. It was thus mandated here, where two death eligible murders were charged, and multiple special circumstances applied to each crime.

E.

Joinder was Prejudicial

Even if the crimes had met the test of relevancy, they should have been excluded nonetheless under Evidence Code §352. As stated in *People v. Guerrero, supra*:

> The reason for this rule [to exclude such evidence] is not that such evidence is never relevant; to the contrary, the evidence is excluded because it has too much probative value. The nature and inevitable tendency of the tribunal . . . is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.(1 Wigmore, Evidence (3d Ed. 1940) p. 646)

(Id. at 724).[3] Once these crimes were tried together, it was all too tempting for the jurors to use evidence presented in one crime to resolve the other charges

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[3] In *Drew v. United States* (D.C. Cir., 1964) 331 F.2d 85, the court pointed out an interesting aspect of 1101(b)-type evidence:

> The Government strenuously argues that the two crimes were sufficiently similar to come within the "identity" to the "other crimes" rule. **However, once that argument has been rejected, the "similarity" point cuts the other way. Every suggestion at the trial that the two crimes were closely parallel increases the likelihood that the jury may become confused or misuse the evidence.** The more similar the crime, the more careful the trial court and government counsel must be to keep the evidence separated.

(331 F.2d at 94 fn. 21; emphasis added.)

as well. As stated in *People v. Albertson* (1944) 23 Cal.2d 550:

> Circumstantial proof of a crime charged cannot be intermingled with circumstantial proof of suspicious occurrences in such manner that it reacts as a psychological factor with the result that the proof of the crime charged is used to bolster up the theory or foster suspicion in the mind that the defendant must have committed the [similar] act, and the conclusion that he must have committed the [similar] act is then used in turn to strengthen the theory and induce the conclusion that he must also have committed the crime charged.

(*Id.* at 580-581).

The *Williams* court explained:

> our principal concern lies in the danger that the jury here would aggregate all of the evidence, though presented separately in relation to each charge, and convict on both charges in a joint trial; whereas, at least arguably, in separate trials, there might not be convictions on both charges. Joinder in this case will make it difficult not to view the evidence cumulatively. The result might very well be that the two cases would become, in the jurors minds, one case which would be considerably stronger than either viewed separately.

(*Williams* at 453-454 (emphasis added)).

Misjoinder which "resulted in prejudice so great as to deny [a defendant] his Fifth Amendment right to a fair trial" suffices to show a constitutional violation. *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073 (quoting *United States v. Lane* (1986) 474 U.S. 438, 446 n.8). In *Bean*, the Ninth Circuit reversed one of two convictions, and the resulting death

sentence, based on improper joinder.

In *Bean v. Calderon, supra,* the Ninth Circuit found that the lack of cross-admissibility was exacerbated by the fact that the State repeatedly encouraged the jury to consider the two sets of charges in concert, as reflecting the modus operandi characteristic of Bean's criminal activities, and Bean's conviction was therefore fundamentally unreliable. *Id.* at 1084.

Under *Bean v. Calderon, supra*, reversal is required, because the jury could not "reasonably [have been] expected to 'compartmentalize the evidence' so that evidence of one crime [did] not taint the jury's consideration of another crime," *Id.* (*quoting United States v. Johnson*, 820 F.2d 1065, 1071 (9th Cir. 1987)).[4] As shown above, the government's case against appellant was weak as to both groups of crimes, each serving to prop the other up.

Under *Bean*, claims of judicial economy ring hollow when viewed against a capital defendant's right to fundamental fairness. Here, the prosecutor argued for judicial economy. Because of the concerns expressed

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Improper joinder is unconstitutionally prejudicial and not ameliorated by curative instructions. "To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities." *Bean v. Calderon* (*quoting Lewis,* 787 F.2d at 1323 (*quoting United States v. Daniels,* 248 U.S. App. D.C. 198, 770 F.2d 1111, 1118 (D.C. Cir. 1985))).

herein, the failure to sever was an abuse of discretion under state law rendering the trial fundamentally unfair under federal constitutional law. Joinder of these cases was prejudicial and violated appellant's right to due process and heightened capital case reliability under the Fifth, Sixth, Eighth and Fourteenth Amendments. The convictions must be reversed.

F.

Joinder Violated Appellant's Right to Testify in Connection with the Ardell Williams Killing

In *People v. Smallwood* (1986) 42 Cal.3d 415, this Court explained an additional source of prejudice stemming from joinder:

> The jury heard Smallwood present a defense to the Dunbar counts but not the House counts. His willingness to testify as to one charge could not help but leave an unfavorable impression with regard to the other. A defendant's silence on one count would be damaging in the face of his express denial of the other.

Id. at 432.

By joining these crimes, the court forced appellant to make an "all or nothing" choice. Taking the stand and testifying as to one crime could have opened appellant up to cross examination on the other crime. Even if he wasn't cross-examined on the count he did not testify about, his silence about it would have spoken volumes. If he denied involvement in one crime and

remained silent about the other, the jury could only have concluded that he was involved in the latter crime.

Appellant had a constitutional right to testify in his own defense. On numerous occasions the United States Supreme Court has stated that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right. *See, e.g., Nix v. Whiteside* (1986) 475 U.S. 157, 164; *id.*, at 186, n. 5 (Blackmun, j., concurring in judgment); *Jones v. Barnes* (1983) 463 U.S. 745, 751 (defendant has the "ultimate authority to make certain fundamental decisions regarding the case, as to whether to ... testify in his or her own behalf"); *Brooks v. Tennessee* (1972), 406 U.S. 605, 612 ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right").

The Constitution guarantees every criminal defendant the right to refuse to testify in his or her own defense. *Freeman v. Lane*, 962 F.2d 1252, 1259-60 (7th Cir.1992). As a corollary to this right, the Fifth Amendment also prohibits a prosecutor from referring to a defendant's refusal to testify. *Griffin v. California* (1965) 380 U.S. 609, 614-15.

These two rights were placed in conflict by the court's decision to deny severance. Forcing appellant to choose between these two rights guaranteed that one of appellant's rights would be violated.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 9

APPELLANT WAS ENTITLED TO DISCOVER PROSECUTION STANDARDS FOR CHARGING SPECIAL CIRCUMSTANCES IN ORDER TO DISCOVER EVIDENCE OF INVIDIOUS PROSECUTION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

On October 3, 1995, appellant filed a motion to discover the prosecution standards for charging special circumstances. (CT 559). Specifically, the motion sought:

> 1. The case name and number of each case prosecuted by the Office of the District Attorney in which special circumstances were alleged pursuant to Penal Code § 190.2 as amended November 7, 1978.
>
> 2. The case name and number of each case prosecuted by the Office of the District Attorney in which the defendant was charged with homicide and the underlying facts of the homicide established probable cause to believe that one or more of the special circumstances enumerated in Penal Code § 190.2 was applicable, but no special circumstances were charged.
>
> 3. The policy and procedures in the Office of the District Attorney since November 7, 1978 with respect to the charging of special circumstances within Penal Code § 190.2.
>
> 4. The race and ethnic background of each victim and defendant mentioned in 1 and 2, above.

Disclosure of these items was necessary to establish purposeful, invidious prosecutorial discrimination in violation of the equal protection guarantees of the Fourteenth Amendment to the United States Constitution and Article 1, section 7 of the California Constitution.

The defense alleged that appellant was charged with special circumstances and that the death penalty was sought in part because he is black while non-blacks in similar circumstances may not have been charged. The Comp USA case was a felony-murder case. Four blacks and one white were involved in the murder. Although the shooter was a black male, Nokkuwa Ervin, the three remaining blacks and one white were equally culpable as aiders and abettors. The white individual was Matt Weaver, who was never charged or even arrested for any crime. Instead, he was granted immunity for any criminal activity. Nokkuwa Ervin and Eric Clark had already been convicted of murder and sentenced to life without parole at the time appellant tried to discover this information. The prosecutor had not sought death against either. Nokkuwa Ervin was the actual shooter of Kathy Lee, and yet he did not face a possible death sentence. Matt Weaver was free from any possibility of prosecution. He was never even subject to arrest. His role in events cannot be considered inconsequential, particularly in light of the grand jury's desire to indict weaver in the Comp USA crimes. The disparate treatment of the suspects in the Comp USA robbery cried out for discovery of the prosecutor's charging standards. The gross disparities between Weaver and the other suspects parallel the racial differences between the suspects. Discovering charging standards was critical in demonstrating violations of Equal Protection

guarantees regarding appellant.

Appellant sought discovery in order to supplement this showing. (RT 886-905). The prosecutor opposed this discovery, stating that the defense had not made an adequate showing to justify ordering discovery of charging standards and practices. (RT 905-908).

The Equal Protection Clause mandates that discriminatory prosecution violates the Constitution. *Yick Wo v. Hopkins* (1886) 118 U.S. 356. This rule applies in all cases. *See, e.g., Murguia v. Municipal Court* (1975) 15 Cal.3d 286, 303 ("there is absolutely no support in any of the numerous discriminatory prosecution cases for the notion that the equal protection clause is inapplicable to the enforcement of 'serious' criminal statutes. ... that prohibition applies to the misuse of any criminal law.")' *People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177 (finding the right to discovery in the Equal Protection Clause; rejecting the "plausible justification" standard); *United States v. Armstrong* (1996) 517 U.S. 456.

Although referred to for convenience as a "defense," a defendant's claim of discriminatory prosecution goes not to the nature of the charged offense, but to a defect of constitutional dimension in the initiation of the prosecution. (*Murgia, supra,* 15 Cal.3d at p. 293, fn. 4). The issue before the California Supreme Court was whether a discriminatory prosecution claim was

a valid defense to a criminal prosecution. The court held that it was, and it concluded that the trial court had erred in denying the defendants' discovery request. The court based its analysis on "the established principle that in a criminal prosecution an accused is generally entitled to discover all relevant and material information in the possession of the prosecution that will assist him in the preparation and presentation of his defense." (*Murgia* at p. 293).

The defect lies in the denial of equal protection to persons who are singled out for a prosecution that is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." (*Oyler v. Boles* (1962) 368 U.S. 448, 456). When a defendant establishes the elements of discriminatory prosecution, the action must be dismissed even if a serious crime is charged unless the People establish a compelling reason for the selective enforcement. (*McLaughlin v. Florida* (1964) 379 U.S. 184, 193-196; *Murgia, supra,* 15 Cal.3d at p. 304). A criminal defendant must produce "some evidence" of discriminatory effect and discriminatory intent as described by the United States Supreme Court in *United States v. Armstrong* (1996) 517 U.S. 456. In *Armstrong*, the Court explained that a defendant must "produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not...." (*Armstrong* at p. 469). "We think the required threshold– a credible showing of different treatment of similarly

situated persons– adequately balances the Government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution." (*Armstrong* at 470).

"The unlawful administration by state officers of a state statute that is fair on its face, which results in unequal application to persons who are entitled to be treated alike, denies equal protection if it is the product of intentional or purposeful discrimination." *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 832. In *Murgia* this court explained the showing necessary to establish discriminatory prosecution: "[I]n order to establish a claim of discriminatory enforcement a defendant must demonstrate that he has been deliberately singled out for prosecution on the basis of some invidious criterion. Because the particular defendant, unlike similarly situated individuals, suffers prosecution simply as the subject of invidious discrimination, such defendant is very much the direct victim of the discriminatory enforcement practice. Under these circumstances, discriminatory prosecution becomes a compelling ground for dismissal of the criminal charge, since the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities." (*Murgia, supra,* 15 Cal.3d at p. 298, fn. omitted).

In *People v. Superior Court (Hartway)* (1977) 19 Cal.3d 338, 348 (*Hartway*), the Court explained: "The elements of the defense of

discriminatory enforcement were set forth in *Murgia v. Municipal Court, supra.* To establish the defense, the defendant must prove: (1) 'that he has been deliberately singled out for prosecution on the basis of some invidious criterion'; and (2) that 'the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.' " "[A] denial of equal protection would be established if a defendant demonstrates that the prosecutorial authorities' selective enforcement decision 'was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Murgia, supra*, at 15 Cal.3d at 302. While broad discretion may be vested in government officers over whom to prosecute, that discretion is not unfettered and may not be based on an unjustifiable standard. (*Wayte v. United States* (1985) 470 U.S. 598, 608).

A criminal defendant may obtain a dismissal of the criminal charges brought by the government on the ground that the prosecution is being conducted in an arbitrary or discriminatory manner. *Murgia v. Municipal Court* (1975) 15 Cal.3d 286. A dismissal based on discriminatory prosecution is a final dismissal. *Yick Wo v. Hopkins* (1886) 118 U.S. 356.

Facts from which an inference of purposeful, invidious discrimination may be made are a proper subject of discovery. *Murguia v. Municipal Court* (1975) 15 Cal.3d 286, 305. "[T]raditional principles of criminal discovery

mandate that defendants be permitted to discover information relevant to such a claim." *Id.* at 306. *See also People v. Edwards* 54 Cal.3d 787, 826. The information appellant sought would have supported such an inference. Discovery is particularly appropriate and necessary because "evidence of discriminatory enforcement usually lies buried in the consciences and files of the law enforcement agencies involved." *People v. Gray* (1967) 254 Cal.App.2d 256, 266.

A criminal defendant is entitled to discovery of all relevant and material information in the possession and presentation of his defense. *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536-537. Appellant filed declarations which made out a prima facie case of discrimination based on race. (CT 562-563). The declaration showed both (1) that the evidence was not readily available, and (2) there was good cause for disclosure. *See, e.g., People v. Moya* (1986) 184 Cal.App.3d 1307, 1317; *Griffin v. Municipal Court* (1977) 20 Cal.3d 300, 306; *People v. Ochoa* (1985) 165 Cal.App.3d 885, 888. The wrongful denial of a defendant's discovery request may result in the dismissal of charges without reaching the question of whether the prosecution was discriminatory. *See, e.g., People v. Hertz* (1980) 103 Cal.App.3d 770; *People v. Ochoa* (1985) 165 Cal.App.3d 885.

This declaration detailed the racial disparity in charging only the black

individuals who were allegedly involved in the crime. (CT 562-563). The lone white male involved, Matt Weaver, was charged with no crime, even though the grand jury wanted to indict him for his role. He was free from any prosecution. (CT 563). This declaration constituted a sufficient basis for granting the motion to provide the information sought. *See, e.g., Griffin v. Municipal Court* (1977) 20 Cal.3d 300, 303, fn. 3.

This discovery was critical because of the level of discretion which a prosecutor wields, and can be abused due to bias. "It is well established, of course, that a district attorney's enforcement authority includes the discretion either to prosecute or to decline to prosecute an individual when there is probable cause to believe he has committed a crime." *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 77. *See also Bordenkircher v. Hayes* (1978) 434 U.S. 357, 364.

A defendant may challenge the decision to seek a sentence of death if he can offer proof that the decision was made in a random, standardless or discriminatory fashion. A showing by a defendant that he is capriciously or invidiously charged with special circumstances establishes a violation of fundamental constitutional rights. *Gregg v. Georgia* (1976) 628 U.S. 153, 188; *Furman v. Georgia* (1972) 408 U.S. 238, 254-56; *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 290; *People v. Superior Court (Bridgette)* (1987)

189 Cal.App.3d 1649. The appearance of vindictiveness in seeking the death penalty warrants dismissal of a special circumstances allegation. *See, e.g., Blackledge v. Perry* (1974) 417 U.S. 21, 28; *In re David B.* (1977) 68 Cal.App.3d 931, 936.

Regardless of equal protection consequences, a defendant's right to due process is violated by discrimination on the basis of the race of the victim. *McCleskey v. Kemp* (1985) 753 F.2d 877, *affirmed, McCleskey v. Kemp* (1987) 481 U.S. 279. This is so because such an application of the prosecutorial power is an "irrational exercise of governmental power." *McCleskey v. Kemp, supra*, 481 U.S. at 291, fn. 8.

Reversal of the conviction is appropriate where the trial court improperly refused discovery. *See, e.g., People v. Hertz* (1980) 103 Cal.App.3d 770; *People v. Perez* (1965) 62 Cal.3d 769.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v.*

Alabama (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 10
APPELLANT'S RIGHT TO A FAIR PRELIMINARY HEARING WAS VIOLATED BY THE ADMISSION OF PREJUDICIAL, IRRELEVANT INFORMATION REGARDING JEANETTE MOORE'S STATE OF MIND

Jeanette Moore testified that she had received a letter while in custody. She claimed that the letter was "very uncomfortable." (Muni RT 213). The prosecution offered the letter into evidence "for the state of mind of the witness at this time." (Muni RT 213). Appellant objected to introducing evidence for her state of mind as irrelevant. (Muni RT 213). The Court allowed the evidence to come in. She stated that the two-page letter was accompanied by a newspaper clipping. (Muni RT 214).

While Moore's testimony may have been relevant, her "state of mind" was not independently relevant. Introducing a threatening letter, which necessarily had inflammatory value, in order to show an irrelevant fact, was error. Attempting to bolster admissible evidence by introducing inflammatory irrelevant evidence is "not only unnecessary but also reprehensible." *United States v. Davis* (4th Cir. 1995) 1995 U.S.App.Lexis 6490.

Only relevant evidence is admissible (Evid. Code § 350). Under Evid. Code § 201, "'relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the

determination of the action." Moore's state of mind was not independently relevant. It did not prove or disprove any disputed fact of consequence.

Relevancy is the first rule of the admissibility of evidence, and the only test of relevancy is logic and common sense. *Traxler v Thompson* (1970) 4 Cal.App.3d 278. Common sense dictates that otherwise irrelevant evidence cannot be made admissible under a blanket "state of mind of the witness" exception. Such an exception would swallow the rule of relevancy.

There is no precise and universal test by which relevancy of evidence may be determined, but the general test in a criminal case is whether the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution or to overcome any material matter sought to be proved by the defense. *People v Warner* (1969) 270 Cal.App.2d 900. The prosecution was under no duty to prove anything about Jeanette Moore's state of mind. Her state of mind was utterly immaterial at the preliminary hearing. Instead, it was appropriate to exclude the proffered testimony, which was on a subject matter not relevant in the case. *People v Newton* (1970) 8 Cal.App.3d 359.

Jeanette Moore testified at the guilt phase as well. (RT 7640 *et seq.*) She testified about receiving the letter and article while at the Orange County Jail shortly before the preliminary hearing. She testified that she gave this

information to Investigator Grasso after receiving it. (RT 7716-7722). Thus, this state of mind evidence was erroneously admitted at trial as well as at the preliminary hearing.

Even if the evidence had some marginal relevance, it should have been excluded. Under Evid. Code §352, "the court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice". Inflammatory evidence is admissible only when its probative value outweighs its prejudicial effect. *People v Durham* (1969) 70 C2d 171. The probative value of Moore's state of mind was minimal at best, while the prejudicial effect of considering a threat to a witness in this case was significant. Alleged threatening letters sent to Moore had the potential to cloud the issues and inject passion and prejudice, with no appreciable benefit.

The Court nonetheless accepted the exhibit into evidence at the conclusion of the preliminary hearing. (Muni RT 2320). This admission violated appellant's right to a fair preliminary hearing.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable

probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 11
APPELLANT'S RIGHT TO A FAIR PRELIMINARY HEARING WAS VIOLATED BY THE ADMISSION OF INADMISSIBLE HEARSAY OFFERED THROUGH MATTHEW WEAVER

Matthew Weaver testified at the preliminary hearing. He stated that in October, 1991, he played on the Moorpark College basketball team with Damian Wilson and Eric Clark. Weaver testified that one Friday at the gym, Eric told Weaver that Eric's brother owned a computer store, had an excess of computers, and wanted to move them to a warehouse. Eric said that his brother would pay Weaver $100 for helping move the computers. (Muni RT 494-496).

Appellant objected to this hearsay evidence. The prosecution stated that it was being offered as pursuant to Evid. Code §1223 as the statement of a coconspirator. (Muni RT 496). The Court took it under submission.

Weaver then testified that Damian was present as well, and said that he was going with Eric, which made Weaver feel better because he knew Damian better than he knew Eric. (Muni RT 497).

This testimony was inadmissible hearsay. It was an out of court statement. The prosecutor admitted that he was introducing it in order to demonstrate a conspiracy. It was thus admitted for its truth, namely that Eric's brother wanted Weaver to move computers for him. It thus violated the

hearsay rule, unless it satisfied an exception.

The sole exception offered, Evid. Code §1223, was not satisfied. Under §1223, otherwise inadmissible hearsay is not inadmissible if "the statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy [and] the statement was made prior to or during the time that the party was participating in that conspiracy." §1223(a)-(b).

The evidence presented was insufficient to show that at the time that Eric Clark made the statements, he was participating in a conspiracy to commit a crime or civil wrong. The statements themselves are equally consistent with Eric Clark believing that they were moving computers owned by his brother. No evidence was ever introduced to show that at the time of the statements, Eric was involved in a conspiracy with anyone, let alone appellant.

Moreover, the statements did not demonstrate that appellant was involved in a conspiracy at that time. Assuming, *arguendo*, that Eric Clark was involved in a conspiracy, his statements do not prove that appellant was involved in that conspiracy. The testimony of Officer Rakitis, who arrived at the Comp USA crime scene, indicated that appellant was likely not present at the scene, as his description of the driver of the BMW did not match appellant. As discussed above and below, Matt Weaver's identification of appellant as

being present was the result of suggestive identification procedures, and thus was not worthy of belief.

The hearsay declaration or statement of a coconspirator may not be admitted before the existence of conspiracy has been established by independent evidence. *People v Lipinski* (1976) 65 Cal.App.3d 566. No independent evidence of an agreement between Eric Clark and appellant was ever introduced. There was no more evidence of a conspiracy entered into between Eric and appellant than there was between Matthew Weaver and Eric or appellant. For purposes of the coconspirator exception to the hearsay rule, a conspiracy is shown by evidence of an agreement between two or more persons with the specific intent to commit such offense, which agreement is followed by an overt act committed by one or more of the parties for the purposes of furthering the object of the agreement. *People v Longines* (1995, 1st Dist) 34 Cal App 4th 621. No such evidence was produced.

A conspirator's statements are admissible against his coconspirator only when made during the conspiracy and in furtherance thereof. *People v Saling* (1972) 7 Cal.3d 844. Eric's statements may well have been made before any conspiracy existed. After Weaver agreed to participate, later that day, he drove to the apartment shared by Damian Wilson and Eric Clark in North Hollywood. (Muni RT 499). He met up with Damian there. (Muni RT 500).

He and Damian drove to a house off Florence Avenue in Los Angeles. When they arrived, Damian got out of the car and walked to the house while Weaver waited inside the car. (Muni RT 501). Later, he saw Damian walk toward him with Eric and another man. (Muni RT 502). They then drove to the CompUSA store. They arrived and waited for a while. Weaver went to a nearby Del Taco to call his mother and get something to eat. (Muni RT 509). After that, he left the Del Taco and met up with a man who was introduced to him as Bill Clark, Damian Wilson and the man he had previously seen with Eric and Damian, all driving in a BMW. (Muni RT 511).

This chronology shows that there were numerous times after which Eric made his statements to Weaver that a conspiracy could have been hatched, assuming arguendo that a conspiracy existed. If the conspiracy arose after Eric's statements were made, then they were not made in furtherance of the conspiracy or during its existence. Thus, §1223 was not satisfied.

In *Crawford v. Washington* (2004) 124 S.Ct. 1354, the United States Supreme Court held that out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause,[5] unless witnesses are

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The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." That bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas,* 380 U.S. 400, 406 (1965).

unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court, abrogating *Ohio v. Roberts*, 448 U.S. 56.[6]

The Supreme Court explained that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Crawford v. Washington.* at 1365. "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the 'right ... to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox v. United States,* 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895); cf. *Houser,* 26 Mo., at 433-435." *Crawford v. Washington*, at 1365. Cases conform to *Mattox's* holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See *Mancusi v. Stubbs,* 408

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In *Ohio v. Roberts,* 448 U.S. 56 (1980), the High Court held that the admission of an unavailable witness's statement against a criminal defendant was allowable if the statement bore "adequate 'indicia of reliability.'" *Id.,* at 66. To meet that test, the evidence was required to either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Ibid.*

U.S. 204, 213-216 (1972); *California v. Green*, 399 U.S. 149, 165-168 (1970); *Pointer v. Texas,* 380 U.S., at 406-408 ; cf. *Kirby v. United States,* 174 U.S. 47, 55-61 (1899).

The Supreme Court held:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.

Crawford v. Washington, at 1366. That Court explained that "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at 1371.

Appellant has shown "that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination." (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529). It is settled that denial of a substantial right at the preliminary examination renders the ensuing commitment illegal and entitles a defendant to dismissal of the information on timely motion. (*Jennings v. Superior Court* (1967) 66 Cal.2d 867 (§§865, 866– right to cross-examine and present affirmative defense); *People v. Elliot* (1960) 54 Cal.2d 498 (§868– right to closed examination); *People v. Napthaly*

(1895) 105 Cal. 641, 644-645, 39 p. 29 (§§858, 859– denial of counsel); *People v. Phillips* (1964) 229 Cal.App.2d 496, 501-502 (denial of continuance to secure counsel); *People v. Hellum* (1962) 205 Cal.App.2d 150, 153-154 (absence of counsel); *People v. Bucher* (1959) 175 Cal.App.2d 343 (§861– examination in one session); *McCarthy v. Superior Court* (1958) 162 Cal.App.2d 755, 758-759 (§866.5– failure to advise of right to counsel); *People v. Williams* (1954) 124 Cal.App.2d 32, 38 (§866.5– examination of defendant without counsel); *People v. Salas* (1926) 80 Cal.App. 318 (§858– denial of counsel)). Here, appellant was deprived of a preliminary hearing comporting with the rules of evidence.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North*

Carolina (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 12
APPELLANT'S RIGHT TO A FAIR PRELIMINARY HEARING WAS VIOLATED BY THE CUTTING OFF OF CROSS EXAMINATION OF ELIZABETH FONTENOT

Elizabeth Fontenot, Ardell Williams' sister, testified at the preliminary hearing. She testified about a tape she made of phone calls she received from appellant. (Muni RT 943-948). She said that she wanted to find out what, if anything, Ardell was involved in. (Muni RT 1007-1011).

Ms. Fontenot testified that she always told Ardell to be honest and straight. (Muni RT 1029). She said that the conversation had come up many times, and that she always told Ardell to tell the truth. (Muni RT 1029).

She vaguely knew that something occurred in Orange County and that law enforcement was talking to Ardell about it, but she didn't know what it was. (Muni RT 1029-1030). In the conversation with appellant, she learned that the case was a robbery and that a woman had been shot. (Muni RT 1030-1031). She testified that appellant was concerned with whether Ardell Williams was talking to the police. (Muni RT 1031-1032). She was concerned that Ardell might be involved also. (Muni RT 1032).

She testified that her response to appellant was that she told Ardell just to be honest and "If you have nothing to hide, and Bill didn't do anything, you know, just be honest." (Muni RT 1032-1033). At the time of the conversation, she knew that Ardell had been talking to people about a crime

in Orange County involving appellant. (Muni RT 1033). She explained that she told Ardell:

> I said, Ardell, you have nothing to hide. Just be honest. Whoever talks to you now, then in the future, whatever, just be honest.

(Muni RT 1033).

The following took place:

> MR EARLEY: Did it alarm you that your sister might have gotten into some deep stuff or gotten in over her head?
> A: I didn't believe at that time that she was involved in it, no, even though Bill brought it to my attention. Even though me and Bill had conversation– slight conversation about it, I never thought that she could be involved in anything.

(Muni RT 1034). In order to test her credibility and the basis of her opinion, appellant's counsel sought to examine Ms. Fontenot about her knowledge of Ardell's criminal history:

> Q: Well, you weren't concerned enough for you sister?
> A: I didn't believe she was capable of being involved in anything like that.
> Q: You didn't believe she could be duped to be involved in anything either?
> A: Like that.

(Muni RT 1035).

Counsel then asked "You didn't know your sister had been convicted of crimes, from stealing from computer stores?" (Muni RT 1035). The prosecutor objected to this question on relevancy grounds. Counsel explained:

> For someone to say I don't think my sister could be involved in something like that, you just heard Mr. Weaver testify a week ago. Does that mean that since he was there that he knew someone was going to get shot?

(Muni RT 1035-1036). The Court sustained the objection. (Muni RT 1036).

Counsel sought to make an offer of proof, which the Court allowed.

Counsel explained:

> Your honor, um, she had at least been convicted of one crime that involved theft from a computer store, Comp USA, as a matter of fact, Ardell Williams.
>
> The District Attorney– we are taping this. We are taking this testimony down. At some point in time– I don't think I need to be stuck with an answer from a witness, my sister wouldn't do anything like that or I would never believe something like that of my sister.
>
> She's not only involved in Comp USA, at least by her sister's own admission, she was involved in the– in a number of other crimes. Her sister knew that she was then convicted of a crime in Las Vegas during that period of time. So it appears to me that it is just inherently unbelievable that somebody would here know that their sister was involved in thefts from Comp USA which is the robbery store here, is involved in crimes in another state where she's– where she's getting involved with Mr. Clark.
>
> Then she hears about a murder robbery from a computer store where an investigator from Orange County gives her a tape.
>
> And then she comes and says it didn't raise any questions in my mind. I can't believe that if you have a sister and you had this, that you wouldn't be saying what's going on here. Why is this happening.
>
> And I don't think any reasonable person would say– it doesn't make sense what she's saying. It just doesn't make sense to me that she's just being so nonchalant like I don't really even care. And so I think it goes to credibility.

(Muni RT 1036-1037).

The prosecutor responded that the "question pending is having to do with the prior crimes of the victim in this case. Again, I just ask the Court– I think we're getting into collateral matters under 352." (Muni RT 1038). The prosecutor did not explain how the witnesses credibility was a collateral matter. Instead, the prosecutor stressed that he had played the tape, and that the tape should be the only evidence examined. The Court sustained the objection. (Muni RT 1039).

The evidence counsel sought to elicit was relevant in two ways. Ms. Fontenot's testimony was designed to shore up the credibility of Ardell Williams, whose statements came in through other witnesses. Ms. Fontenot offered testimony that Ardell would not be involved in certain activities because of her character. Thus, counsel's questions would have impeached the assertion that Ardell had good character and would not have been involved in certain crimes.

Second, the evidence was relevant to impeach the credibility of Ms. Fontenot. Ms. Fontenot had testified to her sister's good character who would not have been involved in certain crimes. If she was aware of her sister's past criminal history and still thought her sister was of good character, her ability to make such assessments would have been placed in question, as well as her

general truthfulness as to other testimony. If she was unaware of her sister's criminal history, then her ability to assess what Ardell would and wouldn't do was severely impaired.

Under these circumstances, both Ardell Williams and Elizabeth Fontenot should be considered witnesses. A witness's own character for honesty and truthfulness, as revealed by past criminal conduct, is a proper factor in assessing credibility. *See People v. Wheeler* (1992) 4 Cal. 4th 284, 295. "[I]t is undeniable that a witness' moral depravity of any kind has 'some tendency in reason' [citation] to shake one's confidence in his honesty. . . . [P] There is . . . some basis . . . for inferring that a person who has committed a crime which involves moral turpitude [even if dishonesty is not a necessary element] . . . is more likely to be dishonest than a witness about whom no such thing is known. Certainly the inference is not so irrational that it is beyond the power of the people to decree that in a proper case the jury must be permitted to draw it . . .." *Castro, supra,* 38 Cal.3d at p. 315, fn. omitted.

Misconduct involving moral turpitude may suggest a willingness to lie. (*See People v. Castro, supra,* 38 Cal.3d 301, 314-315; *People v. White* (1904) 142 Cal. 292, 294; *People v. Carolan* (1886) 71 Cal. 195, 196; *Gertz v. Fitchburg Railroad* (1884) 137 Mass. 77, 78), and this inference is not limited to conduct which resulted in a felony conviction. Ardell Williams had a

checkered past, and appellant was entitled to bring forth that past in order to demonstrate her lack of credibility.

That a criminal defendant has a constitutionally protected right to cross-examine adverse witnesses is well established and widely recognized. In *Pointer v. Texas*, 380 U.S. 400 (1965), for example, the Supreme Court observed:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

Id. at 405. In *Davis v. Alaska*, 415 U.S. at 320, the Court called the ability to effectively cross-examine adverse witnesses in a criminal case a "vital constitutional right."[7]

That right was eviscerated by preventing counsel from exploring the credibility of Ms. Fontenot and Ms. Williams. The credibility of both was

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[7] *See also* 5 J. Wigmore, Evidence §§ 1367 (J. Chadbourn rev. 1974) (calling cross-examination "the greatest legal engine ever invented for the discovery of truth"); 4 J. Weinstein, Evidence para. 800[01] (1988) (cross-examination, a "'vital feature' of the Anglo-American system," "'sheds light on the witness' perception, memory and narration,'" and "can expose inconsistencies, incompletenesses, and inaccuracies in his testimony").

relevant. By presenting statements of both women, the prosecutor placed the credibility of both at issue. Under the Sixth Amendment, appellant had the right to confront and cross-examine the witnesses against him. As this was a capital case, the Eighth Amendment also required heightened scrutiny, as well as heightened due process under the Fifth and Fourteenth Amendments.

The objection was sustained under Evid. Code §352. To the extent that state law operates to prevent a criminal defendant from presenting relevant evidence, the defendant's constitutionally-guaranteed right to confront adverse witnesses and present a defense is diminished. *Michigan v. Lucas*, 500 U.S. 145, 149. Restrictions on a criminal defendant's rights to confront adverse witnesses and to present evidence "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock* v. *Arkansas, supra*, at 56. Evidence Code § 352 was never designed to violate the United States Constitution, nor could it do so even if it was so intended.

Appellant has shown "that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination." (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529). It is settled that denial of a substantial right at the preliminary examination renders the ensuing commitment illegal and entitles a defendant to dismissal of the information on timely motion. (*Jennings v. Superior Court* (1967) 66 Cal.2d 867 (§§ 865,

866– right to cross-examine and present affirmative defense); *People v. Elliot* (1960) 54 Cal.2d 498 (§868– right to closed examination); *People v. Napthaly* (1895) 105 Cal. 641, 644-645, 39 p. 29 (§§858, 859– denial of counsel); *People v. Phillips* (1964) 229 Cal.App.2d 496, 501-502 (denial of continuance to secure counsel); *People v. Hellum* (1962) 205 Cal.App.2d 150, 153-154 (absence of counsel); *People v. Bucher* (1959) 175 Cal.App.2d 343 (§861– examination in one session); *McCarthy v. Superior Court* (1958) 162 Cal.App.2d 755, 758-759 (§866.5– failure to advise of right to counsel); *People v. Williams* (1954) 124 Cal.App.2d 32, 38 (§866.5– examination of defendant without counsel); *People v. Salas* (1926) 80 Cal.App. 318 (§858– denial of counsel)). Here, appellant was deprived of a preliminary hearing comporting with the rules of evidence.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable,

individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 13
THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT BY COMPELLING WITNESS ALONZO GARRETT WITH THREATS OF CONTEMPT CHARGES. THE COMPELLED TESTIMONY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The prosecutor comitted misconduct regarding the testimony of Alonzo Garrett which took two forms: (1) the prosecutor failed to offer immunity to Alonzo Garrett before bringing contempt charges against him, in violation of Cal. Penal Code §1324; and (2) this failure resulted in the coerced, unreliable trial testimony of Garrett at appellant's trial. Had the prosecutor offered Garrett immunity before bringing contempt charges, Garrett would have testified without fear of incrimination, and would not have been compelled to testify in the manner sought by the prosecution.

Alonzo Garrett was a state prisoner. He was called by the prosecution to testify at the preliminary hearing. Before the witness was brought into Court, the prosecutor characterized a letter which was intercepted to Garrett as a "death threat by Mr. William Clark to Alonzo Garrett." (Muni RT 922). The prosecutor stated that to his knowledge, the letter had not been made known to Mr. Garrett. He stated that he would not be showing the letter during his examination "because I think it could impact an allegation of his credibility."

The defense was concerned that if Garrett's attorney, Mr. Jensen, who was present in Court, told Mr. Garrett about the letter, that Garrett might decline to testify out of fear, and that that refusal would be preserved and put before a jury. (Muni RT 927). Such a refusal would clearly have been prejudicial to appellant. The parties were confused as to how the issue should be handled.

After a recess, Yancey's counsel, Gary Proctor, stated that he had consulted state bar lawyers who indicated that:

> it is clear and unequivocal that under the general obligations of the fiduciary obligation of the attorney to the client, that disclosure would be mandated.
>
> And they felt that, to the extent the lawyer withheld information, the client thereafter found out about it and made a decision based upon that withholding of information, that the client then complained to the State Bar, that the State Bar could take disciplinary action against the attorney.
>
> There is no specific rule of effectual conduct dealing with this very issue. But the State Bar lawyer felt that unequivocally that the lawyer had that obligation.

(Muni RT 930). The prosecutor argued that the Court had authority to order Mr. Jensen not to disclose the threat to his client. (Muni RT 931-933).

The Court stated:

> My druthers at this point is– let me do this. Let's bring him back. And then I'm going to ask Mr. Jensen– at this point my tentative is to ask Mr. Jensen not to disclose the threat until after Mr. Garrett has taken the stand and has made his position clear as to whether he is going to talk or not.

(Muni RT 935). This ruling was unclear, in that the Court stated it would "ask" Mr. Jensen not to disclose the threat. Mr. Jensen apparently interpreted it as an order, however, when he stated "I'm not here to argue with the Court. But I just don't see the Court's authority in me not telling him this information." (Muni RT 936).

Mr. Jensen intimated that he might not follow the Court's order when he stated:

> I have never knowingly violated a court order before; but the court's putting me in an extremely difficult position here. And I just don't– I don't know what I'm going to do.

(Muni RT 936). They agreed they would bring Mr. Garrett in after the lunch recess and see if he would testify at all, considering that he was serving a sentence in state prison and might not testify out of fear of being considered a snitch.

When they returned, Mr. Jensen informed the Court that Garrett did not even wish to be brought into court, and that he wouldn't say a word. Mr. Jensen stated he believed that Mr. Garrett had a Fifth Amendment right not to testify about these crimes. (Muni RT 966-967). The prosecutor, however, asked that if the witness refused to answer any questions, that he be held in civil contempt. (Muni RT 968-969). Mr. Jensen argued that there was sufficient evidence that criminal liability could be attached to the

conversations between Garrett and appellant so that Garrett's Fifth Amendment rights applied. (Muni RT 969-970).

The Court asked if Garrett would be asserting his Fifth Amendment rights. Mr. Jensen said that he was not going to say a word, but that Jensen would assert them on Garrett's behalf. The Court asked if the prosecutor planned on granting immunity. The prosecutor said he did not because he had no indication that Garrett would be subject to criminal liability. (Muni RT 971). The prosecutor stated that they had to take it question by question, in spite of the evidence that Mr. Garrett may have attempted to dissuade Ardell Williams from testifying based on his contact with appellant.

This procedure violated Evidence Code §915(a): "...the presiding officer may not require disclosure of information claimed to be privileged under this division in order to rule on the claim of privilege..." The Court was obligated to rely on the representations of Jensen as Garrett's counsel, since §915(a) prohibited the forced disclosure of privileged information in order to rule on the exercise of that privilege. Under Evid. Code §404, Garrett had carried the burden of proof, and the privilege had to be sustained "unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege." The prosecutor's bald, unsupported statement could not so satisfy the court, while Jensen's

statement to the contrary controlled. *See also Blau v. United States* (1950) 340 U.S. 159; *People v. Lucas* (1995) 12 Cal.4th 415, 454.

The Court had Mr. Garrett brought to Court, at which time he refused to speak to take the oath. The prosecutor submitted paperwork finding Mr. Garrett in contempt of court under CCP §1219. The Court found him in contempt and ordered him held at Orange County Jail until such time as he agreed to purge himself of contempt by taking the oath as a witness.

The Court then lifted the order not to disclose the letter to Garrett. They agreed that Mr. Jensen would inform Garrett of the letter and confirm that by writing to the parties. (Muni RT 982).

A.
The Court Failed to Conduct an Inquiry Into Whether the Content of the Letter was Communicated to Mr. Garrett

Both the prosecutor and the defense were concerned over whether the content of the allegedly threatening letter was disclosed to Mr.Garrett prior to being called into court. It was because of fear of tainting testimony that the parties had this concern.

The Court, however, failed to ensure that this concern was protected in its handling of the matter. The Court phrased its initial "order" as "asking" Mr. Jensen not to disclose the existence of the allegedly threatening letter. The

phraseology used made it unclear whether the Court was merely expressing its wishes, or issuing an order. If it was the former, then Mr. Jensen was under no compulsion to abide by that request.

If it was, however, an order, the inquiry became more complex. The conclusion of the state bar lawyers consulted with was that Mr. Jensen was compelled to disclose the information to Mr. Garrett. Mr. Jensen further muddied the waters by stating that he doubted the Court's authority to make such an order, and that he didn't know what he was going to do. (Muni RT 936).

The Court never inquired into this matter further. When Mr. Garrett was finally brought into court, the Court did not inquire whether Mr. Jensen had abided by the Court's request/order. The Court also failed to determine whether Mr. Garrett had learned of the letter from any other sources, such as deputies, marshals, etc. Thus, the Court failed to ensure that the danger posed by the possible tainting of the witness was avoided. Having taken the steps of trying to prevent knowledge, the Court was obligated to ensure that those rulings were followed. The failure to do so injected an uncertainty and unfairness into the trial.

B.
The Witness Was Unfairly Intimidated and Coerced by the Prosecutor's Bringing of Contempt Charges

Ultimately, Alonzo Garrett was found to be in contempt, and sentenced to an additional year in prison, to be served consecutively to the sentence he was then serving.

When he was called to testify at trial, he testified that he hadn't testified at the preliminary hearing. He said that he was testifying now because he was afraid of any more contempt charges which might be brought against him. (RT 9689-9696).

Thus, the prosecution and the Court were able to coerce Garrett into testifying by holding contempt charges over his head. They were able to do so in spite of the fact that his attorney had invoked the Fifth Amendment on his behalf. That invocation of the Fifth Amendment was proper and should have been respected.

The Self-Incrimination Clause of the Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." U. S. CONST., AMDT. 5. *See Bram v. United States* (1897) 168 U.S. 532. The Supreme Court recognized the Clause's applicability to state cases in *Malloy v. Hogan* (1964) 378 U.S. 1.

It has long been held that this prohibition not only permits a person to

refuse to testify against himself at a criminal trial in which he is a defendant, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973). While Garrett was not facing charges at the trial, it would nevertheless be included in the Fifth Amendment guarantees as a formal criminal proceeding.

> In all such proceedings:
>
> > a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. . . . Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution.

Id., at 78 (citations omitted). Garrett was thus protected by the privilege and entitled to claim it. The prosecution refused to protect Garrett from self-incrimination by granting him immunity from prosecution on the subjects of his testimony. Instead, the prosecutor simply stated that Garrett was not exposed to criminal liability. (MUNI RT 969-972). If the prosecutor was so sure of that premise, then it was easy enough to offer immunity. Holding Garrett in contempt for refusing to incriminate himself did not comport with the rules as set out in Penal Code §1324, which states that the DA must offer

immunity before seeking contempt charges. The prosecutor committed misconduct by intimidating a witness through the use of contempt proceedings.

A defendant does not lose this protection by reason of his conviction of a crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled, they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted. See *Baxter* v. *Palmigiano*, 425 U.S. 308, 316 (1976). Thus, the fact that Garrett was serving a sentence in state prison did not affect his right to invoke the Fifth Amendment privilege.

If a witness asserts the privilege, he "may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him" in a subsequent criminal proceeding. *Maness v. Meyers*, 419 U.S. 449, 473 (1975) (White, J., concurring in result) (emphasis in original). Garrett was never given immunity, and yet he was still compelled to answer potentially incriminating questions.

The net effect was to coerce Garrett to answer questions without granting him immunity. The result was that Garret was naturally afraid of the prosecution, because they could potentially inflict upon him additional prison time if he incriminated himself. The prosecution should not have been allowed

to hold the threat of punishment over Garrett's head.

Garrett's trial testimony was prejudicial. He testified that appellant provided him with a transcript and said that the transcript was what was keeping him in jail. (RT 9678-9684). The transcript was the grand jury testimony of Ardell Williams. (RT 9704-9707). This testimony provided evidence of motive for killing Ardell Williams. Under these circumstances, it was highly prejudicial.

The prosecutor highlighted this testimony before the jury, arguing that it was no coincidence that appellant showed the transcript to Garrett. The prosecutor also argued that appellant tried to silence Garrett by threatening him, causing further prejudice. (RT 10891-10895).

The testimony Garrett gave was thus coerced, and hence unreliable, since he had ample reason to shift culpability from himself to appellant. This violation of the Fifth Amendment, Sixth, Eighth and Fourteenth Amendments rendered appellant's trial unfair.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 14
APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE SUGGESTIVE VOICE IDENTIFICATION OF ANTOINETTE YANCEY BY NENA WILLIAMS

Nena Williams testified at the preliminary hearing regarding the voice of "Janet," who had called the Williams house several times. She had spoken with Janet on two occasions and had heard Janet's voice on the phone on two others. (Muni RT 1203). After Ardell's death, Sergeant Guzman played several tapes for her and she identified a voice as Janet. (Muni RT 1220). She didn't recognize Janet's voice as that of "Carolyn", the woman who delivered flowers to the house, until Sergeant Guzman played the tapes for her. (Muni RT 1259).

Yancey's attorney wanted to play a tape the defense made for the witness in order to see if she could identify Janet's voice. The prosecution tapes which had been played were comprised of people saying different things, while the defense tape was of people saying the same thing. Moreover, the prosecution tapes were of interviews, and the Yancey interview included her giving her name, although the prosecution claimed to not know which portion of the tape was played for the witness. The prosecution objected to playing the defense tape, said that they had not been given discovery on the defense tape, and said that they could use the prosecution tapes. The defense objected,

saying that they shouldn't be bound by the tapes the prosecution used, which were stacked against Yancey and were unduly suggestive. (Muni RT 1281-1295).

The Court ruled that it would only allow the defense to play portions of the tape which law enforcement already played. At that point, appellant's counsel asked for a two minute recess in order to ask the witness, who had been excused, if she would listen to the tape. When he did so, other members of the Williams family accompanied him and told Nena Williams that she was not required to listen to the tape. (Muni RT 1300-1303). Investigator Grasso advised her not to do anything before speaking to the prosecutor. (Muni RT 1304).

The Court called Nena Williams back into the courtroom. He told her she had the right to listen to the tape or not to listen to it. (Muni RT 1308). They had a hearing and she said she was willing to listen to the tape. (Muni RT 1324). Then she said she didn't want to listen to the tape. (Muni RT 1328). Then she said she didn't mind listening to it in the District Attorney's Office. (Muni RT 1329). Then, when the Court informed her that it was her choice whether or not to listen to the tape and under what conditions, she said she didn't want to listen to it. (Muni RT 1332). She confirmed that since she first listened to the suggestive tapes, they were played for her again in the

DA's office. She identified the fourth voice as that of Janet. (Muni RT 1328).

There was a break in her testimony, and she came back approximately 10 days later. At that time, she was willing to listen to the tape after speaking with the prosecutor. (Muni RT 1384-1390). She listened to the tape and identified voice numbers three and five as familiar, but was unsure. Voice three was Yancey; voice five was not. She said that she was able to identify the voices in the DA's office because only one of them spoke softly. (Muni RT 1393). Apparently, she identified the voice because it was soft, and not because it sounded like Janet's voice in pitch, tone, etc. In other words, it appeared that she picked out the only voice which was "soft" rather than actually identifying a voice as Janet's voice. She said that voice five was the closest voice to Janet. (Muni RT 1395).

The prosecutor then sought to have Antoinette Yancey read People's 30 and 31, two notes that had been identified as notes written by Ardell while talking to Janet. (Muni RT 1441). The defense objected that such a method would be unduly suggestive. (Muni RT 1442). The defense argued that the witness had obviously drawn the connection that Yancey was the person who delivered the flowers and presumably made the phone calls as Janet. (Muni RT 1442). The Court overruled the objection. (RT 1445). They debated whether she should read those exhibits, which the Court thought could be

suggestive, but ultimately settled on her reading those exhibits. (Muni RT 1448). She read the material, and the witness identified Yancey as Janet.

At trial, the prosecution capitalized on these patently suggestive pretrial identification procedures. Nena Williams testified that she had learned of the identity of the arrested suspect, Antoinette Yancey, around the time she first listened to tapes played by Guzman. (RT 9413). Thus, at the time she made the identification, she had learned that Antoinette Yancey was suspected by the police. Any doubt was erased by the fact that Yancey was standing in front of her in County Jail clothes, making it blindingly obvious what voice she was supposed to identify.

Nena Williams made an in-court identification of Yancey, connecting her to Janet and the person who delvered the flowers. The suggestive pretrial identification procedures produced and erroneous and tainted in-court identification.

A pretrial identification procedure that is unnecessarily suggestive and conducive to mistaken identification constitutes a denial of due process. "[J]udged by the 'totality of the circumstances,' the conduct of identification procedures may be 'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law." *Foster v. California* (1969) 394 U.S. 440, 442.

A procedure which suggests in advance the identity of the person suspected by police is unfair. *People v. Phan* (1993) 14 Cal.App.4th 1453, 1462. Putting a black man in a lineup with three white men is unnecessarily suggestive and conducive to irreparable mistaken identification where the witness had described the person seen committing the crime as black. *People v. Hogan* (1968) 264 Cal.App.2d 254, 259-262.

Once a pretrial identification procedure is found constitutionally defective, a subsequent identification by that witness is inadmissible unless the prosecution establishes that the subsequent identification has been purged of the taint of prior illegality. The prosecution must establish this by "clear and convincing evidence." *People v. Martin* (1970) 2 Cal.3d 822, 833.

> "The phrase 'clear and convincing evidence' has been defined as 'clear, explicit, and unequivocal,' 'so clear as to leave no substantial doubt, and "sufficiently strong to demand the unhesitating assent of every reasonable mind." ' [Citation omitted]. The prosecution will bear the burden of producing through the witness the requisite level of proof. The lineup served to enhance their memories so that they could identify defendant at trial. They now must totally eliminate from recollection all observations at the lineup and convince 'every reasonable mind' that they distinctly recall defendant from their fleeting impressions during the robbery. As suggested in *Wade*, this may be extremely difficult."

People v. Caruso (1968) 68 Cal.3d 183, 190.

The testimony of a witness that his in-court identification is independent from the prior suggestive identification is by itself insufficient to

purge the taint. *People v. Nation* (1980) 26 Cal.3d 169, 181. "The mere fact that ... [the witness] testified at trial that her identification stemmed from her observation at the time and place of the street encounter begs the critical inquiry, i.e., 'How did her testimony as to her specific observations tend to show that her in-court identification was not infected with the taint of the illegal pretrial confrontation?'"

In-court identification procedures which are so "'unnecessarily suggestive and conducive to irreparable misidentification'" amount to a denial of due process of law. *Williams*, 436 F.2d at 1168-69 (*quoting Stovall v. Denno*, 388 U.S. 293, 302 (1967)). This procedure was that suggestive. Nena Williams was on the stand for hours. It was obvious to her that her ability to identify a voice was critically important. When given a choice at the preliminary hearing of whether to listen to the defense tape, she chose not to. After listening to the defense tape, she stated that she hadn't wanted to listen to it out of fear for being tricked. That is, she could not identify Yancey's voice as that of Janet. At that point, the prosecutor then engaged in this suggestive procedure, which telegraphed to Nena Williams that she was supposed to identify Yancey. She couldn't identify Yancey's voice on tape, but she could identify her when Yancey stood up in court in jail coveralls. This procedure reeked of suggestiveness, and rendered the trial unfair.

The prosecutor produced no evidence at trial to show that Nena Williams' in court identification was based on factors other than those outlines above. The trial identification was a result of the suggestive procedures, and thus should not have been allowed. As identity was a critical issue at trial, this error was prejudicial.

The identification of Yancey was grossly prejudicial to appellant. As appellant had an airtight alibi at the time Ardell Williams was killed, being in Orange County prison, he could only be guilty of that crime as a conspirator. Yancey was the only other conspirator alleged by the prosecutor. This voice testimony was critical to link Yancey as "Janet" in order to try and place Yancey at the scene of the Williams shooting.

Equally suggestive was the statement which Yancey was forced to read. The words were describing actions taken by the woman who delivered the flowers, who Ms. Williams had been told was also Janet and who was responsible for Ardell's death. If the only purpose of the demonstration was to identify the voice, Yancey could just as well have read from the phonebook or the juror handbook. By forcing Yancey to read this statement, the prosecutor was able to create the link between Yancey and the woman who delivered the flowers, who Angelita already believed was Janet. Forcing Yancey to read this passage to both Angelita and Nena Williams was even

more suggestive than simply having her read irrelevant material. These procedures all combined to result in an entirely suggestive and unfair in-court identification.

Had this testimony been excluded, evidence of a critical link in the prosecution's chain of evidence would have been missing. Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 15
APPELLANT'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE SUGGESTIVE VOICE IDENTIFICATION OF ANTOINETTE YANCEY BY ANGELITA WILLIAMS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Angelita Williams, Ardell Williams' mother, testified at the preliminary hearing regarding her phone calls with the woman identifying herself as Janet. She testified that Sergeant Guzman had brought tapes to her house for her to listen either the night after the murder or the evening after that. She listened to four tapes of conversations with female voices, and she identified one as Janet. (Muni RT 1721-1724).

She testified that she came to the District Attorney's Office approximately one month before she was called to testify. (Muni RT 1725). She made an identification then as well. (Muni RT 1726). She knew Antoinette Yancey's name as a defendant when she listened to the tapes at the DA's Office. (Muni RT 1729).

In Court, the tape that the officers used was played for Ms. Williams, including the portion with Antoinette Yancey's name on it. She was able to identify the voice as Janet's Voice. (Muni RT 1738).

At the preliminary hearing, the defense tape previously played for Nena Williams (Claim 16) was played for Angelita Williams. (Muni RT 1830). She wanted to listen to voices one and five again. (Muni RT 1831). They played

only those two voices again. She wasn't sure if either of the voices were Janet's voice. (Muni RT 1832). She said voice five was the closest. (Muni RT 1832). Voice three was Yancey's voice. She said that other than voices one and five, the others did not sound like Janet's voice. (Muni RT 1832).

In sum, when the officers played their tapes for Angelita and when they were played in the DA's office, she could identify Yancey's voice. When the tape was played which contained Yancey's name, she could identify the voice. But when the defense tape was played which was completely anonymous and on which all the voices uttered the same words, she identified other voices as Janet and excluded Yancey as Janet.

The prosecutor was obviously unhappy with these results. He asked that Yancey read the statement she had previously read while Nena Williams was on the stand. (Muni RT 1850). The defense objected on the ground that "the previous methodology was impermissibly suggestive as evidenced by what's transpired in court and the name [being included in the tape]." (Muni RT 1850-1851). The Court overruled the objection. (Muni RT 1851).

Defendant Yancey was ordered to read, and did read, the following:

> On 2/10/94 a woman came to the door and said she was delivering flowers to Ardell. The woman was allowed inside and was standing in the entry of the kitchen while Nena called Ardell. When Ardell came downstairs, the woman gave her the flowers. Ardell was wondering who sent her the flowers. A card was attached and read 'hope to meet you soon,' or words to

> that effect. They asked the woman which florist sent the flowers. And she said it was Creative Gestures in Torrance.

(Muni RT 1851-1852). Ms. Williams then identified Yancey's voice as Janet's voice. (Muni RT 1852).

As expressed in regard to Nena Williams (*see* Claim 16), this procedure was unfairly suggestive. When a fair tape was played before the witness in court, she excluded Yancey's voice as Janet and identified another voice. Only when the Yancey stood before her in County Jail issue clothes and read the statement could she allegedly identify her voice, the voice which she affirmatively stated was not Janet only moments before.

Equally suggestive was the statement which Yancey was forced to read. The words were describing actions taken by the woman who delivered the flowers, who Ms. Williams had been told was also Janet and who was responsible for Ardell's death. If the only purpose of the demonstration was to identify the voice, Yancey could just as well have read from the phonebook or the juror handbook. By forcing Yancey to read this statement, the prosecutor was able to create the link between Yancey and the woman who delivered the flowers, who Angelita already believed was Janet. Forcing Yancey to read this passage to both Angelita and Nena Williams was even more suggestive than simply having her read irrelevant material. These procedures all combined to result in an entirely suggestive and unfair pretrial

identification.

This suggestiveness affected the trial as well. Angelita Williams testified at the trial in conformity with the testimony she gave at the preliminary hearing. (RT 9443-9474). The testimony she gave at the preliminary hearing was repeated, and there was no indication that the identification she made at trial was anything but the product of the suggestive identification she made previously.

A pretrial identification procedure that is unnecessarily suggestive and conducive to mistaken identification constitutes a denial of due process. "[J]udged by the 'totality of the circumstances,' the conduct of identification procedures may be 'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law." *Foster v. California* (1969) 394 U.S. 440, 442.

A procedure which suggests in advance the identity of the person suspected by police is unfair. *People v. Phan* (1993) 14 Cal.App.4th 1453, 1462. Putting a black man in a lineup with three white men is unnecessarily suggestive and conducive to irreparable mistaken identification where the witness had described the person seen committing the crime as black. *People v. Hogan* (1968) 264 Cal.App.2d 254, 259-262.

The prosecutor produced no evidence at trial to show that the in-court

identification was based on factors other than those outlines above. The trial identification was a result of the suggestive procedures, and thus should not have been allowed. As identity was a critical issue at trial, this error was prejudicial.

Once a pretrial identification procedure is found constitutionally defective, a subsequent identification by that witness is inadmissible unless the prosecution establishes that the subsequent identification has been purged of the taint of prior illegality. The prosecution must establish this by "clear and convincing evidence." *People v. Martin* (1970) 2 Cal.3d 822, 833.

> "The phrase 'clear and convincing evidence' has been defined as 'clear, explicit, and unequivocal,' 'so clear as to leave no substantial doubt, and "sufficiently strong to demand the unhesitating assent of every reasonable mind." ' [Citation omitted]. The prosecution will bear the burden of producing through the witness the requisite level of proof. The lineup served to enhance their memories so that they could identify defendant at trial. They now must totally eliminate from recollection all observations at the lineup and convince 'Every reasonable mind' that they distinctly recall defendant from their fleeting impressions during the robbery. As suggested in *Wade*, this may be extremely difficult."

People v. Caruso (1968) 68 Cal.3d 183, 190.

The testimony of the witness that his in-court identification is independent from the prior suggestive identification is by itself insufficient to purge the taint. *People v. Nation* (1980) 26 Cal.3d 169, 181. "The mere fact that ... [the witness] testified at trial that her identification stemmed from her

observation at the time and place of the street encounter begs the critical inquiry, i.e., 'How did her testimony as to her specific observations tend to show that her in-court identification was not infected with the taint of the illegal pretrial confrontation?'"

In-court identification procedures which are so "'unnecessarily suggestive and conducive to irreparable misidentification'" amount to a denial of due process of law. *Williams*, 436 F.2d at 1168-69 (*quoting Stovall v. Denno*, 388 U.S. 293, 302 (1967)).

The identification of Yancey was grossly prejudicial to appellant. As appellant had an airtight alibi at the time Ardell Williams was killed, being in Orange County prison, he could only be guilty of that crime as a conspirator. Yancey was the only other conspirator alleged by the prosecutor. This testimony was critical to link Yancey as "Janet" in order to try and place Yancey at the scene of the Williams shooting.

For all these reasons, appellant's trial was rendered fundamentally unfair in violation of due process and heightened capital case reliability. Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v.*

Watson (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 16
APPELLANT'S RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE COURT FORCED INVESTIGATOR ALAN CLOW TO DIVULGE INFORMATION PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT PRIVILEGE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Investigator Alan Clow was appointed to work on appellant's behalf. The prosecutor called Clow to testify at the preliminary hearing. The following questions were asked:

> Q: During the time that you were Mr. Clark's investigator while he was pending the prosecution of the Comp USA murder and while Ardell Williams was alive and a witness, do you understand my question?
> A: Yes, sir.
> Q: Did you ever have any contact with Ardell Williams?

(Muni RT 2221).

Trial counsel objected on the grounds of attorney-client and work-product privilege. The Court overruled the objection. Counsel stated, "Your Honor, I would just prefer to have the Court order direct him to answer those questions." Counsel did so in order to make it clear that the Court was ordering Clow to disclose the information, and to ensure that it could not be construed that appellant waived the confidentiality of the information. The Court did so. (Muni RT 2221-2222).

The following colloquy took place:

Q: Did you have contact with Ardell Williams?
A: Yes, I did.
Q: Approximately how many times during the pendency of the Comp USA prosecution while Ardell Williams was alive and a witness did you have contact with her?
MR. EARLEY: Your Honor, objection. The same objections.
THE COURT: Thank you. And the Court will note a continuing objection from Mr. Earley.

And the Court will continue to order Mr. Clow to answer the questions.
THE WITNESS: Yes, sir. I have talked to her twice in person and approximately ten times over the phone. That's just a rough estimate.
Q: Now, the twice that you contacted her in person, what location was that?
A: It was her residence– it's Lorella Lane in the city of Gardena. I'm not sure of the exact house numbers; but it is the only two-story house on that street.
Q: When you made contact with her– is it Lorri Lane?
A: I think it's Lorella.
Q: Lorella Lane in the city of Gardena; is that correct?
A: Yes, sir.
Q: Was is outside or inside the residence?
MR. EARLEY: Your Honor, I'm going to object now, we're starting to go into more than just contacts.
THE COURT: My understanding is that I was going to allow Mr. King location and time. That was my ruling. So overruled.

Inside or outside, please answer.
THE WITNESS: I was outside. She was inside.
Q: When– with respect to the first time that you contacted her at the residence and you were outside and she was inside, what was the first date of that contact?
A: I believe it was July 22nd, 1993.
Q: And the second contact that you had with her at the residence, if you can recall the date?
A: August 9th, 1993.
Q: With respect to the July 22nd '93 contact, what time of day was that?
A: It was in the afternoon, probably between 1:00 and 2:00 P.M.
Q: And with respect to August 9th, '93 contact that you had with

her, what time was that?
A: It was also in the afternoon, probably between 1:00 and 2:00 P.M.

(Muni RT 2222-2224).

This testimony was largely repeated at the penalty phase retrial. He testified that he had contacted Ardell Williams between 10 and 20 times by phone, and tried to set up interviews. Once she said no. Other times she made appointments. Yet, he never sat down and interviewed her. During his last call on January 31, 1994, she said she didn't want to be interviewed. He had in-person contact with her on July 22, 1993 and August 9, 1993. The first time, he went to the house and she said she was too busy and that her child was sick. She just called out to him from the window. The second time was at home, at her door. She said she had made statements to the District Attorney and she didn't want to make any more. (RT 14974-14979). This testimony tended to undercut the defense theory that the efforts to draw Ardell Williams out were necessary because they were not sure where she was living and they were unable to contact her. By creating an inference that they knew exactly where she was, this evidence placed a more sinister tone upon Yancey's alleged contacts with the Williams family.

The attorney-client privilege is "a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client

and lawyer." (Evid. Code, §§ 954.) That privilege encompasses confidential communications between a client and experts retained by the defense. Evid. Code, §§ 952; *People v. Lines* (1975) 13 Cal. 3d 500, 509-510.

The work product privilege, now codified in Code of Civil Procedure section 2018 and applicable in criminal as well as civil proceedings (*People v. Collie* (1981) 30 Cal. 3d 43, 59), absolutely bars the use of statutory discovery procedures to obtain "[a]ny writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories" (Code Civ. Proc., §§ 2018, subd. (c)), and bars discovery of any other aspect of an attorney's work product, unless denial of discovery would unfairly prejudice a party. (*Id.,* subd. (b).)

These privileges were violated by the questions asked of Alan Clow. Clow's efforts to investigate on appellant's behalf were a result of consultation between appellant and his trial counsel. Moreover, the efforts demonstrated counsel's impressions, conclusions, opinions and legal research or theories.

The work-product privilege reflects "THE POLICY OF THE STATE TO: (1) preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of the case; and (2) to prevent attorneys from taking undue advantage

of their adversary's industry and efforts." (Code Civ. Proc., §§ 2018, subd. (a).)

The prosecutor was able to take undue advantage of his inquiry into these efforts. The prosecutor presented evidence at trial that appellant told Yancey that the defense shouyld show that efforts to gain access to Ardell Williams were necessary because Mr. Clow was having difficulty locating Ms. Williams. Specifically, the prosecution introduced the "kite" sent by Clark to Yancey on June 24, 1994. (See above). In that kite, appellant suggested to Yancey that reason for flower delivery is because they hadn't located Ardell Williams. (RT 9762-9766). This letter also stated that Yancey should get Norm Kesner to print up fliers stating that Yancey was an exotic dancer, which would provide a reason why Yancey would have possessed wigs. (RT 1171-1176). Norm Kesner testified that he never heard about Yancey dancing, and that she worked in a construction company. (RT 9634-9639). In concert, these errors eviscerated the attorney-client privilege and the work-product privilege, which were designed to ensure that a defendant would receive a fair trial.

The prosecutor was able to argue that after Yancey was arrested, Clark tried to 'fix' things. The prosecutor centered on the "kite" sent by Clark to Yancey in which Clark stated that she needed to come up with an explanation for the flower delivery, and she could claim it was a way to see where Ardell

Williams lived. (RT 10887-10891). The prosecutor was able to contrast this evidence with Clow's testimony that he knew where Ardell Williams lived and had contacted her several times. (RT 10889-10891). The prosecutor also argued that the evidence about the false exotic dancing of Yancey further demonstrated consciousness of guilt when contrasted with Norm Kesner's testimony. (RT 10888-10891). The prosecutor argued that all of this was evidence of consciousness of guilt, a powerful argument.

By intruding into this privileged areas, the prosecutor was able to argue that these efforts by appellant showed a consciousness of guilt, since Mr. Clow had no difficulty locating Ms. Williams.

A defendant's Sixth Amendment rights may be violated by the state's intrusion into the attorney-client relationship. *Weatherford v. Bursey*, 429 U.S. 545 (1977). *See also Briggs v. Goodwin*, 698 F.2d 486, 493 n.22 (D.C. Cir.) (noting that "[a] deliberate attempt by the government to obtain defense strategy information or to otherwise interfere with the attorney-defendant relationship through the use of an undercover agent may constitute a per se violation of the Sixth Amendment"), *reh'g granted, opinion vacated, and on reh'g*, 712 F.2d 1444 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

The circuits have adopted varying standards for resolving claims of violation of the Sixth Amendment privilege. The Third Circuit has adopted the

rule that intentional intrusions by the state constitute *per se* violations of the Sixth Amendment. *See United States v. Costanzo*, 740 F.2d 251, 254 (3d Cir. 1984), cert. denied, 472 U.S. 1017 (1985); United States v. Levy, 577 F.2d 200, 210 (3d Cir. 1978). The Second and District of Columbia Circuits, on the other hand, have recognized that prejudice may not be required when an intrusion is intentional, but have not specifically decided. *See Briggs, supra*, 698 F.2d at 493 n.22 (D.C. Cir.); *Morales, supra*, 635 F.2d at 179 (2d Cir.).

The First, Sixth, and Ninth Circuits have held that something beyond the intentional intrusion itself is required to rise to the level of a Sixth Amendment violation. *See United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984) (holding that even in the context of an intentional intrusion lacking any justification, "[a] Sixth Amendment violation cannot be established without a showing that there is a 'realistic possibility of injury' to defendants or 'benefit to the State' as a result of the government's intrusion," but placing a "high burden" on the state to rebut the defendant's prima facie showing of prejudice) (*quoting Weatherford*, 429 U.S. at 558); *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984) ("Even where there is an intentional intrusion by the government into the attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted.") (*citing Morrison*, 449 U.S. at 365-66), *cert. denied*, 467 U.S. 1209 (1984);

United States v. Glover, 596 F.2d 857, 863-64 (9th Cir.) (holding that even in the context of an intentional intrusion into the attorney-client relationship, that "distinction [does not] overshadow[] an important principle to be read from [*Weatherford*]: that the existence or nonexistence of prejudicial evidence derived from an alleged interference with the attorney-client relationship is relevant in determining if the defendant has been denied the right to counsel"), *cert. denied*, 444 U.S. 857.

Under any of these standards, reversal is mandated. The proceedings were rendered unfair because the prosecutor was able to learn privileged details about defense efforts, and then use those efforts against appellant in a very prejudicial manner. The defense was entitled to interview witnesses and investigate these charges, including investigating Ardell Williams. This information was work-product and privileged. By intruding into this area, the prosecutor was able to use the defense's investigation against appellant, as discussed above regarding the flower delivery and Ardell Williams' location. The prosecutor was able to turn appellant's shield into the prosecutor's sword in argument. (RT 10887-10891)

The right to counsel in order to secure the fundamental right to a fair trial is guaranteed by the Due Process Clause of the Fourteenth Amendment. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984); *see also Estelle v.*

Williams, 425 U.S. 501, 503 (1976). It follows that the "benchmark" of a Sixth Amendment claim is "the fairness of the adversary proceeding." *See Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (*citing Strickland*, 466 U.S. at 695). Under these circumstances, trial counsel had no adequate option remaining. If he investigated his case thoroughly, he ran the risk that his efforts would be used against his client. The only way to protect against disclosure was to foreclose investigation.

"[I]n certain Sixth Amendment contexts, prejudice is presumed." *Strickland*, 466 U.S. at 692. This is particularly true with regard to "various kinds of state interference with counsel's assistance." *Id.*; *see also Perry v. Leeke*, 488 U.S. 272, 279-80 (1989) (stating that the Supreme Court has "expressly noted that direct governmental interference with the right to counsel is a different matter" with regard to whether prejudice must be shown, and collecting representative cases where prejudice need not be proved); *Cronic*, 466 U.S. at 658 & n.24 (citing cases in which the Court has discussed circumstances justifying a presumption of prejudice).

The cases in which state interference with the right to counsel has been held to violate the defendant's Sixth Amendment rights *per se* include the following circumstances: prohibiting direct examination of the defendant by his counsel, *see Ferguson v. Georgia*, 365 U.S. 570 (1961); requiring those

defendants who choose to testify to do so before any other defense witnesses, *see Brooks v. Tennessee*, 406 U.S. 605 (1972); refusing to allow defense counsel closing argument in a bench trial, *see Herring v. New York*, 422 U.S. 853 (1975); and prohibiting any consultation between a defendant and his attorney during an overnight recess separating the direct-examination and the cross-examination of the defendant, *see Geders v. United States*, 425 U.S. 80 (1976). *See also United States v. Decoster*, 624 F.2d 196, 201 & nn. 14-17 (D.C. Cir.), cert. denied, 444 U.S. 944 (1979); 2 LaFave & Israel, supra, 11.8(a). The District of Columbia Circuit has explained the rationale behind the use of a per se rule in these cases:

> These state-created procedures impair the accused's enjoyment of the Sixth Amendment guarantee by disabling his counsel from fully assisting and representing him. Because these impediments constitute direct state interference with the exercise of a fundamental right, and because they are susceptible to easy correction by prophylactic rules, a categorical approach is appropriate.

Decoster, 624 F.2d at 201 (emphasis added).

The violation present here was equally egregious because it disabled counsel from fully representing appellant. It initially occurred at the preliminary hearing, long before the actual trial began. It signaled to appellant and his counsel that any investigation they performed could be used against them. The right to conduct investigation is a critical part of the right to a fair

trial, compulsory process and the Sixth Amendment right to effective assistance of counsel. Automatic reversal is required.

Counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. This duty is of even greater importance in a capital case. *See, e.g.*, *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999) ("It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase.") (*quoting Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999)). *See also Williams v. Taylor* (2000) 529 U.S. 362.

This error rendered the trial unfair, as it created an argument for the prosecutor supporting his case for guilt. Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth

Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 17
THE TRIAL WAS RENDERED FUNDAMENTALLY UNFAIR WHEN THE COURT ADMITTED EVIDENCE UNDER § 1223 WHERE AN INSUFFICIENT SHOWING OF A CONSPIRACY WAS MADE. THE ADMISSION OF THIS EVIDENCE VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The prosecutor presented a considerable amount of evidence regarding the delivery of flowers to the Williams house on February 10, 1994 and subsequent events. Specifically, the prosecutor introduced (1) the sequence of phone calls from "Janet"; and (2) evidence of the flower delivery, against appellant pursuant to Cal. Penal Code §1223.

Specifically, the prosecutor introduced evidence that a woman came to the house on February 10, 1994 to deliver flowers to Ardell Williams. She was let into the house by the Williams family to deliver flowers, and it seemed to them that she stayed an inordinate amount of time. She told them that she was pregnant and needed to use the bathroom, which they allowed her to do. They felt that she stayed in the bathroom longer than normal. Subsequently, the police lifted a fingerprint from the box holding the flowers and identified a latent print as belonging to Antoinette Yancey.

The prosecutor also presented evidence that shortly after the flower delivery, a series of phone calls were received at the Williams house. A woman identified as "Janet" called, purportedly looking for Liz Fontenot, one

of the Williams sisters, who Janet claimed used to cut her hair at a salon. Janet struck up conversations with Angelita Williams, Ardell Williams' mother, about religion, and they became friendly over the phone. After several conversations, Janet said that her uncle, who ran a graphics company, had a job at his company for someone with artistic talents. Angelita Williams suggested that Ardell might be interested. After several conversations between Janet and Ardell, an interview was set up for early Sunday morning. Ardell went to that interview, and was subsequently found dead in the parking lot.

The prosecutor used the statements made by the flower delivery person and Janet as evidence of the conspiracy between appellant and Antoinette Yancey to kill Ardell Williams. This was error.

Evidence Code §1223 reads: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order or proof, subject to the admission of such evidence."

In order for §1223 to apply, there had to be a conspiracy and the statements had to be made prior to or during the time of the conspiracy. For example, in order for the flower delivery evidence to be relevant and admissible against appellant, the Court needed to first find that a conspiracy existed between appellant and Antoinette Yancey at least by February 10, and that the flower delivery was performed in furtherance of that conspiracy.[8]

In order for extrajudicial declarations of a codefendant to be admissible, the statements must be made in furtherance of the conspiracy and there must be sufficient evidence to connect them with the conspiracy. *People v Gant* (1967) 252 Cal.App.2d 101. There was no evidence that an agreement was formed between appellant and Yancey. The prosecutor only presented evidence which could contribute to motive– that Ardell Williams was a witness against appellant in the Comp USA case. (RT 2551). The prosecutor presented no evidence, however, that a conspiracy existed at the time of the flower delivery. Thus, §1223 didn't allow the evidence to be admissible against appellant.

Under Evid. Code, §§ 1223, a conspirator's statements are admissible

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8

It was unclear how the flower delivery furthered the conspiracy. The prosecutor never explained this theory in detail. According to the testimony of Alan Clow, the defense team knew where Ardell Williams was living. Since they knew where she lived, it is unclear how the flower delivery furthered any conspiracy.

against his coconspirator only when made during the conspiracy and in furtherance thereof. *People v Saling* (1972) 7 Cal.3d 844. Much of the evidence presented by the prosecution centered on events occurring after Ardell Williams was shot. That evidence included correspondence between appellant and Antoinette Yancey. (RT 3042). That evidence did not, however, establish that a conspiracy existed before Ardell Williams was killed. In particular, it did not establish that there was an ongoing conspiracy on February 10, 1994, when the flower delivery allegedly took place. Thus, these communications, which took place after the purported goal of the conspiracy was achieved, were not in furtherance of the conspiracy, and did not establish it. *See, e.g., People v Saling* (1972) 7 Cal.3d 844.

The courts have interpreted the co-conspirator exception to the hearsay rule broadly. "As direct evidence that the actors agreed to commit a particular offense is rarely available, the existence and nature of that agreement is commonly inferred from circumstantial evidence showing concerted conduct on the part of the defendant and other participants in furtherance of the alleged conspiratorial goal." *People* v. *Alexander* (1983) 140 Cal.App.3d 647, 661. The existence of the agreement of conspiracy may be shown by circumstantial evidence; the agreement may be inferred from the conduct of mutually carrying out a crime. *People* v. *Lipinski* (1976) 65 Cal.App.3d 566, 575-576.

Yet the prosecution in this case showed no evidence that the Ardell Williams killing was "mutually" carried out. There was no evidence of "concerted conduct"on the part of appellant in that killing. The fact that Antoinette Yancey may have been involved in Ardell's death does not a conspiracy make.

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." This bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas* (1965) 380 U.S. 400, 406.

In *Crawford v. Washington*, the United States Supreme Court explained:

> the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right ... to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. *See Mattox v. United States*, 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *cf. Houser*, 26 Mo., at 433-435.

Crawford v. Washington (2004) 124 S.Ct. 1354, 1366.

Appellant had no opportunity to cross-examine the maker of the out-of-court statements introduced at trial. "Testimonial statements of witnesses

absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington* (2004) 124 S.Ct. 1354, 1366.

In essence, the prosecution was able to bootstrap these otherwise inadmissible hearsay statements in an effort to show that the conspiracy existed. Then, having done so, the prosecution was allowed to render the statements admissible through the conspiracy exception to the hearsay rule. Without independent evidence of a conspiracy, using the statements to prove the conspiracy in order to be allowed to use the statements makes the exception swallow the rule. The statements were inadmissible, and their admission violated appellant's right to a trial.

The prosecutor used these statements along with allegations of motive of appellant to kill Williams to convince the jury that appellant was guilty of Williams' death. He relied on the flower delivery and job interview, implying that since no innocent explanation was offered, it must be proof of appellant's guilt. (RT 10825-10828; 10876-10882). The prosecutor argued that these events, culminating in Ardell's death, must be evidence of a conspiracy, as they would be too great a coincidence to be believed. (RT 11115-11125).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386

U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 18
THE PRELIMINARY HEARING WAS RENDERED FUNDAMENTALLY UNFAIR WHEN THE COURT CONSIDERED EVIDENCE IN VIOLATION OF THE SIXTH AMENDMENT OF ARDELL WILLIAMS' STATEMENTS AND GRAND JURY TESTIMONY FOR CORPUS OF THE 'KILLING A WITNESS' SPECIAL CIRCUMSTANCE

Appellant was originally charged with the Comp USA case, which was brought against him in 1992. Ardell Williams testified before the grand jury considering that crime and gave several taped statements to Investigator Frank Grasso. (Grand Jury Transcript ["GT"] 20-72; RT 2237, 8731). She claimed to have been present while appellant, along with Eric Clark and Damian Wilson, observed the closing procedures of the Comp USA store in Orange County. (GT 38-39). (RT 8731). She claimed that she was told the store was their next target. (GT 33). (RT 8731). She claimed that Eric Clark told her about the crime some time after it occurred. (GT 58-59). (RT 8731).

Prior to allegedly witnessing appellant observing the closing procedures, Ms. Williams had been charged in two previous felonies involving appellant. First, she was arrested for fraud while employed at Softwarehouse. Allegedly, Ms. Williams let two individuals walk through her register with expensive merchandise without charging them for it.[9] (RT 2337). She was

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9

Years after her conviction, she would claim that appellant was one of the men who stole the merchandise.

arrested, placed on probation, and ordered to pay approximately $14,000 restitution. (RT 2331).

On another occasion, appellant and Ms. Williams went to the cashier's window at the Mirage Hotel in Las Vegas, where appellant allegedly had Ms. Williams use fraudulent identification to forge a series of traveler's checks in an estimated amount of $50,000. (RT 2530). Appellant and Ms. Williams were arrested. (RT 2495) Williams ultimately pled to a misdemeanor, while appellant pled guilty to a felony. (GT 60). Williams thus provided information not only about her purported knowledge of the COmp USA robbery, but about her purported knowledge of appellant's prior criminal activity. This activity would later be introduced as evidence of appellant's motive for the robbery, namely his alleged interest in computers.

Prior to her death, Ms. Williams had informed the Orange County District Attorney's Office that she had received several unusual contacts and phone calls, including the flower delivery, which she suspected were related to the homicide case pending in Orange County. (Superior RT 1250) Because Ms. Williams had picked out Antoinette Yancey from photo lineups as the person involved in the strange contacts, Yancey was questioned and arrested a few days after the homicide. (RT1257).

During the preliminary hearing, the grand jury testimony was

considered as an exhibit. (RT 2119-2122). A motion was filed pursuant to Penal Code §995 on these issue. (RT 1129 *et seq.*). The motion was denied.

Under *Crawford v. Washington* (2004) 124 S.Ct. 1354, both the grand jury testimony and the taped statements were testimonial, and thus their admission runs afoul of the confrontation clause. The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The High Court has held that this bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas* (1965) 380 U.S. 400, 406. The right to confront one's accusers is a concept that dates back to Roman times. *See Coy v. Iowa* (1988) 487 U.S. 1012, 1015. "The Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the 'right ... to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox v. United States,* 156 U.S. 237, 243 (1895); cf. *Houser,* 26 Mo., at 433-435." *Crawford v. Washington,*

supra, at 1365.

The United States Supreme Court's cases have thus remained faithful to the Framers' understanding: "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington, supra*, at 1369. Any doubt about this rule has been removed:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses ... is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

Crawford v. Washington, supra, at 1369.

Constitutional rights do not evaporate during a preliminary hearing. This preliminary hearing violated the most basic tenets of due process,

reliability and fairness. *See Coleman v. Alabama* (1970) 399 U.S. 1 (holding that the preliminary hearing is a critical stage of the States's criminal process).

An information based on hearsay or otherwise incompetent evidence "is unauthorized and must be set aside on motion under Penal Code §995. *People v. Backus* (1979) 23 Cal.3d 360, 387; *People v. Anderson* (1968) 70 Cal.3d 15, 22; *mott v. Superior Court* (1964) 226 Cal.App.2d 617, 618. An illegal commitment requiring dismissal of the information results when the defendant has been denied a substantial right during the preliminary examination. *DeWoody v. Superior Court* (1970) 8 Cal.App.3d 52. A commitment must be set aside if during the preliminary examination, the defendant has been denied a substantial right and timely moves to have the commitment set aside under Penal Code § 995. *See, e.g., People v. West* (1990) 224 Cal.App.3d 1337, 1342; *People v. McGee* (1977) 19 Cal.3d 948, 967); *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 293 & fn. 4. Here, appellant's commitment must be set aside because appellant was denied the right to confrontation. There was no cross-examination before the grand jury or during the statements to law enforcement.

Appellant did so. Appellant argued in his §995 motion that the evidence regarding Ardell Williams was wrongly admitted under the theory that it demonstrated that she was a witness. (1129-1133). Significant amounts

of hearsay were introduced under this guise, as discussed above. Appellant also argued that the special circumstance of killing a witness did not apply, as Ardell Williams was not a witness "to a crime" as contemplated by the statute. (RT 1141-1144).

This is a capital case, which involves a qualitatively different penalty requiring heightened reliability. *People v. Murtishaw* (1981) 29 Cal.3d 733, 771 (*quoting Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plur. opn.)). Because life is at stake, the courts must ensure that every safeguard designed to guarantee "fairness" and accuracy in the "process requisite to the taking of human life" must be carefully observed. *Ford v. Wainright* (1986) 477 U.S. 399, 414. *See also Gardener v. Florida* (1977) 430 U.S. 349.

The prosecutor stated that he needed to prove that Ardell Williams was a witness in this case. (Muni RT 2333-2334). There was no reason why he could not do so without introducing the statements she made, however. The prosecutor could have had Investigator Grasso testify that he took a statement from Ardell Williams about the Comp USA robbery. The prosecutor also could have presented evidence that Ardell Williams testified at the grand jury, without presenting the substance of that testimony.

The problem with the prosecutor's argument that he could present this evidence for a nonhearsay purpose, that of demonstrating that Ardell Williams

was a witness, in order to show corpus, was that the statements were only relevant if they were true. Regardless of the truth of the statements, Ardell Williams had still given statements to Grasso about the Comp USA robbery, and had still testified before the grand jury. (Grand Jury RT

Thus, the prosecutor's claim that they were introduced for nontruth was a ruse to introduce otherwise inadmissible hearsay. The only persuasive value of the statements was if one believed them to be true. If they were false, than they lacked any more probative value than evidence that Williams made statements to Grasso and the Grand Jury. If, however, one used the statements for their truth, then they were out-of-court statements being used for their truth in violation of the hearsay rule.

Appellant was entitled to a full and fair preliminary hearing. The introduction of hearsay evidence allowed the court to find sufficient evidence to support a special circumstance, the evidence of which was otherwise lacking. The witness killing special circumstance should have been set aside.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 19

THE JUROR SELECTION PROCEEDINGS WERE BIASED IN FAVOR OF PRO-DEATH JURORS IN VIOLATION OF THE RIGHT TO A FAIR AND IMPARTIAL JURY, TO DUE PROCESS OF LAW, AND TO A RELIABLE PENALTY DETERMINATION GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A.

Constitutional Standards Mandated the Dismissal of Numerous Prospective Jurors Who Were Not Dismissed

Although the trial court on occasion phrased its rulings on challenges for cause using the *Wainwright* v. *Witt* (1984) 469 U.S. 412, 424 language of "prevent[ing] or substantially impair[ing] the performance" of a juror's duties, in fact the only jurors who were excused for cause were those whose biases were so unmistakably expressed that the trial court was, in reality, following a super-*Witherspoon* standard, in violation of *Wainwright v. Witt*. The Court required more than being "substantially impaired." The only jurors who were excused for cause were those who stated on the record unequivocally that they would not follow the law.

This error infected the entire voir dire and forced appellant's trial counsel to use peremptory challenges to remove jurors who specifically had stated their bias, prejudice or inability to follow relevant aspects of the law.

The end result was that the jury pool was biased toward death, and the ultimate jury selected was biased toward death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. "The process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to either side of the case." *Morgan v. Illinois* (1992) 504 U.S. 719, 734.

It is well established that a juror whose attitude towards the death penalty prevents her from making an impartial decision as to the defendant's guilt, or as to the penalty to be imposed, is subject to exclusion for cause. (*Morgan* v. *Illinois* (1992) 504 U.S. 719; *Wainwright* v. *Witt*, *supra*, 469 U.S. 412). While many cases have adopted language from *Witherspoon* v. *Illinois* (1968) 391 U.S. 510, 522, n. 1, stating that a juror's feelings must be so strong as to make it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any evidence, *Wainwright* v. *Witt, supra,* established that the standard is not so stringent. Rather, a juror is subject to exclusion when his or her capital punishment views "prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his instructions and his oath." (*Adams* v. *Texas* (1980) 448 U.S. 38, 45.)

Morgan v. *Illinois, supra*, 504 U.S. 719 makes it clear that the trial court erroneously denied the defense challenges to the listed jurors. In

Morgan, the trial court had refused a defense request to ask prospective jurors whether they would automatically vote to impose the death penalty if they found the defendant guilty. The Court reversed, holding that the trial court's refusal to inquire into this area violated the due process clause of the Fourteenth Amendment because (1) a juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances and to determine whether the latter is sufficient to preclude imposition of the death penalty and (2) if voir dire was not available to expose the foundations of the defendant's challenge for cause against automatic death jurors, the defendant's right not be tried by such jurors would be meaningless. (*Morgan* v. *Illinois, supra*, 504 U.S. 719 .)

Under *Morgan*, a juror's recital of an alleged ability to "listen to both sides" does not justify the denial of a challenge for cause. "Doubts regarding bias must be resolved against the juror." *Burton v. Johnson* (10th Cir. 1991) 948 F.2d 1150, 1158; *United States v. Gonzales* (9th Cir. 2000) 214 F.3d 1109, 1114; *United States v. Nell* (5th Cir. 1976) 526 F.2d 1223, 1230. The trial court appeared to believe that as long as a juror could be persuaded to say that he or she would consider mitigating evidence, then he or she was capable of being impartial. These jurors were nonetheless "substantially impaired." even if they could be coaxed into saying that they would consider mitigating factors. Such

a position was the functional equivalent to that discussed in *Morgan*. The Court rejected the view that jurors who would automatically rule for death are constitutionally permissible:

> . . . [S]uch jurors obviously deem mitigating evidence to be irrelevant to their decision to impose the death penalty: they not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and they will not consider it. While Justice Scalia's jaundiced view of our decision today may best be explained by his rejection of the line of cases tracing from *Woodson* v. *North Carolina* and *Lockett* v. *Ohio* . . . , it is a view long rejected by this court.

(*Morgan* v. *Illinois, supra,* 504 U.S. ___(citations omitted); *see also id.* at fn. 9).

Such a "merciless juror will not give mitigating evidence the consideration that the Illinois statutory scheme contemplates." (*Id.* at p. 507.) In California, a juror who states he or she will not consider mitigating evidence is a juror who is explicitly stating he or she will not follow the law, and a cause challenge to such a juror should be granted. (*People* v. *Coleman, supra*, 46 Cal.3d at p. 768.)

In *People* v. *Easley* (1983) 34 Cal.3d 858, 877-880, this court made it clear that mitigating evidence could not be limited to facts that lessen the gravity of the crime, but must also include facts pertaining to the background

of the defendant, as the United States Supreme Court has long required. Necessarily, then, a juror's ability to be fair and impartial on penalty is "substantially impaired" if the juror is willing to consider only mitigating facts about the crime, but not about the defendant's background. A juror with such a state of mind is "substantially impaired," within the meaning of *Witt*. (*See People* v. *Coleman, supra*, 46 Cal.3d at pp. 767-768; *see also Morgan* v. *Illinois, supra*, 504 U.S. 719.)

The following prospective jurors should have been dismissed.

1.

Brooks Friend

When asked about his feelings about the death penalty, Mr. Friend responded that "I usually feel that the death penalty is justified in cases of murder." (RT 3586). This attitude differed from the general concept that death is appropriate only for the worst of the worst. He stated that "I usually consider murder is something that should be punished by the death penalty." (RT 3586).

When asked "Do you have such strong pro feelings for the death penalty that your ability to return something less, life the life without possibility of parole, would be impaired?", he responded "I probably would,

if you don't give me criteria to weigh it by, I guess." (RT 3588).

He stated that going into deliberations, "I would have a strong opinion about the death penalty, yes." He clarified that his strong opinion was in favor of the death penalty. (RT 3593). Counsel asked the following:

> And there are those people who say yes, of course, if I'm sitting here I'm going to listen, but I'm substantially a strong supporter, and once the person has been found to be guilty and no legal justification or excuse at all, substantially I'm going to vote for the death penalty in every case, because I have a strong belief that that's the appropriate punishment in the case.
>
> Do you fit that category?

He responded "I probably do, yeah." (RT 3594).

The following then took place between counsel and Mr. Friend:

> Q: ... And so that's why we have to ask you, if you feel that, of course, you would consider it, but your feelings are strong enough about the death penalty that it would substantially make it so it would be hard for you to consider another sentence, then that's we need people with views on both ends of the spectrum.
>
> A: It would probably make me hard to consider other sentence other than death.

(RT 3596-3597).

He explained his views:

> I would say I tend to lean more toward the death penalty, but I can– I guess I can think of examples– not examples, but where– I forget the thought. I tend to lean more that way, toward the death penalty. But at the same time, if the Court asks you to

> consider the mitigating and aggravating factors in deciding it, you have to go with what the Court instructs you.

(RT 3600). Considering the possibility of life without parole, he added:

> I guess I would consider it, but I guess if you're looking toward someone with like 50/50, I may not be that way. I may be more toward the death penalty.

(RT 3600).

The trial court should have found that Mr. Friend's bias substantially impaired his ability to consider life without the possibility of parole. His statement that he would probably sentence anyone he convicted to death clearly demonstrated his bias, and showed he was substantially impaired.

2.

Donald Miller

In regard to the death penalty, he stated:

> I voted for the death penalty. I think, I believe in the death penalty if the case, if there is a– if the crime is sufficient enough to warrant it. That's the way I was brought up, that's my belief system. It's hard for me to expound a whole lot more. Just, because never having to actually ever sat on or made that decision or put in that situation, how I would react, again, I probably couldn't, but how I believe is I voted for it, I believe in it. If it was up for a ballot again, I'd vote for it again.

(RT 3639).

When asked what his likely feelings would be going into a penalty phase, he stated:

> My best guess is, if everything is true, everything, convicted, and it's a guilty penalty, I would vote for the death penalty.

(RT 3643-3644).

After having the process explained to him, he stated that if he were to find someone guilty of first-degree murder, without justification or excuse, he wasn't sure how he would react. (RT 3649-3650). His best estimate was that:

> I would probably lean more towards death penalty than life in prison. If everything that I've been told is true and we find that he's guilty of everything, that's where I would probably lean to.

(RT 3651).

After the juror left the courtroom, trial counsel accurately explained why Mr. Miller was objectionable:

> when you examine his views he tells you that once they find first degree murder, it appears to me that he is going to vote for death based on his answers. I know he's reluctant to say how he will react, but when he gives his best guess, it's still he would vote for the death penalty.

(RT 3654).

The Court's denial of appellant's challenge for cause was erroneous.

(RT 3654-3656). He gave no indication that he would likely do anything other than vote for the death penalty. Instead, it appeared from his statements that if he voted to convict, he would vote for death. He was substantially impaired, and the challenge for cause should have been granted.

3.
Janine Carlson

When asked how she felt about the death penalty, she stated, "I do believe in the death penalty for two reasons. Biblical, and I don't believe somebody should purposely seek someone out to kill them." (RT 3966). When asked to expand on her beliefs, she explained, "I'm a religious woman. I read the Bible quite a bit. I believe in the Old Testament along with the New Testament and I'm guided through prayer, through the Holy Spirit. And the answer I receive back is yes, I do believe in the death penalty." (RT 3966).

When asked how her religious views would affect her, she stated "What I would do is pray for guidance first that I do make the right decision." (RT 3973). She clarified that "I would hope it would be God guiding my decision, and that's how strongly I feel about my religious convictions, yes." (RT 3973-3974). When asked if she would make a personal decision or if God would make it for her, she stated "Well, I won't leave God out of it. I don't know

how, he's my whole life. I am not sure I'm answering your question, but because I live my life every day with the Lord, I don't separate my life without him." (RT 3975). She stated "I make my decisions through God who guides me." (RT 3975).

When asked if she would continue to read the Bible during trial to consult it, she stated "I read the Bible every day. It's something I wouldn't stop." (RT 3975). She stated that what she read in the Bible could affect her deliberations during this case. (RT 3976).

The Court denied a challenge for cause. (RT 3981). This denial was erroneous, because it was clear that her decision would be based largely on her view of the Bible, and not the evidence presented in Court or the instructions given by the trial judge. She stated that she would not make a personal decision, but that God would, in essence, make it for her. It was error not to excuse her, as she could not say that she would follow the law.

4.

William Pittman

When asked if he could give full consideration to mitigating evidence,

Mr. Pittman responded, "I think I would have to convict him of death, to death." (RT 4158). When asked whether mitigating evidence could make any difference for him, he stated "I think I would favor the death penalty, yes, sir." (RT 4159). He commented that "Personally I think life in prison without parole would be worse than death. That's my personal feeling, if I had the choice." (RT 4159). When asked if it would be difficult to return a verdict of LWOP, he stated "It would be difficult in this case, yes. In this situation." (RT 4160).

The Court denied counsel's challenge for cause. (RT 4165). This denial was erroneous. Mr. Pittman stated that he felt that LWOP was a worse punishment than death, a view contrasting with the law. Then, he stated that it would be difficult to return a verdict of LWOP. In conjunction with his statements that he would favor the death penalty, it cannot be said that his ability to consider LWOP was not substantially impaired.

5.

Billy Aldridge

When asked how he felt about the death penalty, Mr. Aldridge responded:

I am thoroughly convinced that it should be invoked, I

> mean carried out. I also realize that there are times when death does occur, if there are circumstances which may cause that that should not be, but, the death– no less fact they are guilty, but the less fact they may have been provoked.

(RT 4489-4490).

He stated that his views on the death penalty were such that if he found appellant guilty of a special-circumstance murder he would probably always vote for the death penalty. (RT 4494). When asked about how he viewed his role, he subsequently added that "If this man had been convicted of murder, and one or more of these allegations, I wouldn't have– I would have him put to death." (RT 4503).

When asked if he could ever consider the option of life in prison without parole, he stated:

> I can conceive where the idea that a man, under certain circumstances, has killed someone, and should not never be let out again, and be life sentence. But, I'm not accusing this man of doing anything, but if you take the man that is in the process of robbery and killed someone, in all probability, probably a 99 and 9/10ths of the time I would say the death penalty would be involved.

(RT 4504). When asked if he would consider a defendant's background, he stated "Background doesn't make a bit of difference. " (RT 4504). He explained, "Again, I don't think anything that I have done before today, if I killed someone, has any reflection on whether I killed him. It's what I did in

the process of that, if you're asking me that question." (RT 4505). When asked about the special circumstances charged, he stated "In most cases, like I say, as far as I can see right now, I would say the death penalty ... I'm going to say as near as I can get, 99 and 9/10ths of the time, yes." (RT 4505).

When asked if he would nearly automatically give death to someone guilty of a special circumstance, he responded:

> Assuming that the evidence showed that this man knew what he was involved in, and went ahead with it, yes, I would be inclined to stay with the death penalty.

(RT 4510).

The Court denied counsel's challenge for cause, although later excused him for health reasons. (RT 4516-18). The denial was erroneous, as he had already prejudged the case. He stated, in essence, that if appellant was convicted of the charges listed, he was 99.9% likely to sentence appellant to death. He also stated that the defendant's background, a potential source of mitigation, was largely irrelevant to him, which meant he would not give it any meaningful consideration. *Morgan* requires that a juror be willing to consider mitigation and not be automatically disposed to voting for death in the penalty phase. It was erroneous to deny the challenge for cause.

6.
Arthur Irvin

Mr. Irwin felt that the punishment should fit the crime. (RT 4650). He explained this by stating:

> Well, when you think of cases like Bonin or Manson, where there was such a wanton disregard for life that– to me that means that they have lost disregard for their own lives, and so there would be no hesitation in cases like that.

(RT 4651). He added "But I feel the punishment should fit the crime, as long as there is no doubt about the guilt of the individual." (RT 4652). He responded that from the listed aggravating circumstances, there would likely be no possible sufficient mitigation to merit a sentence of life without parole, and death would be virtually automatic.

When discussing the special circumstances, he explained:

> Well, murder of a witness would make me lean more toward capital penalty. Lying in wait, multiple murder, that would depend on what the circumstances, whether it was self-defense or soemthing like that.
>
> Murder during the commission of a robbery, I would lean more toward the capital punishment, during the commission of a burglary I might lean more the other way thinking that it could have been just an accidental spur of the moment thing.

(RT 4656).

He added:

> It would be substantially difficult for me to go against a capital punishment in the murder of a witness and lying in wait, despite the mitigating circumstances.

(RT 4657).

When asked if he would be substantially impaired in consideration of mitigation, he said "Not substantially. But impaired." (RT 4665). When asked about this, he said, "I'm certainly in favor of the death penalty, where there is no doubt of guilt." (RT 4667).

The court denied counsel's challenge. (RT 4668). This denial was erroneous. The juror's word cannot be taken at face value. That the juror said he was impaired is enough for the Court to exclude him. A trial judge has a duty "to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality ..." *Frazier v. United States* (1948) 335 U.S. 497, 512; *United States v. Torres* (6th Cir. 1997) 128 F.3d 38, 43.

7.
Michael Wolgat

Mr. Wolgat strongly supported the death penalty and felt that it was a deterrent. (RT 5156). He said, "people aren't scared of going to jail. They

just basically do what they want." He felt that jail wasn't a deterrent to murder. (RT 5156).

He felt that the death penalty should be automatic for anyone who committed a first degree murder with a special circumstance. (RT 5157). He stated that he had such strong views on the death penalty that if he were to convict someone of first degree murder and a special circumstance that he would always vote for the death penalty. (RT 5159). He reiterated that people who commit first-degree murder and a special circumstance should always get death. (RT 5161). He felt the same for aiders and abettors who weren't actual killers. (RT 5162).

The Court denied counsel's challenge for cause. (RT 5187-88). This denial was erroneous as Wolgatg was automatically in favor of the death penalty. He was excludable under *Morgan*, and it was error to deny the challenge.

8.

David Blenkhorn

Mr. Blenkthorn stated that the death penalty "tends to be the only thing that's a hundred percent guaranteed." (RT 5213). He explained this remark by stating:

> From what I've seen on the news media in the past, anybody who is usually up for life imprisonment without the possibility of parole, I have understood would be eligible for parole, which to me defeats the purpose of life without the possibility.
>
> Whenever I've heard of any case where capital punishment has been enforced, usually the person condemned has not been paroled.

(RT 5214).

Later, he added, "I usually tend to notice that in other cases something usually develops where someone has been issued that and then they are out on parole later on." (RT 5221).

The Court denied counsel's challenge for cause. (RT 5223). It was erroneous to deny the challenge, as he erroneously believed that LWOP did not mean that the person would not be eligible for parole. He felt that the only sentence which would adequately protect the public was death. He was thus substantially impaired, and it was erroneous to deny the challenge for cause.

9.

Lisa Treen

During voir dire, Ms. Treen stated:

> I am for the death penalty. I feel that the punishment should fit the crime depending upon the circumstances. And wouldn't have any problem with enforcing that or voting for the death

penalty depending upon the situation.

(RT 5546). When asked to explain her views, she stated:

> Well, the circumstances that have been put out in this case would definitely, I think, swayed my decision whether or not I'd vote for the death penalty or not.

(RT 5547). This statement showed that she had already been affected by the charges which had been brought.

She decided that based on the charges that had been leveled, and if those charges were found true, she would automatically vote for the death penalty. (RT 5548:16). She said that it was true that she had such a strong feeling about the death penalty for certain crimes that if that crime is committed, the penalty had already been determined in her mind. (RT 5548:24). She added:

> Well, I think if there's premeditation involved it would swayed me towards feeling the death penalty would be a logical step.

(RT 5549).

When asked "on the death penalty is your feeling so strong in favor of the death penalty that if there a special circumstance that you look at and say, if that person is guilty of that, really, the book is closed as far as those two punishments?" she responded, "To answer that honestly, I'd probably have to

say yes." (RT 5549-5550). When asked which special circumstances would be sufficient to automatically warrant death, she replied, "Lying in wait. Murder of a witness. Multiple murder. You know." (RT 5550).

Counsel asked:

> Do you feel that you have such strong feelings that your ability to truly consider the other alternative would be substantially impaired by your strong feelings about the death penalty?

She responded:

> Yes, I do.

(RT 5550).

Counsel also asked her about her feelings about aiders and abettors. She stated that her feelings would be the same for aiders and abettors who intended to kill as for actual killers. (RT 5551). Thus, she couldn't consider life without the possibility of parole for aiders and abettors who intended to kill with the specified special circumstances. She clarified "Even if they weren't the actual killer they still took part in the murder and, therefore, should share the guilt." (RT 5552).

The court denied counsel's challenge for cause. (RT 5556). She was automatically in favor of death, at least where the special circumstances were lying in wait, murder of a witness and multiple murder. Those special

circumstances were alleged in this case. She had thus prejudged the evidence, or at least the charges, and had concluded that if appellant was convicted and the special circumstances found true, she would sentence appellant to death. In this case, she was automatically in favor of death, and it was error not to exclude her.

10.
Steve Hamilton

The following colloquy took place during voir dire:

> Q: We want to hear from you in your own words what you feel about the California death penalty laws, particularly as it relates to your appropriateness to sit as a juror where such a decision may, might be in your hands.
>
> So will you speak out, sir?
>
> A: Okay. I assume you mean by for or against the death penalty?
>
> Q: Yes. And how strongly.
>
> A: I would say for the death penalty. The only thing, it seems to take so long to actually enact. The one most recently, what, 15 years?
>
> Q: Mr. Bonin?
>
> A: Yes.
>
> Q: When you say so long to enact, you mean to execute, carry out?
>
> A: Yes, final sentence is passed and actual penalty takes place.

(RT 5805-5806). Mr. Hamilton was already focused on the execution of sentence, even before the guilt phase began. His desire to speed executions also betrayed a likely bias in favor of conviction and death sentence.

Mr. Hamilton equivocated when asked if he could keep an open mind and consider all evidence in the penalty phase:

> I'm not predisposed right now, say, that the death penalty is going to be the case in this particular case. I don't know if I would be, when it came time for the penalty phase, because I would think that these particular items would have already been addressed during the guilt phase of the trial that could pretty much ascertain during the penalty phase what it's going to be, but– maybe I'm not clear as to what other evidence would come up.

(RT 5808).

The delay in executions was again discussed:

> Q: You mentioned the fact of how long it takes to implement the death penalty. Is that something that you've studied before? Is it just something you've heard in the one case?
>
> A: It just seems to be an ongoing, whenever someone comes up for, or whenever the death penalty is actually enacted it seems to be there is some things on that. You see various articles in the newspaper or on television relating to the number of inmates on death row, how long they've been there, that sort of thing. The continual appeal process that people seem to go through. I'm aware of it, but I've not studied it, no.

(RT 5810). When asked about his feelings about the appellate process, he responded:

> I think the State takes a very thorough approach to the original trial, that in most cases the appeal process seems to be, unless there is new evidence, seems to be very redundant. Especially when you get into cases that go on for ten or 15 years. That was my only point. It could be a much quicker, faster process.

(RT 5811).

When asked if any of the special circumstances would make him automatically vote for the death penalty, he stated:

> I guess I would have to say barring any of the items mentioned in the death penalty that would prevent that, all of those would. Or any of those would. As the statement, as the death penalty.

(RT 5812). He stated that his feeling going into a penalty phase would be that he would vote for the death penalty unless he was convinced otherwise. (RT 5813).

The Court denied counsel's challenge for cause. (RT 5815). He was automatically in favor of death for the special circumstances charged in this case. He also appeared frustrated with the length of time cases took, and appeared to be in favor of speedy executions. As an auto-death juror, he was excludable under *Morgan*, and it was error to deny the challenge for cause.

11.

Leonard Wilkinson

When asked about his feelings on the death penalty, he stated:

> Well, I think if a person commits a crime and it's been proved that he is guilty, I don't see any reason, because you take a life, you give a life, you take a life. But as I said, absolutely you need proof that he's guilty, then I don't think it would make any difference, it's up to the jury to give their opinion.

(RT 5985). The Court asked questions in an effort to see if Mr. Wilkinson would consider life without the possibility of parole, but he clung to this belief:

> A: I certainly would take all possibilities of getting the jurors' opinion, we all get together, and we take the facts of the penalty which we consider. And I think, as I said before, that if it's a crime which involved violence or anything, I think I would consider the death penalty.
>
> Q: Would you also consider life without the possibility of parole?
>
> A: If it was proved that there is any doubt, I would.

(RT 5986).

When counsel discussed the concept of automatic votes for the death penalty, Mr. Wilkinson stated:

> All I have to say, according to the crime, if it was deliberately murder and it was deliberately done, I should say, I would say the death penalty.

(RT 5987). The following colloquy occurred:

> Q: So if someone intended to kill, you would then find that it's the death penalty in all of those cases?
>
> A: Yes, unless there was reasonable doubt, you know or the circumstances how the death was committed. If it was, you know, like through genocide or something like that, I might consider life sentence. But if was really committed, to commit the crime, I should– and deliberately done, I should say that I would consider the death penalty.

(RT 5987-5988).

He stated "if all the jury got together and the crime was real deliberately, and it was intended, I would suggest the death penalty." When asked if he could consider LWOP, he stated, "if the circumstances were where a crime was committed and there was any kind of doubt, 12 people with reasonable doubt, then if there is life without parole, I would consider that if all the other 12 jurors agreed on that." (RT 5989).

The Court denied counsel's challenge for cause. (RT 5995). For all intents and purposes, he was automatically in favor of the death penalty. He stated that as long as it was proven that appellant was guilty beyond a reasonable doubt, he would sentence appellant to death. He was certainly "substantially impaired" and it was error not to exclude him.

12.
Roger Millett

Mr. Millet stated that he supported the death penalty. (RT 6509). When asked how he felt about a life without parole sentence, he stated:

> I would probably, I'm not too sympathetic to it. If a person is guilty of murder, and they've been found guilty, and the death penalty is on the law books, I would see no reason why the death penalty should not be imposed in favor, that life without parole would be elected in favor of the death penalty.

(RT 6511).

The following colloquy took place:

> Q: You're a strong supporter of the death penalty; is that correct?
>
> A: I like to avoid the use of adjectives. I do support the death penalty strongly. We have to– define what you mean by "strongly." Am I sort of leaning in that direction? I'll tell you the truth, I do. For pragmatic reasons. Why should the state spend x-number of dollars supporting the life of someone that could be a long time as opposed to the death penalty? There is no pragmatism laid out for you in a nutshell.

(RT 6513).

He was asked about his views of life without parole, and he responded:

> My views are simply this: that in the– I'm out of my element here but I'll use the terms the best I can. In the justice system, there is provision for people or, people who are convicted and found guilty or murder to be put to death. I see no problem with that. I don't have a problem with that. If I were to come upon

> some circumstance that were presented, I could certainly consider life without parole.

(RT 6514). While admitting that he could consider LWOP, he still placed that sentence at the top of a mountain while maintaining the death penalty as more of a given.

The Court denied the challenge for cause. (RT 6518). He was substantially impaired. He stated that he was strongly in favor of the death penalty. His concerns with cost and support of those in prison also weighed in the favor of the death penalty. It was error not to exclude him.

B.

Numerous Jurors Should Have Been Excused for Cause During Selection of Jurors at the Penalty Phase Retrial

Numerous jurors should have been excused for cause at the penalty phase retrial, but were not. Several of these jurors were not challenged for cause by appellant's trial counsel. Nevertheless, the trial court was obligated to excuse these jurors. A trial court's broad discretion in the conduct of voir dire is nevertheless "subject to essential demand of fairness." *Wolfe v. Brigano* (6th Cir. 2000) 232 F.3d 499, 504 (Wellford, J., concurring) (quoting *United States v. Nell* (5th Cir. 1976) 526 F.2d 1223, 1229). "At stake is

[appellant's] right guaranteed by the Sixth Amendment to an impartial jury; the principal way this right is implemented is through the system of challenges exercised during the voir dire of prospective jurors." *Nell*, 526 F.2d at 1229 (citing *Swain v. Alabama* (1965) 380 U.S. 202). A defendant can obtain a new trial if an impaneled juror's honest responses to questions on voir dire would have given rise to a valid challenge for cause. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556; *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 457-458.

The question of whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction. *Unites States v. Martinez-Salazar* (2000) 528 U.S. 304. "Failure to remove biased jurors taints the entire trial, and therefore ... [the resulting] conviction must be overturned." *Wolfe*, 232 F.3d at 503. "A court must excuse a prospective juror if actual bias is discovered during voir dire." *Allsup*, 566 F.2d at 71. "Actual bias is 'bias in fact'– the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *United States v. Torres* (2d Cir. 1997) 128 F.3d 38, 43 (*citing United States v. Wood* (1936) 299 U.S. 123, 133).

If counsel's decision not to challenge a biased venireperson could

constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury. However, if counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury "without the fully informed and publicly acknowledged consent of the client," *Taylor v. Illinois* (1988) 484 U.S. 400, then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury. Indeed, given that the presence of a biased juror, like the presence of a biased judge, is a "structural defect in the constitution of the trial mechanism" that defies harmless error analysis, *Johnson*, 961 F.2d at 756 (quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 309, to argue sound trial strategy in support of creating such a structural defect seems brazen at best. *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 463.

A trial court's discretion is not synonymous with abidcation of appellate review of the trial court's exercise of discretion. "[D]eference is not abdication." *People v. Johnson* (1993) 19 Cal.App.4th 778, 786. "A trial court's broad discretion in the conduct of voir dire is nevertheless subject to essential demands of fairness." *United States v. Hughes* (6th Cir. 2001) 258 F.3d 453, 457; *Wolfe v. Brigano* (6th Cir. 2000) 232 F.3d 499, 504.

The trial court failed to perform its duties regarding proper voir dire.

The court's insufficient voir dire failed to root out evidence of juror bias. A trial court has the duty to ask questions of jurors that will reveal whether bias or pretrial media coverage has affected their ability to be fair in the case at hand. *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1313; *People v. Wells* (1983) 139 Cal.App.3d 721, 727). Leading questions posed by a trial court which have no higher purpose than to convince jurors that they really can be fair, when the jurors themselves express serious doubts that they can be, undermine, rather than promote, the purpose of voir dire:

> Because ... bias is a thief which steals reason and makes unavailing intelligence– and sometimes even good faith efforts to be objective– trial judges must, where appropriate, be willing to ask prospective jurors relevant questions which are substantially likely to reveal such juror bias or prejudice, whether consciously or unconsciously held.

Ibid.

"A court must excuse a prospective juror if actual bias is discovered during voir dire. Bias can be revealed by a juror's express admission of that fact, but more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence." *United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, 71 (9th Cir. 1977). *See also Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 459.

If an impaneled juror was actually biased, the conviction must be set aside. *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 463; *Johnson,* 961 F.2d at 754 (citing *Rogers v. McMullen* (11th Cir. 1982) 673 F.2d 1185, 1190; *United States v. Crockett* (5th Cir. 1975) 514 F.2d 64, 69; *United States v. Silverman* (2d Cir. 1971) 449 F.2d 1341, 1344.

1.

Heather Ferris

Heather Ferris served as a juror at the penalty phase retrial. However, it appears that she should have been excused from service due to several factors. First, her father was a deputy district attorney. (CT 4873). During voir dire, she confirmed that he father, Dennis Ferris, worked in the district attorney's office, and that her brother, Gerald Ferris, worked for county counsel. (RT 12964-12969). She herself was considering going to law school. As a whole, she had a law background from her family, and that background was slanted in favor of the prosecution.

Additionally, she had received a college degree in psychology. (CT 4874-4875). She was not thoroughly questioned about her studies during voir dire. Psychological testimony would prove to be an important part of the

penalty phase retrial, with several experts testifying about appellant's social history as well as neuropsychological testing. With this framework, allowing a juror to serve who had a degree in psychology, and might offer informal expert opinions during voir dire, was fraught with danger.

During voir dire, Ms. Ferris stated that she leaned toward the death penalty. (RT 12967-12969). Considering her admitted leanings, as well as these other concerns, she should have been excused from service by the court.

2.

Kristen Hauptmeier

Ms. Hauptmeier served as a juror at the penalty phase retrial. She received a bachelor's degree in psychology. (CT 4913). She was the second person, along with Heather Ferris, who had such a degree. This further increased the likelihood that the jury would use out-of-court sources of evidence regarding psychology when evaluating testimony.

She was also affected by crime personally. She had been held up at a bank at gunpoint, and been pushed into the bank vault. (CT 4916-4919). Her home had also been broken into. (CT 4916).

She did not think that life without the possibility of parole was an

acceptable sentence. She stated "Nothing is equivalent to living." (CT 4925).

She was not questioned about these issues by trial counsel or by the Court. Considering that they were present on her questionnaire, it was error to leave her on the jury under these circumstances, without exploring her answers in order to determine if she was biased or if she could fairly decide the case based on the evidence presented in court. Her answer that nothing was equivalent to living appeared to place her in the auto-death category. The court's voir dire was insufficient to show otherwise. It was error to allow her to remain on the jury.

3.
Cheryl Platas

Ms. Platas served as a juror at the penalty phase retrial. She had previously studied both psychology and business law. (CT 4951). She was not questioned about her studies.

More importantly, she had previously been hospitalized for mental illness. (CT 4954). She was asked no questions about her hospitalization, what kind of mental illness she had, whether still had that illness, how it affected her, or any other questions about it. She was not questioned about these issues by trial counsel or by the Court. Considering that they were

present on her questionnaire, it was error to leave her on the jury under these circumstances, without exploring her answers in order to determine if she was biased or if she could fairly decide the case based on the evidence presented in court.

Additionally, she was familiar with the case. She stated that "I saw it on TV. A man went into Comp USA and murdered several employees." (CT 4956). She described her initial reaction as "shocked." (CT 4956). She stated "I later heard from someone that a friend of my ex-husbands, (deceased)– Joe Plourde was on TV, as he is an employee at Comp USA). This really surprised me. My kids (sons) were real close to Joe and haven't seen him in years." She wasn't questioned about this issue either.

Once again, the voir dire was insufficient. It appeared that she had significant knowledge about the case, as well as issues surrounding the case. That information likely caused her to suffer one or more biases. Since the voir dire was inadequate, the record must be interpreted as demonstrating a biased juror who should have been excused.

4.
Ronald Lupei

Mr. Lupei served as a juror at the penalty phase retrial. He had done coursework in psychology to support his requirements. (CT 4971).

He had particular views surrounding the death penalty which should have excused him from service. He stated:

> The death penalty should be given to "those" persons who have little regard for life, who show no remorse– and the brutality of the crime. It should not be for the victims– (although it does give them closure)– It should [be] fast and quick– not for the public's eye.

(CT 4979)(emphasis in original).

When asked whether the statutory aggravating and mitigating circumstances should be considered, he stated:

> The victim's family shouldn't be a factor. Revenge is wrong– justice should prevail. The actions of the crime based on that decision at that time. What happen in past or not in the past– irrelevant.

(CT 4981).

These answers showed that potential mitigation was irrelevant to Mr. Lupei. *Morgan* requires that a juror be willing to consider mitigation. Absent that ability, Mr. Lupei was unfit to serve and should have been excluded.

5.
Kim McCurdy

Ms. McCurdy served as a juror at the penalty phase retrial. She should have been excused because of her views on the death penalty. When asked about her general feelings, she stated:

> If someone is found guilty without a shadow of doubt, I agree with the death penalty. I do not feel that death row convicts should spend 10+ years on death row. It drains taxpayers' funds. I feel that if the death penalty were used more, it may make people think twice before committing a serious crime.

(CT 4998). These feelings obviously did not comport with the law's requirements.

Her thoughts about life without the possibility of parole did not clear up the issue:

> If the crime is not punishable by death, the longer someone dangerous stays off the streets the better.

(CT 4998). A special circumstances homicide is punishable by death. What the law requires is a juror who is willing to consider both penalties. These answers demonstrate that she was not.

C.

The Erroneous Failure to Dismiss Prospective Jurors Unconstitutionally Infringed on Appellant's Right to Exercise Peremptory Challenges

The courts have indicated that although there is no constitutional right to peremptory challenges in themselves, where such challenges are provided, the constitutional right to a fair and impartial jury – per the Sixth and Fourteenth Amendments – includes the right to a voir dire procedure that permits the intelligent exercise of those challenges.[10] Additionally, the denial of such a right also necessarily violates the Fifth Amendment right to liberty, the Sixth Amendment right to effective counsel, the Fifth and Fourteenth Amendment rights to due process and the Eighth Amendment right to heightened capital case due process, as well as the Fifth, Eighth and fourteenth Amendment rights to reliability in guilt and penalty adjudication.

Ross v. *Oklahoma, supra*, held that a defendant's "right" to peremptory challenges is "denied or impaired" where the defendant does not receive that which state law provides. (*Ross* v. *Oklahoma, supra*, 487 U.S. at p. 89.) California law allows for the use of peremptory challenges to excuse

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Rosales-Lopez v. *United States* (1981) 451 U.S. 182, 189; *United States* v. *Spaar* (8th Cir. 1984) 748 F.2d 1249, 1253; *United States* v. *Delval* (5th Cir. 1979) 600 F.2d 1098, 1102; *United States* v. *Rucker* (4th Cir. 1977) 557 F.2d 1046, 1049; *United States* v. *Dellinger* (7th Cir. 1972) 472 F.2d 340, 368; *Knox* v. *Collins* (5th Cir. 1991) 928 F.2d 657, 661.

prospective jurors as to whom for-cause challenges have been denied. (*People* v. *Coleman, supra*, 46 Cal.3d 749.)

Applying the correct standard, each of the listed jurors above should have been excluded for cause. "[A]ny juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence." (*Morgan v. Illinois, supra.*) The jurors described above should have been excused for cause. Appellant was thus effectively deprived of peremptory challenges when the trial court failed to excuse the prospective jurors for cause.

The trial court's error deprived appellant of a state created liberty interest. Liberty interests are protected by the due process clause of the Fourteenth Amendment even when the liberty interest itself is a statutory creation of the state. *Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

In *Hicks v. Oklahoma, supra*, 447 U.S. 343, the United States Supreme Court held:

> Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion

> is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the [proper] exercise of its . . . discretion . . . and that liberty is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

Id., supra, 447 U.S. at p. 346.

The general rule in this state is that exhaustion of peremptories is a prerequisite to raising issues relating to the erroneous denial of cause challenges. (*People* v. *Johnson* (1992) 3 Cal. 4th 1183; *People* v. *Price* (1991) 1 Cal.4th 324, 401-402; *People* v. *Morris* (1991) 53 Cal.3d 152, 185; *People* v. *Ashmus* (1991) 54 Cal.3d 932, 964-967.) However, as this court explained in *Morris*, *supra*, the rule has an exception applicable here:

> In order to complain on appeal about the trial court's decisions overruling his challenges for cause, defendant must show (1) he used a peremptory challenge to remove the juror in question; (2) he exhausted his peremptory challenges **or can justify his failure to do so**; and (3) he was dissatisfied with the jury as selected.

(*People* v. *Morris, supra,* 53 Cal.3d at p. 185, emphasis supplied.)

In *People* v. *Box* (1984) 152 Cal.App.3d 461, 465-466, a conviction was reversed when the accused was wrongly allowed 10 peremptory challenges rather than 26; the defendant explained that he had not exhausted his peremptory challenges because he could not have removed the 5 or 6

remaining unfavorable jurors with his single remaining challenge, and he risked obtaining a more unfavorable juror if the challenge were exercised. This was precisely the position appellant was in. Since appellant did not know the order in which the remaining jurors would be called, he risked seating jurors he had already unsuccessfully challenged for cause when he had insufficient peremptory challenges remaining. (*See People* v. *Morris, supra*, 53 Cal.3d at p. 184.)

Ross v. *Oklahoma* (1988) 487 U.S. 81 does not compel a different result. *Ross* involved challenges to a jury box selection system. California's general rule, like that of the Oklahoma courts in *Ross*, is that claims of error in the denial of for-cause challenges are not cognizable on appeal unless the defendant has exhausted his peremptory challenges and remains dissatisfied with the jury. (*People* v. *Coleman* (1988) 46 Cal.3d 749, 770.) Thus, the challenge for cause, the ruling and the use of a peremptory challenge to strike the erroneously qualified juror all occur after the juror has been provisionally seated in the jury box. Hence, a prospective juror who has been unsuccessfully challenged for cause may immediately be removed with a peremptory challenge. Yet the consequence of exercising a peremptory challenge in this situation is that a prospective juror of unknown qualifications is substituted in the box for the person excused.

This rationale is flatly inapplicable to the variation of the "struck" system used here. At the beginning of the final "shootout," there were numerous jurors who should have been excused for cause who remained. At the first trial, Brooks Friend, Donald Miller, Janine Carlson, William Pittman, Billy Aldridge, Arthur Irwin, Michael Wolgat, David Blenkhorn, Lisa Treen, Steve Hamilton, Leonard Wilkinson and Roger Millett were all remaining. At the penalty phase retrial, Heather Ferris served as a juror, as did Ronald Lupei, Jose Gallegos and Kim McCurdy.

Appellant's peremptories were insufficient to challenge all of these jurors, as well as other jurors who were less than palatable. Under these circumstances, appellant simply did the best possible with limited resources, and the failure to exercise all peremptories should not bar him from raising claims of error, especially when they are as apparent as in this case. *Ross* does not apply to the erroneous denial of a cause challenge under the hybrid method of jury selection used in this case.

Under the jury selection system used, cause challenges were made to prospective jurors one at a time, before individual jurors were seated. At the time peremptories were exercised to the final group of jurors, both counsel were aware who remained to be called from the group since all jurors from the group had already been examined. At the time of the final "shootout,"

numerous jurors from the final group had been challenged, unsuccessfully, for cause.

The non-exhaustion of challenges was a legitimate and even necessary choice, because it was the only manner in which defense counsel could retain any control over the seating of prospective jurors against whom cause challenges had already been denied. Because of the trial court's erroneous denial of challenges for cause, and the composition of the venire in general, counsel was fully aware that there were jurors remaining in the final group who had stated during voir dire that: they would not consider appellant's background as a mitigating factor; they would impose the death penalty if special circumstances were found to be true; and one was a member of a church that advocated the death penalty and would follow the church over the law. This situation presents itself whenever a challenge for cause is erroneously denied under the "struck" system. States that follow the "struck" system of jury selection by statute hold that reversible error occurs when a cause challenge is erroneously denied, because such error denies the objecting litigant his right to a full panel of qualified jurors before he makes his peremptory challenges. (*See, e.g., State* v. *Morrison* (Mont. 1977) 557 S.W.2d 445, 447.)

Under these circumstances, non-exhaustion of peremptory challenges

is not a waiver, but a legitimate and necessary response to the error of failing to exclude unqualified jurors from the panel. In numerous other contexts, such defensive acts have been held not to constitute a waiver of error for purposes of appeal.[11] Further, the appellate courts of states whose courts use the "struck" system have come to the same conclusion with regard to the non-exhaustion of peremptory challenges under a "struck" system of jury selection. (*State* v. *Morrison, supra,* 557 S.W.2d at p. 446; *Pope* v. *State* (Ga. 1986) 345 S.E.2d 831.)

Therefore, appellant is not precluded from raising arguments concerning the wrongful denial of challenges for cause. Such a rule would be in violation of appellant's rights to an unbiased jury, liberty, fair trial, effective counsel, due process, reliability in guilt and penalty adjudication, and heightened capital cased due process, under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the California Constitution.

The jurors discussed previously should have been excluded for cause since "any juror to whom mitigating factors are . . . irrelevant should be

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See People v. *Sam, supra*, 71 Cal.2d at pp. 206-207; *People* v. *Newton* (1978) Cal.App.3d 359, 382-383; *People* v. *Musumeci* (1955) 133 Cal.App.2d 354, 362-363; *see also 9 Witkin, California Procedure* (3d Ed. 1985), Appeal Section 310, pp. 319-320, and cases cited therein.

disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence." (*Morgan* v. *Illinois, supra,* 504 U.S. ___). Those jurors indicated that they would not consider classic *Lockett-Eddings-Hitchcock* mitigating evidence.[12]

Several jurors indicated their willingness to consider Biblical concepts of justice. Consideration of religion is "constitutionally impermissible or totally irrelevant to the sentencing process." (*Zant* v. *Stephens* (1982) 462 U.S. 862, 855). A juror who states that he or she will follow instructions from religious texts is a juror who cannot be fair and impartial and who, therefore, should be excused for cause.[13]

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See Lockett v. *Ohio* (1978) 438 U.S. 586; *Eddings* v. *Oklahoma* (1982) 455 U.S. 104; *Hitchcock* v. *Dugger* (1987) 481 U.S. 393, 399.

In *People* v. *Easley* (1983) 34 Cal.3d 858, 877-880, this court made it clear that mitigating evidence could not be limited to facts that lessen the gravity of the crime, but must also include facts pertaining to the background of the defendant, as the United States Supreme Court has long required. Necessarily, then, a juror's ability to be fair and impartial on penalty is "substantially impaired" if the juror is willing to consider only mitigating facts about the crime, but not about the defendant's background.

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The Bible frequently is viewed not only as an authoritative source of law, but also as a source of law that conflicts with judicial law. (*See, e.g., Nederhood, The Demise of Justice*, 1 Christian Legal Society Quarterly 2, at p. 12 ["Biblical view of law, you see, is quite different from the prevailing opinions on the subject today. The Biblical view is, in fact, the exact opposite of what now prevails."]; Land, *Law in the Old Testament*, 4 Christian Legal Society Quarterly 2 & 3, (1983) at pp. 65-66 ["[W]e cannot be faithful if we accept state law as our rule for communal life . . . . [There exists] a head-on

Each of the listed jurors should have been excused for cause because of their unmistakable bias. The court's denial of trial counsel's motions to challenge for cause was erroneous, in violation of appellant's rights to an unbiased jury, liberty, fair trial, effective counsel, due process, reliability in guilt and penalty adjudication, and heightened capital cased due process, under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the California Constitution.

While there is no constitutional right to peremptory challenges in themselves, where such challenges are provided, the constitutional right to a fair and impartial jury – per the Sixth and Fourteenth Amendments – includes the right to a voir dire procedure that permits the intelligent exercise of those challenges.[14] The denial of such a right also necessarily violates the Fifth Amendment right to liberty, the Sixth Amendment right to effective counsel, the Fifth and Fourteenth Amendment rights to due process and the Eighth Amendment right to heightened capital case due process.

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collision between the law of God and the law of man."].)

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(*Rosales-Lopez* v. *United States* (1981) 451 U.S. 182, 189; *United States* v. *Spaar* (8th Cir. 1984) 748 F.2d 1249, 1253; *United States* v. *Delval* (5th Cir. 1979) 600 F.2d 1098, 1102; *United States* v. *Rucker* (4th Cir. 1977) 557 F.2d 1046, 1049; *United States* v. *Dellinger* (7th Cir. 1972) 472 F.2d 340, 368; *Knox* v. *Collins* (5th Cir. 1991) 928 F.2d 657, 661.)

The trial court's error deprived appellant of a state created liberty interest. Liberty interests are protected by the due process clause of the Fourteenth Amendment even when the liberty interest itself is a statutory creation of the state. *Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

> In *Hicks v. Oklahoma, supra*, 447 U.S. 343, the Supreme Court held:
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> Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the [proper] exercise of its . . . discretion . . . and that liberty is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

Id., supra, 447 U.S. at p. 346.

The error cannot be deemed harmless in this matter. Trial counsel for appellant were reduced to trying simply to keep jurors who had been challenged for cause unsuccessfully off the jury, and they did not have enough peremptory challenges to make sure this happened. The error infected the entire procedure surrounding the selection of the jury and cannot be considered harmless. The presence of one biased juror on a jury panel "cannot be harmless; the error requires a new trial without a showing of actual

prejudice." *United States v. Gonzalez, supra*, 214 F.3d at 1111; *Dyer v. Calderon* (9th Cor. 1998) 151 F.3d 970, 973 fn.2; *Fields v. Woodford* (9th Cir. 2002) 309 F.3d at 1113).

This error was exacerbated by the prosecutor's ability to use his peremptory challenges to further skew the jury pool. The Fifth, Sixth, Eighth and Fourteenth Amendments guarantee the rights to a jury drawn from a representative cross-section of the community, to a fair trial in the guilt phase and a fair and reliable determination of the penalty. The United States Supreme Court has found that the Sixth and Fourteenth Amendment guarantee of a fair trial prohibits the exclusion of all potential jurors who express general objections to the death penalty, or moral or religious scruples against its imposition. *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522; *People v. Mattson* (1990) 50 Cal.3d 826, 844 (superceded on other grounds).

Excusing all jurors who expressed scruples about capital punishment resulted in a jury comprised of people strongly in favor of capital punishment. This skewed results in both the guilt phase and at sentencing, as studies establish that persons with pro-death attitudes generally favor the prosecution and are likely to believe criminal defendants are gulity. The effects were far more serious in the penalty determination where, due to jury composition, the verdict was almost a forgone conclusion. "[A] state may not entrust the

determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Witherspoon v. Illinois, supra*, at 520.

"The process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to either side of the case." *Morgan v. Illinois* (1992) 504 U.S. 719, 734. Here, biased jurors were seated in both the guilt and penalty phase. "A juror is considered to be impartial 'only if he can lay aside his opinion and render a verdict based on the evidence presented in court...'" *United States v. Gonzales, supra*, 214 F.3d at 1114; *Patton v. Yount* (1984) 467 U.S. 1025, 1037 fn.12. These jurors could not do so, and it was error to deny challenges for cause. These errors violated appellant's right to Due Process under the Fifth and Fourteenth Amendments, to a fair trial under the Sixth Amendment, and heightened capital case scrutiny and freedom from cruel and unusual punishment under the Eighth Amendment.

As this Court observed:

> If it appears substantially likely that a juror is actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict.

People v. Marshall, supra, 50 Cal.3d at 951. Appellant's conviction and sentence must be reversed.

Under the Sixth Amendment, both the guilt and penalty phase must be

reversed automatically if a single biased juror sits on the jury. Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 20

THE COURT WRONGLY EXCUSED JURORS FOR CAUSE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The trial court failed to ask pro-LWOP prospective jurors the same sort of rehabilitative questions the court asked pro-death penalty prospective jurors. The record reveals a series of erroneous excusals for cause of prospective jurors in violation of the standards established in *Wainwright v. Witt* (1985) 469 U.S. 412 and *Witherspoon v. Illinois* (1968) 391 U.S. 10. Independent of the trial court's lack of evenhandedness in conducting the death-qualification voir dire, these erroneous excusals require the setting aside of appellant's sentence of death.

The trial court's more accommodating treatment of pro-death prospective jurors than pro-life prospective jurors also violated appellant's Fourteenth Amendment rights to due process and equal protection of law by improperly tilting the jury selection process and ultimately the sentencing deliberations in favor of the prosecution. The United States Supreme Court and this Court have recognized the need for fairness between the defense and the prosecution. *Wardius v. Oregon* (1973) 412 U.S. 470 [reciprocal discovery]; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-77 [same]; *Reagan v. United States* (1895) 157 U.S. 301, 310 [impartiality of jury

instructions]; *People v. Moore* (1954) 43 Cal.2d 517, 526-27[same]. In *Wardius*, noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," the high court 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*, 412 U.S. at 474. The Due Process and Equal Protection Clauses of the Fourteenth Amendment are violated by unjustified and uneven application of criminal procedures in a way that favors the prosecution over the defense. *Ibid.*; *see also Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection]; *Green v. Georgia* (1970) 442 U.S. 95, 97 [defense precluded from presenting hearsay testimony which the prosecutor used against the codefendant]; *Webb v. Texas* (1972) 409 U.S. 95, 97-98 [judge gave defense witness a special warning to testify truthfully but not the prosecution witnesses]; *Washington v. Texas* (1967) 388 U.S. 14, 22-23 [accomplice permitted to testify for the prosecution but not for the defense].

A.

Janet Brown

When asked about the death penalty, she stated:

I would have to say in all truth I believe in the death penalty. I

> think it is a criminal deterrent. I know for a fact I could not choose to send somebody to a means to have them killed. I know that I could not do that.

(RT 3627). She added, "I think I could be fair, I think I would be fair. THe responsibility of choosing whether someone dies or not is very uncomfortable for me." (RT 3628).

She confirmed that she would be able to be fair during the guilt phase. (RT 3630). When the system was explained to her, including information about how the penalty phase works, and was asked whether she could consider death, she replied, "That's a big question. I can't give you an honest answer right now." (RT 3632).

She explained her view on the death penalty:

> I think the death penalty is an appropriate part of our system in that I think that it is a deterrent, hopefully a deterrent to criminals. I'm assuming that that is part of why it is in place. Therefore, in terms of my way of logically thinking it out, I see it as a place, as a justifiable place in a legal system.

(RT 3633). She wasn't sure that she would be able to follow her logic, however. (RT 3634).

The prosecution challenged her for cause. (RT 3635). The Court granted that challenge, stating:

> The Court views her answers and those of Mr.– our first juror,

> that was Mr. Friend, somewhat differently. I believe as I understood this juror's responses, she is telling the Court that she has no philosophical quarrel in the abstract with the death penalty, but she personally could not impose it. And the Court believes that under the *Witt* standards she's made that clear with the exception of to some of your responses, Mr. Earley, she again said I don't know, I've never had to do that before.

The Court excused her, although her answers were equally equivocal about whether she could give death as those of jurors mentioned above regarding their ability to consider life without parole.

B.

Charles Callendar

When asked about the death penalty, Mr. Callendar stated:

> I'm opposed to the death penalty. I don't believe abortion is the right thing, either. But on a death penalty it's just getting even, is the way I feel. So I'm opposed to it.

(RT 3688). He confirmed that he would not be impaired during the guilt phase in any way. (RT 3690). When asked by counsel whether he could consider the death penalty, he responded:

> I would be willing to listen, but I pretty much made up my mind that that's how I feel about it.

(RT 3690). When asked if he could look at things differently, he responded:

> Yeah. I've thought a lot about the abortion issue. I firmly believe that that is murder, that that's wrong, taking a life of an unborn child. You have to go a step further of taking a life, even the State taking a life. I don't, you know, I think the State now in the modern times can handle the problem without killing. So that's the way I've reasoned that through.

(RT 3961).

Despite the fact that he said he would listen to the evidence, the Court excused him. The Court also ignored the fact that Mr. Callendar said that he would not be impaired at all in the guilt phase.

C.
Don Flora

When asked about the death penalty, he said, "I don't honestly know if I could– I haven't been there, like you said. I don't honestly know if I could participate in a death penalty in saying yes to it." (RT 6496). When asked if he was opposed to having a death penalty law, he said "I can't honestly say I am, no." When asked if he thought it was appropriate in some cases, he said, "Yes, I think so. I can think of the Bonin case, for example." (RT 6496). He was not eager to accept the responsibility for himself. (RT 6497).

He had seen cases in which he felt the death penalty was appropriate.

(RT 6498). If he had sat on those juries, he's not sure how he would have reacted. (RT 6499-6500). He confirmed that intellectually, he could follow the judge's instructions and determine which penalty was appropriate. (RT 6501).

The court upheld the prosecutor's challenge. (RT 6504-6505). His answers were no more automatic-life than the jurors discussed above were automatic-death.

As the United States Supreme Court has stated:

> [A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

Witherspoon v. Illinois (1968) 391 U.S. 510, 520-23.

The high court subsequently added:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing temporarily to set aside their own beliefs in deference to the rule of law.

Lockhart v. McCree (1986) 476 U.S. 162, 176.

A prospective juror should only be excused for cause as result of views on the death penalty which "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt* (1985) 469 U.S. 412, 424, fn. omitted; *People v. Jones* (2003) 29 Cal.4th 1229, 1246; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146; *People v. Guzman* (1988) 45 Ca;.3d 915, 955. This standard applies whether the juror is predisposed to vote for or against the death penalty. *Morgan v. Illinois* (1992) 504 U.S. 719; *People v. Cunningham* (2001) 25 Cal.4th 926, 975. And this Court has stated:

> trial courts should be evenhanded in their questions to prospective jurors during the death-qualification portion of the voir dire and should inquire into the jurors attitudes both for and against the death penalty to determine whether these views will impair their ability to serve as jurors.

People v. Champion (1995) 9 Cal.4th 879, 908-09. The Court has "not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections." *Morgan v. Illinois, supra*, 504 U.S. at 730 (court must inquire as to the ability of pro-death jurors, just as it does of pro-life jurors, to put their personal feelings aside and follow the court's instructions); *Turner v. Murray*, 476 U.S. 28, 36-37 (judge has no discretion to refuse to ask questions requested by the defense about racial bias

in a case involving a black defendant and white victim); *Ham v. South Carolina* (1973) 409 U.S. 524, 526-27 (court has no discretion to refuse to inquire about racial bias); *Witherspoon v. Illinoism supra*, 391 U.S. at 512-13 (court has no discretion to permit state to make unlimited challenges for cause to exclude those jurors who "might hesitate" to return a verdict imposing death).

If even one of these anti-death penalty jurors was improperly excluded from the death-qualified pool, appellant is entitled to a new penalty trial with a fairly selected, impartial jury. (*See People v. Ashmus* (1991) 54 Cal.3d 932, 962 ["The exclusion of a prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal– but only as to penalty and not as to guilt."] [*citing Gray v. Mississippi* (1987) 481 U.S. 648, 666-67; *id.* at 667-68 (plur. opn.); *id.* at 672 (conc. opn. of Powell, J.); *Witherspoon v. Illinois, supra*, 391 U.S. at 521-23).

This is not a case in which a reviewing court can accord the customary deference to the trial judge's rulings on prospective jurors who gave conflicting evidence. *See People v. Jones, supra*; *People v. Carpenter* (1997) 15 Cal.4th 312, 357). Appellant's complaint is that the trial judge let bias infect his decision-making process by treating jurors with reservations about the death penalty differently and more hostilely than jurors who indicated that

they would automatically vote for the death penalty

The difference in the treatment of anti-death penalty and pro-death penalty jurors may have been influenced by the fact that under California law, it takes a unanimous vote of the jury to impose the death penalty; one vote for life precludes the death sentence. Thus, the trial judge may have felt constrained to be extra-cautious about qualifying pro-life jurors. This argument was used to attempt to justify a system which allowed for the close questioning of pro-life jurors about their ability to return a life sentence while rejecting such questioning about pro-death jurors' ability to return a life sentence. The United States Supreme Court rejected this argument:

> Almost in passing, the State also suggests that the reverse-Witherspoon inquiry is inapposite because of a putative "qualitative difference." Illinois requires a unanimous verdict in favor of imposing death, ... thus any one juror can nullify the imposition of the death penalty. "Persons automatically for the death penalty would not carry the same weight," Illinois argues, "because persons automatically for the death penalty would still need to persuade the remaining eleven jurors to vote **for** the death penalty." Brief for Respondent 27. The dissent chooses to champion this argument, although it is clearly foreclosed by *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988) where we held that even one such juror on the panel would be one to many. ... In any event, the measure of a jury is taken by reference to the impartiality of each, individual juror.

Morgan v. Illinois, supra, at 735, fn. 8. It was error to exclude these jurors:

> A man who opposes the death penalty, no less than one who

> favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule not standard, 'free to select or reject as it (sees) fit,' a jury that must choose between life imprisonment and capital punishment can do little more– and must do nothing less– than express the conscience of the community on the ultimate question of life or death...[I]n a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community.

Witherspoon, supra, 391 U.S. at 519-20.

Reversal is mandated *per se*, if even one of these anti-death penalty jurors was improperly excluded from the death-qualified pool. (*See, e.g., People v. Ashmus* (1991) 54 Cal.3d 932, 962). Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S.

578, 584-85).

CLAIM 21

APPELLANT'S DUE PROCESS AND CONFRONTATION RIGHTS TO PERSONAL PRESENCE AT TRIAL WERE VIOLATED WHEN HE WAS EXCLUDED FROM THE IMMUNITY PROCEEDINGS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Jeanette Moore and Matthew Weaver were critical prosecution witnesses. Without the testimony of these two witnesses, appellant could not have been connected with the attempted robbery of Comp USA and the subsequent murder of Kathy Lee. (RT 7469, 7497). Matt Weaver was the only person who identified appellant as having been present at the scene. Jeanette Moore provided testimony tending to show that appellant had taken steps to fraudulently rent a U-Haul truck, presumably in order to prevent the crime from being traced back to him. (RT 7660-7663).

Both witnesses committed crimes regarding these incidents. Jeanette Moore fraudulently obtained a driver's license, and then used that license to fraudulently rent a U-Haul truck. Thus, she was guilty of those crimes, as well as subject to prosecution for aiding and abetting the Comp USA robbery and resulting shooting. Matt Weaver was at the Comp USA scene in order to help move the computer equipment. Matt Weaver was an eyewitness to the murder of Kathy Lee and participated in the robbery. He was liable for prosecution for the robbery and murder. The grand jury had sought to indict him for these

crimes, although the prosecutor ultimately was able to prevent that from occurring, by intimating that he didn't want Weaver charged.

Both witnesses were later given immunity for crimes related to their testimony. (RT 7555, 7999). Neither would have been able to testify against appellant if they had not been given immunity, for fear of incriminating themselves. (RT 7640).

On March 28, 1996, while appellant, his attorney and the prosecutor were in one courtroom, in another courtroom immunity was sought for witnesses Moore and Weaver. Neither appellant nor his legal representative were present. (RT 7592).

Upon being made aware that a hearing pertaining to appellant's trial was occurring without appellant or his counsel being present, the trial court expressed concern "in view of the status of the trial" that Mr. Clark and his counsel be present at any proceeding involving a during– the– trial grant of immunity." (RT 7592). The prosecutor argued that appellant had no standing to be present for the immunity hearing, stating that "he was not a party." (*Ibid*). Ultimately, appellant and counsel were not present at the immunity hearing for either Jeanette Moore or Matt Weaver. Since both had already received considerable consideration from the prosecution in exchange for their testimony, presence at the immunity grants was critically important.

Appellant's absence from the immunity hearing violated longstanding rules of constitutional law. The right of a criminal defendant to be present at his own trial is beyond dispute. *See Diaz v. United States*, 223 U.S. 442 (1912) (discussing history of right). The immunity hearing took place during the trial and was an integral part of the trial because the two witnesses were free to commit perjury because of the immunity that they were given.

The United States Supreme Court has specifically noted that waiver of presence is not appropriate in capital cases:

> **Where the offense is not capital** and the accused is not in custody, . . . if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.

Diaz v. United States, 223 U.S. 442, 455 (1912)(emphasis added).

In *People v. Boehm*, the Court was confronted with a situation where a codefendant was granted immunity outside of their presence and all charges were dismissed. The Court stated:

> As to the due process contention, the United States Supreme Court in *Snyder v. Massachusetts*, 291 U.S. 97, 107, has stated: "So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process **to the extent that a fair and just hearing would be thwarted by his ansence and to that extent only.**" (Emphasis added). The rule

> has been expressed in *In re Dennis*, 51 Cal.2d 666, 672-673, as follows: "In other words, it appears that when the presence of the defendant **will be useful, or of benefit to him and his counsel**, the lack of his presence becomes a denial of due process of law." (Emphasis added). In *Dennis* (p. 672) the court quoted with approval from *Snyder v. Massachusetts, supra*, the following: "Nowehere in the decisions of this court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow."

People v. Boehm, 270 Cal.App.2d 13, 19. The Court went on to state that the exclusion of a defendant from immunity principles may prejudice a defendant, although under the circumstances of that case, the exclusion was not prejudicial. That result is not appropriate here, however, where transcripts of the immunity proceedings have not yet been provided, as they were in *Boehm*. Thus, there can be no determination that the exclusion was harmless. Considering the critical nature of the testimony of Moore and Weaver, and their credibility problems as accomplices, as well as their admissions of perjury, it was error to exclude appellant and his counsel from the immunity hearings.[15]

The failure to ensure petitioner's presence at trial violated due process

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15

Appellant asserts that the facts of his case warrant relief. Appellant is aware of *People v. Randolph* (1970) 4 Cal.App.3d 655. To the extent necessary, appellant respectfully requests that the Court follow the reasoning of *Boehm* and reject *Randolph*.

under the Fifth and Fourteenth Amendments and heightened capital case scrutiny under the Eighth Amendment. At the very least, appellant and his counsel were entitled to a copy of the transcript of the immunity hearing and to cross-examine the witnesses based on that transcript. *People v. Boehm* (1969) 270 Cal.App.2d 13.

"A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." *Lewis v. United States*, 146 U.S. 370, 372 (1892). *See also Bustamante v. Eylman*, 456 F.2d 269, 273 (9th Cir. 1972). This principle has been consistently upheld and continually reaffirmed. *See Hopt v. Utah*, 110 U.S. 574 (1884); *Diaz v. United States*, 223 U.S. 442 (1912); *Illinois v. Allen*, 397 U.S. 337 (1970). In *Hopt v. Utah*, *supra*, the Court held that it was "not within the power" of the accused or his counsel to waive this right, because the right reflected the interests of the public in guaranteeing that life and liberty were not taken without due process of law. 110 U.S. at 579. *See also Lewis v. United States, supra*. Both *Hopt* and *Lewis* were capital cases.

The courts have emphasized the difference between capital cases and no-capital cases in requiring that a defendant must be present during capital trials. *See, e.g., Hopt v. Utah* 110 U.S. 574, 579 (1884); *Hall* v. *Wainwright* 733 F.2d 766, 775-776 (11th Cir. 1984); *Bustamante* v. *Eyman* 456 F.2d 269,

273-274 (9th Cir. 1972).

The combined force of the Court's opinions in *Hopt, Lewis* and *Illinois v. Allen, supra,* indicates that this principle is founded upon both the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Furthermore, the defendant's unwaivable right to be present during trial is obligatory upon the states. *Illinois v. Allen, supra*; *Pointer v. Texas*, 380 U.S. 400 (1965).

In *Bustamante, supra*, the court concluded:

> Since petitioner was in custody for a capital offense and his absence was not necessitated by disruptive behavior, **we hold that he did not, indeed could not, waive** his right to be present in the courtroom at trial. . . . If the petitioner in a capital case could not waive his right to be present at trial except by disruptive conduct, it must certainly follow that whatever attempt counsel made in petitioner's absence and without his knowledge to waive this right was without effect. *United States v. Crutcher*, 405 F.2d 239 (2d Cir. 1968), *cert. denied*, 394 U.S. 908, 89 S. Ct. 1018, 22 L. Ed. 2d 219 (1969); *Evans v. United States*, 284 F.2d 393 (6th Cir. 1960).

Bustamante v. Eyman, supra, 456 F.2d at p. 274.(emphasis added). At least one sister circuit has adopted an identical rule. See *Hall v. Wainwright,* 733 F.2d 766, 775 (11th Cir. 1984) (holding that "a defendant may not waive his presence in a capital case.")

The failure to require petitioner's presence resulted in a fundamentally

unfair trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Since these constitutional errors occurred during guilt phase, reversal of petitioner's conviction is mandated.

The California Supreme Court has explained that under its law, a criminal defendant may not be excused from testimony during a capital trial:

> Statutory error is another matter. §977, subdivision (b)(1), states in pertinent part that "[i]n all cases in which a felony is charged, the accused *shall* be present" at various times during the process, including "during those portions of the trial when evidence is taken before the trier of fact . . . ." (Italics added.) That subdivision further provides that "[t]he accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present . . . ." §1043 further provides that a felony defendant "shall be personally present at trial," (*id.*, subd. (a)), but that the trial may continue in a defendant's absence if (1) defendant persists in disruptive behavior after being warned (*id.*, subd. (b)(1)); (2) defendant is voluntarily absent in "[a]ny prosecution for an offense **which is not punishable by death**" (*id.*, subd. (b)(2)); and (3) if a defendant has waived his rights in accordance with §977 (*id.*, subd. (d), italics added). Thus, when read together, sections 977 and 1043 permit a capital defendant to be absent from the courtroom only on two occasions: (1) when he has been removed by the court for disruptive behavior under §1043, subdivision (b)(1), and (2) when he voluntarily waives his rights pursuant to §977, subdivision (b)(1). However, §977, subdivision (b)(1), the subdivision that authorizes waiver for felony defendants, expressly provides for situations in which the defendant cannot waive his right to be present, including during the taking of evidence before the trier of fact. **§1043, subdivision (b)(2), further makes clear that its broad "voluntary" exception to the requirement that felony defendants be present at trial does not apply to capital**

> **defendants**. Thus the trial court, by permitting a nondisruptive capital defendant to be absent during the taking of evidence, committed error under sections 977 and 1043. . . .
>
> **We are now persuaded by the plain meaning of the statute that a capital defendant may not voluntarily waive his right to be present during the proceedings listed in §977, including those portions of the trial in which evidence is taken, and that he may not be removed from the courtroom unless he has been disruptive or threatens to be disruptive.** The Legislature evidently intended that a capital defendant's right to voluntarily waive his right to be present be severely restricted. Of course, we will generally defer to the trial court in determining when a defendant has been disruptive or when further disruption may be reasonably anticipated. (See *People v. Price*, *supra*, 1 Cal. 4th at pp. 405-406.) The trial court's ability to remove a disruptive or potentially disruptive defendant follows not only from §1043, subdivision (b)(1), but also from the trial court's inherent power to establish order in its courtroom. (See Code Civ. Proc., §§1209 [trial court has the power to sanction various acts of contempt of court].) In the present case, however, the trial court did not remove defendant to prevent disruption, nor does the record reveal that defendant was engaging in disruptive behavior. We therefore conclude that the trial court erred, under sections 977 and 1043, in granting defendant's request to absent himself during the taking of evidence.

People v. Jackson, 13 Cal. 4th 1164, 1209-1211 (1996) (emphasis added). *Jackson* recognizes that it is error to allow a defendant to be excused while testimony is taken. In this case, it violated due process for the trial court to arbitrarily decide not to follow statutory guarantees. *See, e.g., Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Vitek v. Jones*, 445 U.S. 480, 488-89

(1980).[16]

The testimony of Weaver and Woodard was critical in this case. It was Weaver's testimony which placed appellant at the Comp USA robbery scene. The grand jury sought to indict Weaver for his role in that crime. His grant of immunity was a critical portion of the trial considering Weaver's role in the crime. Woodard's testimony was similarly important. It was her testimony which supported the inference that the Comp USA robbery had been planned for a considerable time in advance. She placed him at the scene of the crime of securing a false driver's license in the name of Dena Carey.

Reversal is required because appellee cannot demonstrate that the error

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California is by no means alone in declaring that a defendant's presence is mandatory. Many states do not allow a capital defendant to waive his presence during a capital trial. See Alabama Rule of Criminal Procedure 9.1 (1998); Alaska R. Crim. Proc. 5.1 (1999); *Blackburn v. State*, 31 Ariz. 427, 450 (1927); Ark. Stat. Ann. §§16-89-103 (1997); *State v. Reddick*, 224 Conn. 445, 464-466 (1993); *Gilreath v. State*, 247 Ga. 814, 824 (1981); *State v. Okumura*, 58 Haw. 425, 427 (1977) and *State v. Texidor*, 73 Haw. 97 (1992); State v. Isaac, 261 La. 487, 492 (1972); §§546.030, RSMo 1949 and Missouri Supreme Court Rules 29.02 and 29.03; Hanley v. State, 83 Nev. 461, 466 (1967); *State v. Daniels,* 337 N.C. 243, 257 (1994); *Commonwealth ex rel. Milewski v. Ashe*, 363 Pa. 596 (1950); *State v. Dodd*, 120 Wash.2d 1, 37 fn. 20 (1992) (Utter and Smith, dissenting) (citing cases); W. Va. R.Cr.P., Rule 43 (1998)(claiming it follows Federal Rule of Criminal Procedure 43, which has been interpreted as prohibiting the absence of capital defendants)

was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). The defense never got a transcript of the proceedings, and they have yet to be located during the appeals process. Moreover, the prosecutor did not provide discovery on these issues as required by *Brady v. Maryland* (1963) 373 U.S. 83 and *People v. Westmoreland* (1976) 58 Cal.App.3d 32.

Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 22

APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE ADMISSION OF ARDELL WILLIAMS' STATEMENTS

Ardell Williams was one of the prosecution's lead witnesses, and the admission of her statements violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. She gave several statements to District Attorney's Office Investigator Frank Grasso. (RT 14156) She also testified before a grand jury in September, 1992. (Grand Jury RT 20). In her testimony and statements, she claimed to have been present while appellant, along with his brother Eric Clark and Damian Wilson, observed the closing procedures of the Comp USA store in Fountain Valley. (Grand Jury RT 38-39). She also claimed that she was told that the store would be their next target. (Grand Jury RT 33). She claimed that later, Eric Clark told her that the crime had occurred and that things had gone badly. (Grand Jury RT 58-59).

Prior to allegedly viewing the casing of the Comp USA store in Fountain Valley, Ms. Williams had been charged in two prior felonies. First, she was arrested for fraud while employed as a cashier at a computer store in Torrance. (RT 2337) She allowed alleged shoppers to walk out of the store with computers without paying for them. She was arrested, placed on probation and ordered to pay restitution of approximately $14,000. (RT 2331)

On another occasion, Ms. Williams and appellant went to the cashier's window at the Mirage Hotel in Las Vegas and attempted to cash stolen traveler's check. (RT 2310). Ms. Williams allegedly used fake identification supplied by appellant in an effort to cash the checks. (RT 2500). Both were arrested. (RT 2495). Ms. Williams ultimately pled guilty and was sentenced to probation. (RT 2310) Appellant was sentenced to state prison. These incidents demonstrated that Ardell Williams was generally not trustworthy or a credible witness.

Evidence regarding Ardell Williams statements and testimony came before the jury on numerous occasions. FBI Agent Todd Holliday testified about the statements Ardell Williams made to him. (RT 9083-9108, 9127-9199, 10091-10094, 14435-14498). Frank Grasso testified about his interviews with Ardell Williams. (RT 8625-8628, 8633-8639, 8662-8674, 8690-8699, 8797-8813, 8820-8845). Her grand jury testimony was read, in question and answer form, to the jury. (RT 8731-8796). She didn't testify before appellant's jury because she was killed. The jury was thus allowed to consider a significant amount of testimonial hearsay.

California Evidence Code § 1350(a) provides that evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness in a criminal proceeding charging a

serious felony if:

> (1) there is clear and convincing evidence that the declarant's unavailability was knowingly caused or aided by the party against whom the statement is offered for the purpose of preventing the prosecution of the party and is the result of death by homicide or kidnapping of the declarant;
>
> (2) there is no evidence that the unavailability was caused or aided by the party offering the statement;
>
> (3) the statement must be memorialized in a tape recording made by a law enforcement official, or in a writing prepared by a law enforcement official and signed by the declarant and notarized in the presence of that official prior to the declarant's death;
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> (4) the circumstances surrounding the statement indicate its trustworthiness and lack of inducement, threat or coercion;
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> (5) the statement must be relevant to the issues to be tried; and
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> (6) the statement must be corroborated by other evidence tending to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged.

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."[17] The United States Supreme Court has recently upheld the critical value of confrontation and cross-examination, and held that confrontation under the Sixth Amendment cannot be satisfied by a finding that hearsay evidence is "reliable." *Crawford v. Washington* (2004)

17

The Confrontation Clause is applicable to the States through the Fourteenth Amendment. *Pointer v. Texas* (1965) 380, U.S. 400, 403-405; *Davis v. Alaska* (1974) 415 U.S. 208, 315.

124 S.Ct. 1354. The right of confrontation and cross-examination is deeply rooted in our legal culture. *Coy v. Iowa* (1988) 487 U.S. 1012, 1015-1016. "There are few subjects ... upon which [the Supreme Court] and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas, supra* 380 U.S. at 405. "A major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." *Id.* at 406-407.

The right to confrontation is critical in promoting reliability in criminal trials because it:

> (1) ensures that the witness will give his statements under oath–thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. Green (1970) 399 U.S. 149, 158.

Although the hearsay rules and the Confrontation Clause "stem from the same root ... the two are not equivalent." *Dutton v. Evans* (1970) 400 U.S. 74, 86. The Confrontation Clause may bar the admission of some evidence

that would otherwise be admissible under an exception to the hearsay rule. *California v. Green, supra*, 399 U.S. at 155-156; *Bruton v. United States* (1968) 391 U.S. 123.

In *Crawford v. Washington*, 124 S.Ct. 1354 (2004), the United States Supreme Court revisited the Confrontation Clause and it's relation to hearsay evidence. There, the Court one again rejected "the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." *Crawford, supra*, at 1364 (citing 3 Wigmore § 1397, at 101; *Dutton v. Evans,* 400 U.S. 74, 94 (1970) (Harlan, J., concurring in result)).

The Court stated:

> The text of the Confrontation Clause ... applies to "witnesses" against the accused– in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

Id. at 1364. The Court explained, "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard."

Id. The Court added, "In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Id.* at 1365.[18]

The Court added:

> the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.

Crawford, supra, at 1365. Appellant had no opportunity to cross-examine Ardell Williams prior to trial, as her only previous testimony had been given before the grand jury, which appellant had been excluded from viewing.

18

The Court explained that it used:

> the term "interrogation" in its colloquial, rather than any technical legal, sense. Cf. *Rhode Island v. Innis,* 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case. Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.

Crawford, supra, at 1365, fn. 4. The questioning of Ardell Williams by law enforcement was testimonial for the same reasons as that addressed in *Crawford*.

After a lengthy discussion of past precedent, the Court concluded:

> Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.

Crawford, supra, at 1369.

The *Crawford* Court rejected several of its past cases regarding the Confrontation Clause, including *Ohio v. Roberts* (1980) 448 U.S. 66:

> Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U.S., at 66. This test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Crawford, supra, at 1369.

The *Crawford* Court specifically rejected reliability as a method for determining if testimonial hearsay should be allowed:

> Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative. See, *e.g., People v. Farrell,* 34

> P.3d 401, 406-407 (Colo.2001) (eight-factor test). Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court held a statement more reliable because its inculpation of the defendant was "detailed," *id.*, at 407, while the Fourth Circuit found a statement more reliable because the portion implicating another was "fleeting," *United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 245 (C.A.4 2001). The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), see *Nowlin v. Commonwealth,* 40 Va.App. 327, 335-338, 579 S.E.2d 367, 371-372 (2003), while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect, see *State v. Bintz,* 2002 WI App. 204, ¶ 13, 257 Wis.2d 177, 187, 650 N.W.2d 913, 918. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given "immediately after" the events at issue, *Farrell, supra,* at 407, while that same court, in another case, found a statement more reliable because two years had elapsed, *Stevens v. People,* 29 P.3d 305, 316 (Colo.2001).

Crawford, supra, at 1371. The Court added, "The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.*

The *Crawford* Court also rejected any notion that the fact that testimony was given under oath would allow its admission:

> To add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial. As noted earlier, one court

> relied on the fact that the witness's statement was made to police while in custody on pending charges--the theory being that this made the statement more clearly against penal interest and thus more reliable. *Nowlin, supra,* at 335-338, 579 S.E.2d, at 371-372. Other courts routinely rely on the fact that a prior statement is given under oath in judicial proceedings. *E.g., Gallego, supra,* at 168 (plea allocution); *Papajohn, supra,* at 1120 (grand jury testimony). That inculpating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands.

Id. at 1372. Thus, Ardell Williams' testimony before the Grand Jury was inadmissible pursuant to the Confrontation Clause.

The *Crawford* Court held that "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 1374. The Court concluded:

> In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

Id. at 1374. An identical ruling is called for here, where Ardell Williams' testimonial statements were admitted against appellant, despite the fact that he

had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment.

Trial counsel recognized the devastating effect of allowing these statements into evidence. The prosecutor first sought to introduce them under §1350. Then, seeing a more beneficial course of action, the prosecutor withdrew that request and instead sought to bring the statements in not for a hearsay purpose, but as non-hearsay to prove the corpus of the special circumstance of killing a witness. As discussed elsewhere, this reasoning was specious, as it was unnecessary to introduce her actual statements to prove that she was a witness. If that was all the prosecutor sought to do, he could have introduced the fact that she gave statements to law enforcement and testified before the grand jury without introducing the substance of those statements.

Trial counsel explained that if the statements came in, the court might as well direct a verdict of guilt against appellant. Counsel explained that all the limiting instructions in the world would not prevent the jury from considering these statements for truth and convicting appellant based on them. (RT 1906-1910). Counsel explained that the prosecutor's action demonstrated that they really didn't care under what theory the evidence was admitted so long as the jury heard it. The prosecutor's efforts to admit this evidence under any theory showed that he knew that once the jury heard it, the case was

effectively over.

A.
Ardell Williams' Hearsay Statements Do Not Fall Within a Firmly Rooted Hearsay Exception and Do Not Bear Adequate Indicia of Reliability

Ardell Williams' hearsay statements do not possess the particularized guarantees of trustworthiness required to withstand Confrontation Clause scrutiny. They were not offered under a firmly rooted hearsay exception. Instead, they were offered under Evid. Code §1350, a hearsay exception codified in 1985 lacking the requisite "imprimatur of judicial and legislative experience." Because she was an accomplice, her statements to law enforcement and the grand jury were not of such character that cross-examination of Ms. Williams would have been of marginal utility.

Under *Crawford v. Washington, supra*, Williams' testimony to the grand jury and statements to law enforcement would both be considered hearsay which required the opportunity to examine the declarant in court before the jury. (*Id.* [discussing "*ex parte* in-court testimony or its functional equivalent" and "statements taken by police officers in the course of interrogations" as both being subject to the limitations of the Sixth Amendment Confrontation Clause]). This "testimony" was never subject to cross-examination by appellant, as mandated by *Crawford v. Washington*.

There was no credible evidence of Ardell Williams' character for truthfulness and honesty. All evidence indicated that she had a history of dishonesty, including her conviction on charges of theft from Software House, her guilty plea in Las Vegas on the forged check charges, and her discharge from her job at Disney Stores because of her assistance to friends in leaving the store with merchandise they had not paid for.

Neither her grand jury testimony nor her statements to law enforcement were subject to cross-examination. Appellant never had the opportunity to question Ms. Williams regarding her ability to perceive events accurately, her motives in making statements against appellant, or any inducements offered by law enforcement.

Ms. Williams had ample motive to inculpate appellant. She could have been charged as an accomplice in the Comp USA robbery. She had been allegedly present during the "casing" of the Comp USA, and had allegedly been involved with appellant in other felonies. (Grand Jury RT 38-39) She had considerable incentive to lie to the grand jury and law enforcement regarding her involvement and implicate appellant in order to protect herself.

The status of Ms. Williams' Nevada case also casts doubt on her credibility. She could have been charged with 86 counts of felony passing of stolen and forged checks. Instead, she ultimately pled guilty to 1 misdemeanor

count. (RT 2045) Moreover, according to law enforcement, she only told FBI Agent Holliday about the Comp USA robbery and killing less than two weeks before her sentencing hearing in Las Vegas. (RT 2072, 2518) According to law enforcement, she knew about that crime for months, but for some unexplained reason, only told them of it about 10 days before sentencing. She did so despite the fact that she had been implicating appellant in other crimes for several months. (RT 2065-2069)

In sum, cross-examination of Ardell Williams would have been of maximal utility, given her lack of credibility and obvious motive to inculpate appellant. Information about deals she may have received and her hopes or expectations of leniency, either in exchange for grand jury testimony or cooperation with law enforcement, would have been crucial.

Her interviews with Investigator Grasso were even less trustworthy. They were not under oath, and obviously there was no cross-examination. She had the same motive to inculpate defendant as with her grand jury. She had the motive to lie to minimize her involvement and inculpate appellant, since she was talking to the DA's Office which could have brought charges against her on the charges she was discussing. As an accomplice to the crime, she obviously was strongly motivated to implicate appellant.

B.
Section 1350 is not a Firmly Rooted Hearsay Exception

The mere fact that a statement is proffered under a codified hearsay exception does not suffice to meet the "particularized guarantee of trustworthiness" standard. There is a difference between a codified hearsay exception and a firmly rooted hearsay exception. Only the latter passes the Confrontation Clause standard. *Idaho v. Wright, supra.*

While § 1350 is codified, it is not firmly rooted. It was not codified until 1985. *See* Stats. 1985, c. 783 § 1. It was only 11 years old at the time of appellant's trial. It lacks the historical roots of other exception which have existed over time. *See, e.g., People v. Brawley* (1969) 1 Cal. 3d 277, 286-291 (citing cases and discussing exceptions).

C.
The Rationale Behind Section 1350 is Inconsistent with those Behind Other Firmly Rooted Hearsay Exceptions Which are Based on Circumstances Indicating Reliability

The Supreme Court has instructed courts to focus only on the "relevant circumstances" that "surround the making of the statement and that render the declarant particularly worthy of belief." The basis of firmly rooted exceptions such as excited utterances and dying declarations are that declarants are unlikely to fabricate their statements under those circumstances.

Section 1350 has no relation to the likely reliability of the statements made. Even if a declarant's unavailability was caused by a defendant, that does not mean that the statements are true. It is as likely that the statements are false, and it is for that reason that the defendant causes the witness's unavailability.

And in this case in particular, it was problematic to use this exception. The prosecution was allowed to introduce otherwise inadmissible statements of Ardell Williams under § 1350 on the theory that appellant had made her unavailable in order to prove that appellant made her unavailable. The truth was assumed in order to prove that truth.

D.
Section 1350 Does Not Preserve a Defendant's Right to Face to Face Confrontation

In *Maryland v. Craig* (1990), 497 U.S. 836, the Supreme Court upheld the use of a Maryland statutory procedure permitting a child to give testimony via closed circuit television in a child abuse case. The statutory scheme allowed closed circuit testimony if it was determined that courtroom testimony would result in the child suffering serious emotional distress, such that he could not reasonably communicate. *Id.* at 840. The procedure provided that the prosecutor and the defense counsel withdraw to another room where the

child is examined and cross-examined. The judge, jury and the defendant remained in the courtroom and could view the witness's demeanor and body by video monitor. *Id* at 840-841. The defendant remained in electronic communication with counsel, and objections could be made and ruled on. *Id.* The Supreme Court held that this procedure did not violate the Confrontation Clause since the defendant retained the full opportunity for contemporaneous cross-examination and "all of the other elements of the confrontation right" including the oath and observation of the witness's demeanor. *Id.* at 851. Thus, the Confrontation Clause does require these steps.

Section 1350 does not preserve these various elements of the confrontation right. There is no opportunity for cross-examination, the declarant was not necessarily under oath and the judge, jury, and the defendant and his counsel and the jury cannot view the witness's demeanor or body language. The complete absence of these elements rendered Ardell Williams's statements unreliable.

E.
Section 1350 Violates the Confrontation Clause in Permitting Corroborating Evidence to Determine Whether Hearsay Statements are Admissible

Section 1350(a)(6) provides that a statement is admissible under the conditions laid out in paragraphs (1) through (5) if it is established by

corroborating evidence tending to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged. *See* § 1350(a)(6).

Under *Idaho v. Wright, supra*, the trustworthiness of such evidence cannot be established by corroborative evidence. Instead, only circumstances surrounding the making of the statement may be considered in rebutting the presumption that a hearsay statement is unreliable and inadmissible. Because §1350 allows using corroborative evidence, it fails to pass the hurdle of the Confrontation Clause.

F.

Even if Section 1350 Satisfied the Confrontation Clause, Ardell Williams's Statements Did Not Satisfy That Section

Under section 1350(a)(6), the hearsay statements at issue may be corroborated by other evidence in determining whether they are admissible. Under Cal. Penal Code § 1111, a "conviction cannot be had upon the testimony of an accomplice unless it is corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

This language is largely similar to that of § 1350(a)(6). Thus, it appears

that the Penal Code's prohibition against corroboration by accomplice testimony applies equally to section 1350(a)(6). This suggestion is buttressed here by the fact that corroborating testimony would be offered to support hearsay statements sought to be introduced under a non-firmly rooted hearsay exception.

Under Cal Pen. Code § 1111, an accomplice's testimony must be corroborated by independent evidence which, without aid or assistance from accomplice's testimony, tends to connect the defendant with the crime charged. *People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1206. Corroborative evidence must come in by the means of the testimony of a non-accomplice witness. *People v. Fauber* (1992) 2 Cal.4th 792, 834.

"Accomplice" is statutorily defined as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Cal. Pen. Code § 1111. The statutory definition of "accomplice" in criminal cases encompasses all principals to the crime. *People v. Stankewitz* (1990) 51 Cal.3d 72, 90; *People v. Tweklsbury* (1976) 15 Cal.3d 953, 960. This includes aiders and abettors and conspirators. *People v. Gordon* (1973) 10 Cal.3d 460, 468; *People v. Stankewitz, supra*, 51 Cal.3d at 90.

Under the rule of vicarious criminal liability, a person who conspires to commit or aids and abets another in the commission of an offense is guilty not only of that offense, but also of any reasonably foreseeable offense committed by a coconspirator or by the person aided and abetted. *People v. Croy* (1985) 41 Cal.3d 1, 12 & fn. 5

1.
Ardell Williams Hearsay Statements Could Not Be Corroborated by the Accomplice Testimony of Matthew Weaver

There was sufficient evidence that Matthew Weaver aided and abetted in the commission of the Comp USA robbery for which appellant was tried. The evidence supports the inference that Mr. Weaver shared the alleged criminal purpose and/or intended to commit or facilitate the crime. Specifically, Matt Weaver showed a consciousness of guilt with his continued perjurious testimony. (RT 8099-8101) He was never able to account for an hour long period between the time he claims they arrived at 9:00 pm and the time the shooting occurred around 10:30 pm. (RT 8106) His testimony was at odds with that of Officer Rakitis, who had no motive to lie. Officer Rakitis stated there were only two people in the BMW, both of whom were black. (Muni RT 444-445). Weaver is white. A red shirt and pair of gloves were found in the U-Haul truck which could not be matched to any of the others

charged with the crime. (RT 10839). The logical inference is that the red shirt, which was designed to look like the red shirts worn by Comp USA employees, and the gloves were for Matt Weaver, and that he spent the hour period waiting in the U-Haul, ready to load the computers.

The shooting which resulted at the Comp USA store was a natural and probable consequence of any illegal activity Mr. Weaver aided. Matt Weaver was an accomplice, and his testimony could not provide corroboration under § 1350.

At a minimum, the jury should have been instructed that , if they found Weaver was an accomplice, they could not use his testimony to corroborate Ardell.

2.
Ardell Williams Hearsay Statements Could Not Be Corroborated by the Accomplice Testimony of Jeanette Moore

Jeanette Moore was also an accomplice in the Comp USA robbery, and as such, her testimony could not be used to corroborate Ardell Williams's statements.

As the trial judge said on several occasions, Jeanette Moore's testimony was simply not worthy of belief, and anything she said which could not be corroborated was unworthy of belief. (See RT 13433, 13612). She regularly

perjured herself, and actually required two grants of immunity in order to secure her testimony because of her extensive perjury. (RT 16632).

Equally important, however, was the fact that Moore was an accomplice in the Comp USA robbery. She testified that she went to the Department of Motor Vehicles with appellant in order to get a license in the name of "Dena Carey." (Muni RT 242, 244). Once the license was obtained, she allowed it to be sent to appellant. Then, she testified that she was contacted by appellant and told that appellant's brother would take her to a U-Haul office to rent a truck. (Muni RT 253). The following day, she did so with Eric Clark, and later received $100 for her efforts. (Muni RT 256, 262). Additionally, it was later proved that she used the license in order to apply for a credit application at Circuit City and got a television, which she claimed she did with appellant (RT 7758). She also made numerous purchases of clothes using Dena Carey's license and credit. (Muni RT840-841).

As a blatantly unbelievable witness, and an accomplice in the Comp USA robbery, Jeanette Moore's testimony could not be used to corroborate Ardell Williams's statements. Trial counsel also objected to the evidence under Evid. Code §352, and as the evidence lacked legal relevance, it should have been excluded.

The prosecutor understood the importance of the evidence. He

conceded that if the admission of the evidence was erroneous under the law, then the conviction and sentence would have to be reversed. (RT 1919-1925). The prosecutor called an expert to testify in order to explain to the jury how critical the evidence was. The trial court agreed that the evidence was critical, and questioned whether it would be possible for any juror to compartmentalize the evidence. (RT 1934). In argument, the prosecutor argued extensively to the jury that Williams' statements were true. (RT 10847-10859). If the statements were truly only admitted for a nonhearsy purpose, there was no reason to argue so extensively that the statements were true. The prosecutor committed misconduct in arguing this theory, and it prejudiced appellant before the jury.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth

Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 23
THE ADMISSION OF ARDELL WILLIAMS'S STATEMENTS AS NON-HEARSAY VIOLATED APPELLANT'S RIGHTS TO CONFRONTATION, DUE PROCESS, AND A RELIABLE DETERMINATION OF GUILT AND PENALTY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The prosecution also offered Ardell Williams' statements under the alleged non-hearsay purpose to prove that she was a witness against appellant, as alleged in the special circumstance under § 190.2(a)(10). This was a thinly-veiled effort to introduce the statements for their truth.

The prosecution wanted to admit in their entirety Ardell Williams's statement for the non-hearsay purpose of illustrating motive for her murder and retaliation for the statements she made. Specifically, there were two taped police interviews on April 1, 1992, one on May 30, 1992, and her grand jury testimony. (RT 1901). These statements included the facts that appellant took Ardell Williams to case Comp USA before the robbery, that Eric Clark told Ardell after the robbery that it went bad and a woman was killed, and that appellant was involved in other criminal activity, including activity involving computers.

Appellant argued that it was completely disingenuous for the prosecutor to try to jettison his arguments for admissibility under Evid. Code §1350 and pursue admissibility under a non-hearsay purpose. Counsel argued that in fact,

the prosecutor only wanted the statements in front of the jury, regardless of the purpose for their admissibility. (RT 1906).

Counsel argued that by admitting the statements, the Court was rendering the trial largely irrelevant:

> ...just make a judicial finding that he is guilty, because no jury is going to be able to hear the statements to prove the motive in the Williams 187 but not also listen to them for the truth of the Comp USA count.

(RT 1906-1907). Appellant argued that the counts needed to be severed for precisely this reason. (RT 1910). (*See* Claims 9-10, re severance). Counsel argued that some evidence was too difficult for a jury to compartmentalize, which was why, for example, a co-defendant's inculpatory statements are sanitized as to the other defendant. (RT 1909). Counsel argued that even if the court instructed the jury to not consider the evidence for its truth regarding Comp USA right after the evidence comes in, it would later instruct the jury to consider it for evidence of the truth of the Williams murder. Counsel argued that no jury could do this. (RT 1911). Counsel argued that this would become a trial of hearsay, because every time counsel made a hearsay objection, the prosecutor would argue some non-hearsay purpose. (RT 1913). The trial court allowed the statements for the nonhearsay purpose of motive and as evidence of the corpus of the witness killing special circumstance. (RT 2600-2604).

The prosecutor earlier stated:

> We agree with Mr. Early, this is not harmless error. If you are wrong, and offer these statements in for a non-hearsay purpose, the case is getting reversed, all right. I'm up front on that. This is not harmless error. This is the gut of the people's case.

(RT 1919). The prosecutor was correct– this evidence was the heart of his case, and as it was error, it was not harmless and reversal is required.

Ms. Williams' statements could not be used for a nonhearsay purpose to prove she was a witness to a crime. If so, then the statements would be introduced to prove the truth of the matter asserted– that she witnessed what she said she witnessed. Her statements regarding what appellant and others allegedly said or did only made her a witness to the crime if one believed that she was telling the truth about what they said and did.

If the prosecution merely sought to show that she was a potential witness, they would only have been required to prove that she testified before the grand jury and/or gave statements to law enforcement. In effect, what the prosecution was allowed to do was to bootstrap via Penal Code § 190(a)(10) by using Ardell Williams's hearsay statements themselves to, in effect, prove their own truth.

In *People v. Edelbacher* (1989) 47 Cal.3d 983, the Court agreed that testimony regarding a purported witness's testimony against the defendant was

properly admitted to establish motive and to show § 190.2(a)(10). However, the Court did so after finding little prejudice because no evidence regarding the circumstances of the alleged crime witnessed was admitted. The prejudice analysis in appellant's case is completely different however, since the Court allowed the substance of Ms. Williams's testimony and statements to come in. (RT 2917-2923; 8604-8608). Doing so violated the holding of *Edelbacher*.

Moreover, under *Edelbacher*, there was no "underlying crime," since the defendant was actually acquitted of the alleged crime about which the witness provided testimony. Since the defendant was acquitted of the crime, the prosecution did not have to prove that the victim was a witness to the crime (i.e., that the events occurred as the witness claims). It is the fact that the witness testified, and not the substance of the testimony, which mattered there and matters here.

Out of court statements, when offered as nonhearsay, may only be admitted for a limited purpose. In particular, courts emphasize that victim statements raise serious worries. In *People v. Brown* (1984) 8 Cal.4th 746, this Court held that a child witness's hearsay statements disclosing alleged incidents of molestation were properly admitted for nonhearsay purposes as relevant to the issue of whether molestation occurred. Therefore, the Court found them admissible regardless of whether the statements would have

qualified as a fresh complaint.

The Court said that out of court statements may be admitted for the limited, nonhearsay purpose of showing the fact of and circumstances surrounding the victim's disclosure of the assault to others, whenever those facts and circumstances are relevant to the issue of whether the offense occurred– so long at its probative value outweighs its prejudicial effect under § 352. The Court commented that evidence of the victim's conduct following the alleged commission of the crime, including the circumstances under which she did or did not promptly report the crime, could help place the incident in context. In such cases, the evidence could be considered relevant. *Id.*

But the Court stated that only the fact that a complaint was made, and the circumstances surrounding its making, were admissible. Admission of details of the statements themselves to prove the truth of the matter asserted would still violate the hearsay rule. *Id.* (citing *People v. Wooden* (1978) 411 N.Y.S.2d 759 [holding it was error to allow a friend to recite in detail a recounting of the theft as told to him by the victim, in the absence of any claim by the defendant that the victim recently had fabricated her version of the incident]).

In *People v. Brown*, this Court held that evidence of the fact of, and the circumstances surrounding, an alleged victim's disclosure of the offense may

be admitted in a criminal trial for limited nonhearsay purposes, provided the evidence meets the ordinary standard of relevance. That is, evidence about the fact of and the circumstances surrounding the making of the statement may be admitted if it is relevant. Relevance must be shown in every case. The Court emphasized that the evidence remains subject to exclusion under § 352 if the court determines that the probative value of the evidence is outweighed by the risk that the jury will consider it for impermissible hearsay purposes, or that the evidence will otherwise create a danger of undue prejudice or will mislead or confuse the jury.

Appellant's jury was misled, and only considered the evidence of Ardell Williams's statements for an impermissible hearsay purpose. The prosecutor invited them to do so when he argued that she was killed because her testimony and statements could not be impeached. (RT 10863-10869). If she couldn't be impeached, the only conclusion was that she must have been truthful. A limiting instruction was unlikely to clear up the confusion, considering the length of time consumed by her testimony and statements. A jury could not heed it. The jury was unlikely to listen to the evidence in its entirety and then ignore its substance. If the jury considered the substance of the statements, then it was considering them for truth in violation of the

hearsay rule.[19]

> Because of these concerns, the Court concluded:
>
> > Indeed, in the light of the narrow purpose of its admission, evidence of the victim's report of disclosure of the alleged offense should be limited to the fact of the making of the complaint and other circumstances material to this limited purpose. Caution in this regard is particularly important because, if the details of the victim's extrajudicial complaint are admitted into evidence, even with a proper limiting instruction, a jury may well find it difficult not to view these details as tending to prove the truth of the underlying charge of sexual assault (see Jefferson, Cal.Evidence Benchbook, op. cit. *Supra*, § 1.1, p. 12), thereby converting the victim's statement into a hearsay assertion (4 Wigmore, op. cit. *supra*, § 1136, p. 307).

People v. Brown, supra.

As trial counsel argued (RT 1585-1604), the prosecutor was able to extract statements from Ardell Williams under circumstances which did not comport with statutory authority. Under Penal Code § 1335(a), conditional exams are only authorized in cases "other than those for which the punishment may be death" and only if adequately represented by counsel with notice. As this is a capital case, the prosecution could not have conducted a conditional

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In *People v. Baeske* (1976) 58 Cal.App.3d 775, the defendant wanted to introduce a copy of a police report of a telephone call received by police from a neighbor of the victim shortly after a robbery. The Court held hat the report could not be offered for the nonhearsay purpose of showing that a report of another license plate number had been made. The Court stated that it was really being offered for its truth, namely that another car had been present. By introducing the substance of Ardell Williams's statements and testimony, the prosecution did the same thing.

exam of Ardell Williams under oath and subject to cross-examination by defense counsel. To allow the admission of unsworn statements made to law enforcement and grand jury testimony not subject to cross-examination was thus clearly erroneous. Moreover, at the time of some of Ardell Williams's statements, appellant was not represented by counsel in this case, since the case was not charged.[20]

The prohibition against conditional exams in death penalty cases remains. In *Dalton v. Superior Court* (1993) 19 Cal.App.4th 1506, the defendants were charged with capital murder. The Superior Court authorized the prosecution to conduct a conditional examination of a terminally ill witness who had received a threatening note. The Court of Appeal issued a writ of mandate vacating the Superior Court's order and entering a new order denying the application. The Court held that the prohibition against conditional examination of witnesses in death penalty cases remained, based on the century-old prohibition on such examinations and the absence in legislative history of reason to depart from the prohibition. *Dalton* relied on *Lee v. Superior Court* (1976) 58 Cal.App.3d 851,which had held that the predecessor

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Section § 1335(b) would not allow for the conditional exam of Ardell Williams, as defendant's counsel had not been informed of the exam at the time they occurred. Moreover, at the time of the "exams," the prosecution did not believe that the life of Ardell Williams was in jeopardy.

of §1335(a) unequivocally prohibited conditional examinations in capital cases. *Dalton* stated that the logical reading of §1335 must be interpreted as prohibiting conditional examinations in any case in which the prosecution seeks death.

Trial counsel also objected to the evidence under Evid. Code §352, and as the evidence lacked legal relevance, it should have been excluded. If the evidence were truly admitted solely to establish that Ardell Williams was a witness, that status could have been presented to the jury in a far less prejudical manner.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S.

578, 584-85).

CLAIM 24
THE ADMISSION OF EVIDENCE SEIZED VIA THE SYSTEMATIC VIOLATION OF APPELLANT'S FOURTH AND SIXTH AMENDMENT RIGHTS REQUIRES REVERSAL

The prosecution sought a protective order from the Court, which was granted, in order to allow them to open appellant's mail and check it for contraband, and also photocopy it for use in this case. The protective order allowed the jail to continue indefinitely this procedure which began on July 20, 1994 with a request from Investigator Grasso. (RT 1634-1635). He also requested that Antoinette Yancey's mail be copied, and it was. (RT 1635) Grasso stated that he was afraid for safety of witnesses, and that the cover was necessary to ensure their continued safety. (RT 1636).

The defense argued that the letters were privileged under the attorney-client privilege, under *Massiah* and under the Fourth Amendment. (RT 1625-1629, 2691). The prosecution gathered mail for forty days after the cover began and received no information about witness manipulation. The defendants were engaged in an authorized use of the mail, and thus had a reasonable expectation of privacy, so as not to have the mail be used as an investigative means in this case. (RT 1629-1633). The Municipal Court Judge allowed a joint defense, so it was reasonable to expect that consultation would be private, as trial counsel argued. (RT 1804).

Two kites prompted the prosecution to seek a protective order– the first was a letter from Clark to Yancey found on June 24, 1994, and the second was a kite found in Clark's cell concerning Alonzo Garrett. (RT 1640). Neither was sent via U.S. Mail. Moreover, the mail cover had been in place for 40 days between July 20 and August 30, and no threats or requests to manufacture evidence had been found. (RT 1935, 1937). Despite no evidence of wrongdoing, there were six repeated requests for mail cover– September 21, 1994, February 8, 1995, April 17, 1995, June 8, 1995, October 16, 1995, and October 25, 1995. (RT 1782). The inital cover and the subsequent requests for it violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

It appears that this exercise was no more than a fishing expedition, and a way to try and gather evidence in this case. The amount of mail copied pursuant to the mail cover exceeded 6,000 pages. (RT 1749). The Sixth Amendment had already attached, and the prosecution should not have been allowed to end-run it in this manner.

The defense also pointed out that in the requests for mail cover, Grasso checked numerous purposes for the cover, including ongoing criminal activity, which amounted to using the cover as an investigative tool in this case. (RT 1795-1797). Such investigation was prohibited under *Massiah* as it amounted

to recording appellant's statements without his knowledge at a time when law enforcement knew he was represented by counsel on the charges they were investigating. The defense argued that under *United States v. Cohen* (S.D.N.Y. 1973) 358 F.Supp. 112 and Cal. Penal Code §2600, the evidence could not be used because appellant's rights while in jail could be deprived only as necessary for security. (RT 1800-1804). Security was not at issue, as this cover was done purely to investigate.

There was abundant time to obtain a warrant to search the mail, particularly considering that the mail cover was renewed six times over a period of many months. The mail cover was a means of investigation, and not a response to any perceived emergency. Pursuing the requirements of the Fourth Amendment narrowly, as we must, the seizure of mail was unconstitutional and requires reversal.

The order from the Court was not issued to justify the mail cover. Instead, the prosecution sought an order, which the Court entered, which stated that the prosecution did not need to discover to the defense materials seized as a result of that cover. The prosecution wanted this order so that the defense would remain unaware of the cover, and that evidence was being seized. The cover amounted to a warrantless search and seizure. (RT 1822-1826).

The Fourth Amendment's Warrant Clause provides the fundamental

check on official invasions of the individual's right to privacy. *E.g., Harris v. United States* (1947) 331 U.S. 145, 195-196 (Jackson, J., dissenting). The United States Supreme Court has tolerated departures from the warrant requirement only when an exigency makes a warrantless search imperative to the safety of the police and of the community. See, *e.g., id.,* at 456 ("We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative"); *Warden v. Hayden,* 387 U.S. 294 (1967) (hot pursuit); *Chimel v. California,* 395 U.S. 752 (1969) (interest in officers' safety justifies search incident to an arrest); *Michigan v. Tyler,* 436 U.S. 499, 509 (1978) ("compelling need for official action and no time to secure a warrant" justifies warrantless entry of burning building).

The prosecution seized more than 6,000 pages of letters pursuant to that order and the mail cover. The prosecution used those letters to demonstrate the personal relationship between Clark and Yancey, in order to support its case that they were conspirators and had motive to kill Ardell Williams. (RT 10870-10875). The admission of this evidence was constitutional error.

The United States Supreme Court has repeatedly held that prisons are not beyond the reach of the Constitution. *Hudson v. Palmer* (1984) 468 U.S.

517, 523. An inmate has a reasonable expectation of privacy in a sealed or partially sealed letter. *United States v. Vallez* 653 F.2d 403, 406 (9th Cir. 1981). Pretrial detainees have residual privacy interests that are protected by the Fourth Amendment. *See United States v. Cohere* (2d Cir. 1986) 796 F.2d 20, 23-24; *United States v. Willoughly* (2d Cir. 1988) 860 F.2d 15, 21.

"[T]he limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved" *Procunier v. Martinez* (1974) 416 U.S. 396, 413. In *Stewart v. Gates* (1978) 450 F.Supp. 583, 585, the Court told Orange County Jail to consider the possibility that absent exceptional circumstances, outgoing mail need not be examined at all and incoming mail should only be checked for contraband.

Here, the Jail ignored that warning. The Jail intercepted, seized, tore open sealed envelopes containing embarrassingly personal communication, xeroxed the letters, replaced the letters in their envelopes and resealed them before sending the mail on its way. The xeroxed copies were given to the prosecutor. These Fourth Amendment violations continued unabated for years and accumulated more than 6,000 pages of discovery.

These seizures were far greater intrusions than necessary to protect any governmental interest involved. They did not serve the legitimate penal

objectives of deterrence of crime through rehabilitation and by confinement in a facility isolated from the rest of society, or the maintenance of internal security within the institution. *Pepperling v. Crest* (9th Cir. 1982) 678 F.2d 787, 790.

The mail cover also intruded upon the joint defense privilege, as discussed above in Claim 7. This privilege had been upheld by the Municipal Court, and thus it was reasonable for the parties to have a reasonable expectation of privacy in their communications with each other. (RT 1804).

Appellant was prejudiced by the admission of these letters. The prosecutor was able to argue that the letter showed an intense personal relationship between Yancey and appellant. (RT 10870-10875). The implication was that intense relationship resulted in Yancey acting as a "vehicle of death" for appellant.

If the prosecution was really concerned with witness safety, then there was no need to try and introduce these letters at all. The true motive became clear when they sought to do so– they wanted to end-run the Sixth Amendment and gain evidence against appellant. The letters seized should have been suppressed in their entirety.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386

U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 25
THE TESTIMONY OF JEANETTE MOORE SHOULD HAVE BEEN EXCLUDED DUE TO OUTRAGEOUS GOVERNMENT CONDUCT WHICH RENDERED THE TESTIMONY UNRELIABLE AND INVOLUNTARY IN VIOLATION OF THE FIFTH, EIGHT AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, DUE PROCESS AND A RELIABLE DETERMINATION OF GUILT AND PENALTY

Jeanette Moore testified at appellant's preliminary hearing as well as at his trial. (Muni RT 176, RT 7636). Her testimony should have been excluded from both proceedings due to the misconduct discussed herein.

Investigator Grasso falsely told Jeanette Moore that her life was in danger. (MUNI RT 286). After he had her arrested in Chandler, Arizona, for a Penal Code §1332 commitment because she failed to appear on a subpoena, he falsely told her that someone involved with appellant had shown up where she had been living and shot up her roommate's house looking for her. He also told her that "they" called her father and left a message on his answering machine that her life was in danger. (MUNI RT 287). She was falsely told by both Chandler Police and Orange County investigators that appellant was involved in the shooting in which some guy came through the residence shooting the place up asking "Where is that bitch at?" (MUNI RT 348; RT 1705). She was kept in protective custody and was told it was because her life was in danger when in reality, it was because she had failed to respond to a

subpoena. (MUNI RT 288,289). This information caused her to fear the defendants, and gave her a motive to lie in order to keep them in jail. (7-21-94 RT 352).

Investigator Grasso repeatedly told Moore that her only option, if she wanted to save herself, was to cooperate with the District Attorney's Office and ensure appellant's conviction. (Muni RT 354). Grasso told her that appellant would kill her if he got out, as he had killed another witness. He guaranteed her safety through the time she cooperated and went to court, which implicitly meant that once she went to court, she should testify in a way which would help her. (MUNI RT 288). He thus offered her the solution to the anxiety and fear he had himself engendered– namely to testify in such a fashion as to ensure that appellant not get out.

The defense argued that the police knew that appellant was not responsible for what happened in Arizona. (RT 2691-2701). The woman whose house Moore was staying in thought her ex-boyfriend, James Heckathorne, was responsible for the events in Arizona. (RT 2691). Grasso put fear into Moore, which led her to conclude that she was in custody for her own protection. (RT 2673-2684). Actually, she was in custody for her failure to appear in court. The end result was that Grasso's subterfuge led to a biased witness. Remarkably, the trial court found no intentional bad faith on the part

of Grasso. (RT 2755).

At trial, she testified that she had received a grant of immunity prior to her testimony, but that her immunity didn't cover any perjury she would give in her testimony. (RT 7640). She testified that she met appellant in 1990-91 through Gary Jackson. Some months later, she had dealings with appellant, and they got a driver's license in the name of "Dena Carey" with Moore's picture on it. She testified that appellant didn't tell her anything about why they got the license, although later she used it to rent a U-Haul truck at appellant's request. (RT 7660). She testified that appellant, accompanied by Warren Canada, paid her $100 the following day. While her testimony minimized her role, her status as an accomplice should have been determined by the trier of fact. She also testified that she moved to Arizona, and later received calls and money from "Nina" who identified herself as appellant's wife. (RT 7699).

It is axiomatic that "the state should not profit by its own wrong" by seeking to use illegally obtained evidence. *Emslie v. State Bar* (1974) 11 Cal.3d 210, 226. One important consideration is the extent to which exclusion would deter, or non-exclusion would encourage, further illegal acts by the state. *United States v. Calandra* (1974) 414 U.S. 338; *People v. Cahan* (1955) 44 Cal.2d 434, 445, 449. The deterrence argument for exclusion is

most compelling when the agency in question has an investigative function and investigative personnel of that agency participated in the illegal activity for the purpose of providing information to support proceedings against the suspect. Where an agent uses falsehood and fear to induce a witness to testify against a defendant, exclusion is necessary to prevent the prosecution from profiting from its wrong. Such is the case here.

In *People v. Wesley* (1990) 224 Cal.App.3d 1130, 1142 the Court discussed "outrageous governmental conduct" and explained that "sufficiently gross police misconduct could conceivably lead to a finding that conviction of the accused would violate his constitutional right to due process of law." *Id.* (citing cases). In *People v. Thoi* (1989) 213 Cal.App.3d 689, fn. 2, the Court stated:

> "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction,..." *United States v. Russell, supra*, 411 U.S. at pp. 431-432, 93 S.Ct. at pp. 1642-1643).

Today is that day.

Various types of governmental and judicial interference have been found to deprive the criminal defendant of the right to a fair trial. *See, e.g., Webb v. Texas*, 409 U.S. 95, 34 L. Ed. 2d 330, 93 S. Ct. 351 (1972) (per curiam) (witness effectively driven off witness stand by remarks of trial judge

regarding the penalties for perjury); *United States v. Smith*, 156 U.S. App. D.C. 66, 478 F.2d 976 (D.C. Cir. 1973) (witness told by prosecutor that if he testified as indicated by other testimony he could or would be prosecuted for carrying a concealed weapon, obstructing justice, and as an accessory to murder); *United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982) (U.S. Attorney telephoned defendant's girlfriend's attorney to advise him to remind his client that if she testified at trial she could be reindicted on dropped charges); *United States v. Goodwin*, 625 F.2d 693 (5th Cir. 1980) (witnesses intimidated by threats of prison officials conditioned upon whether the witnesses testified at trial); *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979) (witness threatened by FBI agent with retaliation in other cases pending against him); *United States v. Henricksen*, 564 F.2d 197 (5th Cir. 1977) (per curiam) (witness intimidated by terms of his plea bargain in another case); *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973) (per curiam) (witness told by secret service agent during recess of trial that he would be prosecuted for a felony if he testified); *Berg v. Morris*, 483 F. Supp. 179 (E.D. Cal. 1980) (trial court coerced witness into giving inculpatory evidence by twice warning him that his probation would be revoked and perjury charges filed if the truth were not told).

Here, Moore's testimony was suspect because she was also an

accomplice in the Comp USA robbery. Testimony given by an accomplice witness is inadmissible if the witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion. *People v. Medina* (1974) 41 Cal.App.3d 438, 455. Here, her immunity agreement, which required that Moore testify truthfully, impliedly required that she testified in the manner the prosecution wanted. The immunity agreement ensured that Moore would testify to what they had coerced her into saying initially. Her testimony was thus tainted by the witness's self-interest and was inadmissible. *People v. Garrison* (1989) 47 Cal.3d 746, 768; *People v. Lucey* (1986) 188 Cal.App.3d 551.

The statements were tainted, and led to a fundamentally unfair trial.[21] The prosecution coerced statements from Moore. The prosecution had her placed in Orange County Jail. Doing so placed her in the position of having to tell the prosecution what they wanted to hear in order to get out. The prosecution also capitalized on her vulnerability by trying to convince her that appellant was seeking to have her killed. After extracting the information that they wanted in interviews, the prosecution had Moore granted immunity. That immunity, however, did not cover "perjury" which she might commit on the

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Coercive immunity agreements may require testimony at trial consistent with the coerced statements. *See Badgett, supra.* Thus, the trial testimony was tainted as well.

stand. Thus, if her testimony did not continue to consist of what the prosecution wanted to hear, her immunity agreement would be null and void.

The primary purpose of excluding coerced testimony is to assure the reliability of the trial proceedings.[22] Moore's immunity agreement actually had to be granted a second time when she continued to commit perjury on the stand in her first appearance.[23]

A statement "is involuntary if the government's conduct caused the

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See Douglas, supra, 50 Cal. 3d 468, 500. *See also United States v. Chiavola* (7th Cir. 1984) 744 F.2d 1271, 1273; *United States v. Fredericks* (5th Cir. 1978) 586 F.2d 470, 481, & fn. 14; *LaFrance v. Bohlinger* (1st Cir. 1974) 499 F.2d 29, 32-34).

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The statements of the witnesses seeking immunity or deals was particularly problematic:

> '[A] defendant is denied a fair trial if the prosecution's case depends substantially on accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion.' [Citation.] Thus, when the accomplice is granted immunity subject to the condition that his testimony substantially conform to an earlier statement given to police [citation], or that his testimony result in defendant's conviction [citation], the accomplice's testimony is 'tainted beyond redemption' [citation] and its admission denies defendant a fair trial. On the other hand, although there is a certain degree of compulsion inherent in any plea agreement or grant of immunity, it is clear that an agreement requiring only that the witness testify fully and truthfully is valid.

People v. Allen, supra, 42 Cal. 3d at pages 1251-1252 (Fn. omitted).

[witness's] will to be overborne and 'his capacity for self-determination critically impaired.'" *United States v. McCullah*, 76 F.3d 1087, 1100 (10th Cir. 1996) (*quoting Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973)). The relevant circumstances embrace "both the characteristics of the accused and the details of the interrogation." *Schneckloth*, 412 U.S. at 226; *Lucero v. Kerby*, 133 F.3d 1299, 1311 (10th Cir. 1998).

The crucial question is whether the witness's "'will was overborne at the time he confessed'"[24] The answer lies in whether the authorities obtained the statement through coercive means.[25] Inconsistencies and variances in a witness's statements to law enforcement as compared to testimony presented to a jury may be so great that the statement cannot be deemed his own. See

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24 *United States v. Hocking*, 860 F.2d 769, 774 (7th Cir. 1988) (*quoting Lynumn v. Illinois*, 372 U.S. 528, 534, 9 L. Ed. 2d 922, 83 S. Ct. 917 (1963)); *see also McGuire*, 957 F.2d at 315; *Haddon*, 927 F.2d at 945-46; *United States v. Fazio*, 914 F.2d 950, 956 (7th Cir. 1990)).

25 *Buckley*, 4 F.3d at 559 (*citing Colorado v. Connelly*, 479 U.S. 157, 166-67 (1986)). The witnesses and appellant admitted to varying degrees, severe alcohol and drug abuse. A diminished mental state due to the effects of alcohol or drugs is relevant "to the voluntariness inquiry if it made mental or physical coercion by the police more effective." *Chrismon*, 965 F.2d at 1469; *see also Bae v. Peters* (7th Cir. 1991) 950 F.2d 469, 475; *Andersen v. Thieret* (7th Cir. 1990) 903 F.2d 526, 530 n.1 (the defendant's intoxication is relevant to the extent it made him more susceptible to mentally coercive police tactics). The Court explained in *Haddon* that "when the interrogating officers reasonably should have known that a suspect is under the influence of drugs or alcohol, a lesser quantum of coercion may be sufficient to call into question the voluntariness of the confession." 927 F.2d at 946.

Clewis v. Texas, 386 U.S. 707, 712 n. 8 (1967). At the penalty phase retrial, the judge found that Moore had been utterly impeached, and that nothing she said was worthy of belief absent corroboration. (RT 13433-13435).

In *Miller v. Fenton* (1985) 474 U.S. 104, 109, the United States Supreme Court held that by virtue of the Due Process Clause "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned." *See also Moran v. Burbine* (1986) 475 U.S. 412, 432-434. "The Fourteenth Amendment secures against state invasion ... the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will...." *Malloy v. Hogan* (1964) 378 U.S. 1, 8.

A fortiori, a coerced statement is an involuntary one. In order for a statement to be admissible, it must represent the product of a "rational intellect and a free will." *See Townsend v. Sain*, 372 U.S. 293, 307 (1963); *Reck v. Pate*, 367 U.S. 433 (1961); *Blackburn v. Alabama*, *supr*a, 361 U.S. at 208.

A statement induced by express or implied threats accompanied by promises or suggestions of leniency is involuntary and inadmissible. *Arizona v. Fulminante* (1991) 111 S.Ct. 1246. In addition to physical violence, other

types of coercive activity rendering statements involuntary include psychological coercion (*Payne v. Arkansas* (1958) 356 U.S. 560, 566-67), threats (*Lynum v. Illinois* (1963) 372 U.S. 528, 534), promises of benefit or leniency (*Hutto v. Ross* (1976) 429 U.S. 28, 30) and other activity offending the community's sense of fair play and decency. *Garrity v. New Jersey* (1967) 358 U.S. 493, 496. The introduction of involuntary statements violate a defendant's due process. *People v. Douglas*, *supra*, 50 Cal.3d at 500.

Moore's testimony was critical in providing proof of the conspiracy and planning that went into the Comp USA robbery. She provided testimony about appellant's efforts to secure a false license to use to rent the U-Haul truck. (RT 7640-7660). She also testified that she and Eric Clark rented the U-Haul truck at appellant's direction. (RT 7664-7682). She was one of only 2 people who could place appellant as a direct actor in the Comp USA robbery.

The deliberate tainting of a witness in order to secure a conviction required Jeanette Moore's testimony to be excluded, and the failure to do so warrants reversal.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v.*

Watson (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 26
THE ADMISSION OF SEXUALLY EXPLICIT LETTERS FROM APPELLANT TO ANTOINETTE YANCEY VIOLATED THE EVIDENCE CODE AND APPELLANT'S RIGHTS TO DUE PROCESS AND A RELIABLE GUILT AND PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

Under Evidence Code §352, a trial court has discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice..." "The prejudice referred to in Evidence Code §352 applies to evidence which uniquely tends to evoke an emotional bias against ... [one party] as an individual and which has very little effect on the issues." *People v. Garcia* (1995) 37 Cal.App.4th 952, 960; *People v. Garceau* (1993) 6 Cal.4th 140, 178.

The prosecution sought a protective order from the Court, which was erroneously granted, in order to allow them to open appellant's mail and check it for contraband, and also photocopy it for use in this case. (See Claim 27). The Protective Order allowed the jail to continue this procedure, which began on July 20, 1994 with a request from Investigator Grasso. (RT 1634-1635). He also requested that Antoinette Yancey's mail be copied, and it was. (RT 1635) Grasso stated that he was afraid for safety of witnesses, and that the cover was necessary to ensure their continued safety. (RT 1636). Trial counsel objected to the admission of the letters under constitutional grounds,

as well as under Evidence Code §352. (RT 1612).

The defense argued that the letters were privileged under the attorney-client privilege, under *Massiah*, the Fourth Amendment and Evid. Code §352. (RT 1625-1629). The prosecution gathered mail for 40 days and received no information about witness manipulation. The defendants were engaged in an authorized use of the mail, and thus had a reasonable expectation of privacy, and to not have the mail be used as an investigative means in this case. (RT 1629-1633).

The defense also pointed out that in the requests for mail cover, Grasso checked off numerous purposes for the cover, including ongoing criminal activity, which amounted to using the cover as an investigative tool in this case. (RT 1795-1797). Such investigation was prohibited under *Massiah*. They argued that under *United States v. Cohen*, the evidence could not be used. (RT 1804). Under Penal Code § 2600, appellant's rights while in jail could be deprived only as necessary for security. (RT 1800-1803). Security was not at issue, as this cover was done to investigate. The order from the Court was not issued to justify the mail cover. Instead, the prosecution sought an order, which the Court entered, which stated that the prosecution did not need to discover to the defense materials seized as a result of that cover. The prosecution wanted this order so that the defense would remain unaware of the

cover, and that evidence was being seized. The cover amounted to a warrantless search and seizure. (RT 1822-1826).

The prosecution seized more than 6,000 pages of letters pursuant to that order. The Court used those letters to demonstrate the personal relationship between Clark and Yancey, in order to support its case that they were conspirators and had motive to kill Ardell Williams. The admission of this evidence was constitutional error.

The letters between appellant and Antoinette Yancey were pornographic in nature. They were sexually explicit and offered little probative value to this case. The prosecutor claimed that they showed an intense personal relationship between appellant and Ms. Yancey. (RT 10870-10875). Appellant did not dispute this relationship, and was even willing to stipulate to it.

The trial court abused its discretion by allowing the admission of the evidence. The evidence's prejudicial effect far outweighed any probative value. In this case, it violated due process for the trial court to arbitrarily decide not to follow statutory guarantees. *See, e.g., Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980). Considering their minimal probative value as compared to their prejudicial ability to offend, the letter should have been excluded under § 352.

A collateral matter has been defined as "one that has no relevancy to prove or disprove any issue in the action." (1 Jefferson, Cal. Evidence Benchbook (3d ed. 1997) §§ 27.105, 27.106, pp. 478-479.) Whether or not appellant and Yancey wrote sexually explicit letters had no relevancy to prove or disprove whether appellant was guilty of murder. As with all evidence, the trial court retains discretion to admit or exclude evidence offered for impeachment. (Evid.Code, §352; *People v. Douglas* (1990) 50 Cal.3d 468, 509). Under Evidence Code §352, a court may "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Sexually explicit letters consumed undue amounts of time while creating undue prejudice by offending the jurors, as well as misleading them into convicting appellant based on the jurors' perceptions of him as a bad person. These factors substantially outweighed the marginal probative value of showing an intense personal relationship, which was obvious, admitted, and provable by other, less prejudicial means.. (*See, e.g., Wheeler, supra,* 4 Cal.4th at pp. 296-297.

A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th

155, 201). It may be reversed on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Jones* (1998) 17 Cal.4th 279, 304). Specifically, the court is not required to admit evidence that merely makes an individual look bad. (*See, e.g., People v. Kelly* (1992) 1 Cal.4th 495, 523). Evidence of what the jurors might see as sexual deviancy could only make appellant look bad in their eyes.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 27
THE REFUSAL TO AGREE WITH THE DEFENSE'S MOTION TO STIPULATE TO A CLOSE RELATIONSHIP BETWEEN APPELLANT AND YANCEY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE GUILT AND PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

The prejudicial sexual letters between appellant and Yancey assisted the prosecutor in obtaining a guilt conviction. Appellant opposed their admission prior to both the guilt phase and before the retrial of the penalty phase. (See Claim 29, above). They should have been excluded from both phases, particularly because appellant agreed to stipulate to the close relationship between appellant and Antoinette Yancey, which was purportedly the prosecutor's purpose in introducing the letters. (RT 3053-3061).

"'If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code sections 210 and 350 respectively.' Through the offer of the defense, the facts covered by the proposed stipulation– the victim was a human being and was alive before the alleged criminal act was committed and dead afterwards– were removed from dispute. Therefore, the testimony elicited to prove such facts was irrelevant and inadmissible." *People v. Bonin* (1989) 47 Cal.3d 808, 848-849

In *People v. Hall* (1980) 28 Cal.3d 143,[26] the defendant was charged with robbery and with being an ex-felon in possession of a firearm. At trial, the defendant offered to stipulate to his status as an ex-felon, which was an element of the crime, in order to preclude introduction of his prior conviction into evidence. The trial court refused to accept the stipulation and permitted the prosecution to enter evidence of the prior conviction. This Court disagreed and explained: "If a defendant offers to admit an element of the charged offense, the prosecutor must accept that offer and refrain from introducing evidence of other crimes to prove that element to the jury." *Id* at 152. As such, the letters should not have been introduced in the guilt phase.

Furthermore, there was no reason to introduce the letters at the penalty phase retrial. A penalty phase retrial is not a retrial of the guilt phase. *People v. Montiel* (1993) 5 Cal.4th 877. It is proper to inform the jury that they are not retrying the penalty phase. *See, e.g., People v. DeSantis* (1992) 2 Cal.4th 1198, 1238-1239; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1234-1235. Accordingly, evidence which was, arguendo, relevant at the guilt phase may

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This case was subsequently overruled by Cal. Const., art. 1, § 28(f). *See People v. Valentine* (1986) 42 Cal.3d 170, 173, 181. However, *Valentine* made clear that it applied to situations where a defendant sought to stipulate to an *element* of the crime. Appellant did not seek such a stipulation, and only wanted to stipulate to a fact. Thus, *Valentine* doesn't bar the stipulation and the reasoning of *Hall* should apply.

not be relevant at a penalty phase retrial.

The introduction of this evidence denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law, *see People v. Bonin, supra*, was a violation of a state created liberty interest in fair jury instructions, which led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836. To the extent that this error affected the penalty phase but did not amount to a federal constitutional violation, there is a reasonable possibility that the jury would have rendered a different verdict had the errors not occurred. *People v. Brown* (1988) 46 Cal.3d 432, 448.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable,

individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 28
THE ADMISSION OF A LETTER AND NEWSPAPER ARTICLE PURPORTEDLY RECEIVED BY JEANETTE MOORE SHOULD HAVE BEEN EXCLUDED, AND ITS ADMISSION VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Jeanette Moore allegedly received a two page letter sent by somebody calling himself or herself "Outlaw Jack." (CT 2243). The letter was accompanied by a newspaper article about a witness who was released from jail after refusing to testify. (CT 2245). Jeanette Moore testified at Eric Clark's trial on July 13, 1994. She testified at appellant's preliminary hearing on July 18, 1994. The letter was postmarked July 12, 1994.

Fingerprint evidence indicated that Shaun Birney, a prisoner in the Orange County Jail when appellant was housed there, had possession of the letter and the newspaper article prior to it being mailed to Ms. Moore from Orange County Jail. (RT 8287, 7717). While Birney was housed in the same module as appellant, the prosecution produced no evidence, either physical or from witnesses, that linked appellant to that letter.

The author of the letter said that the DA couldn't make Moore testify, and that she could exercise her constitutional right against self-incrimination. The author also said that any threats from the DA that Moore could become a defendant if she didn't testify were bogus. Instead, she would be out in a week

or shortly thereafter if she refused to testify. (CT 2344). The article detailed a case where a witness who had been granted immunity for being the driver in a gang shooting refused to testify, and was let out of jail after 13 months. (CT 2245).

Appellant objected to the introduction of this evidence, on the ground that it couldn't be tied to appellant and thus didn't support an inference of consciousness of guilt. The Court overruled the objection and admitted the evidence. (RT 6783-6804, 7716, 8286, 13274-13280). This was error.

Evidence of persuasion of a witness not in some manner connected to the defendant are irrelevant and therefore excludable. *People v. Benjamin* (1975) 52 Cal.App.3d 63, 81; *People v. Barajas* (1983) 145 Cal.App.3d 804, 808, fn. 5. It is error to admit evidence of persuasion of a witness made by an acquaintance of a defendant when the defendant is not linked to that persuasion. *People v. Brooks* (1979) 88 Cal.Spp.3d 180, 187-188.

Evidence of consciousness of guilt is admissible against a defendant only if the persuasion is authorized by the defendant or made in his presence. *People v. Brooks, supra*, at p. 187 & fn. 4; *People v. Terry* (1962) 57 Cal.2d 538, 566. For example, a trial court prejudicially erred when it admitted testimony of a witness concerning threats made against her by the defendant's girlfriend when the defendant had nothing to do with his girlfriend's threats.

People v. Brooks (1979) 88 Cal.App.3d 180, 187-188. Such evidence is admissible against the defendant as showing consciousness of guilt only if the threats are authorized by the defendant or made in his presence. *People v. Brooks, supra*, at 187 & fn.4; *People v. Terry* (1962) 57 Cal. 2d 538, 566.

In *People v. Terry*, this Court ruled that sending a threatening telegram by the wife of the brother of appellant's wife, who was a constant spectator and saw the witness in the courtroom and who visited defendant before and after the telegram was sent, only proved that defendant had the opportunity to authorize the telegram but had no value as circumstantial evidence that he authorized or participated in the sending of the telegram. *Id.* The jury is prohibited from drawing any inference of a defendant's consciousness of guilt from evidence of fear or intimidation of a witness unless the defendant is directly responsible for such fear or intimidation. *People v. Hannon* (1977) 19 Cal.3d 588, 599.

An identical result is called for in this case, where there was no evidence that appellant authorized the letter. The law is well established that the jury cannot draw any inference of appellant's consciousness of guilt from evidence of persuasion of the witness unless appellant was directly responsible for that persuasion. *People v. Hannon* (1977) 19 Cal.3d 588, 599.

There was no evidence that appellant was present or authorized the

sending of the letter and the newspaper clipping to Moore. Other than being housed near Birney, defendant was not linked with this letter. The items were therefore irrelevant and their admission violated appellant's rights to a fair trial.

The introduction of this evidence denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in fair jury instructions. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth

Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 29
THE COURT'S RULINGS REGARDING NOKKUWA ERVIN'S STATEMENT "LADY, DON'T DIE" VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, AND A RELIABLE DETERMINATION OF GUILT AND PENALTY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant was charged as an aider and abetter to the capital murder charges surrounding the Comp USA robbery. (CT 273). The prosecution was required to prove the killing during the course of the attempted robbery and burglary of the Comp USA store was intentional or at least committed with reckless disregard for Ms. Lee's life. Cal. Pen. Code § 190.2(d). Nokkuwa Ervin entered the Comp USA and placed all of the Comp USA employees handcuffed in the bathroom. (RT 8347). Ervin asked for and received keys to open the warehouse door. (RT 8348). Kathy Lee arrived during the attempted robbery in search of her son who worked at Comp USA. (RT 8343). Ervin discovered Lee at the back entrance and accidently pulled the trigger resulting in Lee's death. The police arrived very soon after and Officer Griswold heard Ervin express distress over Lee's likely death. (RT 8331). The statement by the actual shooter, Nokkuwa Ervin, "Lady don't die," was relevant as nonhearsay showing a state of mind from which it could logically be inferred that the shooting of Ms. Lee was accidental.

The statement was not state of mind evidence under Evidence Code §

1250 which requires a description of a mental or physical condition, intent, place or motive and is received for the truth of the matter. *See* 1 Witkin, Cal. Evid. (3d ed. 1986); The Hearsay Rule § 735, p. 716. The statement did not directly declare a mental state. It was merely circumstantial evidence of distress and was not hearsay. It was not offered for the truth of the matter stated, but was relevant to a determination of the declarant's state of mind. *People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.

Ervin's state of mind as the shooter was very relevant because appellant was vicariously liable for such state of mind as an aider and abettor since an aider and abettor must "share" the perpetrators' specific intent. *In re Meagan R.* (1996) 42 Cal.App.4th 17, 22; *People v. Beeman* (1984) 35 Cal.3d 547, 560. Ervin's nonhearsay statements were relevant if they proved a relevant fact through a series of inferences. Ervin's state of mind declaration was made in a natural manner and not under circumstances of suspicion, and thus carried the probability of trustworthiness. *People v. Howard* (1988) 44 Cal.3d 375, 403-406; *People v. Scott* (1995) 41 Cal.App.4th 527, 537.

Appellant wanted to introduce Ervin's statement at the scene of "please lady, don't die" through a police officer who heard it. (RT 10207). As discussed, that statement was admissible as nonhearsay. The prosecutor argued that was not admissible as nonhearsay, and if it came in, it should come

in for truth and be subject to impeachment. (RT 10212). The prosecutor argued that he could then introduce Nokkuwa Ervin's testimony at his trial that he wasn't the shooter, and that gang members had forced him to commit the crimes. Appellant argued that this statement was nonhearsay in the same way that Ardell Williams' statements were nonhearsay.

The Court ruled that it would come in for all purposes as circumstantial evidence, which meant that it was subject to impeachment. (RT 10217). Appellant elected not to present the statements pursuant to that ruling.

As discussed, the statements were admissible as nonhearsay. By allowing them to come in for all purposes subject to impeachment, the Court violated Evid. Code § 352 by implicitly allowing the prosecutor to retry the Nokkuwa Ervin case in front of appellant's jury. Allowing impeachment of this statement with evidence from Ervin's trial would open up a Pandora's box. Allowing such evidence could only serve to consume undue time and confuse the jury. Thus, the court erred in allowing impeachment of these statements. The statement Ervin made at the scene was spontaneous and made under circumstances indicating truthfulness, even though the statement didn't come in for truth. The testimony from his trial, however, came after considerable length of time and opportunity to reflect.

The trial court's evidentiary rulings were erroneous on several grounds

under the state's laws of evidence. California law holds that evidence of third party culpability is highly relevant, as is evidence bearing on the witnesses' motives. *See People v. Hall* (1986) 41 Cal.3d 826; *People v. Garcea* (1993) 6 Cal.4th 140, 177; *People v. Alvarez* (1996) 49 Cal.App.4th 679, 688.

Because the trial court erroneously excluded this evidence in contravention of established state law, the court's action deprive appellant of a state created liberty interest and denied him due process of law as required by the Fifth and Fourteenth Amendments to the federal constitution. For all these reasons, the trial court's erroneous ruling requires reversal of appellant's conviction and sentence of death. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Lambright v. Stewart* (9th Cir. 1999) 167 F.3d 477.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 30
THE COURT ERRED IN ALLOWING THE ADMISSION OF THE TAPED PHONE CALL FROM APPELLANT TO LIZ FONTENOT. THE ADMISSION OF IT VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, A FAIR TRIAL, RIGHT TO COUNSEL AND HEIGHTENED CAPITAL CASE RELIABILITY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The Court erred when it allowed the prosecutor to introduce a tape of the phone call from appellant to Liz Fontenot, Ardell Williams's sister. The prosecutor presented that tape as evidence of consciousness of guilt, claiming that appellant's comments demonstrated that he was afraid of Ardell Williams's testimony and wanted her to remain silent. (RT 9245-9252). During the conversation, Fontenot made reference to the fact that appellant knew how Ardell Williams was, and that she always told the truth. The prosecutor claimed that appellant largely agreed with that statement, thus admitting on that tape that Williams was truthful.

Appellant moved to suppress the tape under federal law. The court erroneously believed that taping a phone conversation with one party's consent (see Pen. Code §632 and Claim 34) was legal under state law. (RT 2777-2781). Appellant argued that the only remedy was exclusion, and that an officer had to be acting in scope of authority. Under that scope, there were limits, and taping couldn't be indiscriminate. (RT 2782-2784). The prosecutor argued that there was no conflict between state law and federal law,

that Fontenot consented, thus there was no interception of communications without the parties knowledge. (RT 2785-2786).

The defense argued that it was the prosecution's burden, and they hadn't carried it. Grasso did not within act the scope of his authority, because the taping was indiscriminate and without limits. He gave Fontenot a tape recorder with little instruction other than to record. He gave her unfettered discretion. Moreover, the prosecutor had to show the recordings occurred before initiation of adversarial proceedings, which began on September 25, 1992. Furthermore, according to Fontenot, she was told to record conversations about Las Vegas, which wasn't in Grasso's scope of employment since he was investigating only California crimes. Fontenot said the recording lasted over months, which was likely after September 25, 1992. Trial counsel argued that prior to indictment, appellant had Fourth Amendment rights. After indictment, the taping violated the Sixth Amendment also because she was acting as an agent of police. (RT 2812-2816). The Court denied the motion. (RT 2817).

Title III of the Omnibus Crime Control and Safe Street Act of 1968 (18 U.S.C. §§ 2510-2520) generally prohibits the interception of wire communications. The exclusionary provisions of the act (§2515)[27] apply even

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18 U.S.C. § 2515. Prohibition of use as evidence of intercepted wire or oral

when the unlawful interception is performed by a private individual. That chapter operates as a national standard which only permits the states to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation. Standards are to be construed strictly. *United States v. Capra* (2d Cir. 1974) 501 F.2d 267. Interpretation of state wiretap statutes could never be controlling where it might impose requirements less stringent than the controlling standard of the chapter for the interception of communications, but if state procedures are more exacting than those of this chapter, then validity of the interceptions pursuant to state court orders or authorizations would have to comply with the state test as well as this chapter. *United States v. Marion* (2d Cir. 1976) 535 F.2d 697. *See also United States v. McKinnon* (1st Cir. 1983) 721 F.2d 19.

The suppression sanction was designed to ensure that courts do not become partners in the illegal conduct, regardless of whether the wiretap was

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communications

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

perpetrated by private or governmental means. *People v. Otto* (1992) 2 Cal.4th 1088, 1107-1113.

Here, the wiretap was perpetrated by both private and governmental means. While Liz Fontenot was a private citizen, Investigator Grasso was a governmental official. He asked her to tape any conversations with appellant. Grasso provided the tape recorder and tapes for the taping. (RT 2787-2790).

Appellant was prejudiced by the admission of this tape. The prosecutor argued that, based on the tape, they had proven that appellant had an interest in stealing computers as a way to make money. (RT 10831). The prosecutor also argued that the taped conversations between Clark and Liz Fontenot were important evidence. They showed that appellant was concerned, and that he was aware that Ardell Williams had informed on him on the Las Vegas charges. He admitted that Ardell was truthful. (RT 10851-10858).

The case against appellant was one based almost entirely on circumstantial evidence. The prosecutor repeatedly emphasized evidence of motive as evidence supporting appellant's conviction. This consciousness of guilt evidence presented by the prosecutor served as the alleged motive for killing Ardell Williams. It was a key part of the prosecutor's case.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386

U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 31
THE COURT ERRED IN ADMITTING THE TAPED PHONE CALL FROM APPELLANT TO LIZ FONTENOT THEREBY DENYING RIGHTS TO DUE PROCESS AND RELIABLE DETERMINATION OF GUILT AND PENALTY

The Court erroneously allowed the prosecutor to introduce a tape of phone calls from appellant to Ardell Williams' sister, Liz Fontenot. (RT 9250). The prosecutor presented the tape as evidence of consciousness of guilt. He claimed that appellant's comments demonstrated that he was afraid of Ardell Williams's testimony and wanted her to remain silent. He also claimed that appellant admitted on that tape that Williams was truthful. (MUNI RT 1124).

The tapes were recordings of confidential conversation between appellant and Fontenot. These tapes were recorded in violation of the California Invasion of Privacy Act. As such, they were inadmissible. *Cal. Pen. Code* §§ 632 (a)[28] and (d)[29].

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California Penal Code §632(a) provides as follows:

> (a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($ 2,500), or imprisonment in

A.
Conversation Was Recorded and All Parties Did Not Consent

Section 632 (a) of the California Invasion of Privacy Act prohibits any person, whether a government agent or a private actor, to record a confidential telephone conversation without the consent of all parties to the conversation. *Cal. Pen Code* § 632 (a). A conviction under § 632 is a misdemeanor and ".. shall be punished by a fine not exceeding two thousand five hundred dollars ($ 2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment." *Ibid.*

The recordings were made by Liz Fontenot at the request of Inspector Grasso. Grasso contacted Fontenot in May or June of 1992. He asked Fontenot to record her telephone calls with appellant. (RT 2788). He gave

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> the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Section 631, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($ 10,000), by imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

[29] California Penal Code § 632(d) reads as follows:

> (d) Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding.

Fontenot a small hand-held cassette recorder and cassette tape in May or June of 1992. (RT 2790).

Fontenot recorded several conversations she had with appellant. Grasso failed to follow up with Fontenot and after a two-year delay, Fontenot finally gave copies of the taped conversations to Officers Guzman and Anderson. (RT 2790). Grasso had been unaware that conversations had taken place or that they had been recorded for over two years. (RT 2790).

Grasso never obtained, or event sought, a warrant authorizing the unconsented recording of appellant's telephone call conversations. Nor did Fontenot ever obtain permission or consent from appellant to record their conversation. (RT 9253). In addition to being unreliable, the recordings made by Fontenot were in violation of the California Invasion of Privacy Act and under the Act are deemed inadmissible in any California [30]judicial proceeding. *California Pen. Code* §§632 (a) and (d).

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The trial court incorrectly applied federal evidence rules in a state criminal court. The relevant question is whether the recordings could be admissible in state court. Fed.R.Cr.Evi.402; *United States v. Daniel*, 667 F. 2d 783, 785; (MUNI RT 2785).

B.

Conversations Between Fontenot and Appellant Were Confidential

The California Invasion of Privacy Act prohibits the recording of a telephone call without the consent from all parties when the call includes a "confidential communication." *J. Michael Flanagan v. Honorine T. Flanagan* (2002) 27 Cal.4th 766, 768; Pen. Code, §632, subd. (a). In 2002, this Court resolved a split in the Appeals Courts defining the term "confidential communication." *Ibid.* This Court held that a conversation is "confidential if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." *Ibid.* "Confidentiality appears to require nothing more than the existence of a reasonable expectation by one of the parties that no one is 'listening in' or overhearing the conversation." *Frio v. The Superior Court of Los Angeles* (1988) 203 Cal. App.3d 1480, 1490.

Appellant reasonably expected that his conversation was confidential. He had no reason to know that the conversation was recorded by Fontenot. Appellant made the call directly to Fontenot and not through a third party. (RT 9246). Fontenot did not inform him that the conversation was recorded. She never requested permission to record appellant. (RT 9253).

The purpose of the California Invasion of Privacy Act was to "protect

the right to privacy by, among other things, requiring that all parties consent to a recording of their conversations." *Ibid.* There is a substantial difference between "the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device." *Warn v. Kahn* (1979) 99 Cal. App. 3d 805. "Such secret monitoring denies the speaker an important aspect of privacy of communication-- the right to control the nature and extent of the firsthand dissemination of his statements." *Ribas v. Clark* (1985) 38 Cal.3d 355, 360-361.

Moreover, appellant was discussing facts related to his pending criminal case. The pending case was a special circumstances homicide. This was not information which appellant was willing to share with the public at large.

C.

Violations of §632(a) Render the Conversation Inadmissible

Liz Fontenot violated 632(a) when she recorded conversations with appellant without his consent. This violation renders all of the recordings inadmissible. Section 632(d) reads as follows:

> Except as proof in an in action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or *recording a confidential communication* in violation of this section *shall be inadmissible in any judicial*, administrative, legislative, or other proceeding. *California Penal Code Section*

632(d). (Emphasis added).

Accordingly, the tapes should have been excluded and the court erred in not doing so.

The prosecutor had to show the recordings occurred before initiation of adversarial proceedings, which began on September 25, 1992. Fontenot said the recording lasted over months, which was likely after September 25, 1992. The defense argued that prior to indictment, appellants had a Fourth Amendment objection. After indictment, taping violated the Sixth Amendment also because she was agent of police. (RT 2812-2816). The Court denied the motion. (RT 2817).

The case against appellant was one based almost entirely on circumstantial evidence. The prosecutor repeatedly emphasized evidence of motive as evidence leading to appellant's conviction. During his closing the prosecutor repeated the contents of the conversation between appellant and Liz Fontenot, suggesting that it again showed appellants alleged motive:

> You have an admission by Mr. Clark, Ladies and Gentlemen, ... that he was at Del Taco with Ardell Williams. That's the only thing that you can come up with when you hear that entire tape. That tape is an incredible piece of evidence. I 'm sounding like a broken record. It's his words, it shows his concern, it shows what he's doing. It shows all of this before he is indicted, before he is brought to Orange County, and before he receives the true information of the evidence against him. The motive to kill Ardell Williams was started in August of 1992–not in August of 1992 but when he was brought down to Orange

> County when realized that his fears, his fears as expressed to Liz about Ardell were coming true. (RT 10861).

This consciousness of guilt evidence presented by the prosecutor served as the alleged motive for killing Ardell Williams. It was an important part of the prosecutor's case.

The introduction of this evidence denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in fair jury instructions. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836. The error in admitting the tapes requires reversal.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable,

individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 32
TODD HOLLIDAY'S TESTIMONY INCLUDED INADMISSIBLE DOUBLE HEARSAY

Todd Holliday testified in the guilt phase regarding statements from Ardell Williams. He stated that:

> The first thing that Eric Clark had told her was how he and William Clark had been involved in a robbery at a Comp USA, in Fountain Valley.
>
> From what he told her, it sounded– she believed from what he said that Eric Clark and William Clark had set the robbery up, that they had planned the robbery.
>
> Eric told her that the– that there had been two robbers, that they had the people tied up, that something went wrong and a lady was killed. Eric Clark said that one of the robbers had shot this lady. But there weren't supposed to be bullets in the gun.
>
> Eric Clark also told her that William Clark's B.M.W. had been seen. And I don't recall whether she said that Eric Clark told her that they had sold the B.M.W. or they were trying to sell the BMW.

This evidence was admitted over appellants repeated objections. (RT 1901-50; 2548-2594; 2954-2970).

Hearsay evidence is generally inadmissible under the Hearsay Rule. *See* Evid. Code §1200. This testimony contained multiple levels of hearsay. The first level of hearsay were the alleged comments made by Eric Clark to Ardell Williams. The second level of hearsay were the alleged comments from Ardell Williams to Todd Holliday. Such evidence is inadmissible unless there are exceptions to both levels.

More importantly, the admission of this evidence violated the Constitution. In *Crawford v. Washington* (2004) 124 S.Ct. 1354, the United States Supreme Court held that out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause,[1] unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court, abrogating *Ohio v. Roberts*, 448 U.S. 56.[2]

The Supreme Court explained that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Crawford v. Washington.* at 1365. "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the 'right ... to be confronted with the

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1

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." That bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas,* 380 U.S. 400, 406 (1965).

2

In *Ohio v. Roberts,* 448 U.S. 56 (1980), the High Court held that the admission of an unavailable witness's statement against a criminal defendant was allowable if the statement bore "adequate 'indicia of reliability.'" *Id.,* at 66. To meet that test, the evidence was required to either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Ibid.*

witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox v. United States,* 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895); cf. *Houser,* 26 Mo., at 433-435." *Crawford v. Washington*, at 1365. Cases conform to *Mattox's* holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See *Mancusi v. Stubbs,* 408 U.S. 204, 213-216 (1972); *California v. Green*, 399 U.S. 149, 165-168 (1970); *Pointer v. Texas,* 380 U.S., at 406-408 ; cf. *Kirby v. United States,* 174 U.S. 47, 55-61 (1899).

The Supreme Court held:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.

Crawford v. Washington, at 1366. That Court explained that "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at 1371.

Even assuming, arguendo, that the evidence had some non-hearsay, not-

for-truth value, the probative value of that evidence was substantially outweighed by the danger of undue prejudice created by its admission.

Evidence Code §352 provides:

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

This code section requires the trial court to undergo a careful scrutiny of such evidence:

> Evidence Code section 352 vests discretion in the trial judge to exclude evidence where its probative value us substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of prejudice, of confusion of issues, or of misleading a jury...

Kessler v. Gray (1978) 77 Cal.App.3d 284, 291.

What §352 is designed to avoid "is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence, rather, the statute uses the word in [the] sense of 'prejudging' a person or cause on the basis of extraneous factors." *People v. Zapien* (1993) 4 Cal.4th 929, 958. The danger of undue prejudice is that the evidence is likely to arouse the emotions of the jurors or be used in some manner unrelated to the issue on which it was admissible. *People v. Cudjo* (1993) 6 Cal.4th 585, 610. "Substantial danger of undue prejudice" within the meaning of §352 thus refers to situations where

the evidence may be misused by the jury for a purpose other than that for which it was admitted. *People v. Foilson* (1994) 22 Cal.App.4th 1841.

The prosecution allegedly offered this evidence in order to show that Ardell Williams was a witness. The prosecution argued that this evidence went to the corpus of the special circumstance, which thus provided motive for killing Ardell Williams. The jury could not, however, reasonably be expected to separate its consideration of this evidence in this manner. Having heard that Eric Clark told Ardell Williams that they had done the Comp USA robbery for the purpose of determining whether Ms. Williams was a witness, the jury could not "forget" that statement for the purpose of deciding if appellant took part in the Comp USA robbery.

When a prosecutor intentionally asks a question, the answer to which he knows is inadmissible, he is guilty of a bad-faith attempt to improperly persuade the court or jury. *People v. Mazoros* (1977) 76 Cal.App.3d 32, 48. The hearsay elicited from the witness was clearly inadmissible, and the prosecutor committed misconduct in eliciting it.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v.*

Watson (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 33
TRIAL COURT ERRED BY NOT STRIKING TESTIMONY BARRED BY EVIDENCE CODE SECTION 771, WHICH ALLOWED TESTIMONY IN VIOLATION OF THE CONFRONTATION CLAUSE

FBI Special Agent Todd Holliday was called by the prosecution to testify. Holliday had interviewed Ardell Williams when she and the appellant had been arrested in Las Vegas. While Holliday was testifying, he refreshed his recollection by referring to a file which included his investigation notes. (RT 9181). When trial counsel asked about Holliday's contact with Frank Grasso and requested to see Holliday's notes, Holliday refused to provide the notes. *Id.*

Trial counsel: Did you tell him about other crimes that involved Capri Jewelry, other such things?

Todd Holliday: The counterfeit cashiers checks, I'm not sure. I may have, I may have. I don't specifically recall.

Q: Did you keep notes of that conversation?

A: I have just a real brief note just saying on March 30th that I called Frank Grasso and gave him Ardell's name, number and background. That's pretty much all it says. I also passed on that Ardell said that Eric Clark was at Morehouse college in Georgia.

Q: You keep looking at a file when you say "I have notes." Do you have notes in that file.

A: Well, I have, yes, sir, I have some. Actually, I have my 302's and I have the transcript from the other thing, and I have the notes that I have.

Q. May I see those?

A: They are not mine to give permission to, they are really the F.B.I.'s. As I guess you know, we went through before, I have to get permission from the Department,

from the FBI., to turn these over to you.

(RT 9181-9182). Holliday's testimony was important because it was the first indication that Ardell Williams alleged that appellant and others were responsible for the Comp USA robbery. Her statements to Holliday also coincided with her efforts to strike a deal in her prosecution in Las Vegas, a deal which she eventually struck.

Holliday refused to allow trial counsel to see the notes even though the information had been previously passed on to law enforcement. (RT 9184).

Trial Counsel:	That's what I'm asking. You can give fellow law enforcement the information over the telephone but you can't give it to me?
Holliday:	I can pass on, yes , certain information on to fellow law enforcement, yes, sir. In cases that are being investigated where we are working together or where I'm passing on information about crimes.

(*Ibid.*) He admantly refused to show his notes to counsel, simply stating that counsel had not gone through the proper channels. (RT 9129-9134).[3] The trial court refused to compel discovery, either pre-trial or while Holliday was testifying.

3

Trial Counsel had previously subpoenaed all documents that pertained to the investigation of Ms. Williams and appellant. The legal department at the Federal Bureau of Investigation, however, denied appellant's requests. (RT 9182).

California Evidence Code § 771 requires the production of any writing used to refresh memory:

> [I]f a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testified, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.

California Evidence Code §771.

While testifying, Holliday used his notes to refresh his memory in order to answer trial counsel's questions. In violation of § 771, Holliday refused to produce the notes when trial counsel requested the witness to do so. Section 771 required that the testimony of Holliday, concerning Ardell Williams and appellant's connection to her, be stricken. *People v. Blackwell* (1981)172 Cal.Rptr.636, 640 ("It is clear that in a proper case a party is entitled under Evidence Code §771 to have a witness' testimony stricken upon refusal to produce a writing used to refresh his recollection.")

Holliday claimed that he could not provide the notes because of rules that he had to follow. (RT 9184). This Court has recognized that

> [t]he state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits.

(*People v. Ainsworth* (1990) 266 Cal.Rptr. 175, 180 (Quoting *People v. Riser*

(1956) 47 Cal.2d 566, 586, 305 P.2d 1, disapproved on other grounds in *People v. Morse* (1964) 60 Cal.2d 63) 649 and fn. 2, 36 Cal.Rptr. 201, 388 P.2d 33)

By not ensuring the notes be provided to appellant nor striking the testimony, the court committed error which resulted in the violation of appellant's right to cross-examination, due process and a fair trial as provided for under the Sixth and Fourteenth Amendments. *Estelle* v. *McGuire* (1991) 502 U.S. 62, 71-72. The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The High Court has held that this bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas,* 380 U.S. 400, 406 (1965). "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Washington v. Crawford* (2004) 124 S.Ct. 1354, 1369. "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 1374.

The introduction of this evidence denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a

violation of a state created liberty interest in fair jury instructions. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). The timing of Ardell Williams' alleged statements, and the content of those statements, was a critical issue at trial. The defense contended that Ardell Williams was not truthful in making these alleged statements. These notes were an important tool for testing the credibility of both Ardell Williams and law enforcement witnesses.

Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North*

Carolina (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 34
APPELLANT'S RIGHTS TO COMPULSORY PROCESS AND CONFRONTATION WAS VIOLATED BY ERRONEOUS APPLICATION OF THIRD PARTY CULPABILITY PRINCIPLES IN VIOLATION OF DUE PROCESS AND HEIGHTENED RELIABILITY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant sought to bring evidence of third-party culpability before the jury. The third party who may have been responsible for Ardell Williams's death was Tony Mills, the father of Ardell's child. Mr. Mills and Ms. Williams were engaged in a heated custody dispute. If Ardell Williams died, Mr. Mills was in a much stronger position viz-a-viz child custody. Mills was present at the house just minutes before Carolyn delivered flowers on February 10, 1994. Both Mills and Carolyn spent unusually long amounts of time in the bathroom on that day. The Williams' family found a $1 bill in the bathroom that day, which could have been some sort of signal between Mills and Carolyn.

In court papers filed regarding Williams' and Mills' custody dispute, the Williams family submitted sworn affidavits stating that they believed that Mills was responsible for Ardell Williams's death. (RT 6748-6780).

Ardell Williams's boyfriend Kevin Hardeman was available to testify as to Mills's efforts to take Ardell Williams's life. Mills threatened to slit Williams's throat. (RT 6764-6768).

Trial counsel argued that the third party culpability of Tony Mills was

admissible, citing the strange occurrences at the home, the motive to kill Williams because of the custody dispute and the motive to do the casing. He argued that circumstantial evidence of appellant's motive was also circumstantial evidence of Mills's motive, as Mills was present the day of the flower delivery also. The circumstantial evidence pointing to Mills was as strong as that pointing to appellant. Counsel argued that the prosecution case was based on circumstantial evidence, and that the Yancey fingerprint on the flowers didn't relate to the murder scene. Yancey and Mills both went to the bathroom that day, and a dollar bill dropped in bathroom might have been a signal. (RT 6748-6755).

Trial counsel argued that appellant's connection with Yancey was less inculpatory than Mills' connection with Williams. Whatever Yancey did, that didn't make appellant guilty. Williams' family filed sworn affidavits to court that Mills was responsible after they talked to police in this case. (RT 6748-6763).

The defense also stated that Kevin Hardeman, Ardell Williams's boyfriend, would testify about Mills' efforts to take her life. (RT 6764-6767). The Court ultimately ruled that the custody dispute information wouldn't come in, because in the Court's, custody cases are filled with lies and exaggerations. (RT 6775-6776). The Court erroneously applied *People v. Hall* in part in

denying the admission of the evidence. *Hall* states that the trial court is to assume that the defendant's proffer is true in deciding if the burden is met.

The defense sought at trial to introduce evidence that Kevin Hardeman saw a run-in between Mills and Ardell Williams where Mills ran her off the road with his car, and they exchanged words. The Court stated that it had previously ruled that there could be no third-party liability unless Mills could be linked to the crime scene. The defense argued that Hardeman would show Mills' motive to kill because of child custody issues. Basing its ruling on *Hall*, the trial court stated that there must be something more than just motive to use 3rd party culpability. The trial court found that the defense had made an inadequate showing, and excluded evidence of child custody. (RT 10356-10367). Similar rulings were made during the penalty phase retrial. (RT 12259-12262, 13055-13064).

This evidence was critical considering the circumstantial nature of the evidence surrounding Ardell Williams's death. As with Mills, there was no direct evidence to connect appellant to her death. He certainly couldn't be placed at the scene of the crime, since he was in the Orange County Jail. This fact alone made it difficult to satisfy the trial court. The court required, under *Hall*, that appellant produce evidence of opportunity for Mills to kill Williams. But since appellant was not at the scene, it would be impossible for him to

place Mills there.

The prosecutor relied heavily on the fact that appellant had a motive to kill Ardell– that of either silencing a witness or retaliation for her cooperation with law enforcement. The fact that Mills couldn't be placed at the scene should not have been determinative, since appellant couldn't be placed at the scene either. If motive was enough to inculpate appellant, it was enough to inculpate Mills. This circumstantial evidence of another suspect was critical for the jury to consider in assessing the likelihood that appellant was guilty of Ardell Williams's death.

The Court opined that evidence in custody disputes was not credible or sufficiently reliable. (See, e.g., RT 9075-9082). It was not the court's job, however, to assess whether that evidence was true or not, or even credible. It was the job of the trier of fact to assess the credibility of the evidence presented and determine whether the prosecution had proved its case beyond a reasonable doubt. "To be admissible, the third party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt." *People v. Hall* (1986) 41 Cal.3d 826.

The prosecutor continued to try to prevent any mention of third-party culpability. During the testimony of Nena Williams, a home-invasion robbery

at the Williams home was mentioned. Nena Williams was the prosecutor's witness, and he was determined to prevent her from mentioning anything which could be interpreted as third party culpability. (RT 9280-9286). The court precluded appellant from inquiring into this issue. (RT 9371-9380).

There was also third-party culpability evidence available to be introduced via Nokkuwa Ervin's testimony. Nokkuwa Ervin named Stanley Grant and Lionel Jones as the people who forced him to commit the robbery. The court refused to allow this evidence to go before the jury. (13055-13064, 13859-13864). The prosecutor consistently sought to preclude any such evidence. After calling John Barnett, as an attorney-expert on the legal process, to testify about the 995 hearing, the prosecutor moved that any inquiry into third-party culpability issues be precluded, and the court so ruled. (RT 13945-13952).

The Court also refused to allow inquiry into third party culpability and Mills during Angelita Williams's testimony. (RT 14587). The court precluded the defense from asking the security person from Disney who fired Ardell Williams, Anthony Miller, who gave him the information that Ardell was stealing. Mills was the source of the information and the court said that it was third-party culpability evidence and thus excludable. (RT 15545-15548).

Exclusion of this evidence violated appellant's federal constitutional

rights to present a defense and witnesses and to confront and cross-examine witnesses as guaranteed by the Sixth and Fourteenth Amendments. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-91; *Washington v. Texas* (1967) 388 U.S. 14, 22-23; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302). Because the evidence was directly related to culpability, its exclusion undermined the reliability required by the Eighth and Fourteenth Amendments for the conviction of a capital offense *Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived him of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

The trial court's evidentiary rulings were also erroneous under the state's laws of evidence. The trial court's assessment of the evidence as having little probative value was contradicted by California law holding that evidence of third party cuplability is highly relevant, as is evidence bearing on the witnesses' motives. (*See People v. Hall* (1986) 41 Cal.3d 826; *People v. Garceau* (1993) 6 Cal.4th 140, 177; *People v. Alvarez* (1996) 49 Cal.App.4th 679, 688). Under Evid. Code §352, the probative value of the evidence exceeded any potential for prejudice or confusion. (*People v. Clair* (1992) 2 Cal.4th 629).

This Court has explained:

> To be admissible, the third-party evidence need not show "substantial proof of a probability" that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt.

People v. Hall, supra, 41 Cal.3d at 833-834. The Court also added:

> ...courts must focus on the actual degree of risk that the admission of relevant evidence may result in undue delay, prejudice, or confusion. As Wigmore observed: 'If the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt. (1A Wigmore Evidence (Tillers rev. ed. 1980) §139, p. 1724.).

People v. Hall, supra, at 834.

The trial court's ruling is contrary to the applicable statutes and California case law, both of which favor broad inclusion of evidence bearing on witness' credibility and motive for testifying. This Court has found evidence of motive highly relevant:

> Relevant evidence is defined in Evidence Code §210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive." [Citations].

People v. Garceau (1993) 6 Cal.4th 140, 177. The *Garceau* Court found that motive was a material issue. *Id.* at 178-179. *See also People v. Alvarez* (1996)

49 Cal.App.4th 679, 688.

The strength of the evidence is immaterial in the determination of admissibility and relevance. Where the evidence tends to prove a disputed issue, either directly or by reasonable inference, it should be admitted. *People v. Jaspal* (1991) 234 Cal.App.3d 1446, 1462 ("evidence is relevant whenever "it tends logically, naturally, and by reasonable inference to prove or disprove a material issue."); *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 347. Evidence Code §780 echoes this concern, in pertinent part:

> Except as otherwise provided by statue, the court or jury may consider in determining the credibility of the witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing including but not limited to any of the following:
>
> * * *
>
> (f) The existence or nonexistence of a bias, interest or other motive.

The Compulsory Process Clause of the Sixth Amendment of the United States Constitution provides the accused in a criminal case the right "to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. The United States Supreme Court has read the Clause to stand for nothing less than the accused's "right to present a defense." See *Washington v. Texas,* 388 U.S. 14, 19 (1967). As the Supreme Court agreed in *Washington v. Texas*, the Framers "did not intend to commit the futile act of giving to a

defendant the right to secure the attendance of witnesses whose testimony he had no right to use." 388 U.S. at 14. It is highly unlikely, given the development of the rights of criminal defendants over time and the state provisions on the right to present witnesses, that the ratifying states did not intend the right to present witnesses and evidence in one's favor as part of the right to compel testimony. Akhil Reed Amar, Sixth Amendment First Principles, 84 Geo. L.J. 641, 698 (1996).

The right to confrontation and the right to compulsory process are intimately related, as each is the sister clause of the other. Together, the two rights make the presentation of a defense at trial complete. *See California v. Green,* 399 U.S. 149, 176 (1970) (Harlan, J., concurring) (stating that the Compulsory Process Clause and the Confrontation Clause together "constitutionalize the right to a defense as we know it"). The defense has two distinct opportunities to rebut the prosecution's case: one on cross-examination of the prosecution's witnesses, and another on direct examination of its own witnesses. While the timing and mode of presentation may be different, See *California v. Green,* 399 U.S. 149, 176 (1970) (Harlan, J., concurring) (stating that the Compulsory Process Clause and the Confrontation Clause together "constitutionalize the right to a defense as we know it"), the goals of each are the same - to discredit the prosecution's case and to elicit facts favorable to the

defense in order to raise in the juror's minds a reasonable doubt about the guilt of the accused. By examining the more thoroughly developed Confrontation Clause jurisprudence, we can come closer to a complete understanding of how the Compulsory Process Clause should best operate.

In 1967, in *Washington v. Texas*, 388 U.S. 14, the Supreme Court had its first real opportunity to address the meaning of the Compulsory Process Clause since its adoption almost two centuries earlier. In reversing the defendant's murder conviction, the Court found that Washington had been denied his right to compulsory process when a state statute prevented him from presenting the exculpatory testimony of his alleged accomplice. The accomplice, Charles Fuller, would have testified that it was he, and not Jackie Washington, who had fired the fatal shot. Washington wanted to present the testimony of Fuller, who had already been convicted of the murder and who would have testified consistently with Washington's defense. 388 U.S. at 16.

In deciding the issue of whether this rule violated Jackie Washington's right to compulsory process, the Court first concluded that the right of compulsory process is "so fundamental and essential to a fair trial that it is incorporated into the Due Process Clause of the Fourteenth Amendment" and therefore applicable to the states. *Id.* at 17-18. The Court then defined the

right as a broad "right to present a defense":[4]

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id.

The Supreme Court's 1986 decision in *Crane v. Kentucky*, 476 U.S. 683 (1986), also preferred an adversarial testing of defense evidence to evidentiary rules suppressing the evidence. Rather than addressing a statutory rule of evidence, *Crane* addressed a court ruling excluding defense evidence. The trial court erroneously ruled that the defendant could not testify about the coercive circumstances of his confession because it amounted to a relitigation of voluntariness, an issue the court had already decided against the defendant.[5]

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4 *Id.* at 19.

5 At the suppression hearing, Crane testified that he was detained in a windowless room for a significant amount of time, surrounded by as many as six officers, that he repeatedly requested, and was denied, a telephone call to his mother, and that he was badgered into making the confession. *Id. at 685.* Several police officers testified differently, and the trial court denied the motion to suppress the confession. *Id.* At trial, the prosecutor moved in limine to prevent any testimony on the circumstances of the confession, arguing that it went to voluntariness, which had already been litigated and was irrelevant. *Id.* at 685-86. Although defense counsel explained that this was not a

The Supreme Court held that this evidentiary ruling denied the petitioner "his fundamental constitutional right to a fair opportunity to present a defense."[6] The Court emphasized that "'questions of credibility, whether of a witness or of [sic] a confession, are for the jury.'" *Crane,* 476 U.S. at 688 (*quoting Jackson v. Denno,* 378 U.S. 368, 386 n.13 (1964)) ("of a witness or a confession"). It was important that the defendant be able to cast doubt on the credibility of his confession. Otherwise, "the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Crane,* 476 U.S. at 689. The credibility of the confession, as well as of the witness testifying, was an issue for the jury.

"Reliability" would have added a new requirement to the right of the defendant to present evidence, beyond "relevant" and "material," the sole requirements under *Washington.* Significantly, while it found the evidence relevant, the Court stated that it does not "pass [here] on the strength or [the] merits of [the] defense." *Crane,* 476 U.S. at 691.

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relitigation of voluntariness but a testing of the credibility of the confession, the trial court agreed with the prosecution. *Id.* at 686-87.

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Id. at 687. The Court did not choose the source of this constitutional right, but stated that it was either the Due Process Clause or the Compulsory Process Clause. *Id.* at 690.

In *Rock v. Arkansas*, 483 U.S. 44 (1987), the Court held that the Arkansas Supreme Court ruling, that the hypnotically refreshed testimony of Vickie Rock was *per se* inadmissible, was "arbitrary" and "disproportionate to the purposes [the ruling] was designed to serve[,]" therefore violating her constitutional rights. 483 U.S. at 55-56. This "arbitrary or disproportionate" language has come to define the Court's standard. *See Scheffer,* 523 U.S. at 308 ("[Evidence] rules do not abridge an accused's right to present a defense so long as they are not arbitrary 'or disproportionate to the purposes they are designed to serve.'" (*quoting Rock,* 483 U.S. at 56)).

"Where a defendant's guilt hinges largely on the testimony of a prosecution's witness, the erroneous exclusion of evidence critical to assessing the credibility of that witness violates the Constitution." (*Thomas v. Hubbard* (9th Cir. 2002) 273 F.3d 1164 (quoting *De Petris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062)).

Here, Ardell Williams was a prosecution witness against appellant, even though she didn't testify at trial. Her testimony came in for truth, and thus this third-party culpability evidence was relevant in two respects. First, it cast doubt on the prosecution's implicit assumption that appellant must have committed the crime because he was the only person with motive to do it. Second, it impeached Ardell Williams's statements as biased, because it

showed that she had an ongoing custody dispute which could be impacted by her own troubles with the law, and thus she had an even greater reason to cooperate with law enforcement and say what they wanted to hear.

In *Chambers v. Mississippi*, 410 U.S. 284, the Court found that Mississippi's hearsay rule precluding declarations against penal interest, combined with its "voucher rule," disallowing the impeachment of one's own witness, deprived Leon Chambers of due process of law. 410 U.S. at 302. Justice Powell, who wrote the opinion in *Chambers*, appeared to recognize that *Chambers* was rightfully a Compulsory Process Clause case in the opinion he wrote for the Court in *Pennsylvania v. Ritchie*. In *Ritchie*, Justice Powell cites *Chambers* as a Compulsory Process Clause case. 480 U.S. at 56 & n.13.

The United States Supreme Court's jurisprudence on the scope of a defendant's Sixth Amendment right to confront witnesses through cross-examination reflects the primacy of the constitutional imperative of fair process. The Court's two hallmark cases in this area, *Davis v. Alaska,* 415 U.S. 308 (1974) and *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) reinforce the value of cross-examination as a tool for getting the defendant's version of the facts before the jury, regardless of the inherent trustworthiness of that evidence. These cases shed light on how the Court should also treat the Compulsory Process Clause.

The Supreme Court defined a Confrontation Clause violation in fairly broad terms:

> [A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury facts from which jurors ... could appropriately draw inferences related to the reliability of the witness."

Id. at 680 (quoting *Davis,* 415 U.S. at 318). The Court emphasized that a defendant need not show prejudice with respect to the trial as a whole, but only need focus on the individual witness. *Id.* Therefore, because "[a] reasonable jury might have received a significantly different impression of [the witness'] credibility[,]" the defendant met his burden of showing a constitutional violation. *Id.*

As with the cross-examination of a prosecution witness, it should be equally true that when a defendant calls his own witness to the stand he may elicit relevant testimony as long as it "exposes to the jury facts from which jurors ... could appropriately draw inferences" *Davis,* 415 U.S. at 318, in favor of the defense. "Evidence that someone other than the defendant may have committed the crime is critical exculpatory evidence that the defendant is entitled to adduce." *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1177. There, the Ninth Circuit stated:

> Fundamental standards of relevancy require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged.

Id.

The Sixth Amendment does not require that the defendant show to a certain degree that the evidence reliably show the inference, merely that a juror might reasonably find that it does so. To allow a defendant to present evidence, as long as there is a reasonable possibility that the jury will believe it, is a goal of fair process. The Ninth Circuit has made clear that the defense does not need to make a threshold showing that its third party culpability defense is plausible before being entitled to present the evidence or conduct cross-examination in support of the theory:

> Even if the defense theory is purely speculative ... the evidence would be relevant. In the past, our decisions have been guided by the words of Professor Wigmore: [I]f the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.

Thomas v. Hubbard, supra, at 1177 (quoting *United States v. Vallejo* (9th Cir. 2001) 237 F.3d 1008, 1023) (quoting 1A John Henry Wigmore, Evidence in Trials at Common Law, §139 (Tillers rev. ed. 1983, alterations in original)). To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable

of raising a reasonable doubt of defendant's guilt." *People v. Hall, supra*, 41 Cal.3d at 833-34. "[Trial courts] should avoid a hasty conclusion ... that evidence of guilt was incredible. Such determination is properly the province of the jury." *Id.* at 834.

By precluding the defense from cross-examining witnesses or presenting evidence of third-party culpability, the court violated appellant's rights to compulsory process and cross-examination. Appellant's constitutional rights were violated, and the trial rendered fundamentally unfair.

The United States Supreme Court has applied heightened scrutiny to procedures involved in capital cases based on its recognition that "death is [] different." (*Gardner v. Florida* (1977) 430 U.S. 349, 357-58; *see also, e.g., Lockett v. Ohio* (1978) 438 U.S. 586; *Godfrey v. Georgia* (1980) 446 U.S. 430). This increased concern with accuracy in capital cases has led the United States Supreme Court to "set strict guidelines for the type of evidence which may be admitted, must be admitted, and may not be admitted." *Lambright v. Stewart, supra*, 167 F.3d 477, *citing Skipper v. South Carolina* (1986) 476 U.S. 1; *Booth v. Maryland* (1987) 482 U.S. 496).

The introduction of this evidence denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in fair jury instructions. It also led

to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 35
THE TRIAL COURT ERRED IN ADMITTING ACCOMPLICE TESTIMONY THAT WAS TAILORED TO CONFORM TO LAW ENFORCEMENT EXPECTATIONS AND WAS THE PRODUCT OF NUMEROUS INDUCEMENTS, RENDERING IT TOO UNRELIABLE TO BE ADMITTED WITHOUT VIOLATING APPELLANT'S RIGHT TO DUE PROCESS.

As discussed above, both Jeanette Moore and Matt Weaver were accomplices who testified in exchange for benefits regarding their own criminal activities. The defense repeatedly objected to it. (RT 834, 1756-1760, 1968). The trial court erred in considering this tesimony in pretrial proceedings as well as in admitting this testimony, as it was too unreliable to be presented to the jury. The admission of that testimony rendered appellant's trial fundamentally unfair and mandates reversal.

A.
Introduction

Both Moore and Weaver were offered deals from the prosecution in return for their testimony, making them bargained-for accomplice witnesses. Their accomplice testimony constituted a compelling part of the prosecution's case, as it provided specific testimony regarding events leading up to the Comp USA Robbery. Without their deals, each could have been charged with burglary, robbery and special circumstance murder regarding the Comp USA crimes as accomplices and/or accessories. Of all the witnesses, they had the

most to gain from their testimony, since they could have been facing at least a sentence of life without the possibility of parole.

Their testimony was wholly unreliable, and was only forthcoming once they were granted immunity. Moore in particular required a second grant of immunity after she perjured herself pursuant to the first immunity agreement. While the agreements purportedly required the witnesses to testify truthfully, that requirement was obviously not effective, as shown by the need for the second agreement for Moore. Both witnesses admitted to committing perjury on several occasions. Essentially, these 'witnesses' followed a script given to them by law enforcement.

B.

Because Accomplice Testimony Is Inherently Suspect, Constitutional Prerequisites To Its Use Have Been Established. They Were Not Followed In This Case.

The Supreme Court has noted that "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals, which are 'dirty business' may raise serious questions of credibility." (*On Lee v. United States* (1952) 343 U.S. 747, 757.) Such testimony "ought not to be passed upon ... under the same rules governing other apparently credible witnesses." (*Crawford v. United States* (1908) 212 U.S. 183, 204.)

In the case of *In re Miguel L.*, (1982) 32 Cal.3d 100, 108-09, this Court

noted that:

> [A]ccomplice testimony is `often given in the hope or expectation of leniency or immunity.' (*People v. Wallin, supra*, 32 Cal.2d at p. 808; *see also* Comment, Accomplice Corroboration – Its Status in California, (1962) 9 UCLA L.Rev. 190, 192.) As a result, an accomplice has a strong motive to fabricate testimony which incriminates innocent persons or minimizes his participation in the offense and transfers responsibility for the crimes to others.

Other courts have been equally skeptical about the veracity of accomplice informants. (*See United States v. Baresh* (S.D.Tex. 1984) 595 F.Supp. 1132, 1135 (agreement contingent upon indictments "placed far more stress upon [witness'] veracity [despite government's requirement of truthfulness] than its gossamer frailness could withstand"); *United States v. Turner*, (E.D.Mich. 1979) 490 F.Supp. 583, 602 (credibility of witness more suspect when he believed that leniency is contingent upon his testimony), *aff'd*, 633 F.2d 219 (6th Cir. 1980); *People v. Green* (1951) 102 Cal.App.2d 831, 838-39 (agreement premised upon conviction of defendant resulted in unfair trial)).

This Court has rejected the argument that accomplice testimony is so inherently unreliable that it should never serve as a basis for a death verdict. (*People v. Hamilton* (1989), 48 Cal.3d 1142, 1179-80.) However, courts and scholars[7] have recognized that certain constitutional prerequisites must be

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"It is important to note that accomplice testimony is ordinarily more damaging and frequently less reliable than that of a disinterested witness. The

followed in admitting such testimony.[8] Where accomplice informants are under compulsion to conform their testimony to a particular version of facts, defendants may be denied "any effective cross-examination of the witnesses, thereby depriving them of the fundamental right to a fair trial." (*People v. Medina* (1974) 41 Cal.App.3d 438, 450; *People v. Allen* (1986) 42 Cal.3d 1222, 1251-53; *People v. Fields* (1983) 35 Cal.3d 329.) Here, the prosecutor granted immunity in exchange for truthful testimony, which clearly implied that the witnesses were compelled to testify in ways which would satisfy the prosecutor. The prosecutor would be satisfied with testimony which inculpated appellant. California has a specific jury instruction, which was given in this case, stating that accomplice testimony is to be viewed with

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likelihood of perjury is increased because the accomplice, admittedly guilty, may be seeking to diminish the severity of his own punishment or to gain revenge. And the chance of successful perjury is increased by the fact that the accomplice, completely familiar with the events of the crime, can fabricate a believable story which can withstand cross-examination." (The Rosenberg Case: Some Reflections on Federal Criminal Law, 54 Columbia Law Review, 219, 234 (1954)).

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Some of the more common precautions are mentioned in *United States v. Fallon* (7th Cir. 1985) 776 F.2d 727 at 734. The *Fallon* court noted particularly the subjection of the accomplice's testimony to cross-examination, the credibility of the testimony as determined by the jury, and proper jury instructions concerning the credibility of accomplice witnesses. (*Fallon* at 734).

distrust. (CALJIC No. 3.18).

Testimony may be so contaminated and untrustworthy that the efficacy of cross-examination to expose lies is rendered so unlikely and the testimony so inherently unreliable that the admission of such evidence would violate due process. *See, e.g., Williams v. Woodford* (9th Cir. 2002) 306 F.3d 665. Here, Matt Weaver's testimony regarding his "identification" of appellant was such testimony. Under these circumstances, it was impossible to shake his testimony about the identification, despite the highly suggestive nature of that identification. Similarly, Moore was compelled to testify regarding her effort to get a fake license in order to be able to drive, and not admit her use of it for fraud.

Necessary safeguards were so flagrantly abused by the admission of the testimony that appellant's right to due process was violated.

C.
As a Matter of Due Process and Eighth Amendment Imperative, the Testimony of the Accomplice Informant Was Too Unreliable to be Admitted at this Capital Trial.

The reliability problem that accomplice witnesses raise is similar to those raised by jailhouse informants and tainted eyewitness identification cases, in which the witnesses, despite the inaccuracy of their testimony, may be largely immune to the corrective process of cross-examination. Such

witnesses "are quite likely to be absolutely convinced of the accuracy of their recollection." Thus their credibility, understood as their truth-telling demeanor, is unlikely to betray any inaccuracies or falsehoods in their statements. (*State v. Michaels* (1994) 642 A.2d 1372, 1382). A similar difficulty exists because accomplice witnesses have the incentive to lie, access to inside information, and, all too frequently, law enforcement coaching, deliberate or otherwise. Here, the witnesses knew that they would not face criminal charges provided that they identified appellant as being involved in the Comp USA robbery.

Bargaining for accomplice testimony produces an enormous incentive for a witness to lie or stick to mistakes (or police suggestions) made at the beginning of their association with the police or prosecution.[9] Such witnesses, like the tainted eyewitness, are, as the court noted, not likely to change their story. (*Michaels* at 1382.)

This Court has spelled out analytical steps for tainted eyewitness cases that may be useful for analyzing the problem of accomplice witness testimony as well: (1) questioning whether the initial pre-trial identification was unduly suggestive and unnecessary, and (2) evaluating (if the answer to the first

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Hughes, Agreements for Cooperation in Criminal Cases, (1992) 45 Vanderbilt Law Review 1, 35.

question is "yes") the reliability of the identification under the totality of the circumstances.[10] (*People v. Johnson* (1992) 3 Cal.4th 1183, 1216. Similarly, in cases involving accomplice witness testimony the court should examine whether or not the accomplice witness' bargain with the prosecution was unduly coercive and suggestive, and should then decide whether the testimony has other sufficient indicia of reliability under a totality of the circumstances test.

In *Michaels*, the court concluded that once the defendant has shown sufficient threshold evidence of the unreliability of the offered evidence, the burden of proof shifts to the prosecution to prove such reliability by clear and convincing evidence. (*Michaels* (N.J. 1994) 642 A.2d 1372, 1383.) A very similar rule exists for tainted identification cases in California. (*People v. Caruso* (1968) 68 Cal.2d 183, 186-87, 190.) Thus, the State should have been required to show that the testimony was reliable. The prosecutor never did so. Weaver's identification of appellant remained subjective, and contradicted the testimony of another eyewitness, Officer Rakitis. Jeanette Moore's testimony

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The *Johnson* court draws the test from *Manson v. Brathwaite* (1977) 432 U.S. 98, *People v. Gordan* (1990) 50 Cal.3d 1223, 1242 and *Neil v. Biggers* (1972) 409 U.S. 188.) The test also includes specified factors for testing the reliability of the identification, such as what kind of opportunity the witness had to see the defendant, consistency with other prior descriptions, and the level of certainty at the time of confrontation. (*Johnson* at 1216.)

remained full of lies and incredulous statements.

The trial court erred in failing to hold an evidentiary hearing in which the prosecution would have had the burden of proof to show by clear and convincing evidence that the accomplice witnesses' testimony met the required standard of constitutional reliability. In the alternative the accomplice testimony should have been excluded under Evidence Code § 352.[11] In *People v. Blankenship* (1985) 167 Cal.App.3d 840, the court upheld a trial court's ruling that certain in-court testimony was inadmissible under Evidence Code § 352 because there was insufficient proof of trustworthiness. (*Blankenship* at 848.) As discussed *supra*, courts have found that in some cases in which testimony is being given for personal advantage, the prejudicial impact can so outweigh the probative value that the testimony could or should be ruled inadmissable.

In capital cases, this need for reliable evidence is all the greater. The United States Supreme Court has made it clear that due process requires a heightened reliability for evidence. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38.) This testimony fell far short of that standard.

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[11] Cal. Evidence Code § 352 allows the court to exclude evidence whose probative value is outweighed by its unjustly prejudicial effect.

D.

Appellant Was Denied Due Process Because The Prosecution's Case Depended Substantially On The Testimony Of Witnesses Who Were Placed, By The Prosecution, Under A Strong Compulsion To Testify In Conformity With An Earlier Unreliable Statement.

In *People v. Medina, supra*, witnesses who were present at the time of a murder were given immunity from charges connected with the killing in return for their testimony. (*Medina,* 41 Cal.App.3d at 450.) This immunity, however, was subject to the condition, written into the order, that their testimony at trial was not materially or substantially changed from prior statements to law enforcement officers. This condition, the *Medina* court found, "denied to defendants any effective cross-examination of the witnesses, thereby depriving them of the fundamental right to a fair trial." (*Id.*) The essence of the decision in *Medina* was that

> [A] defendant is denied a fair trial if the prosecution's case depends substantially on accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion.

(*Id.* at 455.)

In *People v. Fields* (1986) 35 Cal.3d 329, this Court considered a situation similar to, but distinct from, the situation of *Medina.* In *Fields* a witness testified, in response to prosecution questioning, that she had agreed, in a plea bargain, to testify only to the truth. In response to defense

questioning, however, she testified that she understood her agreement to be that she would testify in accordance with her last statement to the police. The defendant argued that the arrangement therefore violated the rule of *Medina*. The Court, though, noted that her statements were not necessarily inconsistent. (*Fields* at 360.) If, the court reasoned, the last statement the witness gave the police was truthful, then, in effect, she had agreed to testify in accord with that statement. (*Fields* at 360-61.) The inconsistency arose, according to the Court, not from her words but from her failure to dispute leading questions put to her by the defense. (*Fields* at 361.) The Court stated

> [W]e recognize that a witness in Gail Fields' position is under some compulsion to testify in accord with statements given to the police or the prosecution. The district attorney in the present case obviously believed that Gail's last statement was a truthful account, and if she deviated materially from it he might take the position that she had breached the bargain, and could be prosecuted as a principal to murder. . . [However,] the requirements of due process are satisfied when a witness' agreement with the prosecution permits the witness to testify freely at trial and to respond to any claim that he breached the agreement by showing that the testimony he gave was a full and truthful account. (*Fields* at 361.)

The essential rule of *Medina*, however, is still in effect and was reaffirmed in *People v. Allen*, in which this Court stated:

> [W]hen the accomplice is granted immunity subject to the condition that his testimony substantially conform to an earlier statement given to the police . . . or that his testimony result in defendants conviction . . . the accomplice's testimony is tainted beyond redemption and its admission denies the defendant a fair

trial.

(*People v. Allen* (1986) 42 Cal.3d 1222, 1251-52.) In *Allen*, the Court stated that a deal for immunity would be valid if it required "only that the witness testify fully and truthfully." (*Allen* at 1253.)

Clearly the *Fields* case contemplates a situation in which the witnesses' statement is a fair representation of what the witness believes to be "the truth." As has been recently noted, however,

> [T]he intractable problem is that a witness may lie or make mistakes at the proffer, and conditions as to the truthfulness may serve as the strongest inducement of the witness to perpetuate the lie or not to retract the mistake. [The witness' temptation to lie is] not just a natural feature of the landscape but specifically is introduced or inflated by the government when it offers immunity or leniency in return for cooperation.[12]

Surely this problem is only exacerbated when the police and prosecution confuse the issue of what is meant by the term "the truth." In this case, the police decided upon a version of what they would accept as "the truth" very early in the process. Officers decided that appellant was guilty and would accept nothing but accounts which implicated him. Only when the witnesses parroted back statements inculpating appellant were officers satisfied.

12

Hughes, Agreements for Cooperation in Criminal Cases, (1992) 45 Vanderbilt Law Review 1, 35.

On September 23 and 24,1992, Ardell Williams and Matt Weaver testified before the grand jury about the Comp USA robbery. Matt Weaver would subsequently receive a grant of judicial immunity for the perjury he committed before the grand jury. (RT 2610-2616, 7628). Appellant was subsequently indicted by the grand jury. The grand jury also asked the prosecutor whether they could indict Matt Weaver as well. The prosecutor was forced to answer that they could, but added that he was not seeking charges against Weaver.

On June 13, 1994, Jeanette Moore and Matt Weaver testified at Eric Clark's trial. Jeanette Moore perjured herself by denying that she used Dena Carey's identification to purchase merchandise on credit. Matt Weaver continued to perjure himself by denying that he knew anything was wrong at the Comp USA crime scene when he really knew that Kathy Lee had been shot and killed.

On July 18-19, 1994, Jeanette Moore was given a judicial grant of immunity for any involvement in crimes related to Comp USA. She testified at appellant's preliminary hearing, and continued to perjure herself by denying that she used Dena Carey's identification to purchase merchandise on credit. (Muni RT 176-420).

On July 20 and 21, 1994, Matt Weaver testified at appellant's

preliminary hearing. He continued to perjure himself by denying that he knew anything was wrong at the Comp USA crime scene when he really knew that Kathy Lee had been shot and killed. (Muni RT 492-663).

On March 28 and April 1, 1996, while testifying at appellant's trial, Jeanette Moore admitted that she committed perjury at the preliminary hearing. Judicial immunity proceedings were then conducted a second time in order to allow her to testify without being subject to punishment for repeated perjury. (RT 7640-7821).

On April 2, 1996, Matt Weaver was judicially granted immunity. (RT 8039-1-- 8039-4). He admitted that he previously committed perjury during grand jury testimony and at the preliminary hearing.

The introduction of this evidence denied appellant a fair trial and reliable determination of guilt and penalty. These were critical witnesses, as Weaver was the only person who testified that appellant was present at the Comp USA scene. Moore was the only witness, other than Ardell Williams, who provided testimony about appellant's planning of the Comp USA robbery. Both of these witnesses provided crucial corroboration for Ardell Willimas hearsay statements. Without this testimony, the prosecution's case would have been decimated, and Williams' statements would likely not have been admitted.

The violation of state law was a violation of a state created liberty interest in fair jury instructions. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 36
THE TRIAL COURT ERRED BY ADMITTING AN OUT OF COURT INTERVIEW UNDER EVIDENCE CODE SECTION 356 WHEN THE TRANSCRIPT OF THE INTERVIEW HAD NOT BEEN ENTERED INTO EVIDENCE, VIOLATING APPELLANT'S RIGHTS TO CONFRONTATION, DUE PROCESS AND A RELIABLE DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Matthew Weaver testified for the prosecution. (RT 7999-8098). On cross-examination, Weaver repeatedly responded to questions by stating that he did not know the answer or could not remember what occurred. (RT 8118-8168). In response, trial counsel refreshed Weaver's memory with a transcript of Inspector Grasso's interview of Weaver on August 17, 1992. (RT 8118). Weaver then would state that he had been refreshed and did remember what happened:

> Trial counsel: Do you remember at a time before you talked to the police from Orange County that there was some investigation done by your friend, Mr. Kemerling, on the case?
> Weaver: Did I remember that?
> Q. Yes.
> A. No
> Q. He called Damian's House, did he not?
> A. I don't remember. I don't know.
> Q. ....I can show you something in the transcript to see if it refreshes your memory. If you could read starting here and that paragraph.
> A. OKAY
> Q. Does that refresh your memory?
> A. Yes.

(RT 8157).

Trial counsel: You remember telling him [Inspector Grasso] in that second interview on August 17th that you brought a change of clothes in case they talked to you for a long time, you would change your clothes..go directly to work?

Weaver: I don't remember saying that.

(RT 8102-8103).

Q: I'd like to show you part of a transcript here, just to see if this refreshes your memory about bringing a change of clothes to that 8/17 interview.

A: Where do you want me to read?

Q: Just right there, and read your answer. Just read it yourself.

1. Okay.

Q. Does that refresh your memory?

A. Yes.

Q. And you brought a set of clothes to go to work in case they kept you there asking questions a little late; is that correct?

A. Correct.

(RT 8118-8119).

On redirect, the court granted the prosecutor's request that it be allowed to play for the jury the entire tape of the interview citing to §356 and §791(b). Cal Evid. Code §356; §791. (RT 8203, 8439).

The admission of this evidence violated the Constitution. In *Crawford v. Washington* (2004) 124 S.Ct. 1354, the United States Supreme Court held that out-of-court statements by witnesses that are testimonial are barred, under

the Confrontation Clause,[13] unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court, abrogating *Ohio v. Roberts*, 448 U.S. 56.[14]

The Supreme Court explained that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Crawford v. Washington.* at 1365. "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the 'right ... to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox v. United States,* 156 U.S.

13

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." That bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas,* 380 U.S. 400, 406 (1965).

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In *Ohio v. Roberts,* 448 U.S. 56 (1980), the High Court held that the admission of an unavailable witness's statement against a criminal defendant was allowable if the statement bore "adequate 'indicia of reliability.'" *Id.,* at 66. To meet that test, the evidence was required to either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Ibid.*

237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895); cf. *Houser,* 26 Mo., at 433-435." *Crawford v. Washington*, at 1365. Cases conform to *Mattox's* holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See *Mancusi v. Stubbs,* 408 U.S. 204, 213-216 (1972); *California v. Green*, 399 U.S. 149, 165-168 (1970); *Pointer v. Texas,* 380 U.S., at 406-408 ; cf. *Kirby v. United States,* 174 U.S. 47, 55-61 (1899).

The Supreme Court held:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.

Crawford v. Washington, at 1366. That Court explained that "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at 1371.

A.
The Tape Recording was Inadmissible Under §791(b)

As a theory of admissibility, the prosecutor argued that the interview

should be admitted because the defense alleged that Clark's prosecution was racially motivated. (RT 8206). The prosecutor attempted to transfer the allegation of a problematic motive for prosecution onto Weaver in order to justify an admission of a prior consistent statement under 791(b).[15] The court disagreed with the prosecution and held that the transcript was inadmissible under 791(b) because it was the prosecution's credibility that was tarnished with bias and possible motive to fabricate and not their witness' credibility. (*Ibid.*)

B.
The Tape Recording was Erroneously Admitted under § 356

Unable to admit the transcripts under § 791(b), the prosecution argued that the interview was admissible under § 356 because on cross-examination of Weaver, trial counsel made references to the interview. (RT 8440). The trial court erroneously admitted the tape under § 356. (RT 8439). The section reads as follows:

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15 This section states:

> (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

> Where part of an act, declaration, conversation, or writing is *given in evidence* by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence. [Emphasis added.]

Cal. Evid. Code §356.

During the argument over the admissibility of the interview, all of the parties relied on *People v. Zapien.* (1993) 4 Cal. 4th 929; (RT 8448). The trial court interpreted *Zapien* to require the trial court to review the entire transcript before it may be read to the jury. (RT 8445-8446). The trial court, further, stated that the "whole of the conversation, if part of it is gone into, may also be offered by the adverse party." (RT 8445). The court ruled that the entire tape of the second interview of Weaver by Inspector Grasso could be played for the jury. (RT 8445). The prosecution distributed transcripts to the jury and then played the entire taped recording. (RT 8705). What was actually played in-court was not transcribed for the record. Nor was the actual transcript given to the jury entered into evidence. (RT 8705).

In order for the transcript to be admissible it must meet two requirements: 1) it must be placed into evidence and 2) it must be limited only to portions which are relevant. Cal. Evid. Code § 356.

This Court has emphasized that in order for an out of court transcript to be admissible under §356, the defendant must place part of the transcript into evidence before allowing the adversary to place the entire transcript into evidence. *People v. Sanders* (1995) 11 Cal. 4th 475, 520. In *Sanders,* trial counsel sought to cross-examine a prosecution witness with statements from a recorded interview with an investigator. *Ibid* at 519. The trial court would not allow questions to be asked based on the transcript unless it was disclosed to the prosecution. *Id.* The court arrived at this conclusion because it believed that §356 applied to the transcript: "And that when you go into part of an act, declaration, conversation or writing, that the prosecution is entitled to bring out the entire matter surrounding it." *Id.*

This Court reversed the trial court's ruling. This Court held that California Evidence Code § 356 is not triggered whenever a party has gone into *part* of an act or conversation. Instead, §356 applies where "part of an act, declaration, conversation, or writing is *offered into evidence* by one party, the opposing party may inquire as to the whole." Cal. Evid. Code §356. The trial court in *Sanders* erred, "..since counsel did not seek to have any portion of the recording or transcript entered into evidence." *Ibid.* This Court further distinguished *Zapien*:

> The case is thus distinguishable from *People v. Zapien* (1993) 4 Cal. 4th 929, 959 [17 Cal. Rper. 2d 122, 846 P.2d 704], in which we held that, because the defendant

> *introduced portions of a witness's testimony into evidence*, the prosecutor was entitled, under Evidence Code section 356, to place the transcript of the entire testimony into evidence. [emphasis added]. *Ibid.*

Here, appellant did not nor seek to introduce the transcript into evidence. At no time, did trial counsel request that Weaver read the transcript aloud. Instead, the transcript was used to refresh witness Weaver's memory, an act insufficient to place the interview into evidence.

The following provides an illustration:

Trial Counsel:	Did you tell investigator Grasso that it was Bill Clark's House?
Weaver:	Not that I remember.
Q:	If I could just refresh your recollection. If you could just read to a couple lines above the yellow mark and then including the yellow mark. Does that refresh your memory?
A:	Yes.
Q:	Did you believe it was Eric Clark's brother's house?
A:	I just assumed it was. I didn't believe it was. I didn't know.

(RT 8153).

As the above example indicates, the appellant used the transcripts to refresh the witness's recollection and did not place them into evidence. (RT 8153). The court erred when it allowed the transcript to be admitted when the first element of §356 was not met. This error requires reversal on state law grounds.

C.
Appellant's Federal Due Process Rights Were Violated by Playing the Tape Recorded Interview

The admission of this evidence violated the Constitution. In *Crawford v. Washington* (2004) 124 S.Ct. 1354, the United States Supreme Court held that out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause,[16] unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court, abrogating *Ohio v. Roberts*, 448 U.S. 56.[17]

The Supreme Court explained that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Crawford v. Washington.* at 1365. "The text of the Sixth Amendment does

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16 The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." That bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas,* 380 U.S. 400, 406 (1965).

17 In *Ohio v. Roberts,* 448 U.S. 56 (1980), the High Court held that the admission of an unavailable witness's statement against a criminal defendant was allowable if the statement bore "adequate 'indicia of reliability.'" *Id.,* at 66. To meet that test, the evidence was required to either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Ibid.*

not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the 'right ... to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox v. United States,* 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895); cf. *Houser,* 26 Mo., at 433-435." *Crawford v. Washington*, at 1365. Cases conform to *Mattox's* holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See *Mancusi v. Stubbs,* 408 U.S. 204, 213-216 (1972); *California v. Green*, 399 U.S. 149, 165-168 (1970); *Pointer v. Texas,* 380 U.S., at 406-408 ; cf. *Kirby v. United States,* 174 U.S. 47, 55-61 (1899).

The Supreme Court held:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.

Crawford v. Washington, at 1366. That Court explained that "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the

Sixth Amendment prescribes." *Id.* at 1371.

The statements did not possess the indicia of truthfulness which the Confrontation Clause was designed to guarantee. *See Coy v. Iowa, supra.* The taped interview played for the jury contained unsworn statements to law enforcement. At trial, Weaver admitted that he had lied during his first interview with Grasso and had been given immunity for perjury by the prosecution. (RT 7999). Weaver's testimony was so lacking in truthfulness that the prosecutor was moved to comment: "Under the court's just previous statements then, probably, that first interview then should not be offered or will not be offered by the people, because its all as the witness said, it was all lies." (RT 8203).

Weaver had every interest to tell the officers what they wanted to hear because of his potential liability. Weaver admitted to assisting in what would have been a robbery of the Comp USA. (RT 8007-08, 8011). He could have easily been charged along with appellant for the conspiracy to rob Comp USA and for the murder of Kathy Lee.

The right to confront witnesses serves three purposes: (1) to insure reliability by means of oath, (2) to expose the witnesses to cross-examination, and (3) to permit the trier of fact to weigh the demeanor of the witness. [18]

18

The United States Supreme Court established that a defendant's Six

California v. Green (1970) 399 U.S. 149, 158. When the tape recording of Inspector Grasso's August 14, 1992 interview was played, none of the above goals of the right to confrontation were met. Weaver did not take an oath as a condition of his testimony before he was interviewed by Grasso. There was no cross-examination at the time of the interview. In fact, Grasso asked leading questions designed to get the answers he wanted to hear. Most importantly, the jury was not given the opportunity to weigh Weaver's demeanor when making the recording.

The admission of these tapes was prejudicial. Weaver's credibility was of critical importance. He was the only witness who could place appellant at the scene of the Comp USA robbery. He also provided corroboration for other witnesses in need of it, such as Jeanette Moore, as well as the statements of Ardell Williams. The introduction of these tapes, which were inadmissible under state and federal constitutional law, allowed the prosecution to buttress its case by presenting the same testimony numerous times. The effect was to convince the jury that it was true because they heard it more than once.

The introduction of this evidence denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a

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Amendment right to confrontation applied to the states through the Fourteenth Amendment. *Pointer v. Texas* (1965) 380 U.S. 400.

violation of a state created liberty interest in fair jury instructions. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 37
THE COURT ERRED WHEN IT FAILED TO ENFORCE ITS RULING AND ALLOWED AN INADMISSIBLE PRIOR BAD ACT TO BE ADMITTED, IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The prosecutor filed a pre-trial motion requesting that evidence of a crime allegedly committed by the appellant be admitted under California Evidence Code §1101(b). (CT 2008). The prosecution alleged a person entered Softwarehouse presented himself as "Tom Jones," and secured two laptop computers from a salesperson named Richard Highness. Tom Jones then proceeded to the register and exited without paying for the two computers. (RT 8589). On the day these events occurred, Ardell Williams was one of the people staffing the registers and was fired as a result. (RT 8590). Williams was also convicted of grand theft, placed on probation and ordered to pay restitution. (RT 10156). Appellant was never charged with, or convicted of, this crime. (RT 2927).

At the hearing to determine the admissibility of appellant's alleged prior thefts of computers, the prosecutor argued that the evidence was admissible to prove that appellant had an "interest in computers." (RT 2928). The prosecutor asserted that the alleged prior thefts fell under the exception to the rule barring the introduction of evidence of character to prove conduct when

using prior bad acts for the purpose of establishing "motive."[19] The trial court disagreed: "His motive is to steal...it's to make money. And that just shows he's a person of bad character." (RT 2931). The trial court then discussed each exception to the hearsay rule that is listed in 1101(b) and found that none applied to the alleged prior theft at Soft Warehouse. (RT 2331-2332). "The motion to bring in specific evidence concerning the walk-in computer thefts in Los Angeles County is denied... ." (RT 2946).

The trial court's ruling was correct. Other-crimes evidence is so inherently prejudicial, its relevancy is to be "examined with care." It is to be

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[19] Cal. Evid. §1101 reads as follows:

Evidence of character to prove conduct

(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

received with "extreme caution," and all doubts about its connection to the crime charged must be resolved in the accused's favor. *People v. Sam* (1969) 71 Cal.2d 194, 203.

"The general rule is that evidence of other crimes is inadmissible when it is offered solely to prove criminal disposition or propensity on the part of the accused to commit the crime charged, because the probative value of such evidence is outweighed by its prejudicial effect. The purpose of the rule is to avoid placing the accused in a position of having to defend against crimes for which he has not been charged and to guard against the probability that evidence of other criminal acts having little bearing on the question whether defendant actually committed the crime charged would assume undue proportions and unnecessarily prejudice defendant in the minds of the jury, as well as [to] promote judicial efficiency by restricting proof of extraneous crimes." *Ibid.*

Allowing evidence which suggested that appellant was involved in an earlier theft involving computers was unduly prejudicial. The evidence did not assist the jury in its determination of guilt or innocence for his involvement in the Comp USA incident. Instead, evidence of alleged prior bad acts prejudiced appellant in the minds of the jury. It only showed that the appellant might have been involved in prior bad acts without illuminating for the jury

any information that indicates that he was or was not involved in the Comp USA incident that took place October 18, 1991. The trial court would have committed error if it had made any other ruling but to exclude the alleged involvement by appellant in a prior theft.

A.

Prosecutorial Misconduct Occurred When The Prosecution Presented to the Jury Testimony Alleging Prior Bad Acts Previously Ruled Inadmissible.

Ignoring the trial court's decision, the prosecution called Richard Highness, the salesperson, to testify. After Highness described the crime, the prosecutor pointed to appellant and asked if appellant was "Tom Jones." (RT 8591). Highness said "yes, sir." *Ibid.* The prosecution presented Highness' testimony for the sole purpose of admitting evidence of the prior bad acts the trial court had previously ruled inadmissible. (RT 2946). Prosecutorial misconduct violated appellant's constitutional rights because the prosecutor's action's "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donneyly v. DeChristofore* (1974) 416 U.S. 637, 643.

"What is crucial to a claim of prosecutorial misconduct is not the good faith vel non of the prosecutor, but the potential injury to the defendant."

People v. Benson (1990) 52 Cal. 3d 754, 793. "When [a prosecutorial misconduct] claim focuses on comments made by the prosecutor before the jury, a court must determine at the threshold how the remarks would, or could, have been understood by a reasonable juror. [Citations.] If the remarks would have been taken by a juror to state or imply something harmful, they are deemed objectionable. *Ibid.*; (citing *People v. Warren* (1988) 45 Cal. 3d 471, 487; *People v. Williams* (1997) 16 Cal.4th 153, 253.

It is reasonably likely that jurors inferred from Highness' testimony and identification of appellant that he had committed prior robberies of computer stores. Thus, they concluded it was likely that he was the type of person who could have participated in the Comp USA incident. However, character evidence provided through prior bad acts is not admissible to establish whether or not appellant was involved in another specific act–robbery of a Comp USA store and resulting murder.

The prosecution was directly responsible for the prejudicial impression the jury received of the appellant resulting from Highness' testimony. This prosecutor's misconduct placed, in front of the jury, testimony of alleged acts by appellant that were similar enough to make a reasonable juror believe that if appellant committed these acts then it is likely that he would be the type of person who would have committed the Comp USA robbery and murder.

However, the walk-in was not similar enough for the trial court to find that it met the requirements to come in for any of the 1101(b) exceptions. (RT 2931-2932).

> And I know you've told me this before, and its's not soaking through, which of those prongs to you believe specific testimony about four or five or however many walk-in computer thefts in preceding years fall into those categories? And which category, motive? His motive is to steal in taking those, its's to make money. And that just shows he's a person of bad character.
>
> Opportunity, there is nothing about the Los Angeles thefts, so far as I know or you have argued or given me evidence of, that relates to his opportunity to commit the crime in question, which is the Cal Comp [sic].[20]
>
> His intent . That practicably blends into motive in this case. It is placed in sure. For example, when the defense says yea, I hit the guy in the face by my intent was just to deck him, I had no intent to kill him. Intent is not an issue.
>
> Preparation? Those thefts in L.A have nothing to do with the preparation that was done to rip off a whole warehouse.
>
> Plan? The plans are totally different.
>
> Knowledge? Knowledge what? That there are computers in a computer sore?
>
> Identity? We have already agreed that there is a signature evidence which would come in on identity and again, absence or mistake or accident. .. So I just don't see where on your offer of specific acts of misconduct it's fitting into an acceptable prong of 1101(b). (RT 2931-2932).

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20 This is not the correct name for the computer store relevant to this case. The correct name is Comp USA and not Cal Comp.

It could not have been clearer to the prosecution that this evidence was inadmissible. The prosecution had filed a pretrial motion requesting that it be admitted and his motion was denied. The hearing was very detailed and extensive. When the court denied the petition he said "[t]he motion to bring in specific evidence concerning the walk-in computer thefts in Los Angeles County is denied..." (RT 2946). Even if the prosecution was " unaware" that Highness' testimony did not fall under the pretrial hearing ruling, the prosecutor knew that he was still required to give notice based on a 1101(b) motion that the trial counsel had filed. (RT 8605).

B.
The Court Failed to Fulfill Duty to Enforce Prior Ruling

Following the identification and testimony by Highness, the trial court expressed its dismay at the fact that the prosecution admitted evidence of prior bad acts, as well as conducting an in court identification without a hearing. (RT 8604). The trial court gave the prosecution the benefit of the doubt and assumed that the "relevancy of the testimony was to link Eric Clark and Ardell Williams, to show familiarity with the store, with each other [and].. with the store procedures." (RT 8604). There was no reason, however, why that testimony could not have been introduced without seeking to identify appellant as "Tom jones." The trial court was aware during the testimony that the

evidence that was being entered had previously been held inadmissible because its probative value was outweighed by its prejudicial impact on the jury. For this reason, the trial court should have taken actions to prevent the admittance of such prejudicial evidence.

California law requires a judge to control proceedings: "It shall be the duty of the judge to control all proceedings during the trial and to limit the introduction of evidence." *Cal. Penal Code* § 1044. "The court has the authority to take whatever steps are necessary to see that no conduct on the part of any person obstructs the administration of justice to maintain the dignity and authority of the court." *People* v. *Ponce* (1996) 52 Cal. Rptr.2d 422, 427 (*quoting, People v. McKensie* (1983) 34 Cal.3d 616, 626-627.) It has further been noted that the trial judge

> ...has the responsibility for safeguarding both the rights of the accused and the interest of the public in administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which my significantly promote a just determination of the trial. *Ibid.*

The foregoing responsibilities and duties are "inherent as well as statutory." *People v. Cox* (1991) 53 Cal.3d 618, 700.

The prosecutor violated the court's ruling by asking the question. The trial court then failed to fulfill its responsibilities and duties when it did not

enforce the ruling by preventing the question from being answered. Up until the identification of appellant as Tom Jones, there was no connection between the theft–the bad act described by Highness– and appellant. The testimony would have shown that Ardell Williams was involved in a theft. Appellant, however, would not have been implicated.

The court failed to exercise its inherent and statutory duty to prevent the identification. Instead, the court, after the fact, questioned the prosecutor as to whether he believed he had the right to ask the question. (RT 8607). The prosecution said yes and the court offered to give a limiting instruction to the defense. However, the damage to the proceeding was already done because the information and identification was already before the jury.

C.
Constitutional Violations

The admission of the prior theft violated appellant's federal due process rights to a fair trial under the Constitution. The introduction of impermissible character evidence is a violation of a state statute, but can also rise to the level of a constitutional Due Process violation:

> While adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when state standards are violated; conversely, state procedural and evidentiary rules may countenance processes that do not comport with fundamental

> fairness. [Citations omitted] The issue for us, always, is whether the state proceedings satisfied due process.

Jammal v. Van de Kamp, 926 F.2d 918 (9th Cir. 1991). Here, evidentiary rules were disregarded. State law evidentiary errors which render a trial fundamentally unfair violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution (*Estelle v. McGuire*, 502 U.S. __, (1991); *Jamal v. VanDeKamp*, 926 F.2d 918, 919 (9th Cir. 1991); and *Henry v. Estelle*, 399 F.2d 3241 (9th Cir. 1993)).

It is improper to convict a defendant and sentence him to death based on irrelevant evidence. It violates a defendant's Fourteenth Amendment rights to do so. *See, e.g.*, *Dawson v. Delaware* 503 US 159 (1993). Prejudice, injected in a trial, can taint the trial to the point where a petitioner is fundamentally deprived of a fair trial. *Kealohapauole v. Shimoda*, 800 F.2d 1463 (9th Cir. 1986). The introduction of this evidence was violative of petitioner's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution (see *McKinney v. Rees*, 939 F.2d 1378 (9th Cir. 1993); *Henry v. Estelle*, *supra*, 993 F.2d 3241), as well as Petitioner's rights under the Fifth and Eighth Amendments, and constitutes an arbitrary denial of state law rights, in violation of due process.

The introduction of this evidence denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a

violation of a state created liberty interest in restricting the admission of evdience pursuant to the Evidence Code. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 38
THE TRIAL COURT ERRED IN ADMITTING TAPE RECORDINGS THAT WERE NEVER PLAYED IN OPEN COURT IN VIOLATION OF DUE PROCESS AND HEIGHTENED CAPITAL CASE RELIABILITY UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

On March 17, 1994, Inspector Guzman played for Angelita and Nena Williams samples of voices in order to identify the voice of "Janet." (RT 9583). A tape of an interview with Ms. Yancey was included among these samples. (RT 9584) Sergeant Guzman played less than 90 seconds of the tape for Angelita and Nena. (Muni RT 1372-1374). At the preliminary hearing in August of 1996, Sergeant Guzman was unsure what portion of the tape he actually played. (Muni RT 1486; RT 2013). He could not identify the particular portion played for the witnesses. Angelita and Nena were asked to identify Yancey's voice from this tape during the preliminary hearing and during the trial. (RT 7533, 9323). They were played a random portion of the tape during the trial which did not necessarily correspond to the portion previously played for them. In addition to the presentation of the recordings during the direct examination, the prosecutor sought to admit the entire cassette into evidence. (RT 10119).

Trial counsel objected to the admission of the entire cassette on the grounds of relevancy and prejudicial value out weighing any possible

probative value. (*Ibid.*). Since the witnesses had heard only brief portions of the tapes, the entire tape was not relevant. The prosecution could not identify what part of the tape had made up the actual portion that had been played and thus identified by Nena and Angelita Williams. (RT 10119). During the preliminary hearing the parties stipulated that the portion that was played for the witnesses was arbitrarily chosen by Grasso and that the same portion was played for the two witnesses in his office. (Muni CT 368).

The court ordered that the tapes be edited down to an allotment which was closer to the amount played for the witness. This was never done and the entire two-hour interview was placed into evidence. (CT 15195). The entire tape should not have been admitted. Moreover, it was misconduct for the prosecutor not to edit the tape, as he had previously represented that they would work it out and pare down the amount presented to the jury. (RT 10119). The Court also had a duty to enforce its order to edit the tape.

This evidence was prejudicial. Yancey's portion of the tape contained various statements by her shifting blame for the crimes onto appellant and away from her. (RT 10119). This evidence was not admissible against appellant.

A.
The Tapes Were Irrelevant and Inadmissible

Only relevant evidence is admissible. Cal. Evid. Code § 350; *People v. Babbitt* (1988) 45 Cal.3d 660, 68. Relevant evidence is defined in Evidence Code §210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. *People v. Garceau* (1993) 6 Cal.4th 140, 177 (quoting *People v. Daniels* (1969) 52 Cal.3d at p. 856.

The sole purpose of the tape recordings was to identify Yancey's voice. The prosecution only played a short portion of the tape for the witnesses for purposes of identifying Yancey as Janet and yet the full two hours were admitted during trial. The rest of the tape was irrelevant because it did not assist in the identification of Yancey. (RT 7533, 9323). It was as relevant to the identification of Yancey as pictures not placed into a six pack would be to the actual six pack identification. As such, the tape should not have been played at all.

The admission of this evidence violated the Constitution. In *Crawford v. Washington* (2004) 124 S.Ct. 1354, the United States Supreme Court held that out-of-court statements by witnesses that are testimonial are barred, under

the Confrontation Clause,[21] unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court, abrogating *Ohio v. Roberts*, 448 U.S. 56.[22]

The Supreme Court explained that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Crawford v. Washington.* at 1365. "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the 'right ... to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox v. United States,* 156 U.S.

21

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." That bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas,* 380 U.S. 400, 406 (1965).

22

In *Ohio v. Roberts,* 448 U.S. 56 (1980), the High Court held that the admission of an unavailable witness's statement against a criminal defendant was allowable if the statement bore "adequate 'indicia of reliability.'" *Id.*, at 66. To meet that test, the evidence was required to either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Ibid.*

237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895); cf. *Houser,* 26 Mo., at 433-435." *Crawford v. Washington*, at 1365. Cases conform to *Mattox's* holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See *Mancusi v. Stubbs,* 408 U.S. 204, 213-216 (1972); *California v. Green*, 399 U.S. 149, 165-168 (1970); *Pointer v. Texas,* 380 U.S., at 406-408 ; cf. *Kirby v. United States,* 174 U.S. 47, 55-61 (1899).

The Supreme Court held:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.

Crawford v. Washington, at 1366. That Court explained that "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at 1371.

B.
Admission of the Tape was Prejudicial

Even if, *arguendo*, the portion of the tape played for the witnesses was relevant, the remainder should have been excluded because its probative value was substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. Cal. Evid. Code §352[23]. The tape with Yancey's voice was a recording of the interview that Grasso had with Yancey that was suppressed on the grounds that law enforcement obtained the statement in violation of Yancey's her right to an attorney. (Muni CT 229-252). Appellant was prejudiced because Yancey's tape, which was given to the jury, contained unsworn information inculpating appellant which was not subject to cross-examination. (RT 10119).

The court's exercise of discretion under §352 can be disturbed on appeal when the probative value of the evidence is outweighed by its prejudicial effect. *People v. Wilson* (1992) 3 Cal.4th 926, 938. This Court has described the "prejudice" referred to in Evidence Code section 352 as "characterizing evidence that uniquely tends to evoke an emotional bias against a party as an

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23

§ 352. Discretion of court to exclude evidence

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

individual, while having only slight probative value with regard to the issues." *People v. Crittenden* (1994) 9 Cal.4th 83, 134. The contents of the tapes were not relevant to the issue of identification and had no probative value, while they were highly prejudicial, in that they contained statements by Yancey placing blame on appellant. Appellant had denied any role in these events, and lacked the opportunity to cross-examine Yancey's taped statement.

The introduction of this evidence denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in fair jury instructions. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and

Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 39
APPELLANT'S RIGHT TO A FAIR TRIAL AND HEIGHTENED CAPITAL CASE RELIABILITY WAS VIOLATED BY THE SUGGESTIVE IDENTIFICATION OF ANTOINETTE YANCEY BY NENA WILLIAMS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

At the time of Ardell Williams' murder, appellant was in custody at the Orange County Jail and thus physically incapable of committing the murder of Ardell Williams. (RT 1232.) The prosecution's case against appellant for Ms. Williams' death was entirely circumstantial. The prosecution alleged a conspiracy between appellant and Yancey to kill Ms. Williams. There was no physical evidence at the crime scene connecting Yancey to Ms. Williams death. (Muni RT 1850-1851). The only evidence presented connecting Yancey to Ardell's death was a delivery of flowers to Williams and phone calls to Williams' mother. The prosecutor claims that the same person who allegedly called and arranged for Ardell to be interviewed for a job was the same person who delivered the flowers. (RT 9349).

At the trial, over defense objections , the court granted the prosecutor's request that Yancey be present at appellant's trial. (RT 9112-9116). The prosecutor then asked the Williams family to (1) visually identify Yancey as both the person who delivered the flowers, and (2) identify her voice as the

person who arranged for Ardell's interview. (RT 9308, 9323, 9387, 9450). The strongest evidence linking appellant to Williams' death was the identification of Yancey as "Carolyn"–the person who delivered the flowers–and "Janet"–the person who arranged Yancey's interview.

This identification was crucial, as the appellant was in the Orange County Jail at the time. The prosecutor's theory was that Antoinette Yancey either killed Ardell Williams or arranged to have Ardell meet her at an isolated location to be killed. It was critical for the prosecutor to present evidence that Yancey was tied to Ardell Williams' murder, as that was the only way to tie appellant to the murder. The crucial role that that identification played in appellant's conviction and the fact that these same identifications were so unduly suggestive as to violate appellant's due process rights, requires reversal.

The identification conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that appellant was denied due process of law. *Johnson v. Sublett* (9th Cir. 1995) 63 F. 3d 926, 928 (Citing *Stovall v. Denno* (1967) 388 U.S. 293, 301-02.) When an eyewitness has been subjected to undue suggestion, the fact finder cannot hear and evaluate the identification testimony if the totality of the circumstances

suggests that there is a very substantial likelihood of irreparable misidentification. *People v. Arias* (1997) 13 Cal.4th 92; *Mason v. Brathweitine* (1977) 423 U.S. 98, 106.

Determining whether an identification is unduly suggestive requires a two step analysis. *United States v. Given* (9th Cir.1985) 767 F.2d 574, 580-582. The first step requires a determination of whether the procedure was "so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification." *Simmons v. United States* (1968) 390 U.S. 377, 384. The second step, "if the identification procedure was impermissibly suggestive, then the court must determine whether it is nonetheless reliable." *United States v. Given*, supra, 767 F.2d at 581. The United States Supreme Court instructed that in order to determine reliability of an in court identification the trial court is to evaluate the following factors:

> (1) the witness's opportunity to view the suspect at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of any prior description by the witness, (4) the level of certainty displayed by the witness at a suggestive confrontation, and (5) the length of time between the crime and the confrontation.

Neil v. Biggers (1972) 409 U.S. 188, 199-200

A.

As Explained in Detail in Claims 16 and 17, the Pre-Trial Procedure Utilized to Identify Yancey as Both Janet and Carolyn was Unnecessarily Suggestive.

Both Nena Williams and her mother Angelita Williams made pretrial identifications of Yancey's voice only after they knew found out her actual name from the newspapers and were made aware that she had been arrested for Ardell's murder. (Muni RT 1220, 1729). The recordings that were used by the prosecution for purported voice identifications included Yancey's name. They were recordings of her interrogation. (Muni RT 1738). In contrast, when the defense played recordings of Yancey's voice which was not identified by name, neither Nena nor Angelita Williams were able to identify her voice. (Muni RT 1832). When the identification procedures were employed fairly, the witnesses were unable to identify any particular voice. When suggestive procedures were used, however, they identified Yancey's voice.

The actual identification at the trial was additionally suggestive. Both witnesses, after suggestive procedures were employed, identified Yancey as Carolyn and Janet. Yancey was brought in alone with no other women into the court room. (RT 9308). She entered the courtroom from the entrance that indicated that she was being held in jail. Nena did not identify the person she

had previously seen. Instead, she simply did what she knew the prosecution wanted, which was to identify the person brought out by the bailiffs. Nena and Angelita knew that the police and prosecution were convinced that Yancey was also Carolyn and Janet. They did not approach the in-court identification with an unbiased mind.

B.
The Factors Demonstrate That These Were Unreliable Identifications

1.
Witness' Opportunity to View the Suspect at the Time of the Crime

Neither Nena nor Angelita Williams observed anyone at the time and place of Williams' murder. Nena and Angelita Williams, instead, reportedly saw a woman who identified herself as Carolyn at the family home on February 10, 1994. (RT 1254, 9306-9307). Nena testified that a black woman came to the door with a flower delivery. Nena indicated that she saw this woman for about a minute and half. (RT 9306.) Angelita saw "Carolyn" for even less time. When Angelita became aware that Carolyn was in the house, she did not see Carolyn because she was in the restroom. As soon as she exited, Carolyn was ushered out of the house. (RT 9447). As such, neither

witness had much time to view the suspect.

2.
Witness' Degree of Attention

It was only after Ardell's death that the family members discussed the incident with Carolyn with the police. (RT 9352). They did not report it despite their concern over Ardell's custody battle with the father of her child.

3.
Accuracy of any prior description by the witness

As discussed in Claims 17 and 18, the witnesses were asked to make voice identifications. Nena's prior identifications were not accurate. The first time that Inspector Grasso played different voices for Nena Williams, she picked out Yancey's voice as the voice that she heard on the phone. However, during the in-court identification offered by the defense, the voice that Nena Williams chose as that of Carolyn was not Yancey's voice. Of note was the fact that she could not identify Yancey's voice on that tape, which she had never heard before, while she could identify Yancey's voice on a tape which she had previously heard more than once, and on which Yancey was identified

by name. (RT 9447). The tape of Yancey was taken from her taped interview with police.

4.
Level of Certainty Displayed by the Witness at a Suggestive Identification

On March 18, 1994, officers played audiotapes of several voices for Angelita and Nena Williams. (RT 9580-9587). There were several voices on the tape. Yancey's voice was the only soft voice on any of the tapes. (RT 9387-9392, Muni RT 1618-1623). The other voices were all recorded from telephone calls. Yancey's voice was recorded at an in-person interview. Yancey's tape also included Detective Guzman's voice, which was well known to the Williams family. They then identified Antoinette Yancey as Janet. (Muni RT 1618-1623, RT 9223-9233).

At the preliminary hearing, trial counsel requested that Nena identify Yancey's voice using a recording where the speakers all stated identical phrases, and in which the speakers were not identified by name as they were on the prosecution tapes. (Muni RT 1281-1295). Trial counsel objected to the prosecution's collection of speakers because they were not all saying the same phrases. In addition, Yancey's voice samples were taken from her interview

with police. Regardless of these important differences the court ruled in favor of the prosecution. (Muni RT 1300-1303).

Initially, Nena Williams refused to listen to any tapes. After leaving the courtroom and speaking to Grasso, she agreed to listen to the tapes in the DA's office. When she listened to the defense tape, she couldn't identify Yancey.

5.
Length of Time Between the Crime and the Identification

"Carolyn" delivered flowers and spent two minutes at the Williams home on February 10, 1994. Some of that time she spent in the bathrrom alone. Ardell was killed March 13, 1994 but Nena was not a witness. (RT 1239-1248). The identification took place over four years later on April 17, 1996. (RT 9308). In light of the short length of time that Nena observed "Carolyn" and contrasted to the extended length of time before she identified Yancey as "Carolyn," the identification procedure was impermissibly suggestive and identification is unreliable.

C.
Conclusion

The introduction of this evidence denied appellant a fair trial and

reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in fair jury instructions. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 40
TRIAL COURT ERRED BY ADMITTING IRRELEVANT EXPERT TESTIMONY IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE REPRESENTATION, AS WELL AS IN VIOLATION OF DUE PROCESS AND HEIGHTENED CAPITAL CASE RELIABILITY UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

During the guilt phase, the prosecutor believed that the key to successfully convicting appellant of capital murder required proving that appellant had motive to kill Ms. Williams. Further, the prosecutor believed that Mr. Earley, appellant's attorney, had been "the vehicle of the death" by giving appellant the impression that his freedom was dependant entirely on whether Ms. Williams testified or not. He argued this theory to the Court in arguing that the requested expert testimony should be allowed:

> It is our theory in this case that Mr. Earley was the vehicle of death. He was the one who processed the information to Mr. Clark that fueled this motive. [...] Motive is the –is absolutely the most critical aspect of the prosecution of Mr. Clark in the death of Ardell Williams. Motive is what this case is about.

(RT 10000).

The prosecutor wanted to examine Mr. Earley about conversations he had with appellant regarding his evaluation of appellant's case. It was the prosecutor's theory that Mr. Earley told appellant that Ms. Williams was a very important witness and impossible to discredit. It was such information which

allegedly led appellant to determine that his only remedy was to get rid of Ms. Williams. (RT 10001).

The prosecution attempted, during pre-trial motions, to recuse trial counsel from representing appellant so that the prosecutor could call Mr. Earley as a witness. (RT 10000). The trial court denied the motion to recuse Mr. Earley because the Court did not find a sufficient basis upon which to justify recusal in light of appellant's desire that Mr. Early not be removed. (RT 592)

The court further took into consideration the needs of the prosecution, the rights of the appellant and the complexity of the case and found that the concerns of the prosecution were too speculative to require recusal:

> The court can envision some problems that will arise in this prosecution with respect to admissibility of certain evidence, with respect to motions to sever, with all kinds of respects, but that is to be anticipated in any case, and more particularly in a case of this seriousness and complexity. The court will address those to the best of its ability as they arise, and become actually in issue and appropriately before the court.

(*Ibid*).

Unable to call trial counsel as a witness, the prosecutor sought to have attorney John Barnett testify as an expert as to how a competent attorney would have acted.

> And as the court knows, we can't call Mr. Clark to the stand, and we can't call Mr. Early to the stand. And so we are going to have Mr. Barnett testifying about what the standard of care would be in the community and that this information, and significance of this information will be communicated to the defendant.

(RT 3073, 10001).

The logic for this testimony was problematic and faulty. The Court had ruled that the prosecution could not produce direct evidence of what occurred between Earley and appellant. Yet the court allowed the prosecutor to present almost identical evidence– testimony from Barnett about what a competent attorney would have done. (RT 10022-10023). The problem with this argument is that Barnett's testimony was both irrelevant and inadmissible. To the extent that Barnett testified only to his opinion about what a competent attorney would have done, his testimony was irrelevant because it did not show what happened in this case. What Barnett would have done had he been appellant's attorney, or whether Mr. Earley's representation was competent in Barnett's opinion, were not relevant considerations for the jury.

It was trial court error to allow this testimony. (RT 10014). What the prosecutor really sought to do was (1) to present testimony of what a competent attorney would have done, (2) have the jury presume that Mr. Earley was a competent attorney, and (3) infer that Mr. Earley, as a competent

attorney, did precisely that which Barnett testified any competent attorney would have done.

Counsel objected to this testimony, arguing that the prosecutor wanted Barnett to testify to the specifics of this case, e.g., what witnesses were the most important, how they fit into chronological events, how an attorney might attack their credibility, etc. Counsel argued that Barnett lacked foundational knowledge of what a competent defense lawyer would do in this case, that different lawyers would try the case differently, that counsel would have to be a witness, that the prosecutor was putting on Barnett as an expert to make closing arguments, and that Barnett would say that Ardell Williams was the most important witness and that there was no way to attack her so appellant had to kill her, that this would take days to ask hypothetical questions, and that the defense would have to get a rebuttal expert. Counsel also cited to Penal Code §28, and argued that the exustence of motive was for the jury to determine. (RT 9993-9996).

Barnett's testimony infringed upon the requirement that the jury determine the facts in violation of the Sixth Amendment. It was up to the jury to determine which facts were important, or which testimony inculpated or exculpated appellant.

The prosecutor wanted the jury to accept the standard of care as the "true" actions taken by trial counsel. In other words, Barnett testified to matters which the Court had precluded the prosecutor from exploring. The questions the prosecutor was allowed to pose to Barnett asked the jury to infer from Barnett's testimony what it was not allowed to hear through direct examination. Barnett had no direct knowledge of what occurred between Earley, appellant and the defense team. His testimony was thus rampant speculation. Barnett testified only to what he surmised was communicated during attorney-client privileged conversations between Earley and appellant. (*Ibid*). The testimony was therefore irrelevant.

Barnett was provided the transcripts of the interviews and grand jury testimony from Jeanette Moore, Matthew Weaver and Ardell Williams and reviewed them. (RT 10035, 10036). He was then asked in reference to each witness, "[w]ould a competent defense lawyer communicate the information contained in those interviews and testimony to a criminal defendant charged with what Clark was charged with during this period of time?" Barnett responded yes.

The prosecutor continued with this kind of questioning:

District Attorney: Are you familiar with a concept called the felony

murder rule?

Barnett: Yes.

17. Would a competent criminal defense attorney communicate to Mr. Clark the felony murder rule.

A: Yes.

(10036).

The jury was barred from hearing the actual conversation because it was protected by the attorney-client privilege. (RT 10035-10036). *Sullivan v. Superior Court* (1972) 29 Cal.App.3d 64,71. If the actual communication had been presented to the jury, it would have been considered a violation of the appellant's Sixth Amendment right to effective counsel. *Barber v. Municipal Court* (1979)24 Cal.3d 742,751. Trial counsel's options for impeaching Barnett and his testimony were severely limited because doing so would breached Clark's attorney-client privilege. Doing so would have required testimony about what was actually said, as counsel stated. (RT 9993-9996). Neither option was ethical.

It forced appellant to choose between his right to counsel and his right to present a defense. He had to sacrifice one constitutional right to preserve another.

A.
Barnett's Testimony was not Relevant and was Inadmissible

The rules pertaining to the admissibility of evidence are well settled. "Only relevant evidence is admissible, and all relevant evidence is admissible, unless excluded under the Federal or California Constitution or by statute." Relevant evidence is defined in Evidence Code §210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence "tends logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. The trial court has "broad discretion in determining the relevance, but lacks discretion to admit irrelevant evidence." *People* v. *Scheid* (1997) 16 Cal.4th 1, 13-14. *See also* Evid.Code, §350.

The testimony that John Barnett gave regarding what a competent defense lawyer would communicate to appellant was not relevant because it did not tend to prove or disprove what actually took place in the conversations between appellant and his counsel. At best, it proved what Barrett would have done if he had represented appellant in these proceedings. How Barrett would have represented appellant, had he been counsel, was irrelevant. It is rank speculation and thus irrelevant. It is not reasonable to have a jury infer what

occurred inside a confidential attorney-client conversation and allow the jury to infer motive. Evidence Code § 210.

The defense was much more complicated that consideration of only the three witnesses that Barnett was provided information about. Barnett's opinion about what he would have told the client should not have been admitted. It was unrebuttable testimony about privileged communication which the prosecutor was prevented from placing before the jury precisely because of the valid privilege.

B.
Even if His Testimony was Relevant, Barnett's Testimony Violated Appellant's Sixth Amendment Rights

The Sixth Amendment assures appellant the right to counsel. This Court in *Barber v. Municipal Court* held "that the attorney-client privilege helps to implement the accused's constitutional right to effective representation because 'if an accused is to derive the full benefits of his right to counsel, he must have the assurance of confidentiality and privacy of communication with his attorney.'" *People v. Godlewski* (1993) 17 Cal.App.4th 940, 946 (quoting *Barber v. Municipal Court* (1979) 24 Cal.3d 742,751). In the criminal context the privilege acquires Sixth Amendment

protection. *Neku v. U.S.* (D.C. 1993) 620A. 2d 259, 262).

"The privilege of confidential communication between client and attorney should not only be liberally construed, but must be regarded as sacred. Courts should not whittle away at the privilege upon slight or equivocal circumstances." *People v. Flores* (1977) 71 Cal.App.3d 559, 565. The prosecutor may not usurp the oldest of the confidential commutation privileges by having a witness testify as to what happened within the confidential communications. When Mr. Barnett testified that a competent defense lawyer would have communicated to Mr. Clark about the felony-murder rule and the information that was contained in the interviews and testimony, he was inferring what Mr. Earley would have said. (RT 10035).

The prosecutor violated Mr. Clark's Sixth Amendment rights because he has undermined the precise rational behind the privilege. The privilege is intended to "safeguard the confidential relationship between a client and counsel so as to promote full and open disclosure of facts and tactics surrounding the case." *People v. Godlewski* (1993) 17 Cal.App.4th 940, 946*(citing People v. Flores, supra,* 71 Cal.App.3d 559, 565.) Barnett, an expert, was asked to speculate as to what an attorney would have told appellant. Such speculations were harmful to appellant and thus the only way

his attorney could defend him would be to testify as to what was said and violate the right that the client had of safe, full disclosure that would not be shared with others.

An expert witness must be barred from testifying to what confidential communications likely occurred for the same reason that inferences of criminal dispositions are inadmissible to establish any link in the chain of logic between an uncharged offense and a material fact. It is not the unreasonable nature of the forbidden chain of reason but instead it is

> the insubstantial nature of the inference as compared to the grave danger of prejudice to an accused when evidence of an uncharged offense is given to a jury... . As Wigmore notes, admission of this evidence produces over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts.

People v. Thompson (1980) 27 Cal.3d 303, 317.

The same danger appeared when Barnett was allowed to speculate about the contents of attorney–client privileged conversations. The jury was likely to believe that the conversation that Barnett described occurred because the jury was likely to believe that the trial counsel was the type of person who would do such acts– give 'proper information' as defined by the expert witness. Moreover, Barnett was the sole "expert" who testified in this area. Thus the jury was presented with only one view of what an attorney would

have done.

Appellant could not defend himself by telling the jury what did occur during his conversations with his attorney, and the jury likely inferred that the witness' testimony was true. That certainly was the prosecutor's intention in putting Barnett on. As a result, the appellant was forced to choose between waiving his Sixth Amendment rights or taking the risk that the jury inferred that he was motivated to kill Ms. Williams based on information that he was allegedly given by his attorney.

This evidence was highly prejudicial. The prosecution admitted that motive was key to its case. This evidence demonstrated a basis for appellant's motive to kill Ardell Williams. The prosecutor argued that appellant wanted to find out what Ardell Williams was saying, and that he wanted Ardell Williams to get amnesia. The prosecutor argued that appellant's motive to kill Ardell arose when he realized that he was in trouble because of Ardell Williams, and couldn't impeach her testimony. (RT 10859-10869).

The introduction of this evidence denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law (Penal Code §28; Evid. Code §352) was a violation of a state created liberty interest in fair jury instructions. It also led to an unreliable evidence in capital

proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). The prosecutor relied on Barnett's testimony about the discovery process and what trial counsel would have shared with appellant in order to provide appellant's motive for the Ardell Williams killing. He argued that counsel would have stressed that Ardell Williams' testimony have been extremely difficult to impeach. (RT 10863-64). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S.

578, 584-85).

CLAIM 41
THE TRIAL COURT ERRED WHEN IT ADMITTED PREJUDICIAL INFORMATION, AND THAT ERROR WAS EXACERBATED WHEN THE COURT GAVE NO LIMITING INSTRUCTIONS, ALL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The prosecutor, during the guilt phase, sought to admit a letter from appellant to Antoinette Yancey. (RT 3187). The letter was found in Yancey's apartment when the police searched it. It included the following passage:

> When you get the I.D. for Keisha Jackson, open an account at Long Beach Bank. I'll explain to you what the benefits are. I know I'm looking forward to coming home.

(RT 3192).

The prosecution argued that it was relevant to admit this evidence because "it has a tendency in reason to show that Mr. Clark has an interest in obtaining a bogus California Driver's License." (RT 3187). The prosecutor believed that the letter would corroborate Jeannette Moore's testimony that appellant requested that she obtain a bogus California Driver's License for the purpose of renting– at the direction of appellant– the U-Haul that was found next to the Comp USA. (RT 3186).

Trial counsel objected on several grounds. (RT 3193-3194). The letter was found in another person's apartment over two and half years after

appellant was alleged to have obtained a driver's license for Jeanette Moore. Furthermore, there was no independent evidence to establish that the bad act inferred by the note occurred.

Trial counsel argued that the jury would be unduly prejudiced by the introduction of the statement particularly in light of Jeanette Moore's testimony. The jury would infer that Mr. Clark and Ms. Yancey obtained, through fraudulent means, identification that did not belong to them. The jury could reach that conclusion based on the fact that Yancey would not be available to testify that Keisha Jackson gave Ms. Yancey her permission to use the identification. (RT 3193-3194).

> Mr. Harley My concern is focused in opening a bank account under a false identification or a false name. That was one of the topics that was brought up during her interview with Guzman and Anderson, Although I do recall something to the effect they felt it was a crime, but she didn't think it was a crime because she had Keisha Jackson's permission. But the jury isn't going to have the benefit of that information, so this appears [...] —like more misconduct not charged.

(RT 3192).

> And she didn't think it was a crime, but evidently the detectives certainly thought it was a crime. The problem is, the jury isn't going to have the benefit of that. To somebody who doesn't know the background of the case this, this appears that they are opening some false bank accounts, which is more 1101(b) type stuff, misconduct not charged. And again, I just wanted the court to be aware we are specifically objecting to that based on lack of corpus and all the other arguments we made just moments earlier.

(RT 3193).

Although California Evidence Code §1101[24] bars the admission of prior

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§ 1101. Evidence of character to prove conduct

> (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

bad acts, the trial court allowed the prosecution to admit the evidence for the purpose of showing appellant's interest in obtaining false identification with no limiting jury instruction. (RT 3193).

The only reason the prosecution submitted the evidence regarding false identification and false bank accounts was to show that appellant had, on other occasions, committed acts similar to those for which he was being prosecuted. This is precisely what is barred by §1101. Because the prosecutor could not present any direct evidence that appellant participated in the robbery, he wanted to show that appellant was the type of person who uses other people's identification and thus he must have used someone else's identification and rented the U-Hall truck. (RT 3187).

Other-crimes evidence is so inherently prejudicial, its relevancy is to be "examined with care." It is to be received with "extreme caution," and all doubts about its connection to the crime charged must be resolved in the accused's favor. *People v. Sam* (1969) 71 Cal.2d 194, 203. In *People v. Sam* this Court stated the following regarding the application of §1101:

> The general rule is that evidence of other crimes is inadmissible when it is offered solely to prove criminal disposition or propensity on the part of the accused to commit the crime charged, because

> the probative value of such evidence is outweighed by its prejudicial effect. The purpose of the rule is to avoid placing the accused in a position of having to defend against crimes for which he has not been charged and to guard against the probability that evidence of other criminal acts having little bearing on the question whether defendant actually committed the crime charged would assume undue proportions and unnecessarily prejudice defendant in the minds of the jury, as well as [to] promote judicial efficiency by restricting proof of extraneous crimes.

(*Ibid.*)

Allowing evidence which suggested that appellant was involved in an earlier acquisition and use of fraudulent identification was unduly prejudicial. The evidence did not assist the jury in its determination of guilt or innocence for his involvement in the Comp USA incident. Instead, evidence of alleged prior bad acts prejudiced appellant in the minds of the jury.

Assuming, *arguendo*, that the evidence was admissible under §1101, the Court should still have excluded it under §352. The prejudicial value of this purported uncharged crime far exceeded whatever probative value it might have had.

The admission of the alleged prior bad act violated appellant's federal due process rights to a fair trial under the Constitution. The introduction of impermissible character evidence is a violation of a state statute, but also rises

to the level of a Constitutional Due Process violation, even if state law would allow admission of the evidence:

> While adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when state standards are violated; conversely, state procedural and evidentiary rules may countenance processes that do not comport with fundamental fairness. [Citations omitted] The issue for us, always, is whether the state proceedings satisfied due process.

Jammal v. Van de Kamp (9th Cir. 1991) 926 F.2d 918, 819. State law evidentiary errors which render a trial fundamentally unfair violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution *Estelle v. McGuire*, (1991) 502 U.S. __; *Jammal v. Van De Kamp*, *supra,* 926 F.2d at 919; and *Henry v. Estelle*, (9th Cir. 1993) 399 F.2d 3241.

The introduction of this evidence denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law and statute was a violation of a state created liberty interest in fair jury instructions. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error

was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 42

THE MULTIPLE INSTRUCTIONS CONCERNING REASONABLE DOUBT VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, MANDATING REVERSAL[25]

The jury was instructed on reasonable doubt when the trial court read CALJIC No. 2.90 to the jury at the guilt phase. (CT 2696).[26] The court also gave two related instructions which discussed reasonable doubt's relation to circumstantial evidence, and two instructions which addressed proof of

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This Court rejected related, but distinct, arguments in *People* v. *Jennings* (1991) 53 Cal.3d 334, 385-386. The instant case presents a stronger factual showing on different issues and therefore mandates reversal. However, to the extent that this Court finds *Jennings* applicable, appellant respectfully asks that it reconsider its holdings therein.

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The defendant in a criminal case is presumed to be

> . . . innocent until the contrary is proved, and in a case of a reasonable doubt, whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt because every thing relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. [¶] It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(CT 694).

specific intent or mental state.[27] Although each of the latter addressed different evidentiary points, they nearly identically stated that if one interpretation of the evidence appeared reasonable and another interpretation unreasonable, it would be the jury's duty to accept the reasonable.

CALJIC No. 2.90 is incomprehensible to a modern jury. Its inherent problems were greatly exacerbated by the reiteration that the standard was actually only proof that evidence "appears reasonable," rather than proof beyond a reasonable doubt.[28]

A.

CALJIC No. 2.90 Was Condemned In *People* v. *Brigham*, As Was A Similar Instruction In *Cage* v. *Louisiana*

Due process requires proof of guilt beyond a reasonable doubt for a criminal conviction to occur. (*In Re Winship*, *supra*, 397 U.S. at pp. 361-364;

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CALJIC No. 2.01, CT 2660 (sufficiency of circumstantial evidence to show guilt); CALJIC No. 2.02, CT 2661 (sufficiency of circumstantial evidence to show specific intent).

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Appellant did not object on these grounds below, but as this court has held, ". . . the defendant is deemed to have objected to *instructions actually given* (§ 1259) . . ." (*People* v. *Montiel* (1993) 5 Cal.4th 877, 928, n. 22, original emphasis; *see also People* v. *Hannon* (1977) 19 Cal.3d 588, 600; Cal. Penal Code § 1469.)

Jackson v. *Virginia*, *supra*, 443 U.S. at pp. 318-319). In *People* v. *Brigham*, *supra*, the majority opinion disapproved a different definition of reasonable doubt contained in former CALJIC No. 22 and also criticized CALJIC No. 2.90 for using archaic language[29] regarding the presumption of innocence and reasonable doubt instruction, which "more than any other is central in preventing the conviction of the innocent," and joined Justice Mosk's concurrence in *People* v. *Brigham* (1979) 25 Cal.3d 283 calling for revision of CALJIC 2.90. (*People* v. *Brigham*, *supra*, 25 Cal.3d at p. 290 and n. 11.)

Justice Mosk's concurrence analyzed the history of CALJIC 2.90's definition of reasonable doubt and its statutory counterpart, section 1096, and concluded that the problem is to make the principles involved "intelligible to modern juries." (*id.* at p. 307).

> Unless the legislature takes action in the matter, juries in all California criminal trials will continue to be mystified at best and misled at worst by hearing the concept of reasonable doubt defined in the archaic idiom of CALJIC No. 2.90. "But this, now hallowed, language produces the same sheep-like acceptance as the 'Emperor's New Clothes.' Judges awesomely intone the ponderous gibberish, as lawyers hypnotized into believing they understand the fatuity listen respectfully, while jurors, noticing His Honor's serious mien and the lawyers' sage expression, mimic the exampled air of grave comprehension.

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See also People of Territory of Guam v. *Yang* (9th Cir. 1986) 800 F.2d 945, 950-951, and cases cited therein.

> Thus, the linguistic parade begun in 1850 continues through today without so much as a smile from the marchers . . ." [¶] Whether parade or charade, it is time the pretense was ended and plain speaking was restored to the courtroom. Respect for the conscientious men and women who serve on our juries to the best of their abilities demands no less.

(*Id.* at pp. 315-316, quoting Sinetar, *A Belated Look at CALJIC* (1968) 43 State Bar J. 546, 551-552.)

Justice Mosk traced the language of CALJIC No. 2.90 and section 1096 to *Commonwealth* v. *Webster* (1850) 59 Mass. (5 Cush.) 295, 320. (*People* v. *Brigham*, *supra*, 25 Cal.3d at p. 294.)[30] In 1927, the Commission for Reform of Criminal Procedure proposed that the legislature incorporate this 'beyond a reasonable doubt' language verbatim into section 1096, to be accompanied by the further admonition that ". . . no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given," after noting the numerous reversals of California convictions resulting from

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Another commentator traces the language to the year 1600 (Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries* 1600-1850, 38 Hast.L.J. 153); a third writer suggests the "beyond a reasonable doubt" test was introduced by prosecutors as a lesser standard from the "any doubt" test. (*Id.* at p. 170, citing Moreno, *A Re-examination of the Reasonable Doubt Rule*, 55 B.U.L.Rev. 507, 514-515 (1975).) The "beyond a reasonable doubt" standard apparently was first employed in the Boston Massacre trials of 1770. (*Id.* at p. 171, citing *A Re-examination of the Reasonable Doubt Rule, supra*, 55 B.U.L.Rev. at 516-519.)

erroneous instructions defining reasonable doubt. (*People* v. *Brigham*, *supra*, 25 Cal.3d at p. 294). The language was ". . . already obsolete in 1927 . . . [and] . . . hopelessly superannuated in 1979 . . ." at the time of *Brigham* (*id.* at pp. 294-295), and is even more so today.

Justice Mosk criticized CALJIC No. 2.90 phrase by phrase (*id.* at pp. 295-307), based on extensive authority to the effect that no words are plainer than "reasonable doubt" and none so exact. (*Id.* at pp. 311-312, citing 1 Bishop's New Criminal Procedure (1895) § 1094, p. 682.)[31] It is futile to define the self-evident; the resultant "straining for making the clear more clear has the trap of producing complexity and consequent confusion." (*Id.* at pp. 308-309, *quoting United States* v. *Lawson* (7th Cir. 1974) 507 F.2d 433, 442).[32]

Justice Mosk saved his strongest criticisms for the phrases "abiding"

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For example, *see Brigham, supra,* 25 Cal.3d at p. 311, fn. 16, where over a dozen appellate opinions from various states are cited for the proposition that no definition of "reasonable doubt" conveys to the juror's mind any clearer idea than the term itself.

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Justice Mosk also noted that the Model Penal Code cites section 1096 as an example of an attempted definition of reasonable doubt which " ... add[s] nothing helpful to the phrase." (*People* v. *Brigham*, *supra*, 25 Cal.3d at p. 312, citing Model Penal Code (Tent. Draft No. 4, 1955) Com. to § 1.13, p. 109.)

(*People* v. *Brigham*, *supra*, 25 Cal.3d at pp. 299-300), "moral evidence" and "moral certainty," the latter being the "most crucial phrase of the instruction." (*id.*, at p. 300), but meaningless to modern juries.[33] Justice Mosk noted that "moral certainty" has been extensively criticized by numerous courts for being a "... contradiction approaching absurdity ... [T]aken literally ... the term imports a truth of fact *probably* proven *beyond any doubt* ..." (*Id.*, at p. 304, original emphasis (*quoting United States* v. *Thompson* (W.D. Wash. 1926) 11 F.2d 875, 876); see further criticisms, *People* v. *Brigham*, *supra*, 25 Cal.3d at pp. 305-307).

The United States Supreme Court voiced a similar criticism in *Cage* v. *Louisiana*, *supra*, 498 U.S. 39, in reversing a death sentence due to a reasonable doubt instruction allowing conviction where jurors found guilt to a "moral certainty," with reasonable doubt defined as any "grave uncertainty" or "actual substantial doubt." (*Id.*, 498 U.S. 39). The unanimous opinion

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> Today's jurors have no idea what "moral evidence" is, and
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> . . . it would be improper to revive the distinction to which it originally referred. Furthermore, the explanation is essentially uninformative: because "moral evidence" is proof that by definition is incapable of resulting in certainty, a person is said to be "morally certain" in this sense when he is as certain as he can be of a fact of which he cannot be certain.

(*Id.*, at p. 301.)

found the related instruction violated the due process clause, which protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged (*id.*, at p. 341, citing *In re Winship*, *supra*), using an automatic reversal standard. (*id.*, *Sullivan* v. *Louisiana* (1993) 508 U.S. 275). The United States Supreme Court specifically condemned the use of "moral certainty," rather than "evidentiary certainty." (*Cage* v. *Louisiana*, *supra*, 498 U.S. 39). The due process clause ensures a defendant's right to have the jury deliberate solely on the basis of the evidence (*Taylor* v. *Kentucky* (1978) 436 U.S. 478, 489) rather than on their subjective, moral disapproval of the defendant's conduct.[34]

The use of this instruction violated appellant's rights to due process of law and heightened due process in a capital case, as well as his rights to a jury trial, fundamental fairness at trial, and a reliable determination of guilt and penalty, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Per *In re Winship*, *supra*, and *Cage* v. *Louisiana*, *supra*, automatic reversal is

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Id., *see United States* v. *Indorato* (1st Cir. 1980) 628 F.2d 711, 721, n. 8; *State* v. *Manning* (S.C. 1991) 409 S.E.2d 372, 374 (reversing capital murder conviction because of due process deficiencies in "moral certainty" reasonable doubt instruction); *People* v. *Hewlett* (N.Y. App. Div. 1987) 519 N.Y.S. 555, 557; *Dunn* v. *Perrin* (1st Cir. 1978) 570 F.2d 21, 24; *United States* v. *Nolasco* (9th Cir. 1992) 926 F.2d 829 (*en banc*).

mandated as to both the guilt and penalty phases.

B.

Four Other Instructions Undermined The Constitutional Requirement Of Proof Beyond A Reasonable Doubt, Mandating Reversal

Besides CALJIC No. 2.90, two other instructions addressed reasonable doubt and told the jury that, if one interpretation of the evidence appeared reasonable and another unreasonable, it would be the jury's duty to accept the reasonable,[35] contrary to the due process requirement that appellant may be convicted only on proof of guilt beyond a reasonable doubt. (*In Re Winship, supra*, 397 U.S. at pp. 361-364; *Jackson* v. *Virginia, supra*, 443 U.S. at pp. 318-319).

These instructions required that the jury accept an indication that the evidence was incriminatory if it "appeared reasonable," *i.e.*, a standard substantially below proof beyond a reasonable doubt.[36] In *Cage* v. *Louisiana*,

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35 CALJIC No. 2.01, CT 668-69 (sufficiency of circumstantial evidence to show guilt); CALJIC No. 2.02, CT 670-71 (sufficiency of circumstantial evidence to show specific intent)

36 *But see People* v. *Jennings*, *supra*, 53 Cal.3d at p. 386.

supra, the United States Supreme Court addressed a similar problem, concerning instructions that equated reasonable doubt with "grave" or "substantial" doubt and therefore unconstitutionally allowed a finding of guilt based on a degree of proof below that required by the due process clause. (*Cage* v. *Louisiana*, *supra*, 498 U.S.39. The instant jury instructions were violative of the Fifth, Sixth, Eighth and Fourteenth Amendments, as they negated reasonable doubt if evidence of guilt merely "appeared reasonable." Reversal is automatic. (*Sullivan* v. *Louisiana*, *supra*, 508 U.S. 275).

These instructions also constituted an impermissible mandatory, conclusive presumption of guilt upon a preliminary finding that evidence of guilt merely "appears reasonable." Such a presumption violates not only due process, but also appellant's right to a jury trial by removing fundamental questions from the jury. (*Carella* v. *California* (1989) 491 U.S. 263, 265).

The confusing, archaic language of CALJIC 2.90 heightened the likelihood that the jury looked to these four other instructions for clarification, which told them four times in modern language that they should follow evidence of guilt that "appears reasonable." And even if the jury was trained in archaic English and found CALJIC 2.90 to merely be in conflict with the other instructions, those instructions' failure to resolve this constitutional

question does not ". . . absolve the infirmity." (*Francis* v. *Franklin* (1985) 471 U.S. 307, 322).

The instructions precluded appellant from arguing that even if the circumstantial evidence had no reasonable interpretation favoring innocence, the same evidence did not necessarily establish guilt beyond a reasonable doubt. The prosecutor thus was able to argue that the jury would have to make reasonable interpretations from the circumstantial evidence but that there was no reasonable such interpretation that pointed toward innocence, i.e., appellant was guilty, completely apart from the prosecution meeting its burden.

The errors involved the basic standard to be applied at trial, undermined the accuracy of the verdicts and operated as a mandatory, conclusive presumption, here violating the Fifth, Sixth, Eighth and Fourteenth Amendments. Therefore, reversal is subject to a special harmless error analysis, which is ". . . wholly unlike the typical form . . ." (*Carella* v. *California, supra*, 491 U.S. at pp. 267-273 (Scalia, J., conc.).) The use of conclusive presumptions, such as those used here, can be held harmless ". . . only in those 'rare situations' when the reviewing court can be confident that [such an] error did not play any role in the jury's verdict. . . . ," such as an instruction regarding a charge on which the defendant was acquitted or an

element of a crime that the defendant admitted. (*Id.*, 491 U.S. at pp. 269-270, quoting *Connecticut* v. *Johnson* (1983) 460 U.S. 73, 87 (Scalia, J., conc.).) This is not such a "rare situation."[37] Therefore, reversal is mandated.[38]

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S.

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Assuming, arguendo, even the lesser, traditional harmless beyond a reasonable doubt test (*Chapman* v. *California*, *supra*, 386 U.S. at p. 23), however, reversal is mandated. The improper instructions were read to the jury and relied upon by the prosecutor. A reasonable juror may well have held a doubt about appellant's guilt, requiring acquittal, but for the multiple, repeated instructions emphasizing the jury's duty to accept apparently reasonable interpretations of evidence that pointed toward guilt. When the wrong standard is used to assess guilt, the deference normally given the fact-finder's judgment is inappropriate. (*Gray* v. *Mississippi* (1987) 481 U.S. 648, 661, n. 10 [95 L.Ed.2d 622, 107 S.Ct. 2045]; *In Re Carmaleta B.* (1978) 21 Cal.3d 482, 496.) Additionally, this error must be evaluated in combination with the archaic language of CALJIC No. 2.90, which is unintelligible to a modern jury. In view of all these factors, reversal is mandated.

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Assuming, arguendo, that this court determines there was no constitutional error, it is reasonably probable that a result more favorable to appellant would have been reached, absent the above errors. (*People* v. *Watson*, *supra*, 46 Cal.2d at p. 836.) These errors mandate reversal.

578, 584-85).

CLAIM 43

THE TRIAL COURT ERRED WHEN IT SUBMITTED CALJIC 2.05 WITHOUT SUFFICIENT EVIDENCE TO ESTABLISH APPELLANT WAS PRESENT DURING FABRICATION OR AUTHORIZED FABRICATION OF EVIDENCE, IN VIOLATION OF APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR TRIAL AND HEIGHTENED CAPITAL CASE RELIABILITY

Over appellant's objection the trial court submitted CALJIC 2.05 to the jury:

> If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized that effort. If you find defendant authorized that effort, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(CALJIC 2.05); (CT 2664); (RT 11137).

The prosecutor argued that there was there was sufficient evidence to support CALJIC 2.05. Specifically, the prosecutor cited three separate incidents. The first incident was the illegally taped interview between Liz Fontenot and appellant. (RT 10578). The second and third incidents were letters allegedly sent from Sean Burney to Alonzo Garrett and Jeanette Moore. (RT 10579). However, the prosecutor never established the required nexus

between appellant and the efforts of a third party to fabricate evidence such that the jury could infer a consciousness of guilt. See *People v. Hannon* (1977) 138 Cal. Rptr. 885, 891-892.

In order for evidence of the act by a third party to manufacture, procure or fabricate evidence to be admissible against appellant, the effort must have occurred in his presence or be shown to have been authorized by him. *People v. Weiss* (1958) 50 Cal. 2d 535, 553-554; *People v. Hannon* (1977) 138 Cal. Rptr. 885, 891-892; *People v. Burke* (1912) 18 Cal. App.72.[39]

> If an attempt is made by a third person, not in the presence of a defendant or shown to have been authorized by him, it should at once be suspect as a mere purporting attempt to suppress evidence and in truth an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut satisfactorily because he does not know the true identity of the pretender. The willful offering of such evidence might well form the basis for declaring a mistrial instanter, or for granting

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In *Weiss* and *Hannon*, this Court discussed when efforts by a third party to suppress evidence could be used to "indicate a consciousness of guilt on the part of a defendant and evidence [would be] admissible against the defendant." The requirements for the admissibility of the suppression of testimony mirrors the requirements for the admissibility of manufacturing, procuring or fabricating evidence. *People v. Caruso* (1959) 174 Cal. App.2d, 624, 641; *People v. Burke supra,* 18 Cal.App.72, 92. As a result, the cases are equally instructive for fabrication of evidence as they are of the suppression. The key issue here remains whether the act in question was perpetrated by third parties and the sufficiency of the evidence to render it admissible to indicate a consciousness of guilt.

> a new trial, or for reversal on appeal if the case is not so strong and the record otherwise so clear as to bring the judgment withing the saving grace of California Constitution, Article VI, section 4 ½.

(People v. Weiss, supra, 50 Cal.2d 535, 554.)

In *Hannon* and *Weiss,* this Court held that the record failed to supply the necessary nexus between the defendant and the alleged suppression of evidence. *People v. Hannon, supra,* 138 Cal. Rptr. 885, 892. In *Hannon*, this Court found that a defense witness's decision not to speak to a prosecution investigator after speaking with an attorney constituted insufficient evidence to support the conclusion that the such conduct rises to the level of suppression. *Ibid.* Similarly here, the prosecution failed to establish that efforts by third parties occurred in appellant's presence or that he authorized illegal conduct.

A.

Liz Fontenot did not Manufacture, Fabricate Evidence or Procure False Evidence on Behalf of Appellant

During the jury instruction conference, the prosecution argued one example of fabrication of evidence by a third party was "the taped interview between defendant William Clark and Liz Fontenot[.] [I]n the taped interview

the defendant on more than one occasion told Liz Fontenot to tell Ardell that if she testifies that, to get selective amnesia. So he [appellant] was attempting through the testimony of Liz Fontenot, to procure false or fabricated evidence through the testimony of Ardell Williams." (RT 10578). The defense objected, stating that this incident was covered by jury instruction 2.04.[40] (RT 10579). The trial court did not agree with the prosecutor: "Do you [Mr. King] believe that Liz Fontenot made such an attempt or there is evidence?" *(Ibid).* The prosecution's only response was that "she [Liz Fontenot] did not know. and that is what 2.05 says." *(Ibid).* In response, the court suggested that an attempt by appellant to fabricate was already covered by CALJIC 2.04–a jury instruction the court gave.

The argument between the trial court and the prosecution demonstrates that there was insufficient evidence to prove that evidence was manufactured or fabricated by Liz Fontenot to instruct the jury with CALJIC 2.05. At no

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CALJIC 2.04: EFFORTS BY DEFENDANT TO FABRICATE EVIDENCE

> If you find that a defendant [attempted to] [or][did] fabricate evidence to be produced at the trial, that conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, any, are for you to decide.

time did Liz Fontenot do anything to support appellant's defense. Her testimony showed just the opposite. Liz Fontenot recorded conversations she had with appellant and turned them over to the prosecution. (RT 2788). As such, the Fontenot tape could not be the basis for instructing pursuant to CALJIC 2.05.

B.

Letter to Garrett

The second alleged example of a third party fabricating evidence was "a death threat to Alonzo Garrett through Sean Burney." (RT 10579). Sean Burney was appellant's cell mate. The prosecution claimed that the threat against Garrett came in the form of a letter that was found in appellant's cell by Orange County Deputy Sheriff Henry Desens. (RT 3309, 9938). The deputy testified that on July 7, 1994, he found two kites inside of appellant's cell. He threw one away because it allegedly was not contraband while the second, he concluded, had threatening language. (RT 1965-1970). The letter was addressed to "Alonzo[41]." (CT 4522).

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41 The letter was never delivered to Alonso Garrett. Thus, there was only an attempt, at most. (RT 3259).

Alonzo Garrett was a prosecution witness who had contact with both the Williams family and the appellant. Garrett knew the Williams family through his friendship with Nena Williams. (RT 9399). Garrett also knew appellant because the two were incarcerated at the same jail at the same time.

The prosecution tried to create a third-party effort on appellant's behalf by showing that Burney's fingerprints were on the letter and that Deputy Desens had seen the appellant and his cell mate together. (RT 9938). As discussed above, the defense objected. During the penalty phase, the trial court commented on the insufficiency of the connection between appellant and Burney.

> The Court: Burney's fingerprint. Burney has no connection other than being housed near Mr. Clark?
>
> Mr. Earley: That is correct.
>
> Mr. King: Correct.

(RT 13278).

The letter that was written to Garrett could not be used to support a CALJIC 2.05 instruction. There was no third-party involved and the allegation that appellant attempted to interfere with witness testimony was already covered by jury instruction 2.04.

C.
Moore and Her Letter

The prosecution's third example of evidence provided to support the instruction to the jury was the letter that was sent to Jeanette Moore while she was held in jail. (RT 6789). The letter included information regarding her right not to testify.

At the time of the jury instruction conference, the prosecution gave no indication why the letter was sufficient to provide support for a 2.05 instruction. (RT 10579). However, during the pre-trial hearing where the prosecution argued to introduce the letter, the prosecution outlined evidence that it was prepared to present which it believed would establish the necessary elements under 2.05: 1) evidence that appellant authorized the letter because it was found in his cell and 2) that the letter was written by Burney because his finger print was found on the letter. (RT 6787). Neither proffer was sufficient. The fact that the letter was found in appellant's cell does not establish that that appellant authorized the letter. The fact that appellant had the letter more likely suggested that there was no third party involved in the creation.

Not only were the prosecution's proffers of evidence weak but

ironically the prosecution himself commented on the fact that the letter does not support 2.05 because the letter does not attempt to fabricate evidence:

> With all due respect, I don't think 2.05 is the one, because the letter does not tell Jeanette Moore to lie or to fabricate. The letter tells her simply do not testify, that's why we feel it comes under 2.06.

(RT 6792).

D.

Introduction of Jury Instruction Violated Appellant's Right to Due Process and Heightened Capital Case Reliability

A jury instruction violates due process when it is so ailing that it has infected the entire trial. *Cupp v. Naughten*, (1973) 414 U.S. 141, 147. *Estelle v. McGuire* established that in order to determine if the introduction of a jury instruction has violated due process that the instruction "may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and the trial record. *Estelle v. McGuire* (1991) 502 U.S. 62, 72. In addition, in reviewing an instruction such as the one at issue here, part of the court's inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution. *Boyde v. California* (1990) 494 U.S. 370, 380.

A large part of the prosecution's theory relied on presenting the appellant as someone who manipulated the judicial system. The prosecution used this theory to provide motive for the murder of Ardell Williams and further to strengthen the case that appellant is dangerous even from jail. The presence of the jury instruction planted in the jury's mind that appellant has manipulated third parties to fabricate evidence. The instruction prejudiced the jury against the appellant when there was no evidence to justify the instruction and thus reversal is mandated. *Estelle v. McGuire* (1991) 502 U.S. 62, 72.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S.

578, 584-85).

CLAIM 44

THE COURT ERRED IN FAILING TO INSTRUCT PURSUANT TO CALJIC 2.91 DEPRIVING APPELLANT OF HIS RIGHTS TO DUE PROCESS, A JURY TRIAL, AND HEIGHTENED CAPITAL CASE RELIABILITY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The fundamental importance of the requirement of proof beyond a reasonable doubt was clearly enunciated in *Sullivan v. Louisiana* (1993) 508 U.S. 275. *Taylor v. Kentucky* (1978) 436 U.S. 478 declared that the principle of a presumption of innocence was basic to the administration of justice and that failure to instruct thereon violated the right to a fair trial. In *People v. Vann* (1974) 12 Cal. 3d 220 and *People v. Elguera* (1992) 8 Cal. App. 4th 1214, this Court reversed the judgments where the trial courts failed to instruct on these constitutional principles. In *Sullivan*, the Supreme Court held that a constitutionally deficient reasonable doubt instruction *cannot* be harmless error, and stated:

> What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, [citations] and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements. . . .
>
> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It

> would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* [(1970) 397 U.S. 358, 364 requires) whether he is guilty beyond a reasonable doubt. In other words, *the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.*

Sullivan, *supra*, 508 U.S. at pp. 277-278 (citations omitted). (emphasis supplied). The trial court failed to adequately instruct appellant's jury regarding the burden of proof.

The trial court did not instruct the jury pursuant to CALJIC 2.91, which states:

> The burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime with which he is charged.
>
> If, after considering the circumstances of the identification and any other evidence in this case, you have a reasonable doubt whether defendant was the person who committed the crime, you must give the defendant the benefit of that doubt and find him not guilty.

In this case, the testimony regarding identification was highly questionable. Officer Rakitis, who was the first officer to respond to the crime scene, could not identify appellant in a sixpack. (RT 7952-7955). He described the driver, who Weaver claimed had identified himself as "Bill Clark", as 20 to 24 years old. (RT 7960-7963). Appellant, who was born in

1953, was 38 at the time of the Comp USA robbery. Matt Weaver testified he may have been unsure when he was first shown the sixpack of appellant. (RT 8115). At that time, he could only say that it looked like appellant. (RT 8116). The "identification" of appellant as being at the Comp USA scene was dubious at best. Pursuant to *People v. Hall* (1980) 28 Cal.3d 143, 159-60, courts should give appropriate instructions on eyewitness identifications and reasonable doubt.

In *People* v. *Gomez* (1972) 24 Cal.App.3d 486, the defense was both alibi and mistaken identification. The trial court gave the alibi instruction of CALJIC No. 4.50. The court failed to give an instruction explaining that the prosecution had the burden of proving not only that the offense was committed but that it was the defendant who committed it. The court also failed to instruct that the jury must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before it may convict and that if the circumstances of the identification are not convincing beyond a reasonable doubt, the jury must find the defendant not guilty. The *Gomez* Court stated that this failure was error. (*Id.*, at p. 490.) The *Gomez* instruction on the burden of proof of identification was formalized as CALJIC No. 2.91. This instruction was required here. "*A defendant is entitled to an instruction*

relating particular facts to any legal issue." (*People* v. *Sears* (1970) 2 Cal.3d 180, 190) (emphasis added).

The jury was left with the impression that the applicable standard of proof for identity was less than that for elements of the crime– *i.e.*, less than "beyond a reasonable doubt." The jury was not instructed, pursuant to CALJIC 2.91, that the standard of proof for identity was beyond a reasonable doubt. The jury was misled and the prosecution's burden of proof was lessened, all in violation of constitutional protections.

The failure to give this instruction denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in fair jury instructions. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

The case against appellant for both murder counts was not overwhelming, or even strong. The identifications of him at the Comp USA scene were contradictory. The Williams proof was completely circumstantial, and it was clear that appellant was not present at **that** scene, since he was in

the Orange County Jail.

The failure to require proof beyond a reasonable doubt is structural error which requires *per se* reversal. Alternatively, reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 45

THE COURT ERRED IN FAILING TO INSTRUCT THE JURORS REGARDING AIDER AND ABETTOR LIABILITY PURSUANT TO CALJIC 3.02 DENYING HIM DUE PROCESS, THE RIGHT TO APPROPRIATE JURY FINDINGS, AND A RELIABLE GUILT DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The trial court failed to instruct the jury pursuant to CALJIC 3.02 regarding the Comp USA crimes. That instruction, had it been given, would have stated:

> One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted.
>
> In order to find the defendant guilty of the crime of murder as charged in count 1, you must be satisfied beyond a reasonable doubt that:
>
> 1. The crime or crimes of burglary and attempted robbery were committed;
>
> 2. That the defendant aided and abetted those crimes;
>
> 3. That a co-principal in that crime committed the crime of murder; and
>
> 4. The crime of murder was a natural and probable consequence of the commission of the crimes of burglary and attempted robbery.
>
> In determining whether a consequence is "natural and probable," you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to

> occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A "natural" consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. "Probable" means likely to happen.

This instruction was important in two respects. First, it was necessary for the jury to determine whether appellant was in fact guilty of murder as charged in count 1. It was undisputed that appellant did not actually shoot Kathy Lee. In fact, Nokkuwa Ervin, the actual shooter, was the only person allegedly involved in the robbery who entered the Comp USA store. According to Ardell Williams, there were not supposed to be any bullets in the gun used by Nokkuwa Ervin. (RT 2070-78). This fact would weigh against a finding that a shooting was a natural and probable consequence of this particular robbery. (*See also* RT 10924-10928).

The instruction was also required in order to properly assess the credibility of prosecution witnesses Matthew Weaver and Jeanette Moore. They were potentially aiders and abettors in the Comp USA robbery. An aider and abettor is liable for the natural and probably consequences of the main actor and aider and abettor testimony is to be viewed with caution. *See, e.g.,* CALJIC 3.16.

Neither Matt Weaver, Jeanette Moore or Ardell Williams – the

witnesses that were used to establish that appellant was involved in the Comp USA incident– testified that there was any intent or knowledge on the part of appellant that there would be any use of force during the robbery. Matt Weaver testified that Eric Clark asked him if he wanted to get paid to move computers. (RT 13532). Weaver agreed and went with Eric Clark and Wilson to a Del Taco across from Comp USA. (RT 13541). At the Del Taco, Weaver claimed he met someone identified as "William Clark" for the first time. (RT 13542). Appellant allegedly then stated that the store was closed. Weaver got in appellant's car. They drove toward Comp USA, where they came upon Ervin who tried to get in the BMW with them. Appellant did not let Ervin in to the car and drove off. (RT 13544, 13545). Weaver provided no evidence that appellant intended that a killing take place or that lethal force be employed.

The test of natural and probable consequences is an objective one, and depends upon whether, under all of the circumstances presented, " ' "a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." [Citation.]' " (*People v. Culuko* (2000) 78 Cal.App.4th 307, 327.) To trigger [the] application of the 'natural

and probable consequences' doctrine, there must be a close connection between the target crime aided and abetted and the offense actually committed." (*People v. Prettyman, supra,* 14 Cal.4th at p. 269.) But this determination is a question of fact for the jury, to be resolved in light of all of the circumstances surrounding the incident. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 530.) "We cannot look to the naked elements of a target crime but must consider the full factual context which the defendant faced." (*People v. Lucas* (1997) 55 Cal.App.4th 721, 732.) *See also People v. Mouton* (1993) 15 Cal.App.4th 1313 (*sua sponte* duty to instruct pursuant to 3.02).

In a case where the prosecutor relies on the natural and probable consequences doctrine (see, e.g., RT 10816-10822), the trial court **must** instruct the jury on the doctrine, including an identification and description of the target crime(s) the defendant may have committed. Such a description is intended to assist the jury in determining whether the charged crime was a natural and probable consequence of some other target crime that the defendant may have encouraged and facilitated. *People v. Prettyman* (1996) 14 Cal.4th 248. at pp. 254, 264-270. *See also People v. Woods* (1992) 8 Cal.App.4th 1570, 1589 (court has *sua sponte* duty to instruct on lesser

included crime when the evidence raised a question whether the lesser offense is a reasonably foreseeable consequence of the act aided and abetted). Where a defendant is charged not only with the perpetrator's planned offense but with another offense ultimately committed as a natural and probable consequence thereof, the jury must be instructed on the related responsibility to determine whether the act committed was in fact a natural and probable result of the criminal act knowingly and intentionally encouraged. *People v. Hammond*, 181 Cal.App.3d 463 468-469 (1st Dist.1986).

It was thus an issue for the jury to determine if the shooting of Kathy Lee was a natural and probable consequence of the attempted burglary and robbery of Comp USA. The jury was never instructed on this principle. This issue was critical to decide, since there was evidence that no shooting was intended, including (1) the fact that the store employees were handcuffed away from the door where the computers were to be taken and thus weren't in harm's way, (2) the fact that only one bullet was in the gun, and (3) Nokkuwa Ervin had never intended to shoot anyone, as he prayed that Kathy Lee wouldn't die. These facts demonstrate that the case against appellant for culpability for Kathy Lee's death was not exceedingly strong even if, *arguendo*, he aided in the robbery. The failure to instruct pursuant to CALJIC

3.02 was prejudicial, because the jury would likely have had a reasonable doubt had they been properly instructed.

"Instructions that allow a jury to convict without finding every element of the offense violate *In re Winship*'s [397 U.S. 358, 364 (1970)] requirement that 'every fact necessary to constitute the crime' must be proven beyond a reasonable doubt." *Keating v. Hood,* 191 F.3d 1053, 1061 (9th Cir.1999). In such instances, constitutional error is presumed. *Solis v. Garcia* (9th Cir. 1999) 219 F.3d 922, 927.

The jury was also entitled to all instructions necessary in order to determine whether Jeanette Moore and Matthew Weaver were accomplices in the Comp USA crimes. If the jury determined that they were accomplices based on the natural and probable consequences doctrine, then their testimony could not be used to convict appellant without sufficient corroboration. Thus, Weaver and Moore may have aided and abetted the crimes even if they were not involved in the conspiracy. *See* above and CALJIC 3.16.

Moore and Weaver aided and abetted the crimes through their agreement to help move the computers and by renting the U-Haul, even if they were not full participants in the conspiracy. This was a question of fact for the jury to determine. "'One may aid or abet in the commission of a crime without

having previously entered into a conspiracy to commit it. [Citations.] Moreover, the aider and abettor in a proper case is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged. Whether the act committed was the natural and probable consequence of the act encouraged and the extent of defendant's knowledge are questions of fact for the jury. [Citations.]'" (*Durham,* supra, 70 Cal.2d at p. 181).

One involved in the commission of a crime is responsible for the natural and reasonable or probable consequences of any act he knowingly aids or encourages, even if he does not share the perpetrator's state of mind or intent. (*People v. Prettyman* (1996) 14 Cal.4th 248, 254, 260-262 [murder]; *People v. Hammond* (1986) 181 Cal.App.3d 463, 467-468 [attempted murder during robbery]; CALJIC Nos. 3.01, 3.02.) Thus, the fact that Weaver or Moore may not have shared the complete mental state of those involved would not be an absolute defense to aiding and abetting.

Knowing that Weaver and Moore were potentially liable as aiders and abettors was an important piece of knowledge for the jury in assessing their credibility under CALJIC 3.16. The jury may well have assessed their

credibility differently had they understood the natural probable consequences doctrine. It was thus error not to instruct the jury pursuant to CALJIC 3.02.

Due process requires proof of guilt beyond a reasonable doubt for a criminal conviction to occur. (*In Re Winship*, *supra*, 397 U.S. at pp. 361-364; *Jackson* v. *Virginia*, *supra*, 443 U.S. at pp. 318-319). This lack of instruction violated the Due Process Clause, which protects against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged (*id.*, at p. 341, citing *In re Winship*, *supra*), using an automatic reversal standard. (*id.*, *Sullivan* v. *Louisiana* (1993) 508 U.S. 275).

> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* [(1970) 397 U.S. 358, 364 requires) whether he is guilty beyond a reasonable doubt. In other words, *the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.*

Sullivan, *supra*, 508 U.S. at pp. 277-278 (citations omitted).

The instructions at issue related to the burden of proof, which must be judged in light of the Due Process Clause:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

(*Addington* v. *Texas* (1979) 441 U.S. 418, 423, quoting *In Re Winship* (1970) 397 U.S. 358, 370 (Harlan, J., conc.; internal quotation marks omitted)). Criminal cases merit the highest standard, the beyond a reasonable doubt test:

> . . . 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.
>
> . . . [¶] . . . In cases involving individual rights, whether criminal or civil, the standard of proof at a minimum reflects the value society places on individual liberty.

(*Santosky* v. *Kramer* (1982) 455 U.S. 745, 755, quoting *Addington* v. *Texas*, *supra*, 441 U.S. at pp. 423, 415; quotation marks and brackets omitted.)

The failure to give this instruction denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in fair jury instructions. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460

(1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

The failure to require proof beyond a reasonable doubt for every element of the offense is structural error which requires *per se* reversal.

Alternatively, reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). *Chapman* cannot be met because the murder was not a reasonable and probable consequence given that Nokkuwa Ervin was surprised by Kathy Lee. Moreover, there were not supposed to be any bullets in the gun used by Nokkuwa Ervin. The employees were specifically isolated in the restroom so that they could not get in the way during the robbery, which would prevent the situation from escalating out of control and leading to an unintended shooting.

Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth

Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 46

THE COURT ERRED IN FAILING TO INSTRUCT PURSUANT TO CALJIC 3.16 IN VIOLATION OF APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND A RELIABLE GUILT DETERMINATION

As discussed in the previous claim, the issue of accomplice instructions came up with regard to Jeanette Moore, Ardell Williams and Matthew Weaver. There was discussion of the natural and probable consequenced doctrine. The parties agreed that at a minimum, these witnesses would be accomplices as a matter of fact for the jury to determine. (RT 10740). Appellant asserted, however, that the witnesses were accomplices as a matter of law, and that the jury should be instructed pursuant to CALJIC 3.16 as to all three witnesses. The prosecutor argued that CALJIC 3.16 should not be read, and instead CALJIC 3.19[42] should be used. (RT 10741). That instruction was inadequate because it allowed the jury to find that the witnesses were not accomplices, while under the natural and probable consequences doctrine, they were. The

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CALJIC 3.19 states:

> You must determine whether the witness _____ was an accomplice as I have defined that term.
>
> The defendant has the burden of proving by a preponderance of the evidence that _____ was an accomplice in the crime[s] charged against the defendant.

trial court refused to instruct pursuant to CALJIC 3.16.

CALJIC 3.16 states:

> **Witness Accomplice as Matter of Law**
>
> If the crime of _____ was committed by anyone, the witness _____ was an accomplice as a matter of law and [his] [her] testimony is subject to the rule requiring corroboration.

This instruction should have been given regarding Matthew Weaver, Ardell Williams and Jeanette Moore. Without CALJIC 3.02 and 3.16, the jury had no way to properly determine appellant's culpability as to Count 1.

Matthew Weaver admitted that he willingly went with Eric Clark and Damian Wilson to Comp USA to move computers. (RT 8003-8033). He could not account for one hour between the time he called his mother and Officer Rakitis responded after hearing gunshots. (8106-8108). An additional red T-shirt similar to those worn by Comp USA employees was found in the U-Haul truck. (RT 8368-8371). Weaver had described the others at the scene as wearing red T-shirts. The obvious inference was that this additional shirt was Weaver's. He saw the body of Kathy Lee while riding in the BMW, and yet remained in that car until he was ordered out of it. (8099-8100). After the fact, he told numerous lies about the events, including the fact that he wasn't there at all. (RT 8084-8091). He also committed perjury when he failed to

testify about seeing Kathy Lee's body and instead said he saw nothing out of the ordinary. He was ultimately granted immunity in order to secure his testimony, to remove his liability for his perjury, and to eliminate the possibility of prosecution for murder relating to these crimes. (RT 7999-8002).

Jeanette Moore was also an accomplice. If her testimony is believed, she twice went to the DMV in order to obtain a false license in the name of "Dena Carey." She allegedly did so at the behest of appellant. (RT 7640-7648). After getting fraudulent licenses, she and appellant used it to defraud various stores and obtain merchandise. She also used it to fraudulently obtain the U-Haul truck used at Comp USA. (7660-7678). She was granted immunity in order to protect her from perjury and prosecution for murder. (RT 7640). A second grant was later given in order to immunize her for the perjury which she continued to commit.

Ardell Williams was also an accomplice. She was a cashier at Soft Warehouse. According to her statements, in conjunction with the testimony of Richard Highness, she allowed appellant to steal thousands of dollars in computer equipment. (RT 8545, 8586, 8612, 8731, 8803, 14031). Subsequently, Ardell Williams traveled with appellant to Las Vegas and

knowingly attempted to fraudulently cash forged traveler's checks while using false identification. (RT 8871, 8942, 9095). She also accompanied appellant to Del Taco and cased the Comp USA store several weeks before the attempted robbery took place. (RT 8731-8765). She remained for considerable time at the Del Taco, and never brought the incident up to anyone until she needed consideration for her Las Vegas case. Instruction pursuant to 3.16 was called for regarding all three witnesses.

In *People v. Guiuan* (1998) 18 Cal.4th 558, this Court stated, "'The law on this question is clear. When an accomplice is called as a witness by the prosecution, the court must instruct the jurors sua sponte to distrust his testimony.'" (*Id.* at p. 564.) "[I]t is the duty of the trial court in a criminal case to give, on its own motion, instructions on the pertinent principles of law regarding accomplice testimony ' "... whenever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice... ."'" (*People v. Gordon* (1973) 10 Cal.3d 460, 466, fn. omitted.)

Penal Code Section 1111 states in part: "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the

accomplice is given." There is little doubt that the witnesses were liable for the criminal acts charged. Two witnesses, Moore and Weaver, were granted judicial immunity in order to secure their testimony in this case. The grand jury which investigated the Comp USA crimes sought to indict Matt Weaver. Ardell Williams was convicted of at least two crimes allegedly involving appellant: the Soft Warehouse theft and the Las Vegas check forging incidents. (RT 8803, 8926, 8957-8967, 9013).

These witnesses were clearly chargable as at least aiders and abettors in the Comp USA crimes. To be chargeable with an identical offense, a witness must be considered a principal under section 31. Aiders and abettors are principals. (*People v. Horton, supra,* 11 Cal.4th at pp. 1113-1114.) Section 31 states:

> All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission ... are principals in any crime so committed.

An accomplice acts "'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. (Citations omitted.)'" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91; *People v. Beeman* (1984)

35 Cal.3d 547, 561.)

A witness's status as an accomplice is a question for the jury where the facts are in dispute. (*People v. Howard* (1992) 1 Cal.4th 1132, 1174; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1158.) However, when the facts are not in dispute, the issue is a legal one to be determined by the trial court. (*People v. Daniels* (1991) 52 Cal.3d 815, 867; *People v. Verlinde, supra,* 100 Cal.App.4th at p. 1159.) "'Where such witness is an accomplice as a matter of law, the court should so charge... . Conversely, where, as a matter of law, the witness is not an accomplice, the court does not err in refusing to charge that he is or in refusing to submit the issue to the jury.'" (*People v. Hoover* (1974) 12 Cal.3d 875, 880, quoting *People v. Jones* (1964) 228 Cal.App.2d 74, 94-95; see also *People v. Verlinde, supra,* at p. 1159.) The facts were sufficient for the trial court to conclude, as a matter of law, that these witnesses were accomplices as a matter of law because of their efforts to aid in the Comp USA robbery and their need for immunity.

The failure to give this instruction denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in fair jury instructions. It also led to an unreliable evidence in capital proceedings. These violations constituted

a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). *Chapman* cannot be met because without Weaver's and Moore's testimony, the case against appellant regarding the Comp USA charges was virtually non-existent. This instruction would have called their testimony into question. The sole testimony against appellant would then have been that of Ardell Williams, which was largely lacking in credibility, and was subject to CALJIC 3.16 as well. As such, appellee cannot demonstrate beyond a reasonable doubt that the instructional error did not affect the verdict.

Alternatively, as discussed above, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth

Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 47

IT WAS ERROR TO INSTRUCT THE JURY PURSUANT TO CALJIC 6.14 IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS, A JURY DETERMINATION OF GUILT BEYOND A REASONABLE DOUBT, AND HEIGHTENED CAPITAL CASE RELIABILITY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The trial court instructed the jury pursuing to CALJIC 6.14, stating the following:

> It is not a defense to the crime of conspiracy that an alleged conspirator did not know all the other conspirators. The members of a conspiracy may be widely separated geographically, and yet may be in agreement on a criminal design and may act in concert in pursuit of that design. The adoption by a person of the criminal design and criminal intent entertained in common by others and of its object and purposes is all that is necessary to make that person a co-conspirator when the required elements of a conspiracy are present.

(CT 2720).

Under the circumstances, it was error to give this instruction. Regarding the killing of Ardell Williams, this instruction unconstitutionally lessened the burden of proof of the prosecution. Because Antoinette Yancey's jury found that she was not the shooter, the prosecutor's theory that appellant and Yancey were the sole conspirators was not correct. Thus, it was incumbent on the prosecutor to show a different theory of conspiracy. The

prosecutor failed to show any evidence of any agreement between appellant and the unnamed other conspirator(s) who acted in the shooting, assuming, *arguendo*, that a conspiracy existed. Appellant made an overall objection to the theory of conspiracy. (RT 10621).

At the time of Williams' death, it was undisputed that appellant was in custody at the Orange County Jail. The prosecution's theory was that a conspiracy existed between appellant and Antoinette Yancey, and that pursuant to that conspiracy, Yancey shot and killed Williams. As discussed above, *see, e.g.,* Claim 49, there was very little evidence actually indicating that a conspiracy existed. The evidence presented was equally consistent with the inference that Yancey killed Williams on her own accord because she wanted appellant to be freed from jail.

After appellant's penalty phase jury hung, the prosecutor tried Antoinette Yancey. Her jury found her guilty of Williams' death. That jury also found the allegation that Yancey personally used a firearm to be not true. As a result of this finding, the prosecutor declined to proceed with the penalty phase against Yancey. (RT 12167-12175).

Synthesizing these results, it becomes clear that there was insufficient evidence that the killing of Ardell Williams was a direct result of the

conspiracy between appellant and Yancey. Instead, it appears that there was at least one additional conspiracy which existed– namely between Yancey and at least one other person who was the shooter. That conspiracy, however, may not have been part of the conspiracy which allegedly existed between appellant and Yancey. Under these circumstances, however, the jury was instructed to disregard the existence of a separate conspiracy, which lessened the prosecutor's burden of proof to show that appellant was involved in a conspiracy and that the death was a result of that conspiracy.

Due process requires proof of guilt beyond a reasonable doubt for a criminal conviction to occur. (*In Re Winship*, *supra*, 397 U.S. at pp. 361-364; *Jackson* v. *Virginia*, *supra*, 443 U.S. at pp. 318-319). This instruction violated the Due Process Clause, which protects against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged (*id.*, at p. 341, citing *In re Winship*, *supra*), using an automatic reversal standard. (*id.*, *Sullivan* v. *Louisiana* (1993) 508 U.S. 275).

> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the

> judge to determine (as *Winship* [(1970) 397 U.S. 358, 364 requires) whether he is guilty beyond a reasonable doubt. In other words, *the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.*

Sullivan, *supra*, 508 U.S. at pp. 277-278 (citations omitted).

The instructions at issue related to the burden of proof, which must be judged in light of the Due Process Clause:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

(*Addington* v. *Texas* (1979) 441 U.S. 418, 423, quoting *In Re Winship* (1970) 397 U.S. 358, 370 (Harlan, J., conc.; internal quotation marks omitted)).

Criminal cases merit the highest standard, the beyond a reasonable doubt test:

> . . . 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.
>
> . . . [¶] . . . In cases involving individual rights, whether criminal or civil, the standard of proof at a minimum reflects the value society places on individual liberty

(*Santosky* v. *Kramer* (1982) 455 U.S. 745, 755, quoting *Addington* v. *Texas*, *supra*, 441 U.S. at pp. 423, 415; quotation marks and brackets omitted.)

"Instructions that allow a jury to convict without finding every element of the offense violate *In re Winship*'s [397 U.S. 358, 364 (1970)] requirement that 'every fact necessary to constitute the crime' must be proven beyond a reasonable doubt." *Keating v. Hood,* 191 F.3d 1053, 1061 (9th Cir.1999). In such instances, constitutional error is presumed. *Solis v. Garcia* (9th Cir. 1999) 219 F.3d 922, 927.

Alternatively, reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, as discussed above, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 48

THE COURT ERRED IN FAILING TO INSTRUCT PURSUANT TO CALJIC 17.10 AND 17.49 REGARDING ARDELL WILLIAMS'S KILLING IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The trial court gave the following instruction, pursuant to CALJIC 8.30:

> UNPREMEDITATED MURDER OF THE SECOND DEGREE
>
> Murder of the second degree is the unlawful killing of a human being with malice aforethought when there is manifested an intention unlawfully to kill a human being but the evidence is insufficient to establish deliberation and premeditation.

(CT 2740). This instruction only related to Count 7, the death of Ardell Williams, as made clear by CALJIC 8.70:

> DUTY OF JURY AS TO DEGREE OF MURDER
>
> Relating to Count 7 only, you are instructed as follows: Murder is classified into two degrees, and if you should find the defendant guilty of murder, you must determine and state in your verdict as to Count 7 whether you find the murder to be of the first or second degree.

(CT 2742).

The Court failed to instruct the jury pursuant to CALJIC 17.49, which states:

> In this case, the defendant has been charged with _____, a felony. The foregoing charged crime includes

the lesser offense of _____.

You will be given _____ verdict forms encompassing both the charged crime and the lesser included offense.

Since the lesser included offense is included in the greater, you are instructed that if you find the defendant guilty of the greater offense, you should not complete the verdict on the corresponding lesser offense and that verdict should be returned to the Court unsigned by the Foreperson.

If you find the defendant not guilty of the felony charged, you then need to complete the verdict on the lesser included offense by determining whether the defendant is guilty or not guilty of the lesser included crime, and the corresponding verdict should be completed and returned to the Court signed by the Foreperson.

It was error not to give this instruction under these circumstances.

The Court also failed to instruct the jury pursuant to CALJIC 17.10, which states:

CONVICTION OF LESSER INCLUDED OR LESSER RELATED OFFENSE– IMPLIED ACQUITTAL– FIRST

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime.

Thus, you are to determine whether the defendant is guilty or not guilty of the crimes charged in Count __ or of any lesser crime. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdicts. However, the court cannot accept a guilty verdict on a lesser crime unless you have

unanimously found the defendant not guilty of the greater crime.

"In a criminal case, a trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citation.] Therefore, even without a request, the court must instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present. [Citation.]" (*People v. Earp* (1999) 20 Cal.4th 826, 885.)

These principles were relevant to the jury's determination of the appropriate crime. By not instructing the jury pursuant to either CALJIC 17.10 or 17.49, the trial court failed to provide any context for evaluating the lesser included offense of second degree murder. The result was that the jury was essentially instructed that they must first consider first degree murder, in violation of *People v. Kurtzman* (1988) 46 Cal.3d 322, 324-325, 330-331. And the jury was never told when, if ever, it should consider the lesser included offense.

The Supreme Court has noted that "'death is a different kind of punishment from any other which may be imposed in this country.... From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state

action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'" *Gardner* v. *Florida* (1977) 430 U.S. 349, 357-358. *See also, e.g., California v. Ramos* (1983) 463 U.S. 992, 998-999; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.

As Justice Brennan explained in his opinion for the Court in *Keeble v. United States*, 412 U.S. 205, 208, providing the jury with the "third option" of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard:

> Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. *Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.* In the case before us, for example, an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented. But the jury was presented with only two options:

> convicting the defendant of assault with intent to commit great bodily injury, or acquitting him outright. We cannot say that the availability of a third option -- convicting the defendant of simple assault -- could not have resulted in a different verdict. Indeed, while we have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense, it is nevertheless clear that a construction of the Major Crimes Act to preclude such an instruction would raise difficult constitutional questions.

Id., at 212-213 (emphasis added).

The Supreme Court has recognized that in some circumstances "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton* v. *United States*, 391 U.S. 123, 135 (1968). *See also Beck* v. *Alabama*, 447 U.S. 625, 642, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980); *Barclay* v. *Florida*, 463 U.S. at 950 ("Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum, as if he had no experiences").

Even before the Supreme Court's opinion in *Beck v. Alabama*, 447 U.S. 625 (1980), there was near-universal state and federal recognition that a jury must be instructed on lesser included offenses, particularly in capital

cases.[43] In *Beck v. Alabama, supra*, the Supreme Court explained:

> For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Id. at 637. In a capital case, the failure to instruct on a lesser included offense is a clear violation of federal constitutional law. *Beck v. Alabama*, 447 U.S.

43

With regard to federal offenses, this principle was first announced in *Stevenson v. United States*, 162 U.S. 313, 323:

> A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter.

See also Berra v. *United States*, 351 U.S. 131, 134, where Mr. Justice Harlan indicated that the defendant's entitlement to such an instruction could not be doubted:

> In a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense. See *Stevenson* v. *United States*, 162 U.S. 313.

625 (1980). Similarly, the failure to provide a context and vehicle for those instructions also violated *Beck v. Alabama* (1980) 447 U.S. 625. CALJIC 17.10 and 17.49 would have provided that context and vehicle.

Especially in capital cases, where a defendant invariably should be charged with lesser included offenses having factual predicates similar to those of the capital murder charges, *see Beck v. Alabama* (1980) 447 U.S. 625, it may be difficult to classify a particular verdict as "accurate" or "inaccurate." A trial court is obligated to instruct on all included offenses supported by the evidence. *See* Cal. Penal Code § 1159; *People v. Breverman*, 19 Cal.4th 142, 161 (1998). Here, there was a lack of evidence presented about what happened prior to Ardell Williams death. As Yancey's jury found that her personal use allegations untrue, the prosecution did not prove who the actual shooter was. Under these circumstances, a second degree murder instruction was proper, since what actually occurred is a matter of speculation.

The trial court's duty to give a required instruction *sua sponte* exists even when the defendant not only fails to request the instruction, but objects to its being given; failure to give such an instruction is error. *See People v. Sedeno*, 10 Cal.3d 703, 716 (1974). Reversal is automatic. *See Beck v. Alabama* (1980) 447 U.S. 625.

Since the court was required to instruct on lesser included offenses, it follows that the jury must be given the proper context for considering those offenses. The failure to instruct pursuant to CALJIC 17.10 and 17.49 failed to provide such context. Automatic reversal on Count 7 is required.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

PENALTY PHASE CLAIMS

CLAIM 49

APPELLANT WAS NOT ELIGIBLE FOR THE DEATH PENALTY UNDER *ENMUND V. FLORIDA* AND THE EIGHTH AMENDMENT REQUIREMENT THAT A DEATH SENTENCE BE PROPORTIONATE TO THE DEFENDANT'S PERSONAL CULPABILITY

The evidence presented against appellant was insufficient to render him death eligible. It is established that he was not the actual killer of either Ardell Williams or Kathy Lee and evidence of his intent that they be killed was minimal. *People v. Smithey* (1999) 20 Cal.4th 936, 1223. The Eight Amendment disavows the imposition of the death penalty for a murder committed by another person, when the person did not himself kill, or attempt to kill, intend that a killing take place or that lethal force be employed. *Enmund v. Florida* (1982) 458 U.S. 782, 797. Individualized consideration is a constitutional requirement when imposing a death sentence. *Id.* at 798 (citing *Lockett v. Ohio* (1978) 438 U.S. 586, 605).

Appellant raised this issue below. During argument on his 1118.1 motion, appellant argued that it was cruel and unusual to find the Comp USA special circumstances true on an aiding and abetting theory where there was no evidence that appellant had knowledge of intent to kill. (RT 10570).

A.

Evidence of Appellant's Individual Culpability for the Death of Kathy Lee Was Minimal

On October 14, 1992, Kathy Lee was shot by Nokkuma Ervin. (MUNI RT 449). Prosecution testimony established that Ervin entered Comp USA and ordered the remaining employees into the bathroom and handcuffed each person to a bathroom stall. (RT 8347). There were no injuries to the employees.

The robbery was designed to reduce the possibility of injury. It took place after closing time when the store was almost empty. (RT 8533). Instead of holding employees at gun point, handcuffs were utilized to decrease the possibility of injury.

Neither Matt Weaver, Jeanette Moore or Ardell Williams– the witnesses who were used to establish that appellant was involved in the Comp USA incident– testified that there was any intent or knowledge on the part of appellant that there would be any use of force during the robbery. Matt Weaver testified that Eric Clark asked him if he wanted to get paid to move computers. (RT 13532). Weaver agreed and went with Eric Clark and Wilson to a Del Taco across from Comp USA. (RT 13541). At the Del Taco, Weaver claimed he met someone identified as "William Clark" for the first

time. (RT 13542). Appellant allegedly then stated that the store was closed. Weaver got in appellant's car. They drove toward Comp USA, where they came upon Ervin who tried to get in the BMW with them. Appellant did not let Ervin in to the car and drove off. (RT 13544, 13545). Weaver provided no evidence that appellant intended that a killing take place or that lethal force be employed.

Jeanette Moore testified that appellant arranged for her to obtain the fake driver's licence that she used to rent a U-haul. (MUNI RT 242, 244, 253; RT 7640-63). Again, her testimony did not indicate that appellant used or intended to use lethal force during the Comp USA robbery.

Ardell Williams' Grand Jury testimony did not include any indication that violence was intended to be used during the robbery. (Grand Jury RT 20-73). Further, when Eric Clark described the Comp USA incident to Williams, he stated it, "had gone down bad" because someone had unexpectedly gotten hurt. (Grand Jury RT 58). There were not supposed to be any bullets in the gun. (RT 2070-78).

Even if all of the evidence that the prosecution asserted were true, the evidence shows that appellant never intended that Kathy Lee be shot or that lethal force would be used. The only culpability that could be established

against appellant would be for aiding and abetting the robbery. The death penalty may not be imposed where appellant's culpability is no more than aiding and abetting a felony. *Edmund v. Florida* (1982) 458 U.S. 782, 797. In *Enmund v. Florida,* the United States Supreme Court reversed the death sentence of a defendant convicted under Florida's felony-murder rule. Enmund was the driver of the "getaway" car in an armed robbery of a dwelling. The occupants of the house, an elderly couple, resisted and Enmund's accomplices killed them. The Court, citing the weight of legislative and community opinion, found a broad societal consensus, with which it agreed, that the death penalty was disproportional to the crime of robbery-felony murder "in these circumstances." *Id.,* at . The Court noted that although 32 American jurisdictions permitted the imposition of the death penalty for felony murders under a variety of circumstances, Florida was 1 of only 8 jurisdictions that authorized the death penalty "solely for participation in a robbery in which another robber takes life." *Id.,* at 789. Enmund was, therefore, sentenced under a distinct minority regime, a regime that permitted the imposition of the death penalty for felony murder *simpliciter. See Tison v. Arizona* (1987) 481 U.S. 137, 147. At the other end of the spectrum, eight States required a finding of intent to kill before death could be imposed in a

felony murder case and one State required actual participation in the killing. The remaining States authorizing capital punishment for felony murders fell into two somewhat overlapping middle categories: three authorized the death penalty when the defendant acted with recklessness or extreme indifference to human life, and nine others, including Arizona, required a finding of some aggravating factor beyond the fact that the killing had occurred during the course of a felony before a capital sentence might be imposed. Arizona fell into a subcategory of six States which made "minimal participation in a capital felony committed by another person a [statutory] mitigating circumstance." *Id.,* at 792. Two more jurisdictions required a finding that the defendant's participation in the felony was not "relatively minor" before authorizing a capital sentence. *Id.,* at 791. *See Tison v. Arizona, supra*, at 147.

> Armed robbery is a serious offense, but one for which the penalty of death is plainly excessive; the imposition of the death penalty for robbery, therefore, violates the Eighth and Fourteenth Amendments' proscription "'against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.'" *Weems v. United States,* 217 U.S. 349, 371, 30 S.Ct. 544, 551, 54 L.Ed. 793 (1910) (quoting *O'Neil v. Vermont,* 144 U.S. 323, 339-340, 12 S.Ct. 693, 699, 36 L.Ed. 450 (1892)); cf. *Coker v. Georgia,* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (holding the death penalty disproportional to the crime of rape).

Tison, supra, at 148.

The *Enmund* Court was unconvinced "that the threat that the death

penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken." 458 U.S., at 798-799. In reaching this conclusion, the Court relied upon the fact that killing only rarely occurred during the course of robberies, and such killing as did occur even more rarely resulted in death sentences if the evidence did not support an inference that the defendant intended to kill. The Court acknowledged, however, that "[i]t would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony." *Id.*, at 799.

While the States generally have wide discretion in deciding how much retribution to exact in a given case, the death penalty, "unique in its severity and irrevocability," *Gregg v. Georgia,* 428 U.S. 153, 187 (1976), requires the State to inquire into the relevant facets of "the character and record of the individual offender." *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976). Thus, in Enmund's case, "the focus [had to] be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" *Enmund v. Florida, supra,* 458 U.S., at 798 (quoting *Lockett v. Ohio,* 438 U.S. 586, 605 (1978)) (emphasis in original). Since Enmund's

own participation in the felony murder was so attenuated and since there was no proof that Enmund had any culpable mental state, *Enmund v. Florida, supra,* 458 U.S., at 790-791, the death penalty was excessive retribution for his crimes.

Pursuant to *Enmund*, the state may not sentence to death "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state. Only a small minority of States even authorized the death penalty in such circumstances and even within those jurisdictions the death penalty was almost never exacted for such a crime." *Tison v. Arizona, supra,* at 149. Appellant did not intend to kill, nor was he shown to have a culpable mental state. Moreover, just like in *Enumnd,* he was not present at the scene of the shooting. Assuming, arguendo, that he was present in the Comp USA parking lot, he was at most acting as the "getaway driver" who was driving the BMW.

The prosecution failed to establish that appellant was culpable for more that aiding and abetting a robbery.

B.

Evidence of Appellant's Individual Culpability for the Death of Ardell Williams was Insufficient

On March 13, 1994, appellant had been incarcerated for over two years. Appellant was not at the Continental Binding in Compton where Ardell Williams was killed. (RT 1378).

Williams died of injuries resulting from a gunshot wound. The murder weapon was never recovered. (RT 1274). No fingerprints were found at the murder scene nor were there any witnesses to the murder. (RT 14850-14852).

Yancey was identified as the woman that brought flowers to Ardell Williams' home a few weeks before her murder. Yancey's voice was also identified by Williams' mother as the person who had made phone calls to the house and ultimately arranged for Ardell to go to the job interview, where she was found murdered. (RT 9443-74).

Yancey visited appellant in jail. (MUNI RT 2159). They corresponded before and after Williams' death. (RT 1250). The prosecution established at most that Yancey and appellant knew each other and had a relationship. There was no evidence that established that appellant orchestrated, paid for, or even asked that Williams be killed. There was no evidence that, assuming arguendo

that he was involved, that appellant intended for Yancey, or anyone else, to lie in wait. Thus, that special circumstance would not apply to him because the Eighth Amendment requires that death be based on an individualized consideration of the defendant's culpability. *Lockett v. Ohio* (1978) 438 U.S. 586, 605. For these same reasons, the special circumstance of killing a witness was also invalid.

Based on the evidence presented, appellant may not be sentenced to death for the murder of Ardell Williams because there was insufficient evidence that he intended that a killing take place, that he intended to kill a witness, or that lethal force would be employed at all. The evidence is equally consistent with the conclusion that Yancy killed Williams herself because she was upset that appellant was in jail. Moreover, since Yancey's jury did not find her personal use allegation true, it is equally likely that another person was involved, and the reason behind that killing is a matter of speculation. If the circumstantial evidence is susceptible of two reasonable interpretations, one pointing to innocence and the other to guilt, the interpretation pointing to innocence must be adopted. *People v. Butler* (1980) 104 Cal.App. 3d 868, 875, (*citing People v. Bender* (1945) 27 Cal.2d 164,175.) The lack of sufficient evidence establishing individualized culpability requires that

appellant's death penalty be reduced. *Enmund v. Florida* (1982) 458 U.S. 782, 797.

C.
Conclusion

Death was disproportionate for these murders. Reversal is required under *Clemons v. Mississippi* (1990) 494 U.S. 738, as appellee cannot demonstrate beyond a reasonable doubt that the invalid special circumstances had no impact on the verdict. Even if this Court were to invalidate only one of the special circumstances, leaving another remaining, reversal is nevertheless required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18).

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." *People v. Brown* (1988) 46 Cal.3d 432, 447.

The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: 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– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina*, *supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard]).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S.

578, 584-85).

CLAIM 50

APPELLANT'S RIGHTS TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, TO COUNSEL AND ASSISTANCE OF EXPERTS UNDER THE SIXTH AMENDMENT, AND TO A RELIABLE DETERMINATION OF PENALTY UNDER THE EIGHTH AMENDMENT WERE VIOLATED BY THE DENIAL OF CRITICAL §987.9 FUNDS

A.

Facts

On March 19, 1997, appellant filed an application for funds pursuant to Penal Code §987.9. Specifically, appellant sought $1,275.00 for consultation with Dr. Edward I. Gelb, a forensic psychophysiologist. (Supplemental CT Vol. 2, 987.9 material, at 322). Appellant wanted Dr. Gelb to perform a polygraph examination on appellant.

In his accompanying declaration, appellant's counsel stated that the prior penalty phase jury had hung seven to five in favor of the death penalty. He added:

> During my interview of the jurors in the first trial, they told me that they would be less likely to impose death if they had a doubt about defendant's involvement. During the retrial, we will be emphasizing lingering doubt pursuant to 190.3, subdivision (a) and 190.3, subdivision (k) to a much greater extent than the first penalty phase.

(Supplemental CT Vol. 2, 987.9 material, at 323). One of the primary defense strategies at the penalty phase retrial would thus be based on this funding request. Counsel also explained the importance of this evidence:

> Some of the jurors I interviewed felt that a polygraph result suggesting innocence would be a powerful argument on lingering doubt justifying an LWOP verdict rather than a death verdict.

(Supplemental CT Vol. 2, 987.9 material, at 323).

The Court denied this request, stating:

> Good cause not shown nor any authorities cited requiring polygraph evidence under due process standards.

(Supplemental CT Vol. 2, 987.9 material, at 325).

On April 17, 1997, appellant filed a second request for §987.9 funds for consultation with Dr. Gelb. In that request, counsel noted:

> In *People v. Harris* (1989) 47 Cal.3d 1047, 1094, the California Supreme Court held that section 28(d) of the California Constitution, otherwise known as Proposition 8, has eliminated restrictions on the admissibility of polygraph results. The adoption of section 28(d) did not abrogate generally accepted rules by which the reliability and thus the relevance of scientific evidence is determined. The reliability of the scientific technique, therefore, is determined under the requirement of Evidence Code section 350 that no evidence is admissible except relevant evidence, a provision necessarily incorporated by reference into Evidence Code section 352 which

is expressly preserved by section 28(d).

(CT 4242-4243). Thus, the relevant issue which defendant needed to show was whether the evidence was relevant under §350.

Appellant also added:

> The California Supreme Court continued by stating that on a proper showing criminal defendants from time to time must be permitted to demonstrate that advancement in a scientific technique has enhanced its reliability and acceptance in the scientific community, and to establish that the advances warrant admission of a previously excluded category of scientific evidence. (*People v. Harris, supra*, at p. 1094).

(CT 4243). The court denied the motion for funding, which prevented appellant from consulting with Dr. Gelb at all. Thus, appellant never had the opportunity to provide the evidence of advancement in the scientific technique.

Counsel informed the court that Dr. Gelb was willing to provide the required evidence if the court provided funding for consultation:

> [Dr. Gelb] has assured me that the polygraph field has progressed to such a degree that the advancement in the scientific technique has enhanced its reliability and acceptance in the relevant scientific community. ... Dr. Gelb is ready, willing, and able to testify that the polygraph is now accepted in the scientific community as a reliable technique.

(CT 4243-4244).

Counsel also stated:

> Based on my research of the law and conversations with Dr. Gelb, I feel that I can now prove that the polygraph is generally acceptable within the within the relevant scientific community much like psychology is.

(CT 4246).

Counsel thus demonstrated for the court that counsel had identified a qualified expert who was available to provide the necessary evidence in order to render the polygraph evidence admissible. No higher showing was required. Nevertheless, the Court would not allow a hearing and denied the request, stating:

> The showing is still insufficient. Other than a conclusionary statement, there is no factual showing, or detailed offer of proof, showing there has been sufficient advancement in polygraph technique that has enhanced its reliability and acceptance in the scientific community to warrant admission of polygraph evidence.

(CT 4241).

Dr. Gelb was eminently qualified to provide expert consultation, and if necessary, testimony. He held a master's degree and a doctorate in psychology. (CT 326). At the time of the request, he had conducted in excess of 30,000 polygraph examinations and testified as an expert in courts and

legislative bodies throughout the country. (CT 326). He had been appointed by the Los Angeles Superior Court in 1975 to administer 400 polygraph examinations to effect settlement of two class action suits. His testimony was accepted by the Los Angeles Police Commission. (CT 326). He was a detective and lieutenant with the Los Angeles Police Department where he received the Medal of Valor. He headed the Los Angeles Police Department's polygraph unit. He had taught at the University of Southern California, Delta College, the Polytechnic Institute in Madrid, Spain, the Department of Defense Polygraph Institute and LaSalle University. He was an instructor at the FBI's advanced polygraph course. (CT 326).

On August 8, 1997, appellant filed a third request for funds to consult with Dr. Gelb. In this request, appellant provided the detailed offer of proof which the court had mentioned in its prior denial. This offer of proof is ten pages long. (See CT 4313-4322). It covers a wide scope of issues, including that:

1. polygraph tests are accepted in the scientific fields of psychology, psychiatry and physiology (CT 4313);

2. conscious efforts at deception cause certain involuntary and uncontrollable, but measureable physiological responses (CT

4313);

3. a properly-administered polygraph test consists of cross-checks in the form of related questions to ensure consistent responses (CT 4314);

4. a qualified examiner will familiarize himself or herself with sufficient facts to ask adequate questions (CT 4314-4315);

5. an experienced examiner will detect countermeasures such as drugs or alcohol through techniques including the use of control questions (CT 4315);

6. the polygraph technique is generally accepted in the scientific communities of criminology, psychology, medicine, psychophysiology and polygraph examiners (CT 4315-4316);

7. criticisms of the accuracy of polygraphs have been shown to be invalid (CT 4316-4317);

8. numerous studies demonstrate the accuracy of polygraph evidence (CT 4317-4322).

Appellant then summed up by stating:

> If permitted, the defendant will prove the above proffered facts and show the court that

> polygraph test results, when produced by a competent examiner using a reliable test technique, will produce highly reliable results. Dr. Gelb, a proponent of modern polygraph technique, would testify that:
>
> 1. The particular technique utilized in this examination is recognized as acceptable and suitable among polygraph experts;
> 2. Instrumentation and chart markings can be found to be within acceptable standards for conducting such a test;
> 3. In scoring the polygraph charts, experts can find evidence of the presence of pronounced emotional reactions in a significant and consistent manner in the tracings on the questions concerning the relevant zone question. This will lead him to conclude the subject was not attempting deception when he answered the relevant questions in the manner indicated;
> 4. Mr. Clark was physically and emotionally testable at the time of the examination.

(CT 4322-4323).

Appellant also submitted a declaration from David Raskin, Ph.D regarding the acceptance of the reliability of polygraph tests. (CT 4340-4353a). That declaration provided a thorough foundation for the offer of proof presented by appellant. (CT 4313-4322).

B.

Appellant Was Entitled to Funding Pursuant to §987.9

Section 987.9, subdivision (a), provides in relevant part:

> In the trial of a capital case ... the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of ... experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense.... Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney.... In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

Appellant was denied rights under this statute.

The constitutional right to the effective assistance of counsel includes the right to ancillary experts. *Doe v. Superior Court* (2nd Dist.1995) 45 Cal.Rptr.2d 888. At the time application is made for the appointment of an expert at public expense, it is often difficult for counsel to demonstrate specific requirements. *Id.* As a result, trial courts are encouraged to view such requests with "considerable liberality." (*See e.g.*, *Corenevsky v. Superior Court, supra,* 36 Cal.3d at pp. 319-320). Criminal defendants, even indigent ones, are entitled to "access to a competent" expert who "will conduct an

appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma* (1985) 470 U.S. 68, 83; *Doe v. Superior Court* (2nd Dist.1995) 45 Cal.Rptr.2d 888, 893. Dr. Gelb was a competent expert who could have conducted an appropriate polygraph examination. The defense repeatedly asked for Dr. Gelb's assistance in presentation of a defense, but was denied that opportunity by erroneous court rulings. The Court should have conducted a hearing on the admissibility of the proffered scientific evidence before denying the funding to conduct the examination.

C.

Constitutional Law Mandates that Appellant Be Allowed to Pursue a Defense

The constitutional guarantees of due process, confrontation, and compulsory process supersede otherwise applicable state evidentiary rules which would exclude relevant and exculpatory evidence. *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 held that state rules of evidence "may not be applied mechanistically" if the result is to exclude fundamental defense evidence, and found that Mississippi law excluding an exculpatory hearsay declaration impermissibly infringed on the defendant's right to present his defense. *Rock v. Arkansas* (1987) 483 U.S. 44, 51 fn. 8, held that Arkansas

law excluding hypnotically refreshed testimony per se impermissibly infringed on the defendant's right to testify on her own behalf. The California courts have held that exclusion of evidence under Evidence Code section 352 "must bow to the due process right of a defendant to a fair trial and his right to present all relevant evidence of significant probative value to the defense." (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599.)

While the right to present defense evidence is not absolute, restrictions on this right are constitutionally permissible only if they "'accommodate other legitimate interests in the criminal trial process'" and are not "arbitrary and disproportionate to the purposes they are designed to serve." (*Rock v. Arkansas, supra*, 483 U.S. at 55-56, *quoting Chambers v. Mississippi, supra*, 410 U.S. at 295.) *In re Aontae D.* (1994) 25 Cal.App.4th 167, 177 instructs that the currently existing Evidence Code section 351.1 exclusion of polygraph evidence was based on the then-perceived unreliability of polygraph testing. These concerns are answered by the current consensus about the reliability of polygraph evidence. Both California and federal cases recognize the need to reassess the admissibility of polygraph evidence, particularly when proffered as evidence of innocence by a criminal defendant.

Evidence Code §351.1[44] cannot constitutionally preclude the admission of exculpatory evidence if the defendant made an adequate offer of proof under *People v. Kelly* (1976) 17 Cal.3d 24 and *People v. Leahy* (1994) 8 Cal.4th 587. As to the current consensus regarding the reliability of polygraph evidence, *see e.g. People v. Jackson* (1996) 13 Cal.4th 1164, 1212.

In *United States v. Piccinonna* (11th Cir. 1989) 885 F.2d 1529, 1530, the Court remanded for trial court determination of the admissibility of the defendant's polygraph testimony. The basis for this remand was the technological developments in polygraphy including "better equipment" operated by "more adequately trained polygraph administrators" and extensive use of such tests "by government agencies". The Court found these developments a legitimate justification to lift the Circuit's *per se* exclusionary rule. (*Id.* at 1532.) The Ninth Circuit held similarly in *United States v.*

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44 That section states:

> Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and postconviction motions and hearing, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile court, unless all parties stipulate to the admission of such results.

Cordoba (9th Cir. 1997) 104 F.3d 225 and vacated the defendant's conviction for possession and distribution of cocaine because the district court had improperly granted the prosecution's motion to exclude the defendant's polygraph results. In *Cordoba*, the Court adopted a rule for admissibility of unstipulated polygraph evidence within the discretion of the trial court. *Id.*

United States v. Galbreth (D.N.M. 1995) 908 F.Supp. 877 held that the polygraph evidence proffered by the defendant met the "*Daubert* standards for admissibility" (*id.* at 878) and could be introduced as evidence at trial to support the truthfulness of the criminal defendant. At issue was defense polygraph evidence that supported the defendant's contention that he did not intentionally attempt to evade payment of taxes. Similarly, *United States v. Crumby* (D.Az. 1995) 895 F.Supp.1354 held that a defendant may use evidence that he has passed a polygraph examination to counter an attack on his credibility by the prosecution at trial. *Crumby* concluded that "the maturation of the science of polygraphy, when properly coupled with a cautious acceptance of this science by federal courts, will lead to a fairer and more just system of criminal and civil jurisprudence." (*Id.* at 1358.) *Crumby* also made clear that:

> [t]he relevant considerations for determining how much caution

> a court should employ in permitting scientific or technological evidence into evidence are: who is attempting to use the technology and for what purpose. In the present case, it is a man who proclaims his innocence.
>
> Most of the cases considering polygraph evidence have only considered the prejudicial effects of an examination that brands an innocent person as a guilty one . . . . In this country, a criminal defendant is afforded many protections -- ie [sic] a presumption of innocence, right to obtain certain exculpatory evidence, `beyond a reasonable doubt' norms, etc.
>
> This country's long history of affording criminal defendants with these protections mandates that the Court consider the value of polygraph technology and its ability to foster justice and provide the criminal defendant . . . with a fair trial.

(*Id.* at 1361.) Just as *Crumby* recognized that federal constitutional provisions warranted admissibility of polygraph evidence, so should this Court recognize in defendant's case.

1.

Evidence Code section 351.1 purports to give the prosecutor a veto over the trial court's exercise of discretion as to the admissibility of polygraph evidence.

The state and federal constitutional guarantees of separation of powers between the judicial and administrative branches of government preclude the

prosecution in a criminal case from exercising a veto power over matters otherwise entrusted to the trial court's discretion. *See People v. Esteybar* (1971) 5 Cal.3d 119; *see also People v. Tenorio* (1970) 3 Cal.3d 89.

Evidence Code section 351.1, subdivision (a), is just such an unconstitutional statute:

> Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and postconviction motions and hearing, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile court, unless all parties stipulate to the admission of such results.

This is precisely the type of unconstitutional delegation of authority to the prosecutor which was held to violate the separation of powers requirement in *Esteybar* and *Tenorio*. *See also People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

2.

Evidence Code section 351.1 impermissibly interferes with a defendant's right to present a defense.

Evidence Code section 351.1 cannot be invoked to preclude admission of this evidence that is crucial to appellant's defense. *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 held that state rules of evidence "may not be applied mechanistically" if the result is to exclude fundamental defense evidence. Restrictions on this right are only constitutional when they "'accommodate other legitimate interests in the criminal trial process'" and are not "arbitrary and disproportionate to the purposes they are designed to serve," (*Rock v. Arkansas, supra*, 483 U.S. at 55-56, quoting *Chambers v. Mississippi, supra*, 410 U.S. at 295.)

Courts must be especially vigilant to assure that evidentiary rules do not "defeat the ends of justice" by implicating "constitutional rights directly affecting the ascertainment of guilt . . ." *Chambers v. Mississippi, supra*, 410 U.S. at 302. Over forty years ago, Justice Potter Stewart wrote that "Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States* (1958) 358 U.S. 74, 81 (Stewart, J., concurring). Many years ago, after a lengthy foundational hearing in which experts testified to the advances of polygraph science, Judge Gordon Thompson, Jr., observed that a continued absolute bar to polygraph evidence impedes the discovery of truth: polygraph evidence has "something valuable

to add to the administration of justice. And the judiciary can no longer afford to ignore the polygraph . . ." *United States v. DeBetham* (S.D. Ca. 1972) 348 F. Supp. 1377, 1384.[45] As such, upon a proper showing of validity, the defendant has a Fifth, Sixth and Fourteenth Amendment right to the admission of this relevant evidence. The blanket prohibition of polygraph evidence in section 351.1 thus represents an antiquated, arbitrary, disproportionate and therefore unconstitutional restriction on exculpatory defense evidence.

Under the familiar *Kelly* test, the proponent of expert testimony based on new scientific techniques must establish the reliability of the method, usually by expert testimony, and the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. The proponent must also demonstrate that correct scientific procedures were used in the particular case. (*People v. Kelly, supra*, 17 Cal.3d at 30.) *Kelly* "assigned the task of determining reliability of the evolving technique to members of the scientific community from which the new method emerges." (Id. at 31.)

45

In reviewing the record in that case, the Ninth Circuit concluded: "Simply stated, the evidence at the hearing vigorously supports the accuracy of polygraph evidence." *United States v. DeBetham* (9th Cir. 1972) 470 F.2d 1367, 1368.

Jesionowski v. Beck (D.Ma. 1997) 955 F.Supp. 149, 150 observed that:

> [in] recent opinions admitting results of polygraph examinations, an expert psychophysiologist testified as to the reasons why the measurable physiological reactions are reliable indicators of whether the examinee is being truthful. [Citations] Absent such testimony, the necessary predicate for admissibility has not been demonstrated. [Citation].

Id.

Jesionowski therefore granted the civil defendants' motion to exclude polygraph results when the plaintiff failed to offer any expert who could testify to the foundational requirement of reliability necessary under *Daubert* or *Kelly*. Appellant, however, offered adequate experts. The Los Angeles Police Commission, the Los Angeles County District Attorney and the Los Angeles Police Department recognize Dr. Gelb as an expert.

The Courts are increasingly recognizing that polygraph results are reliable and admissible. *See, e.g., Rupe v. Wood* (9th Cir. 1996) 93 F.3d 1434 (polygraph evidence showing that an accomplice lied about his minor role in homicides should have been admitted at death penalty phase trial); *United States v. Posado* (5th Cir. 1995) 57 F.3d 428 (polygraph admitted at motion to suppress hearing); *Toussaint v. McCarthy* (9th Cir. 1990) 925 F.2d 800, 802-03, *cert. denied*, (1990) 502 U.S. 874 (polygraph may be used by California

Department of Corrections to help determine gang affiliations of inmates); *Bennett v. City of Grand Prairie, Tex.* (5th Cir. 1989) 883 F.2d 400 (admissible before magistrate to determine probable cause). Each of these courts have found polygraph evidence sufficiently reliable. This increased acceptance is a recognition of the increased reliability of polygraph tests.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). The case against appellant was based on biased, perjuring witnesses. Appellant made a strong case for lingering doubt in his penalty phase retrial, as well for reasonable doubt during his first trial. The polygraph evidence would have been powerful evidence supporting the case for lingering doubt.

To the extent that this error affected the penalty phase but did not amount to a federal constitutional violation, there is a reasonable possibility that the jury would have rendered a different verdict had the errors not occurred. *People v. Brown* (1988) 46 Cal.3d 432, 448. The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we

assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." *People v. Brown* (1988) 46 Cal.3d 432, 447. The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: 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– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina*, *supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard]).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North*

Carolina (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 51

THE RETRIAL WAS RENDERED FUNDAMENTALLY UNFAIR BY (1) THE REFUSAL OF THE COURT TO REQUIRE THE PROSECUTION TO ACCEPT THE DEFENSE OFFER TO STIPULATE TO A CLOSE PERSONAL RELATIONSHIP BETWEEN APPELLANT AND YANCEY, AND (2) THE SUBSEQUENT ADMISSION OF PREJUDICIAL LETTERS IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS' REQUIREMENTS OF DUE PROCESS AND HEIGHTENED RELIABILITY IN A CAPITAL CASE

At the guilt phase, the prosecution claimed it introduced letters between appellant and Yancey in order to demonstrate the close personal relationship between the two, in order to explain the motive for the conspiracy to kill Ardell Williams. Appellant unsuccessfully opposed the introduction of the letters at the guilt phase. (RT 3037-3065).

At the penalty phase retrial, appellant once again offered to stipulate to a close personal relationship between appellant and Yancey, and thus render unnecessary the introduction of the letters, which contained sexual material which, while not probative to a contested issue, was highly prejudicial. (RT 12263). The letters included statements about masturbation, including the deposit of bodily fluids on letters sent to each other, as well as bizexuality, oral sex and other activities. The prosecution refused to enter this stipulation, and

the trial court did not require the prosecutor to enter into it.

The retrial of a penalty phase of a capital case is just that. It does not encompass a complete retrial of all issues presented in the guilt phase. Instead, it contemplates only a presentation of that evidence which is relevant in deciding which penalty is appropriate. *People v. Montiel* (1993) 5 Cal.4th 877. The jury should have been instructed that they only needed to consider evidence relevant to the penalty determination. *People v. DeSantis* (1992) 2 Cal.4th 1198, 1238-1239; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1234-1235.

This is true despite the fact that jurors may consider residual or lingering doubt about a defendant's guilt. It would be error to prevent a penalty phase jury from considering evidence material to the issue of lingering doubt. *People v. Terry* (1964) 61 Cal.2d 137, 147; *People v. Cox* (1991) 53 Cal.3d 618, 677-678; *People v. Hawkins* (1995) 10 Cal.4th 920, 967. Correspondingly, the jury is allowed to consider, pursuant to Cal. Penal Code §190.3(a), "the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true..." *People v. Wright* (1990) 52 Cal.3d 367, 445.

The letters between appellant and Yancey added little to the issues of the penalty phase. Considering the lack of relevance, the stipulation should have been entered.

> If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code sections 210 and 350 respectively." Through the offer of the defense, the facts covered by the proposed stipulation– the victim was a human being and was alive before the alleged criminal act was committed and dead afterwards– were removed from dispute. Therefore, the testimony elicited to prove such facts was irrelevant and inadmissible.

People v. Bonin (1989) 47 Cal.3d 808, 848-849.

Here, appellant's offer to stipulate to a close personal and intimate relationship made the letters largely irrelevant. As this Court has found, "If a defendant offers to admit an element of the charged offense, the prosecutor must accept that offer and refrain from introducing evidence of other crimes to prove that element to the jury." *People v. Hall* (1980) 28 Cal.3d 143, 152. As discussed above, those letters were highly prejudicial in both the guilt and penalty phases.

For all these reasons, the stipulation should have been entered and the letters should not have been admitted. The admission of the letters rendered the trial fundamentally unfair, in violation of Due Process and heightened

capital case reliability. Their overtly sexual nature rendered them exceedingly prejudicial, while they were not generally probative under Evid. Code §352.

The admission of this evidence denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in a fair trial. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." *People v. Brown* (1988) 46 Cal.3d 432, 447. The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The

Brown Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: 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– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina*, *supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard]).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 52

THE ROBBERY-MURDER, BURGLARY-MURDER AND MULTIPLE-MURDER SPECIAL CIRCUMSTANCES SHOULD HAVE BEEN DISMISSED FOR INSUFFICIENT EVIDENCE THEREBY VIOLATING APPELLANT'S RIGHT TO HEIGHTENED RELIABILITY AND A DETERMINATION OF PENALTY BASED ON PERSONAL CULPABILITY UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant's liability for both murders was that of an aider and abettor. He was not the shooter at Comp USA. He never even entered the building the night of the robbery. In *Enmund v. Florida* (1982) 458 U.S. 782, 797 the United States Supreme Court held that the death penalty, imposed under the state felony-murder rule, was disproportionate for a robber who did not himself kill, attempt to kill or intend that a killing take place or that lethal force be implied. It is clear that appellant intended none of this. In *Tison v. Arizona* (1987) 481 U.S. 137, 158, the Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.* (fn. admitted). *Tison* and *Enmund* define the minimum conduct necessary for an individual to be death eligible. Neither appellant's minor participation nor his intentions and actions met this minimum conduct.

Under California law, a defendant found guilty of felony murder, but

who is not the actual killer, may be subjected to capital punishment or life without parole under Cal. Pen. Code § 190.2(d) only if he was a major participant in the underlying felony and acted with reckless indifference to human life. *See. e.g., People v. Purcell* (1993) 18 Cal.App.4th 65, 72-73; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298 fn. 16.

During argument on his 1118.1 motion, appellant argued that it was cruel and unusual to find the Comp USA special circumstances true under an aiding and abetting theory where there was no evidence that appellant had knowledge of intent to kill. (RT 10570).

Evidence of appellant's involvement in the Comp USA robbery was minimal. He never entered the store. The shooter, Nokkuwa Ervin, was apparently the only person who entered the store as part of the robbery. Matt Weaver's testimony, if believed, merely established that Weaver, appellant and one other person were driving into the Comp USA parking lot when suddenly Ervin ran up to the car and tried to get in. Appellant would not let Ervin get in and drove off. Weaver never suggested that a robbery, attempted robbery or burglary was about to occur. Weaver felt that his actions with appellant were completely lawful and innocent of wrongdoing. (RT 8062).

As soon as Ervin tried to escape into his car, appellant took all

necessary steps to terminate any association with the principal by refusing to participate in aiding and abetting the shooter's escape. He left the scene of the crime without taking any further steps to continue with any criminal activity. There was no evidence that he intended to kill or had knowledge that Ervin would shoot anyone. Appellant did not act with reckless indifference to human life.

According to the statements of Ardell Williams, there were not supposed to be any bullets in the gun used by Nokkuwa Ervin. (RT 2070-78). This specific decision would weigh against a finding that a shooting was a natural and probable consequence of the robbery. (*See also* RT 10924-10928). Furthermore, there was evidence that no shooting was intended, including (1) the fact that the store employees were handcuffed away from the door where the computers were to be taken and thus weren't in harms way, (2) the fact that only one bullet was in the gun, and (3) Nokkuwa Ervin had never intended to shoot anyone, as he prayed that Kathy Lee wouldn't die.

The same arguments apply to the multiple murder special circumstance. In *People v. Malone* (1985) 165 Cal.App.3d 31, the court ruled an aider and abettor can only be subjected to the multiple murder special circumstance allegation if he intended to kill or intended to aid another in killing. An intent

to kill or aid in killing is constitutionally mandated even when the special circumstance provision is that the defendant was previously convicted of murder. Proof of intent to kill is an element of the multiple murder special circumstance when the defendant is an aider and abettor rather than the actual killer. *People v. Anderson, supra*, 43 Cal.3d 1104.

In determining whether there is sufficient evidence to support a criminal conviction, an "appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. *People v. Reilly* (1970) 3 Cal.3d 421, 425; *People v. Reyes* (1974) 12 Cal.3d 486, 497. The "substantial evidence" rule is the yardstick used by courts to determine whether a verdict meets this minimal standard of reasonableness.

> The court must determine "whether from the evidence, including reasonable inference to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." ... "[T]he court must review the whole record ... to determine whether it discloses substantial evidence– that is, evidence which is reasonable, credible and of solid value– such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Id.* 39 Cal.3d at 695; *Peole v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Lines* (1975) 13 Cal.3d 500, 505).

"Substantial evidence" does not just mean some evidence that could

support the jury's verdict; it means "evidence that reasonably inspires confidence and is 'of solid value.'" *People v. Redmond* (1969) 71 Cal.2s 745, 755; *People v. Samuel* (1981) 29 Cal.3d 489, 505; *In re Khamphouy S.* (1993) 12 Cal.App.4th 1130, 1134. ."To survive an insufficiency of evidence challenge, the evidence must be substantial enough to support the finding of each essential element of the crime ... ." *People v. Johnson* (1992) 5 Cal.App.4th 552, 558.

> [I]t is not enough for the [prosecution] simply to point to "some evidence supporting the finding," for, "Not every surface conflict of evidence remains substantial in the light of other facts."

People v. Johnson, supra, 26 Cal.3d at 577.

"The power of the factfinder ... has never been thought to include a power to enter an unreasonable verdict of guilty." *Jackson v. Virginia* (1979) 443 U.S. 307, 317. A conviction which is not supported by substantial evidence violates the Due Process Clause of the Fifth and Fourteenth Amendments. *Ibid.* "The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be ... to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.*, 443 U.S. at 318.

> [T]his inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Id., 443 U.S. at 318-319.

Reversal is required under *Clemons v. Mississippi* (1990) 494 U.S. 738, as appellee cannot demonstrate beyond a reasonable doubt that the invalid special circumstances had no impact on the verdict.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 53

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE LYING IN WAIT SPECIAL CIRCUMSTANCE, THEREBY VIOLATING APPELLANT'S RIGHT TO HEIGHTENED RELIABILITY AND A DETERMINATION OF PENALTY BASED ON PERSONAL CULPABILITY

The elements of the lying-in-wait special circumstance are an intentional murder, committed under circumstances that include a concealment of purpose, a substantial period of watching and waiting for an opportune time to act, and immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. The lying in wait must be of sufficient duration to establish the elements of waiting, watching and concealment or other secret design to take the victim unawares and by surprise. These requirements necessarily include a substantial temporal element. *People v. Edwards* 54 Cal.3d 787, 821-876.

The "killing must take place during the period of concealment and watchful waiting or the lethal acts must begin at and flow continuously from the moment the concealment and watchful waiting ends. If a cognizable interruption takes place, the circumstances calling for the ultimate penalty do not exist." *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1011. In *Domino*, the court dismissed a lying in wait allegation where the victim was

captured during the period of lying in wait, but was not killed until at least one hour later.

There was no evidence presented regarding how the killing of Ardell Williams took place.[46] Appellant's case is legally identical to *Richards v. Superior Court* (1983) 146 Cal.App.3d 306. Relying on *Domino*, the Court dismissed a lying in wait special circumstance where the victim was lured to a certain location, stabbed in the heart, and dealt a blow to the left rear portion of his head resulting in a fractured skull. The Court held there was insufficient evidence of lying in wait because there was "no evidence in the record showing the precise manner in which the murder occurred, and hence no basis for concluding that assailants approached him from physical concealment after watchful waiting." *Id.*, 146 Cal.App.3d at 314. The *Richards* court made it clear that (1) taking the victim by surprise from behind was insufficient; (2) surprise was not sufficient to demonstrate the necessary element of concealment; mere ruse, secrecy or deception designed to place the victim in a position where he may be taken unawares is insufficient to find the elements of lying in wait. *Id.* at 314-316.

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As discussed above in Claim 38, appellant offered evidence of potential third-party culpability, which tended to show that Tony Mills may have been responsible for Ardell Williams's death.

Appellant was in jail at the time Williams was killed. While there was evidence that Antoinette Yancey employed the ruse of a job interview to get Ms. Williams to travel to 407 West Compton Boulevard in Gardena, California, there was no evidence regarding the temporal connection between any lying in wait and the killing. There was no evidence that any lying in wait took place. There was no evidence that the killer approached Williams from physical concealment after watchful waiting. She may have been approached from the front, told to turn around, and was shot. Yancey and Williams may have gotten into an argument over appellant which resulted in Williams' death. The evidence simply does not indicate in any way what happened. *See also People v. Morales* (1989) 48 Cal.3d 527 (not requiring the physical place of concealment discussed in *Richards*, but instead requiring "*a period of watchful waiting is shown* which immediately precedes the assault, a concealment of purpose, coupled with a surprise attack from a position of advantage." *Id.* at 556.

Furthermore, there was no evidence, only speculation, that appellant knew about the job application ruse. Of the many letters and telephone calls intercepted by law enforcement, none addressed this issue. As such, under *Lockett*, which focuses on individual culpability, if appellant did not know of

the ruse, he should not be subject to the lying-in-wait special circumstance.

As the necessary elements were not met, the 'true' finding of the special circumstance of lying in wait should be reversed. As the circumstances surrounding the killing of Ardell Williams, a witness, were heavily relied on by the prosecutor to show that appellant would pose a danger in the future, the error was clearly harmful.

Reversal is required under *Clemons v. Mississippi* (1990) 494 U.S. 738, as appellee cannot demonstrate beyond a reasonable doubt that the invalid special circumstances had no impact on the verdict. In determining whether there is sufficient evidence to support a criminal conviction, an "appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. *People v. Reilly* (1970) 3 Cal.3d 421, 425; *People v. Reyes* (1974) 12 Cal.3d 486, 497. The "substantial evidence" rule is the yardstick used by courts to determine whether a verdict meets this minimal standard of reasonableness.

> The court must determine "whether from the evidence, including reasonable inference to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." ... "[T]he court must review the whole record ... to determine whether it discloses substantial evidence– that is,

> evidence which is reasonable, credible and of solid value– such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Id.* 39 Cal.3d at 695; *People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Lines* (1975) 13 Cal.3d 500, 505).

"Substantial evidence" does not just mean some evidence that could support the jury's verdict; it means "evidence that reasonably inspires confidence and is 'of solid value.'" *People v. Redmond* (1969) 71 Cal.2s 745, 755; *People v. Samuel* (1981) 29 Cal.3d 489, 505; *In re Khamphouy S.* (1993) 12 Cal.App.4th 1130, 1134." To survive an insufficiency of evidence challenge, the evidence must be substantial enough to support the finding of each essential element of the crime ... ." *People v. Johnson* (1992) 5 Cal.App.4th 552, 558.

> [I]t is not enough for the [prosecution] simply to point to "some evidence supporting the finding," for, "Not every surface conflict of evidence remains substantial in the light of other facts."

People v. Johnson, supra, 26 Cal.3d at 577.

"The power of the factfinder ... has never been thought to include a power to enter an unreasonable verdict of guilty." *Jackson v. Virginia* (1979) 443 U.S. 307, 317. A conviction which is not supported by substantial evidence violates the Due Process Clause of the Fifth and Fourteenth

Amendments. *Ibid.* "The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be ... to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.*, 443 U.S. at 318.

> [T]his inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Id., 443 U.S. at 318-319.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 54

THE WITNESS KILLING SPECIAL CIRCUMSTANCE ALLEGATION SHOULD HAVE BEEN DISMISSED BECAUSE SECTION 190.2(a)(10) DID NOT APPLY. THE FAILURE TO DISMISS IT VIOLATED DUE PROCESS, HEIGHTENED CAPITAL CASE RELIABILITY AND DETERMINATION OF PENALTY BASED ON PERSONAL CULPABILITY IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

Section 190.2(a)(10) permits a true finding of the special circumstance where "[t]he victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission, of the crime to which he was a witness." The statutory language contemplates the following elements: (1) a victim who has witnessed a crime prior to, and separate from, the killing; (2) the killing was intentional; and (3) the purpose of the killing was to prevent the victim from testifying about the crime he or she witnesses." *People v. Garrison* (1989) 47 Cal.3d 746, 792; *People v. Benson* (1990) 52 Cal.3d 754, 784.

In interpreting this statute, the first step is to examine the language itself. *People v. Pieters* (1991) 52 Cal.3d 894, 898. In ascertaining the intent, the words themselves are most important, and should be construed by their ordinary meaning. *People v. Morris* (1988) 46 Cal.3d 1, 15; *People v.*

Overstreet (1980) 42 Cal.3d 891, 895. When the language of a statute is clear, the court should follow its plain meaning. *Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal.3d 152, 155. When the statutory language is clear and unambiguous, there is no need for construction and the courts should not indulge in it. *People v. Overstreet, supra* 42 Cal.3d 891, 895; *In re Atiles* (1983) 3 Cal.3d 805, 811. In the absence of statutory ambiguity or other constitutional infirmity, the court cannot disregard the plain language of a statute. *People v. Lewis* (1993) 21 Cal.App.4th 243, 247. The language of section 190.2(a)(10) is clear and unambiguous. The plain language requires the victim to be a witness to the crime.

Although Ardell Williams may have been a witness for the prosecution, she was not a "witness to the crime" under § 190.2(a)(10). She was not present at Comp USA on October 18, 1991 and her whereabouts were unknown. If she was not an accomplice, she was only a purported witness to certain ambiguous conduct which occurred long before the crime, and to statements made by another individual about an accidental shooting some time after the crime. She was not a "witness to the crime" under § 190.2(a)(10).

Even if the phrase "witness to a crime" was somehow ambiguous, this state construes a penal statute as favorably to the defendant as its language and

the circumstances of its application may reasonably permit. *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631. This policy applies to enactments by initiative. *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 154. This policy is of particular importance here because § 190(a)(10) establishes eligibility for the death penalty, an area in which the courts have recognized a heightened constitutional demand for certainty. *See, e.g., Beck v. Alabama* (1980) 447 U.S. 625, 637-638.

Using this analysis, *People v. Weidert* (1985) 39 Cal.3d 836, 844-852 held that witnesses in a juvenile criminal proceeding were not covered by the language "any criminal proceeding" in § 190.2(a)(10). Any such construction would violate ex post facto prohibitions and due process. *Weidert, supra* at 849-851; *Marks v. United States* (1977) 430 U.S. 188; *Bouie v. City of Columbia* (1964) 378 U.S. 347. A similar analysis was used in *People v. Garrison, supra*, 47 Cal.3d 746, 792 to exclude a killing which was planned and intended to prevent a victim from becoming a witness.

Ardell Williams was a potential witness for the prosecution, not a witness to the crime. She was a collateral witness. The plain language dictates that § 190.2(a)(10) does not apply to appellant. The true finding of the special circumstance must be reversed.

Reversal is required under *Clemons v. Mississippi* (1990) 494 U.S. 738, as appellee cannot demonstrate beyond a reasonable doubt that the invalid special circumstances had no impact on the verdict. Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18).

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." *People v. Brown* (1988) 46 Cal.3d 432, 447. The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: 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– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate

punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina*, *supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard]).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 55

THE BURGLARY-MURDER AND THE ROBBERY-MURDER AROSE FROM THE SAME COURSE OF CONDUCT, AND BOTH SHOULD NOT HAVE GONE TO THE JURY IN THE PENALTY PHASE. THE CHARGING OF BOTH VIOLATED DUE PROCESS, THE RIGHT TO A FAIR TRIAL AND HEIGHTENED CAPITAL CASE RELIABILITY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The prosecution charged appellant with both burglary-murder and robbery-murder special circumstances. The California Legislature determined that a burglary and robbery which are part of an indivisible transaction can be punished only once. Cal. Penal Code § 654. *See also People v. Smith* (1985) 163 Cal.App.3d 908, 912; *People v. Lee* (1980) 110 Cal.App.3d 774, 784-785; *People v. Garrison* (1966) 246 Cal.App.2d 343, 356-357.

When Penal Code § 190.3 was enacted, the Legislature had already determined that the separate societal interests protected by the burglary and robbery statutes do not warrant increased punishment when the two crimes are part of an indivisible transaction. Since the record shows conclusively that this burglary and robbery were part of an indivisible transaction, one of the special circumstances should be dismissed to avoid duplicative aggravating factors derived from a single course of indivisible course of conduct.

The duplicative special circumstances denied appellant a fair trial and

reliable determination of guilt and penalty. As this was a retrial of the penalty phase, the additional special circumstance, gave the impression that appellant's conduct was greater than it was. The violation of state law was a violation of a state created liberty interest in a fair trial. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required under *Clemons v. Mississippi* (1990) 494 U.S. 738, as appellee cannot demonstrate beyond a reasonable doubt that the invalid special circumstances had no impact on the verdict. Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, as discussed above, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836.

The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." *People v. Brown* (1988) 46 Cal.3d 432, 447. The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: 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– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina, supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard]).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable,

individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 56

THE INTRODUCTION OF EVIDENCE OF A SOFTWAREHOUSE BURGLARY WAS IMPROPER AND VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

At the penalty phase retrial, the prosecution called Richard Highness to testify regarding a burglary at Softwarehouse during which Ardell Williams allowed two customers to pass through the register area with computer equipment which they did not pay for. Williams ultimately pled guilty to this offense without implicating appellant. After the fact, she alleged that he was involved.

Appellant made a motion in limine to limit factor (b) and factor (c) evidence. (RT 12280). The prosecutor said he would not offer any evidence on it. (RT 12281). Subsequently, the prosecutor said he wanted to bring in evidence of Softwarehouse to show the relationship between appellant and Ardell Williams, and in order to rebut lingering doubt. (RT 12411). The theory was that it showed that appellant had a criminal interest in computers and that he and Ardell Williams had a criminal relationship. The Court only allowed the evidence in to rebut lingering doubt, although appellant argued that it should only come in, if at all, during the prosecutor's case in rebuttal. (RT 12415).

The prosecution introduced the testimony of Richard Highness, who worked at the store. Mr. Highness identified appellant as "Tom Jones," the customer Mr. Highness helped select the computers. (RT 14050). This burglary was not violent.

This evidence was inadmissible at the penalty phase retrial. It did not involve the use of force as required under § 190.3(b). Appellant was never charged or convicted of this crime, so it was not a prior felony conviction under §190.3(c). Given the fact that guilt was already established, when determining relevance, the issue was whether the evidence was relevant at the penalty phase, not at the guilt phase.

This Court has explained that "the 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues ... In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" *People v. Gionis* (1995) 9 Cal.4th 1196. The issue was not whether appellant was guilty of the crimes charged, but was whether he should die for the crimes of which he was convicted. Under §190.3, these crimes were not admissible.

As this was a capital case, it was critical for the trial court to observe

all rules of evidence, because "death is a different kind of punishment from any other which may be imposed in this country." *Gardner v. Florida* (1977) 430 U.S. 349, 357. "[I]t is different in both its severity and finality. ... It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason, rather than caprice or emotion." *Id.* at 357-358. By putting before the jury otherwise inadmissible evidence showing bad character, the prosecutor was able to taint the penalty phase with caprice and emotion.

Heightened scrutiny in capital cases is mandated by the Fifth, Eighth and Fourteenth Amendments. Because of the severity of the death penalty, a higher standard of due process is required in capital cases. *Beck v. Alabama* (1980) 447 U.S. 625, 637. This evidence violated these guarantees.

The admission of this evidence denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in a fair trial. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 57

EVIDENCE REGARDING THEFT AT SOFT WAREHOUSE SHOULD HAVE BEEN EXCLUDED FROM THE PENALTY PHASE RETRIAL, AND THE FAILURE TO DO SO VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The prosecutor sought to introduce facts of the Soft Warehouse burglary to show that appellant and Ardell Williams had an ongoing "crime partner" relationship. At the time of Ardell's arrest for that crime, she did not allege that appellant was one of her crime partners. She denied knowing the people involved in the crime. When she entered a guilty plea to the charges, she did not identify appellant, and instead identified Tom Jones and Marcus Williams. (RT 2333-2337).

It was only after she was arrested in Las Vegas that Williams identified appellant as being involved. At the guilt phase, and then again at the penalty phase retrial, the prosecutor called Richard Highness, a former employee of Soft Warehouse, to testify. Mr. Highness identified appellant as the "Tom Jones" involved in the crime. (RT 8586-8595).

The Soft Warehouse burglary was a non-violent crime. Appellant was never convicted of that crime. The introduction of such a crime, particularly one involving computers, was more prejudicial than it was probative and

should have been excluded.

Statutory and case law permits evidence of violent criminality committed at any time in a defendant's life, and whether or not adjudicated, to show his propensity for violence and to assist the sentencer in determining whether he is the type of person who deserves to die. *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. Balderas, supra*, 41 Cal.3d 144, 202; *People v. Ray* (1996) 13 Cal.4th 313, 350.

Section 190.3 itself spells what is not admissible:

> criminal activity by the defendant which did not involve the use of force or violence or which did not involve the express or implied threat to use force or violence.

The violence and force elements are sine qua non to the admission of such evidence. This section controls even in a retrial and where the prosecutor asserts the basis of admissibility as lingering doubt.

Given the fact that guilt had already been established, when making a determination of admissibility, the court should have considered that not all guilt phase evidence had relevance in the penalty phase. This evidence was prejudicial, and thus should have been excluded under Evid. Code §352:

> "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or

> damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to proveguilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues... In applying section 352, "prejudicial" is not synonymous with "damaging." ' [Citation.]"

People v. Karis (1988) 46 Cal.3d 612, 638.

This evidence was not sufficiently probative on any relevant issue in the penalty phase. It was, at best, collateral evidence of criminal association between appellant and Ms. Williams. That evidence was adequately established by other evidence, rendering this highly prejudicial evidence cumulative as well.

The admission of this evidence denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in a fair trial. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

CLAIM 58

THE COURT ERRED WHEN IT ALLOWED THE PROSECUTION TO INTRODUCE PRIOR BAD ACTS IN THE CASE IN CHIEF DURING THE PENALTY PHASE

In his case-in chief, the prosecutor sought to admit evidence of appellant's guilt of prior bad acts in the form of theft at the Softwarehouse. He rationalized this request as combating any potential lingering doubt about appellant's guilt in the minds of the jury. (RT 12419). The trial court allowed the "prosecution to call witnesses to establish that the crime [Softwarehouse computer theft] occurred and that Bill Clark was identified..." for the limited purpose of "...providing more evidence that Clark had motive and thus to provide more than a reasonable doubt." (RT 12418). The trial court erred in admitting this evidence. It was barred by California Penal Code 190.3 ¶ 2, Evidence Code §1101 as well as Federal Due Process and heightened capital case reliability regardless of whether trial counsel discussed lingering doubt[47].

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Trial counsel, during his closing argument ion the first penalty phase, did tell the jury to consider lingering doubt:

> We have a system that maybe is not perfect, but one of the things that you will be able to consider is whatever lingering doubt that you have left in this case and how you view the facts of the case and that's important because again, there is broad brush statements about Mr. Clark's role and I

A.
Lingering Doubt

"Lingering doubt" refers to the concept that in the penalty phase of a capital trial the jury may require "more evidence than is required to convict beyond a reasonable doubt." (*See* RT 12416). This Court has recognized that jurors may consider their doubts concerning a defendant's guilt at the penalty phase of the trial as a mitigating factor:

> Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible. The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment.

People v. Terry (1964) 61 Cal.2d 137, 146-147.

Further, the United States Supreme Court recognized in *Lockett* that the

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> think that everyone has to look and say what are those facts based on and when do we know and how certain can we be. Everybody knows that the system is not infallible.

(RT 11950). Trial counsel also spent considerable time in the penalty phase retrial presenting evidence of lingering doubt. (See RT 16650, 16666).

Eight and Fourteenth Amendments require that the sentencer in a capital case not be precluded from considering any relevant mitigating evidence, that is, evidence regarding, "any aspect of a defendant's character or record and of the circumstances of the offense that the defendant proffers as a basis for a sentence less than a death." *Lockett v. Ohio* (1978) 438 U.S. 586, 604. The jury "must be allowed to consider on the basis of all relevant evidence, not only why a death sentence should be imposed, but also, why it should not be imposed." *Jurek v. Texas* (1976) 428 U.S. 262, 271.

Allowing the prosecution to admit otherwise inadmissible evidence if appellant argued lingering doubt was an incorrect application of the California Evidence §1101 and Penal Code 190.3, paragraph 2, as well as a violation of appellant's right to due process and a fair trial.

B.

Evidence of a Prior Criminal Act was Found Inadmissible Under §1101 During the Guilt Phase and Remained Inadmissible During the Penalty Phase

As discussed above in Claim 41, the trial court found evidence of appellant's alleged prior criminal activity to be inadmissible under California Evidence Code §1101. (RT 2940). The prosecutor sought to admit evidence

of an alleged theft of two laptop computers. He rationalized admitting this evidence on the basis that the prior theft illustrated appellant had an "interest in computers." (RT 2928). The prosecutor argued that the theft fell under the exception to the rule barring the introduction of evidence of character to prove conduct when using prior bad acts for the purpose of proving "motive." The trial court correctly disagreed: "His motive is to steal...it's to make money. And that just shows he's a person of bad character." (RT 2931)

> So where I 'm getting lost here is why is the fact that computers were taken for money or profit has any particular relevance in this case? That's where, the only thing that would–this is a man , I'm saying, if the evidence is true and so forth, I'm not making judgments here, I'm saying the facts are, this is a man who is to out to steal , he will steal anything. He's out to steal jewelry, he's out to steal traveler's checks. He's out to steal one computer at a time or a warehouse full of computers . So why do the specifics of the five walk-in computers in Los Angeles have anything in particular to do –other than to show bad character a propensity to steal.

(RT. 2927).

The trial court then discussed each exception to the rule that is listed in 1101(b) and found that none applied to the alleged prior theft at Softwarehouse.

So I know that you've [the prosecutor] told me this before, and it's not soaking through, which of those prongs do you believe specific testimony about four or four or however many walk-in computer thefts in proceeding years fall into those categories? And which category, motive? His motive is to steal in taking those, it's to make money and that just shows he's a person of bad character.

Opportunity, there is nothing about the Los Angeles thefts, so far as I know or you have argued or give me evidence of that relates to his opportunity to commit the crime in question[].

His intent. That practically blends into motive in this case. Intent is placed in issue. For example when the defense says yea, I hit the guy in the face, but my intent was just to deck him, I had no intent to kill him. Intent is not an issue.

Preparation? Those thefts in L.A. have nothing to do with the preparation that was done to rip off a whole warehouse. Plan? The plans are totally different.

Knowledge? Knowledge what? That there are computers in a computer store?

Identity? We have already agreed that this is not signature evidence which would come in on identity. And again absence of mistake or accident. If there was a defense of yea, judge, I did all of that but I thought my brother Eric owned all of those computers, and I was there to

> help him take them away, or where he says sure
> but it was just a mistake.

(RT 2931-2932). "The motion to bring in specific evidence concerning the walk-in computer thefts in Los Angeles County is denied... ." (RT 2946).

During the retried penalty phase the prosecution argued for, and the trial court allowed, the same evidence to be admitted which the trial court had found inadmissible in the guilt phase. (RT 2946). The penalty phase trial court allowed the "prosecution to call witnesses to establish that the crime occurred and that Bill Clark was identified" for the limited purpose of "providing more evidence that Clark had motive and thus to provide more than a reasonable doubt" based on the anticipation that appellant would present lingering doubt. (RT 12418). Even if the concept of lingering doubt made evidence to prove appellant's guilt relevant during the penalty phase, it did not waive the applicability of the Evidence Code. Evidence Code §1101 applies equally in the penalty phase as it does in the guilt phase. *People v. Farmer* (1989) 254 Cal. Rptr. 508, 530 (overturned on other grounds as noted in *People v. Waidla* (2000) 94 Cal.Rptr.2d 396, 418, Fn.6).

C.

California Penal Code §190.3 Bars Admittance of Evidence of Criminal Activity Which did not Involve Violence

The evidence of other bad acts was also barred by California Penal Code § 190.3. Section 190.3 lists the factors that the trier of fact shall take into account when determining the appropriate penalty to impose on a defendant. The section indicates what evidence may be presented by the prosecution. California Penal Code §190.3, paragraph 1. The second paragraph excludes from the list any criminal activity which did not involve violence:

> [N]o evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence.

California Penal Code §190.3, paragraph 2. The alleged computer theft is clearly barred by the plain language of section 190.3.

This Court affirmed that a prosecutor's first hurdle to introduce evidence of criminal activity during the penalty phase is to prove the involvement of violence. *People v. Jackson* (1980) 168 Cal.Rptr. 603, 656-659. In *Jackson,* the prosecutor tried to admit a robbery which consisted of the

defendant breaking into an apartment with a rock. "The trial court rejected the offer, observing that burglary [was] "more of a crime of stealth than of violence." *Ibid.* This Court affirmed the trial courts assessment and clarified that the requirement of "violence or force" referred to in § 190.3¶2 meant "force or violence against a person." *Ibid.*

> The purpose of this limitation was to place a reasonable restraint of relevance on the number and kind of prior unlawful acts of a defendant that the prosecution should be permitted to introduce at the penalty phase. To extend the statute to include the many offenses involving at least some degree of force against property would defeat that purpose. Thus the Legislature cannot have intended that the jury base its decision as to whether the defendant should live or die on evidence, for example, that he used "force" to break a bicycle lock in order to steal a second-hand bicycle or, as here, to break a window in order to slip inside an apartment and steal some shirts.

Ibid at 657.

The criminal activity for which the prosecutor admitted evidence against appellant was a simple property crime. The prosecution alleged that appellant entered a Soft Warehouse store and told salesperson Richard Highness that he was interested in purchasing two laptop computers. Appellant allegedly was given the two computers with the requisite paperwork

and sent to the cashier. The cashier, Ardell Williams, did not require appellant to pay for the computers. (RT 8590). Assuming, *arguendo*, that the evidence was true, there was no violence involved in the alleged criminal activity, which was, at most grand theft. This property crime was inadmissible under *Jackson* and § 190.3. *Ibid* at 656-657.

D.
Conclusion

Allowing the prosecution to admit evidence of a prior bad act constituted a state law evidentiary error and such error renders a trial fundamentally unfair and violates the Due Process Clause of the Fourteenth Amendment to the United States. *Estelle* v. *McGuire* (1991) 502 U.S. 62, 71-72. The prosecutor was able to capitalize heavily on this error in argument during the penalty phase retrial. He argued that appellant was the type of person who stole computers, and thus they shouldn't have lingering doubt about whether he took part in the Comp USA robbery. (RT 16488-91). As lingering doubt was a major component of the defense case in the penalty phase retrial, this error was prejudicial.

The admission of this evidence denied appellant a fair trial and reliable

determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in a fair trial. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." *People v. Brown* (1988) 46 Cal.3d 432, 447.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth

Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 59

THE COURT ERRED IN PRECLUDING APPELLANT FROM PRESENTING A VALID MITIGATING FACTOR IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

During the penalty phase, trial counsel called Norman Morein, an expert on the security level classification process in California, to testify. He was called to explain how the classification process in California prisons would make it impossible for appellant to constitute a future danger. (RT 16348). The details of the classification process rebutted the argument that appellant constituted an unrestrained threat because he had allegedly committed one of the murders from inside the Orange County Jail.[48] It was vital that the jury understand that appellant would be classified as a security level IV inmate and that he could not receive a reduced security level. Appellant would be subject to the highest level of security measures.

The trial court barred trial counsel from presenting information regarding the classification process. Before trial counsel began examining Mr. Morein, the prosecutor brought up the *motion in limine* he had previously

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48

The prosecutor argued during the penalty phase: "And what is the punishment of life without the possibility of parole, how is the California Department of Corrections going to stop what the Orange County jail could not?" (RT 16534).

submitted and argued that any discussion of "the nature of the confinement that Mr. Clark may receive, in other words, classification, et cetera, et cetera" was barred (RT 16344). The trial court ruled "[a]daptability of prison may be acceptable, but the conditions that an LWOP prisoner will be serving under is not." (RT 16346). The Court seemed to expand its ruling during trial:

> Mr. Harley: Based upon your background, training and experience in the California Department of Corrections system, have you ever known of an LWOP prisoner making his way down to level two or level one institutions?
>
> Mr. King: Same Objection, Relevancy.
>
> The Court: Sustained.

(RT 16364). The inquiry was relevant to appellant's level of access to the outside world, and thus his 'dangerousnes.'These rulings prevented trial counsel from countering the prosecutor's arguments regarding future dangerousness. (RT 16534).

A.

Barring Relevant Mitigating Evidence is Unconstitutional Under Federal Law

The trial court relied on *People v. Thompson* in its decision to bar counsel from admitting mitigation. (RT 16344-48). (1988) 246 Cal.Rptr 245.[49] The fact that proffered evidence may relate top more than one issue– e.g., future dangerousness– a relevant consideration, and conditions of confinement, do not make it inadmissible. This is especially true in the context of a capital penalty phase. However, the assertion that under *Thompson*, conditions in prison are not considered mitigation and thus are irrelevant, would conflict with the United States Supreme Court's statement in *Eddings v. Oklahoma*: "Evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." *People v. Ray* (1996) 52 Cal.Rptr.2d 296, 319-320 (quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104).

The United States Supreme Court has provided standards for a

49

Appellant recognizes that in *People v. Thompson* this Court held that evidence of what conditions might be for a person serving a life sentence without parole was not mitigation and involved speculation. Based on the facts of this case, appellant respectfully requests that the Court reconsider the holding of *People v. Thompson* to the extent necessary.

constitutional death penalty that would serve both the goals of measured, consistent application and fairness to the accused. *Eddings*, *supra*, 455 U.S. 104, 111 (citing to *Furman v. Georgia* (1972) 408 U.S. 238.) That Court believed that "by its requirement that the jury find one of the aggravating circumstances listed in the death penalty statute and by its direction to the jury to consider 'any mitigating circumstance,'" a court could properly confine and direct a jury's attention to the circumstance of the particular crime and the characteristics of the person who committed the crime. *Gregg v. Geogia* (1976) 428 U.S. 153, 197. The Court considered the fair and consistent imposition of the death penalty to be so important that it ruled that it either be "imposed fairly with reasonable consistency, or not at all." *Eddings*, *supra*, 455 U.S. 104, 112 (citing *Gregg*, *supra*, 428 U.S. 153, 197.) The Court stated that the "rule in *Lockett* recognizes that 'justice requires that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'" By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognized that a consistency produced by ignoring individual differences is a false consistency. *Eddings*, *supra*, 455 U.S. 104, 112.

The Eighth and Fourteenth Amendments require that the sentencer in

a capital case not be precluded from considering any relevant mitigating evidence, that is, evidence regarding "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, (1978) 438 U.S. 586, 604, fn. omitted; *People v. Fudge* (1994) 7 Cal.4th 1075, 1117. The constitutional mandate contemplates the introduction of a broad range of evidence mitigating imposition of the death penalty. See *Payne*, *supra*, 501 U.S. at pp. 820-821, *Lockett*, *supra*, 438 U.S. at pp. 602, 604 [noting that concept of individualized sentencing, including the traditionally wide range of factors taken into account by sentencer, insures a greater degree of reliability in capital sentencing determinations]. The jury "must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek v. Texas* (1976) 428 U.S. 262, 271. Strict security measures which render appellant less dangerous were relevant evidence as to why a death sentence should not be imposed.

The trial court violated the rule in *Lockett* when it limited what mitigating evidence appellant could present to the jury. "Just as the State may not by statute preclude the sentencer from considering any mitigating factor neither may the sentencer refuse to consider as a matter of law any relevant

mitigating evidence." *Eddings*, *supra*, 455 U.S. 104, 115.

B.

Penal Code 190.3 Requires that all Relevant Mitigating Evidence be Presented

Appellant's security level of four and the details of the security classification process were relevant evidence for the jury to consider. California Penal Code 190.3[50]

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§190.3. Determination of death penalty or life imprisonment; evidence of aggravating and mitigating circumstances; considerations

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, **evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to,** the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by

the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under

the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

Section 190.3, with certain exceptions, allows "any matter relevant to aggravation, mitigation and sentence." *People v. Ochoa* (1998) 19 Cal.4th 353. This Court recognized that in *McKoy v. North Carolina*, the United States Supreme Court provided guidance on the nature of the relevancy inquiry at the penalty phase. *People v. Frye* (1998) 77 Cal.Rptr.2d 25 (*citing McKoy v. North* (1990) 494 U.S. 433.) The Court observed that the concept of relevance as it pertains to mitigation evidence is no different from the definition of relevance as the term is understood generally. (*Id.* at p. 440, 110 S.Ct. 1227.) "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact- finder could reasonably deem to have mitigating value....'"(*Ibid.*, quoting *State v. McKoy* (1988) 323 N.C. 1, 372 S.E.2d 12, 45 (dis. opn. of Exum, C.J.); see also Evid.Code, § 210 [relevant evidence is evidence having tendency in reason to prove or disprove any disputed fact of consequence to determination of action].)

California Penal Code §190.3 contains the criteria for the determination of the death penalty or life imprisonment. The statute states that evidence may be presented by the defendant as to any matter relevant to mitigation or sentence including but not limited to the eleven examples listed in the statute. California Penal Code §190.3 ¶1. Moreover, the prosecutor

raised the issue of future dangerousness. (RT 16534). Appellant was entitled to provide mitigating evidence relating to future dangerousness. The fact that future dangerousness is not listed as an aggravating factor does not make evidence rebutting an allegation of future dangerousness irrelevant.[51]

The evidence was admissible independently as mitigation and to rebut the prosecution's case in aggravation. Evidence that appellant would retain a high security level under very restricted conditions was relevant. The evidence of his conditions disproved a disputed fact as to whether appellant would be dangerous in the future. Whether appellant would be adequately controlled if incarcerated is an important point in light of the allegation that appellant was convicted of arranging the death of Ardell Williams from county jail. A reasonable juror would ask whether the community would be safe by means other than capital punishment.

Barring relevant mitigating evidence violated appellant's constitutional right to due process and not be disproportionally punished in violation of the Eighth and Fourteenth Amendments.

The denial of admission of this evidence denied appellant a fair trial and

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51

Instead, whether evidence is considered relevant is determined by the rules of evidence. *People v. Frye* (*supra*) 77 Cal.Rptr.2d 25.

reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in a fair trial. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 60

COLLATERAL ESTOPPEL BARRED THE PROSECUTION FROM ARGUING THAT APPELLANT WAS GUILTY OF ARDELL WILLIAMS'S DEATH THROUGH A CONSPIRACY WITH ANTOINETTE YANCEY. THE FAILURE TO PRECLUDE THIS ARGUMENT VIOLATED DUE PROCESS AND HEIGHTENED CAPITAL CASE RELIABILITY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The prosecutor argued in opening statement in the guilt phase that "the evidence is going to demonstrate that these two individuals William Clark, who was in custody, and Antoinette Yancey, who is out of custody, entered into an agreement to murder Ardell Williams to prevent her testimony. And in retaliation for her crossing the line and giving information to the police." (RT 7521). The prosecutor added "Ardell Williams drives to Continental Receiving. At this point in time she meets Antoinette Yancey, who is disguised, and Ardell Williams doesn't recognize that this is Carolyn, the person who delivered the flowers on February 10, 1994. And at this particular time Ardell Williams is given by Antoinette Yancey a job application. (RT 7529). He then added "She places her address on the application where she lived about a block away and then when it got to the zip code, she started to put a 9, and then she was shot in the back of the head with a .25 automatic

weapon by Antoinette Yancey she falls right down. Antoinette Yancey leaves the scene..." (RT 7431).

In the separate trial of Antoinette Yancey, she was convicted of the murder of Ardell Williams. Her jury found, however, the allegation that she personally used a firearm to be untrue. (CT 4395).

During the penalty phase retrial, the defense objected under the doctrine of collateral estoppel. (RT 12287). The Court said that the prosecution did not have to prove that Yancey was the shooter. (RT 12298). The Court made no other ruling on the issue, which allowed the prosecutor to present a theory of the case that Yancey was the shooter.

The doctrine of collateral estoppel prevents the relitigation of issues decided in earlier proceedings upon which a judgment on the merits of the issues has become final. *People v. White* (1986) 185 Cal.App.3d 822. "[T]he doctrine [of res judicata] applies to criminal as well as civil proceedings. ... *Sealfon v. United States* (1948) 332 U.S. 575, 578 ... [and] collateral estoppel [is] not only a requirement of due process, but included within the 'Fifth Amendment's guarantee against double jeopardy.' [*Ashe v. Swenson* (1970) 397 U.S. 436, 443-445.]" *People v. White, supra*, 185 Cal.App.3d at 826-827.

"'[C]ollateral estoppel' is an awkward phrase, but it stands for an

extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson, supra,* at 443.

The doctrine of collateral estoppel bars relitigation of an issue decided at a previous proceeding "if (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]." *People v. Sims* (1982) 32 Cal.3d 468, 484 (*quoting People v. Taylor* (1974) 12 Cal.3d 686, 691). Yancey's jury had determined the personal use allegation was not true. That verdict was a final judgment on the merits. The People were the party in both proceedings, and were even represented by the same trial prosecutor.

At Yancey's trial, the jury decided that Yancey did not personally shoot Ardell Williams, or at least that there was insufficient evidence to conclude that she did. The prosecution then proceeded to retry appellant's penalty phase based on the theory that Yancey and appellant engaged in a two-person conspiracy and murdered Ardell Williams. It was unfair to retry the penalty

phase on a theory which Yancey's jury had just rejected.

"Collateral estoppel is an equitable concept based on fundamental principles of fairness. For issue preclusion purposes it means that a party ordinarily may not relitigate an issue that was fully and fairly litigated on a previous occasion." *Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 941. *See also People v. Nunez, supra* , 183 Cal.App.3d at 222.

There is a heightened standard of reliability required in death cases. "[D]eath is a different kind of punishment from any other which may be imposed in this country." *Gardner v. Florida* (1977) 430 U.S. 349, 357. Because of the severity of the death sentence, a higher standard of due process is required in a capital case. *Beck v. Alabama* (1980) 447 U.S. 625, 637. This heightened scrutiny in capital cases is mandated by the Fifth, Eighth and Fourteenth Amendments of the United States Constitution. This heightened standard should not allow the prosecution to proceed on a theory of trial which had previously been rejected by a jury.

The admission of this theory denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in a fair trial. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of

federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). This error was prejudicial, as the prosecutor was allowed to argue that appellant was amember of the conspiracy, and the only logical coconspirator was Yancey. (RT 16480-16487; 16502-16509).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 61

THE COURT VIOLATED APPELLANT'S RIGHTS BY REJECTING SPECIAL INSTRUCTIONS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

A.

Amended CALJIC 8.85

Appellant requested a modified version of CALJIC 8.85 clarifying how certain factors were to be applied. (CT 4757-4760). A substantially similar instruction was given at the defendant's request in *People v. Wharton* (1991) 53 Cal.3d 522, 600, fn. 23.

The requested instruction removed the requirement that the jury find "substantial evidence" in order to consider a mitigating factor. This instruction removed the artificial barrier to considering evidence which might not have been considered "substantial" but nevertheless was mitigating evidence the jury could consider. The court denied the instruction, finding that 8.85 was a correct statement of law. (RT 16444-16448).

The instruction implemented appellant's Eighth and Fourteenth Amendment guarantees to due process and against cruel and unusual punishment by informing the jury that mitigation is not limited to the enumerated factors but includes any mitigating information that may convince

the jury to impose a sentence less than death. *Blystone v. Penn* (1990) 494 U.S. 299, 308; *McCleskey v. Kemp* (1987) 481 U.S. 279, 305-306.

The instruction correctly informed the jury that mercy, sympathy and sentiment were relevant in giving weight to the mitigating factors. *See People v. Easley* (1983) 34 Cal.3d 858, 874-880. It further informed the jury that it need not be unanimous as to mitigating evidence per the Eighth Amendment. *Mills v.Maryland* (1988) 486 U.S. 367.

B.
Modified CALJIC 8.87

Appellant requested an amended version of CALJIC 8.87 clarifying the burden of proof for other criminal activity as beyond a reasonable doubt. (CT 4762).

The prosecution was obligated to prove beyond a reasonable doubt any unadjudicated acts offered as aggravation under §190.3. *People v. Morales* (1989) 48 Cal.3d 527, 565. *See also Ring v. Arizona* (2003) 536 U.S. 584; *Blakely v. Washinton* (2004) 124 S.Ct. 2531. To do so, not only did the prosecutor have to prove that appellant committed the acts in question, but under the plain language of §190.3(c) it must also be proven that the acts were

"violent" and "criminal." *See, e.g, People v. Figueroa* (1986) 41 Cal.3d 714.

By promoting a reliable, non-arbitrary and individualized sentencing determination, this instruction would have protected appellant's federal constitutional rights to be free from cruel and unusual punishment and to due process and equal protection. *See, e.g., Socher v. Florida* (1992) 503 U.S. ___; *Penry v. Lynaugh* (1989) 492 U.S. 302, 318; *Clemons v. Mississippi* (1990) 494 U.S. 738; *McCleskey v. Kemp* (1987) 481 U.S. 279.

Paragraph 3 of CALJIC 8.87 specifically tells the jury that it is "not necessary for all jurors to agree" as to other unadjudicated crimes. This states the law as interpreted by the California Supreme Court. *People v. Caro* (1988) 46 Cal.3d 1035, 1057. However, because *People v. Breaux* (1991) 1 Cal.4th 314 precludes the defendant from obtaining a specific non-unanimity instruction as to mitigation, the prosecution should not be permitted to obtain such an instruction in the specific context of other crimes aggravation. "There should be absolute impartiality as between the People and the defendant in the matter of instructions..." *People v. Moore* (1954) 43 Cal.2d 517, 526-527; *accord Reagab v. United States* (1895) 157 U.S. 301, 310. Lack of parity skews the proceeding toward death thus promoting random and arbitrary imposition of death in violation of the federal constitutional rights to be free

from cruel and unusual punishment and to due process and equal protection. *Socher v. Florida* (1992) 503 U.S. ___; *Gregg v. Georgia* (1976) 428 U.S. 153.

C.
Aggravation and Mitigation

Appellant requested an instruction clarifying for the jury which factors could be considered aggravating or mitigating, and which could only be considered mitigating. The Court refused the instruction, holding that CALJIC 8.88 was sufficient to convey the necessary information. (CT 4769-4770).

Appellant had a right to clear instructions which "guide and focus the jury's objective consideration of particularized circumstances of the individual offense and the individual offender..." *People v. Benson* (1990) 52 Cal.3d 754. Moreover, the instruction was appropriate in light of the "practically unimpeded" introduction of "victim impact" evidence which "always threatens to pass the bounds of materiality and often does ..." *Bacigalapo* (1991) 1 Cal.4th 103, 152 (Mosk, J., concurring)

By promoting a reliable, non-arbitrary and individualized sentencing determination, this instruction would have protected appellant's federal

constitutional rights to be free from cruel and unusual punishment and to due process and equal protection. *See, e.g., Socher v. Florida* (1992) 503 U.S. ___; *Penry v. Lynaugh* (1989) 492 U.S. 302, 318; *Clemons v. Mississippi* (1990) 494 U.S. 738; *McCleskey v. Kemp* (1987) 481 U.S. 279.

D.

No Mitigation Necessary to Reject Death

Appellant requested an instruction that even in the absence of mitigating evidence, the jury could decide that the aggravating evidence was not comparatively substantial enough to warrant death. The instruction was refused. (RT 16444-16448).

The instruction was a correct statement of law. *People v. Duncan* (1991) 53 Cal.3d 955, 978-979; *People v. Nicolaus* (1991) 54 Cal.3d 551. An instruction on that principle was necessary to assure that the jury did not improperly impose the burden on appellant to present affirmative evidence in mitigation to overcome the existence of the special circumstances and any other aggravating factors. *See Duncan, supra* at 978-979.

Without a specific instruction on this principle, there was a danger that the jury would not understand that it could return a verdict of LWOP even if

no mitigation existed. The entire focus of the CALJIC instructions is on weighing of and comparison between aggravation and mitigation. Without additional instruction, the jurors likely concluded that if there was no mitigation then the existence of any aggravation warranted the imposition of death.

By promoting a reliable, non-arbitrary and individualized sentencing determination, this instruction would have protected appellant's federal constitutional rights to be free from cruel and unusual punishment and to due process and equal protection. *See, e.g., Socher v. Florida* (1992) 503 U.S. ___; *Penry v. Lynaugh* (1989) 492 U.S. 302, 318; *Clemons v. Mississippi* (1990) 494 U.S. 738; *McCleskey v. Kemp* (1987) 481 U.S. 279.

E.
Sympathy

Appellant requested an instruction that if mitigation gave rise to compassion or sympathy, that alone could be sufficient to reject the death penalty. The court rejected the instruction. (CT 4779).

Sympathy or compassion alone is sufficient for the jury to reject a death sentence and return a verdict of LWOP. *See People v. Lanphear* (1984) 367

Cal.3d 163, 167. *See also People v. Taylor* (1990) 52 Cal.3d 719, 746.

The Eighth and Fourteenth Amendments require that the jury be allowed to consider a mitigating circumstance "no matter how strong or weak the evidence is." *People v. Wharton* (1991) 53 Cal.3d 522, 600, fn. 23. By promoting a reliable, non-arbitrary and individualized sentencing determination, this instruction would have protected appellant's federal constitutional rights to be free from cruel and unusual punishment and to due process and equal protection. *See, e.g., Socher v. Florida* (1992) 503 U.S. ___; *Penry v. Lynaugh* (1989) 492 U.S. 302, 318; *Clemons v. Mississippi* (1990) 494 U.S. 738; *McCleskey v. Kemp* (1987) 481 U.S. 279.

These errors denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in a fair trial. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386

U.S. 18).

different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 62

THE JURY WAS IMPROPERLY INSTRUCTED AS TO THE SCOPE OF MITIGATING EVIDENCE IT COULD CONSIDER BECAUSE IT WAS NOT INSTRUCTED THAT IT COULD CONSIDER APPELLANT'S "BACKGROUND" IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

During the penalty phase, appellant's family members testified about the abusive family life appellant endured, including:

1. Lewis Clark, appellant's father, met appellant's mother Joyce when she was only 19. (RT 11431). He married Joyce because she got pregnant. They weren't ready for marriage but it was the "righteous thing to do." (RT 11433). He almost backed out on the day of the wedding, but instead he drank a pint of liquor and went through with it. (RT 11434). Their relationship was tumultuous at best. Appellant was born December 15, 1953.

2. Sometime in 1965 or 1966, Lewis was hospitalized at Metropolitan State Hospital for mental illness. He was thirty years old. (RT 11432). Lewis spent three to four weeks there. His mother, appellant's paternal grandmother, had been hospitalized for mental illness when she was approximately 38-40 years old. (RT 11375, 11432). Lewis's moods alternated

from depression to being highly energized. (RT 11440). When energized, he would completely remodel the house, or focus on fixing his lawn. (RT 11440). Other times, he would build large amounts of furniture. (RT 11441). When Joyce got mad, she would destroy the furniture Lewis made.

3. There was both verbal and physical abuse between Lewis and Joyce. (RT 11435). Lewis drank a lot. They lived in South Central Los Angeles. After they moved to a duplex there, gangs started moving into the area, including the Crips and the Bloods. (RT 11444). Joyce was not a good housekeeper. The house was cluttered and there was frequently moldy food in the refrigerator. Lewis spent his time running his own business from 1967-1975. He was a workaholic. (RT 11415). He spent considerable spare time at the race track. (RT 11416). One of their fights culminated in Joyce throwing boiling water on Lewis. Lewis sustained third degree burns on his face. (RT 11438).

4. Lewis didn't understand the negative effect on their sons John and Bill from witnessing the violence between Lewis and Joyce.

(RT 11442). The violence intensified when Lewis drank. (RT 11376). Lewis was a heavy drinker. (RT 11415). He also broke things when he was drunk. (RT 11428). Lewis eventually left Joyce and his sons, although he saw them on weekends. Appellant was eight years old when his parents divorced. (RT 11393). Later he moved to Fresno for business, while Joyce and the kids stayed in Los Angeles. (RT 11444). The relationship had been so bad and violent that Joyce was actually relieved by the divorce. (RT 11377).

5. Lewis admitted that he was better with his second family– he was a better father to his sons Eric and Jason. (RT 11443). He had to be both a father and a mother to Eric and Jason. (RT 11423). With this second family, he stopped running around with women, and stopped drinking and smoking. (RT 11443). Lewis and Joyce had simply married too young. (RT 11414). While they were married, Lewis was frequently seen in the company of other women. (RT 11417).

6. When appellant was young, he was hit in the head with a champagne bottle. (RT 11578). He went into convulsions. A

scar remained for life. While still a child, he on at least one occasion been unable to stop his arm from shaking uncontrollably. (RT 11582).

7. Joyce always spoke well of her children John and Bill. She portrayed them as always being the best at whatever they did. (RT 11377, 11443). Her life was troubled– she suffered from weight problems, had an early hysterectomy and was plagued with rashes. She often took tranquilizers and had two miscarriages. (RT 11378). At the time of her bragging, appellant was receiving therapy for his problems. (RT 11380).

8. Joyce was remarried for approximately 6 years. She married Jerry Watkins, a social worker, in 1969, when appellant was about 14 years old. (RT 11541-42). Joyce was argumentative, and conflicts would escalate, with her ultimately getting physical. Jerry couldn't deal with it and had to leave. (RT 11545).

9. As a teenager and young adult, appellant was involved in sports and worked with neighborhood children. (RT 11445). He always helped his aunt by putting together Christmas toys for

her children. (RT 11373, 11494). He also babysat for his cousins frequently. (RT 11406). When one of his cousins was raped, appellant provided comfort and tried to help her through the ordeal. (RT 11496).

10. Appellant was active in block committees and organizations. He tried to keep gangs out of the neighborhood. (RT 11481). He was an active volunteer, helping children and senior citizens. (RT 11482). He also helped his mother manage apartments, collect rent and make deposits. (RT 11483).

11. Appellant first attended college at University of California at Los Angeles, and then attended Fresno State University. (RT 11381). While in school, he ran several businesses. (RT 11461). He suffered severe injuries in a car accident while in Fresno, and moved back to the Los Angeles area. (RT 11446). Later, he had an accident while in Los Angeles and suffered a broken neck. (RT 11383). He spent considerable time encased in a body cast while recuperating. (RT 11461).

12. After returning to Los Angeles, appellant engaged in a series of businesses. The Olympics were held in Los Angeles in 1984.

Around that time, appellant created and ran a company which sought to create and distribute various Olympics-related products, including stuffed animals and T-shirts. Appellant's brother Jonathan did much of the artwork. (RT 11588). Appellant often had many ideas for businesses, but was unable to transform those ideas into reality. (RT 11446). Oftentimes, he would come up with good ideas, but wouldn't follow through on his ideas with the necessary planning and hard work. (RT 11464).

13. Appellant thought that his Olympics company would succeed, and he got in over his head. Observers noted that while the offices were plush, it didn't seem like much work was actually being done. (RT 11584). Appellant thought that he could always do things better than others, however. (RT 11585). He had an offer to sell the company to Beatrice Foods, but thought that he could successfully market the company worldwide and turned down the purchase offer. (RT 11447). He was convinced the business would become a world-wide success. (RT 11468). Ultimately, the appellant's dreams failed to

materialize and the company failed and went out of business. (RT 11448).

14. Appellant felt like a complete failure once the business failed. (RT 11459). Members of his family had invested large sums of money in the business, and that money was gone forever. His aunt, Gloria Cooper, lost approximately $350,000 in the venture. (RT 11385). His mother lost her house. Family and friends didn't see appellant as much after the failure of his Olympics business. (RT 11386, 11417, 11429). He felt guilty for his family's loss of money, and some family members were mad at him for their loss. (RT 11417). He took a turn for the worse when the business failed. (RT 11585). He always thought that he would make his family's money back for them. (RT 11470). He avoided his family and started hanging around with other people. (RT 11475).

15. Appellant's grandmother died just around the time of the 1984 Olympics. She was the matriarch of the family. His depression deepened. (RT 11471).

16. Other members of his family were achieving success, while he

had just endured what seemed a catastrophic failure. His brother Jonathan was on his way up at Motown, working as a record executive. (RT 11450). Bill had always been close to Jonathan (RT 11407), who was now a success. His half-brothers Eric and Jason were doing well playing basketball. Appellant entered a depression during this period, while attempting to maintain a T-shirt producing business. (RT 11451). He wanted to be able to impress others with his success and money. (RT 11418).

17. The failure of the business destroyed the life he shared with his wife and children. (RT 11474). Appellant changed after the failure, and entered a deep depression. (RT 11469). He was never mean or abusive to his wife, although they were ultimately divorced. (RT 11470). They had three children together who, at the time of his trial, were eight, nine and 14. He was an involved parent when not incarcerated. (RT 11397, 11479).

18. In 1988, appellant started a T-shirt and graphic design business called the Canopy Group. (RT 10327, 10339). This company did silk screening for T-shirts. The company sold bulk quantities of custom T-shirts to various customers. (RT 10339).

The jury was instructed under CALJIC 8.85(k) that it could consider:

> Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record] [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(CT 3196).

Defense special instruction No. 1 sought to expand the scope of mitigation in order by specifically instructing the jury that mitigation encompassed evidence including appellant's background. The Court denied the request for that instruction on the ground that CALJIC 8.85 was a correct statement of law. (RT 16440-16448).

Because the bulk of the evidence offered in mitigation related to appellant's background, the instruction should have been modified to include "background" as a basis for the jury's consideration of the appropriate penalty. The failure to include the word "background" in factor (k) of CALJIC 8.84.1 likely led the jury to believe that it could not consider a major portion of his family's testimony. Much of that testimony did not relate to defendant's character, and instead discussed events which occurred in his life which may

have led him down one path or another.

Similarly, the word "record" did not necessarily encompass appellant's background, as that word indicates that the jury is expected to consider his criminal record or lack thereof, and not necessarily consider the background information. Appellant's background would not necessarily have "extenuate[d] the gravity of the crime" although it did perhaps provide some context for understanding it..

In *Lockett v. Ohio*, 438 U.S. 586 (1978), the United States Supreme Court held that the sentencer in a capital case could consider any factors concerning the defendant, even those not pertaining to the offense, in deciding whether or not to impose the death penalty. The court noted:

> [W]here sentencing discretion is granted, it generally has been agreed that the sentencing judge's possession of the fullest information possible concerning the defendant's life and characteristics is 'highly relevant'—if not essential— [to the] selection of appropriate sentence. [Citation.]

Id. at 602-603 (citing *Williams v. New York*, 337 U.S. 247 (1949).)

The cases concerning sentencing discretion have generally referred to a defendant's "character and record" (*id.* at 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at 304). Appellant submits that the language of any instruction must be broadened when background evidence is offered.

Background evidence is clearly admissible on the subject and is properly considered by the sentencer (see, e.g., *Eddings v. Oklahoma*, 455 U.S. 104 (1982)).

Failure to tailor the instruction in this case prejudicially misled the jury into disregarding pertinent evidence and failing to give consideration and full effect to constitutionally relevant mitigation. This unfairly skewed the verdict toward death, in violation of the Eighth and Fourteenth Amendments. The factors in aggravation in this case were relatively few—the circumstances of the crime and several incidents of unlawful conduct. Had the jury been properly informed that it could consider background evidence, it is likely that it would have concluded that the aggravating factors did not outweigh those offered in mitigation.

Instructions that fail "to tell the jury that any aspect of the defendant's character or *background* [can] be considered mitigating, and [can] be a basis for rejecting death even though it did not necessarily lessen culpability . . . [are] constitutionally inadequate." *People v. Lanphear*, 46 Cal.3d 163, 167-168 (1984) (emphasis added). When the jury is instructed that it may consider a background of abuse as a child, this is in fact highly likely to influence the jury in the defendant's favor. The instruction in this case did not so inform the

jury and therefore was constitutionally inadequate. Appellant's sentence must therefore be overturned.

The failure to give these instructions denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in a fair trial. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 63

THE COURT ERRED IN THE PENALTY PHASE BY NOT INSTRUCTING PURSUANT TO CALJIC 2.11.5 IN VIOLATION OF APPELLANTS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

CALJIC 2.11.5 states:

> There has been evidence in this case indicating that a person other than a defendant was or may have been involved in the crime for which that defendant is on trial.
>
> There may be many reasons why that person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of the defendant on trial.

It was error not to give the instruction.

There were numerous people who were implicated in the crimes charged other than appellant. The Comp USA robbery allegedly involved Eric Clark, Nokkuwa Ervin and Damian Wilson.[52] Furthermore, according to the prosecution's theory, appellant conspired with Antoinette Yancey to kill Ardell

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52

Matt Weaver and Jeanette Moore were also involved in the Comp USA crime. However, the use note states "Do not use this instruction if the other person is a witness for either the prosecution or the defense." The rationale for this note is that the failure to charge testifying witnesses is a fact the jury can use to assess the credibility of the witnesses. Both Weaver and Moore testified for the prosecution, and thus this instruction would not apply to them.

Williams.[53] None of these people were called as witnesses at appellant's trial. The jury was never instructed as to whether these people were convicted, or what sentence they received. (RT 16293). Thus, the jury was left free to speculate as to the fate of these people, and the rationale of the prosecutor in seeking a particular, but unspecified, result.

When the issue of 2.11.5 was raised, the Court stated, "It is not a correct statement of the law because the People do not have a duty." (RT 16292). When trial counsel stated that it was correct except as to the last sentence, presumably because the jury had additional duties other than the one specified, the Court responded, "Don't give me 'It is a correct statement of the law' when it is not." (CT 16292).

It is unclear exactly what it was about the instruction that caused the Court to believe it was an incorrect statement of law. It appears that it may have related to witnesses Jeanette Moore and Matt Weaver, and the fear that the instruction could be used to exclude consideration of their motive to testify

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53

The assertion that Antoinette Yancey was the shooter of Ardell Williams was found not true when her jury found the personal use of a firearm allegation to be not true. If she didn't personally shoot Ardell Williams, the prosecutor offered no evidence as to who did. Thus, according to the state of the evidence and the juries' verdicts, there was at least one other unnamed person who was involved in the death of Ardell Williams.

in the prosecutor's favor in exchange for immunity:

> THE COURT: Yes. Because that can be considered as you know a motive to lie. A motive to please the side that they are trying to please. That is why I asked if you are requesting that it not be given.

(RT 16292:19-22). Trial counsel explained:

> The problem is we know there are other people out there, your Honor. We have heard Nokkuwa Ervin; we have heard Eric Clark.

(RT 16292:23-25). The Court explained:

> Two People's witnesses, who one for sure could have been charged. I don't know if she was. The other may be depending upon how you evaluate statements, but they were both given immunity. And immunity is something you can argue. I don't see how this instruction is helpful to the jury or helpful for the defense. And it is a misstatement of the law as far as the People's duty.

(RT 16293).

Any difficulty with this instruction could have been alleviated with a simple modification. The instruction could have been modified to apply to specific people including Eric Clark, Nokkuwa Ervin, Damian Wilson and Antoinette Yancey. That modification would have clearly informed the jury that they should not speculate about the fates of those people, but that they

could properly consider the lack of charges against witnesses Matt Weaver and Jeanette Moore. Doing so would have rendered the instruction a completely correct statement of law. This Court has found that the instruction is a correct statement of law. *People v. Farmer* (1989) 47 Cal.3d 888, 919 ("Nonetheless, as far as it goes the instruction accurately states the law").

"The purpose of CALJIC No. 2.11.5 is to discourage the jury from speculating about the fate of the other participants of the crimes and the prosecution's reasons for not joining them." *People v. Lawley* (2002) 27 Cal.4th 102, 162. This Court has rejected any claim that this instruction is erroneous when it is shown the jury was also given "'the full panoply of witness credibility and accomplice instructions,'" as was done in the present case. (*People v. Lawley* (2002) 27 Cal.4th 102, 162; *People v. Hardy* (1992) 2 Cal.4th 86, 190-191; *People v. Carrera* (1989) 49 Cal.3d 291, 313). The trial court gave other instructions on witness credibility to safeguard appellant's rights. *See, e.g., People v. Fonseca, supra,* 105 Cal.App.4th at 550.

This instruction has been upheld even if a coparticipant is a witness:

> If a jury were to give absolutely literal credence to the 1996 instruction that they not "discuss or give any consideration as to why the other person is not being prosecuted," it might feel it

> could not give consideration to admitted evidence that, for example, the witness had been granted immunity in exchange for testimony, since the grant of immunity was the reason the witness was not being prosecuted. Clearly, such an understanding would be erroneous since the evidence of the grant of immunity would be highly probative of witness bias and, therefore, admissible and appropriate for jury consideration. (Evid.Code, §§ 350; CALJIC No. 2.20 [believability of witnesses].)

(*People v. Fonseca, supra,* 105 Cal.App.4th at p. 549.) The Court added:

> the Supreme Court has held that, in every case where the jury receives all otherwise appropriate general instructions regarding witness credibility, there can be no prejudice from jury instruction pursuant to CALJIC No. 2.11.5. In other words, the potentially prejudicial effect of this instruction in the context of the testifying, unjoined coperpetrator lies not in the instruction itself, but in the rather remote possibility that the trial court would fail to give otherwise pertinent and required instructions on the issue of witness credibility. (§§ 1127; see also, CJER Mandatory Criminal Jury Instructions Handbook (11th ed.2002) §§§§ 2.4, 2.96, pp. 13, 76.) There is no error in giving CALJIC No 2.11.5 so long as a reasonable juror, considering the whole of his or her charge, would understand that evidence of criminal activity by a witness not being prosecuted in the current trial should be considered in assessing the witness's credibility. [Citation.]

(*People v. Fonseca, supra,* 105 Cal.App.4th at pp. 549-550.)

The failure to give this instruction was prejudicial. The jury was left with room to speculate that no one had been punished for any of these crimes, and no one would be punished if appellant was acquitted. Without adequate

instruction, the jury may well have used its feeling about the actual shooter, Nokkuwa Ervin, to sentence appellant to death. Similarly, considering the prosecutor's emphasis on the killing of witness Ardell Williams, the jurors may have taken out their feelings of hatred for the actual shooter, Antoinette Yancey, against appellant. They jurors may have been frustrated by the thought that four others may have gotten away with serious crimes, or received light sentences, and used the case against appellant to "send a message."

The admission of this theory denied appellant a fair trial and reliable determination of guilt and penalty. The violation of state law was a violation of a state created liberty interest in a fair trial. It also led to an unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v.*

Alabama (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 64

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT PURSUANT TO CALJIC 2.40 IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant requested that the jury be instructed pursuant to CALJIC 2.40. (RT 16296). That instruction states:

> Evidence has been received for the purpose of showing the good character of the defendant for those traits ordinarily involved in the commission of a crime, such as that charged in this case.
>
> Good character for the traits involved in the commission of the crimes charged may be sufficient by itself to raise a reasonable doubt as to the guilt of a defendant. It may be reasoned that a person of good character as to these traits would not be likely to commit the crimes of which the defendant is charged.
>
> If the defendant's character as to certain traits has not been discussed among those who know him, you may infer from the absence of this discussion that his character in those respects is good.

Evidence of good character had been received during the penalty phase in several respects. This evidence was important in order to allow the jury to consider lingering doubt. Various inmates from jails and prisons who knew appellant testified that appellant was a peacemaker who sought to avoid violence and taught them to do the same. (RT 15756-15800). Members of his family and friends testified that he was a kind and caring person who sought

to help others, not to hurt others. (RT 15564-15756). This evidence tended to show that appellant was a non-violent person who would not have intended to commit violence or have violence committed on his behalf.

The prosecutor objected, stating:

> We have a problem with 2.40 because the second paragraph has to do with creating a reasonable doubt as to the guilt of the defendant. And unless we are giving a second argument having to do with lingering doubt, we think that this instruction should not be given. The (k) factor in the penalty phase will take care of the mitigating evidence that the defense has offered during this phase.

(RT 16296). Trial counsel stated "I prefer 2.40 be given and I think we can modify it." The Court stated "Right now it is refused. And I think it is covered by (k) and we'll look at it after you modify it." (RT 16296).

It would have been easy to make any necessary modifications. As it was lingering doubt which was at issue and not reasonable doubt, the instruction could have been modified to discuss only lingering doubt.

It is a longstanding rule of law that character evidence may be admitted to show a reasonable doubt that a defendant committed charged crimes. *People v. Adams*, 137 Cal. 580, 582 (1902); *People v. Castillo*, 5 Cal.App.2d 194, 198 (4th Dist.1935); *People v. Pauli*, 58 Cal.App. 594, 596, 209 P. 88,

89 (1st Dist.1922). That evidence was admissible under California Evidence Code §1100:

> Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character.

Specific evidence of that character is also admissible pursuant to Cal. Evid. Code §1102:

> In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:
>
> > (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.
> > (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

The limitations provided by Cal. Evid. Code §1101 do not bar admission of this evidence:

> (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
>
> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when

> relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.
>
> (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

As evidence of appellant's good character for nonviolence was properly admitted in the present case (see §§ 1102, subd. (a); *People v. Jones* (1954) 42 Cal.2d 219, 223-225, 266 P.2d 38; *People v. Ashe* (1872) 44 Cal. 288, 291; *People v. Stewart* (1865) 28 Cal. 395, 396), it would have been proper for the trial court to give CALJIC No. 2.40 (*People v. Bell* (1875) 49 Cal. 485, 489-490; *People v. Raina* (1873) 45 Cal. 292, 292-293). "It may be reasoned that a person of good character as to such traits would not be likely to commit the crime[s] of which the defendant is charged." (CALJIC No. 2.40 (5th ed. 1988); *People v. McAlpin* (1991) 53 Cal.3d 1289, 1310-1311).

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.'

[Citation.]" (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149 & *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.) "The duty to instruct, *sua sponte,* on general principles closely and openly connected with the facts before the court ... encompasses an obligation to instruct on defenses ... and on the relationship of these defenses to the elements of the charged offense." (*People v. Sedeno, supra,* 10 Cal.3d at p. 716).

"A defendant, upon proper request therefor, has a right to an instruction that directs attention to evidence from a consideration of which a reasonable doubt of his guilt could be engendered. [Citation]." (*People v. Sears* (1970) 2 Cal.3d 180, 190). CALJIC 2.40 is this type of instruction. (*See People v. Saille* (1991) 54 Cal.3d 1103, 1119 [since abolition of diminished capacity removed intoxication from realm of defenses to crimes, intoxication relevant only to question whether defendant had requisite specific mental state and so is more like pinpoint instruction; such instructions need not be given sua sponte]).

Under *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the defense is allowed to present a wide variety of evidence in mitigation, and the jury must be allowed to consider that evidence. In *People* v. *Easley* (1983) 34 Cal.3d

858, 877-880, this court made it clear that mitigating evidence could not be limited to facts that lessen the gravity of the crime, but must also include facts pertaining to the background of the defendant, as the United States Supreme Court has long required. *See, e.g.*, *Lockett* v. *Ohio* (1978) 438 U.S. 586; *Eddings* v. *Oklahoma* (1982) 455 U.S. 104; *Hitchcock* v. *Dugger* (1987) 481 U.S. 393, 399.

The jury is entitled to consider all relevant mitigating evidence during the penalty phase pursuant to the Eighth and Fourteenth Amendments. (*Lockett* v. *Ohio*, *supra*, 438 U.S. at p. 604.) Appellant's good character was "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death,'" *Skipper* v. *South Carolina*, 476 U.S. 1, 4-5 (1986) (*quoting Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978)). Character evidence is clearly admissible on the subject and is properly considered by the sentencer (*see, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982)).

Appellant was arbitrarily deprived of an instruction which was necessary and appropriate under state law. The violation of state law was a violation of a state created liberty interest in a fair preliminary hearing and reliable evidence in capital proceedings, which constituted a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek*

v. Jones, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18).

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." *People v. Brown* (1988) 46 Cal.3d 432, 447. The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: 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– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate

punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina*, *supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard]).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

SYSTEMIC CLAIMS

CLAIM 65
CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer

into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards

needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord, Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-six special circumstances[1] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

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This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-two.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527,

557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).)[2] It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than

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[2] The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at p. 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature.

The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[3] (See section E. of this Argument, *post*).

3

In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, 33 L.Ed.2d 346, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[4] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance on the "circumstance of the crime" aggravating factor because three weeks after the

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People v. Dyer (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

crime defendant sought to conceal evidence,[5] or had a "hatred of religion,"[6] or threatened witnesses after his arrest,[7] or disposed of the victim's body in a manner that precluded its recovery.[8]

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus,

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People v. Walker (1988) 47 Cal.3d 605, 639, fn.10, 765 P.2d 70, 90, fn.10, *cert. den.*, 494 U.S. 1038 (1990).

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People v. Nicolaus (1991) 54 Cal.3d 551, 581-582, 817 P.2d 893, 908-909, *cert. den.*, 112 S. Ct. 3040 (1992).

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People v. Hardy (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S. Ct. 498.

8

People v. Bittaker (1989) 48 Cal.3d 1046, 1110, fn.35, 774 P.2d 659, 697, fn.35, *cert. den.* 496 U.S. 931 (1990).

prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds[9] or because the defendant killed with a single execution-style wound.[10]

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[11] or because the defendant killed the victim without any motive at all.[12]

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See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

10

See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

11

See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

12

See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

c. Because the defendant killed the victim in cold blood[13] or because the defendant killed the victim during a savage frenzy.[14]

d. Because the defendant engaged in a cover-up to conceal his crime[15] or because the defendant did not engage in a cover-up and so must have been proud of it.[16]

e. Because the defendant made the victim endure the terror of anticipating a violent death[17] or because the defendant killed instantly without any warning.[18]

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See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

14

See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

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See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

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See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

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See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

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See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

f. Because the victim had children[19] or because the victim had not yet had a chance to have children.[20]

g. Because the victim struggled prior to death[21] or because the victim did not struggle.[22]

h. Because the defendant had a prior relationship with the victim[23] or because the victim was a complete stranger to the defendant.[24]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on

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See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

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See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

21

See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

22

See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

23

See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

24

See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[25]

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[26]

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See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

26

See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[27]

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[28]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park

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hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

27

See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

28

See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

or in a remote location.[29]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[30]

In practice, section 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply

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See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

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The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See section C of this argument, below.)

to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].)

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH FACTUAL DETERMINATION PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the

mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of

California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [hereinafter *Apprendi*] and *Ring v. Arizona* (2002) 536 U.S. 584, 122 S. Ct. 2428 [hereinafter *Ring*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court held that Arizona's death penalty scheme, under which a judge sitting without a jury makes factual findings necessary to impose the death penalty, violated the defendant's constitutional right to have the jury determine, unanimously and beyond a reasonable doubt, any fact that may increase the maximum punishment. While the primary problem presented by Arizona's capital sentencing scheme was that a judge, sitting without a jury, made the critical findings, the court reiterated its holding in *Apprendi*, that when the State bases an increased statutory punishment upon additional

findings, such findings must be made by a unanimous jury beyond a reasonable doubt. California's death penalty scheme as interpreted by this Court violates the federal Constitution.

a. *In the Wake of Ring, Any Aggravating Factor Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.*

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[31] Only California and four

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See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn.

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*; 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) outweigh any and all mitigating factors.[32] According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is *any fact,*

Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

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This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against 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 outweigh mitigating factors.[33] 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.[34]

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

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This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*], and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) This holding is based on a truncated view of California law. As section 190, subd. (a),[35] indicates, the maximum penalty for *any* first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring* to no avail:

> In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(c) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. . . . This argument

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Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

> overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 122 S.Ct. at 2431.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 122 S.Ct. at p. 2440.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further finding that one or more aggravating circumstances substantially outweigh(s) the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact,

circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 134 Cal.Rptr.2d at 621 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[36] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[37]

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Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

37

California Penal Code Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." In *People v. Brown* (1985) 40 Cal.3d 512, 541, 545, fn.19, the California Supreme Court construed the "shall impose" language of section 190.3 as not creating a mandatory sentencing standard and approved an instruction advising

There is no meaningful difference between the processes followed under each scheme. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 122 S.Ct. at 2439-2440.) The issue of *Ring*'s applicability hinges on whether as a practical matter, the sentencer must make additional fact-findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow*, *supra*, 30 Cal.4th at 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at 589-590, fn.14.)

The distinction between facts that "bear on" the penalty determination

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the sentencing jury that a finding that the aggravating circumstances substantially outweighed the mitigating circumstances was a prerequisite to imposing a death sentence. California juries continue to be so instructed. (See CALJIC 8.88 (7th ed. 2003).)

and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. The finding of an aggravating factor is an essential step before the weighing process begins.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California* (1994) 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (*Prieto*, 30 Cal.4th at 263; emphasis added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale. The fact that no single factor determines penalty does not negate the requirement that facts be found as a

prerequisite to considering the imposition of a death sentence.

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. The presence of at least one aggravating factor is the functional equivalent of an element of capital murder in California and requires the same Sixth Amendment protection. (See *Ring*, *supra*, 122 S.Ct. at 2439-2440.)

Finally, this Court relied on the undeniable fact that "death is different," but used the moral and normative nature of the decision to choose life or death as a basis for withholding rather than extending procedural protections. (*Prieto*, 30 Cal. 4th at 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." The notion that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be

> compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.

(*Ring*, *supra*, 122 S.Ct. at p. 2442, citing with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at p. 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[38] As the high court stated in *Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443:

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

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In *Monge*, the U.S. Supreme Court foreshadowed *Ring*, and expressly found the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applicable to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

free weighing of aggravating and mitigating circumstances, and the decision 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 facts 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 U.S. Constitution.

b. *The Requirements of Jury Agreement and Unanimity*

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord*, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the

instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[39] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the ultimate deliberative process in which normative determinations are made. The U.S. Supreme Court has made clear that such factual determinations must be made by a jury and

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See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring*, *supra*.)

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra,* 524 U.S. at p. 732;[40] *accord*, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

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The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.)

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring*, 122 S.Ct. at p. 2443).[41] See section D, *post*.

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[42] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well

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Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

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The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

as the Sixth Amendment's guarantee of a trial by jury.

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (*People v. Raley* (1992) 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial on guilt or innocence." (*Monge v. California*, *supra*, 524 U.S. at p. 726; *Strickland v. Washington*, 466 U.S. at pp. 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 439 [101 S.Ct. 1852, 68 L.Ed.2d 270].) While the unadjudicated offenses are not the offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed.

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

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in

> numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.*

(*Richardson*, *supra*, 526 U.S. at p. 819 (emphasis added).)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a

"moral" and "normative" decision. (*People v. Hawthorne*, *supra*; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) However, *Ring* makes clear that the finding of one or more aggravating circumstance that is a prerequisite to considering whether death is the appropriate sentence in a California capital case is precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. *Factual Determinations*

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

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of

proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt.

b. *Imposition of Life or Death*

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being

made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. *Winship*, *supra*, 397 U.S. at 364. Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Stantosky v. Kramer* (1982) 455 U.S. 743, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than that of human life. If personal liberty is "an interest of transcending value," *Speiser*, *supra*, 375 U.S. at 525, how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Ca1.3d 306 (same); *People v. Thomas*(1977) 19 Ca1.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Ca1.3d 219 (appointment of conservator). The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to

the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

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

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

(455 U.S. at 756.)

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 *Stantosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." *Stantosky*, *supra*, 455 U.S. at 763. Nevertheless, imposition of a burden of proof beyond a reasonable doubt can

be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, *supra*, 397 U.S. at 363.

The final *Stantosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake; see *Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly applied the *Stantosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant

[are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

3. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital

sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.*, *supra*, 59 U.S. (18 How.) at pp. 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447

U.S. at p. 346.)

Accordingly, appellant respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana*, *supra*.) That should be the result here, too.

4. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase.

(*People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "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 p. 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

5. Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.

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

The burden of proof in any case is one of the most fundamental

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

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[43] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*.)

43

See, e.g., *People v. Dunkle*, No. S014200, RT 1005.

6. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even

required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[44] The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded

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44

A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. See Title 15, California Code of Regulations, section 2280 et seq.

non-capital defendants. (*Harmelin v. Michigan*, *supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *id.* at p. 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death

judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[45]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent

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45

See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

7. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

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

U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.)).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See section A of this Argument, *ante*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital

sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia* (2002) 122 S.Ct. 2248, 2249; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596.)

Twenty-nine of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review.

By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman* [*v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida* (1976) 428 U.S. 242, 259, 49 L.Ed.2d 913, 96 S.Ct. 2960.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[46]

46

See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977)

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the

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572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

The United States Supreme Court's recent decisions in *Ring v. Arizona*,

supra, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. The application of *Ring* and *Apprendi* to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

9. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486

U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

10. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v.*

Stephens (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly

treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973 quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at 112.)

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327

N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

In *Prieto*,[47] as in *Snow*,[48] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. If that were so, then California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established

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47

"As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, 30 Cal.4th at 275.)

48

"The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow*, 30 Cal.4th at 126, fn. 32.)

by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See sections C.1-C.5, *ante*.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike most states where death is a sentencing option and all persons being sentenced to non-capital crimes in California, no reasons for a death sentence need be provided. (See section C.6, *ante*.) These discrepancies on basic procedural protections are skewed against persons subject to the loss of their life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) There is no hint in *Allen* that the two procedures are in any way analogous. In fact, the decision centered on the fundamental differences between the two sentencing procedures. However, because the Court was seeking to justify the extension of procedural protections to persons convicted of non-capital crimes that are not granted to

persons facing a possible death sentence, the Court's reasoning was necessarily flawed.

In *People v. Allen*, *supra*, this Court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws. The Court offered three justifications for its holding.

(1) The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal. 3d at 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia*, *supra*, 433 U.S. 584) or offenders (*Enmund v. Florida* (1982) 458 U.S. 782; *Ford v. Wainwright*, *supra*; *Atkins v. Virginia*, *supra*.) Juries, like trial courts and counsel, are not immune from

error. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

While the State cannot limit a sentencer's consideration of any factor that could cause it to reject the death penalty, it can and must provide rational criteria that narrow the decision-maker's discretion to impose death. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes.

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See section 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) The absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

(2) The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under

the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal. 3d at p. 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.J.].) (See also *Reid v. Covert* (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 187 [opn. of Stewart, Powell, and Stevens, J.J.]; *Gardner v. Florida* (1977) 430 U.S. 340, 357-358; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605 [plur. opn.]; *Beck v. Alabama* (1980) 447 U.S.

625, 637; *Zant v. Stephens*, *supra*, 462 U.S. at pp. 884-885; *Turner v. Murray* (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [plur. opn.], quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994; *Monge v. California*, *supra*, 524 U.S. at p. 732.)[51] The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply its disparate review procedures to capital sentencing.

(3) Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra*,

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The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.)

at p. 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the

withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*.)

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases [*Allen*, *supra*, 42 Cal.3d at p. 186]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Ring v. Arizona, supra*.)[52] California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process,

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Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443.)

equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California*, *supra*.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions."

(*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website [www.amnesty.org].)[53]

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation,

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These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot*, *supra*, 159 U.S. at p. 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461, 31 L.Ed. 430]; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia*, *supra*, 408 U.S. at p. 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, *supra*, 356 U.S. at p. 100; *Atkins v. Virginia*, *supra*, 122 S.Ct. at 2249-2250.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian

regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 122 S.Ct. at 2249, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra*, 122 S.Ct. at p. 2249.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with

actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[54] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra*.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, as discussed above, appellee cannot show that there

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Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).)

was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." *People v. Brown* (1988) 46 Cal.3d 432, 447. The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: 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– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina, supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard]).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 66
SECTION 190.3 AND THE RELATED PENALTY PHASE INSTRUCTIONS, AS READ AT TRIAL VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND PARALLEL PROVISIONS OF THE CALIFORNIA CONSTITUTION.[55]

A.
United States Supreme Court Cases Preclude Vagueness In Capital Sentencing Statutes And Hold That Aggravating Factors Must Meet Eighth And Fourteenth Amendment Vagueness Requirements

As the United States Supreme Court held, the first problem with using a vague aggravating factor in a penalty phase weighing process, or with employing a vague capital sentencing system, is that such vagueness:

> . . . creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance . . . [and] creates the possibility not only of randomness but also of bias in favor of the death penalty . . .

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

In order to minimize this risk of arbitrary and capricious application of

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To the extent that this court has rejected any of these constitutional challenges to the 1978 law, as well as the other systemic issues raised, appellant respectfully renews each argument, makes other related arguments here, and asks that this court reconsider its former rulings, because they are incorrect interpretations under both the United States Constitution (per the Fifth, Sixth, Eighth and Fourteenth Amendments) and the California Constitution (per art. I, §§ 7, 15, 17 and 24).

the death penalty, the Supreme Court has long held that a state's aggravating factors must ". . . channel the sentencer's discretion . . ." by ". . . clear and objective standards . . ." that provide ". . . specific and detailed guidance . . . ," so as to ". . . make rationally reviewable the process for imposing a sentence of death." (*Lewis* v. *Jeffers* (1990) 497 U.S. 764, 774, *quoting Godfrey* v. *Georgia*, *supra*, 446 U.S. at p. 428).

A capital sentencing scheme may not allot the sentencer complete discretion in deciding whether a defendant should be sentenced to death based merely on the facts of a particular case. (*Furman* v. *Georgia*, *supra*, 408 U.S. at pp. 239-240, 255-257, 309-310, 314.) The jury must be ". . . given guidance about the crime . . . that the State, representing organized society, deems particularly relevant to the sentencing decision." (*Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 196, emphasis supplied (plur. opn., Stewart, Powell and Stevens, JJ.).) *Furman* and *Gregg* require that ". . . the State must establish rational criteria that narrow the decision maker"s judgment as to whether the circumstances of a particular defendant's case . . ." justify the sentence. (*McCleskey* v. *Kemp* (1987) 481 U.S. 279, 305, emphasis supplied.)

> . . . [W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

(*Lewis* v. *Jeffers*, *supra*, 497 U.S. at p. 774, *quoting Gregg* v. *Georgia*, *supra*,

428 U.S. at p. 189 (internal quotation marks omitted).)

It follows that a sentencing statute or jury instructions which, as here, merely instruct the sentencer to look at vague categories, without attempting any further limitation or guidance, are unconstitutionally vague. (*See, e.g.*, *Maynard* v. *Cartwright, supra*, 486 U.S. at p. 363; *Godfrey* v. *Georgia, supra*, 446 U.S. at pp. 429-433.)

The United Sates Supreme Court has applied such an analysis to penalty phase aggravating factors. In *Stringer v. Black, supra*, 503 U.S. 222, the United States Supreme Court held that the Eighth Amendment's prohibition against unconstitutionally vague aggravating factors is applicable not only to aggravating factors designed to narrow the class of death eligible defendants, but also, in "weighing states" like California, to aggravating factors that are weighed by the jury in making its penalty decision.

> [I]f a state uses aggravating factors in deciding who shall be eligible for the death penalty *or* who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion. . . .
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> . . . Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. *A vague aggravating factor used in the weighing process is in a sense worse*, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise

be by relying upon the existence of an illusory circumstance.

(*Stringer* v. *Black, supra*, 117 L.Ed.2d at pp. 381-382, emphasis supplied.) Under the Eighth Amendment, ". . . a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty." (*Richmond* v. *Lewis* (1992) 506 U.S. 40).

The application of these principles to the California capital sentencing system was before the United States Supreme Court in *Bacigalupo* v. *California* (1992) 506 U.S. 802. The Supreme Court vacated the underlying *Bacigalupo* judgment[56] and remanded the matter to this court, for further consideration of section 190.3, in light of *Stringer* v. *Black, supra*. (*Bacigalupo* v. *California*, *supra*; *see People* v. *Wader*, *supra*, 5 Cal.4th at pp. 663-664, n. 12.) This Court re-affirmed its *Bacigalupo* I decision, in *Bacigalupo* II. (*People* v. *Bacigalupo* (1993) 6 Cal.4th 457 (93 D.A.R. 15433, Dec. 7, 1993, cited "*Bacigalupo* II".) Appellant respectfully submits that the Eighth Amendment's vagueness limitations and the other constitutional

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In *People* v. *Bacigalupo* (1991) 1 Cal.4th 103, 148 ("*Bacigalupo* I") this court ruled that the Eighth Amendment's prohibition against unconstitutionally vague aggravating factors did not apply to those factors under section 190.3 which the jury was instructed to weigh in reaching its penalty decision. Defendant petitioned the United States Supreme Court for certiorari, arguing that the opinion was inconsistent with the subsequent *Stringer* decision. (*Bacigalupo* v. *California*, Petition for Writ of Certiorari, pp. 20-22.)

guarantees do apply to section 190.3 and penalty phase instructions. The trial court here failed its constitutional duties by reading instructions which left the jurors "unguided and untethered" in their penalty adjudication.

B.
The Instruction Per Factor (a) of Penal Code Section 190.3, Which Directed The Jury To Separately Weigh The "Circumstances Of The Crime" As A Factor In Aggravation, Violated The Eighth And Fourteenth Amendments.[57]

Factor (a), the aggravating factor that allowed appellant's jury to impose death based on the "circumstances of the crime," made the penalty-determination process here look dangerously similar to the standardless scheme invalidated in *Furman* v. *Georgia*, *supra*, 408 U.S. 238. Factor (a) failed to identify any aspect of the underlying offense which might aggravate punishment. This factor did nothing to limit the discretion of the jury; instead, it inherently invited each juror to personally determine why he or she was most offended by the crime, and use that perception as a reason for aggravation, without any reference to any objective standard.

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57 Appellant acknowledges that this court has previously rejected similar contentions (*People* v. *Wader*, *supra*, 5 Cal.4th at pp. 663-664), but respectfully requests that the issue be reconsidered.

Maynard v. *Cartwright*'s general proscription against use of vague categories in rendering a death judgment, without limitation or guidance, and *Stringer* v. *Black*'s specific proscription against use of vague penalty phase aggravating factors in a penalty phase weighing process, were both contravened by the factor (a) instruction at appellant's trial. The trial court's instruction was standardless, subjective to each individual juror, arbitrary, and weighted heavily toward death.[58] A sentencer may not impose a death sentence merely by looking at the circumstances of the crime with no guiding principles whatsoever.

This portion of the instructions also violated the Eighth Amendment's reliability requirements,[59] state and federal constitutional guarantees of due

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The instruction to consider "the circumstances of the crime" directs the jury to consider facts underlying the crimes of which the defendant was just convicted, i.e., a factor which applies to every defendant at the time the instruction is read. There can be no defense or rebuttal, particularly when, as here, the same jury has just convicted the defendant of those crimes.

The same arguments also apply to factor (a)'s "existence of any special circumstances found to be true" language, which failed to distinguish this case from any other capital prosecution. First, the use of such a factor is inherently death-biased because one or more special circumstances is present in every penalty phase proceeding. Second, the jury was given no guidance or standards by which to evaluate the special circumstances as aggravating factors in this case, i.e., the jurors were asked to evaluate the special circumstances in a standardless vacuum.

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Factor (a) was also unconstitutionally vague under the less rigorous Due Process Clause standards, which require that state statutes give clear notice of

process, the requirement that a jury be given clear and objective standards so that it may have proper guidance in its capital sentencing determination, the requirement that the jury not engage in arbitrary or capricious decision-making, the requirement that said process be designed so as to be rationally reviewable and the prohibitions against cruel and/or unusual punishments.

C.
Section 190.3's Factor (b), Which Allowed The Jury At Appellant's Trial To Weigh As An Aggravating Factor The "Presence Or Absence Of Criminal Activity By The Defendant Which Involved The Use or Attempted Use of Force Or Violence," Is Unconstitutionally Vague Under The Eighth And Fourteenth Amendments And Resulted In Arbitrary And Capricious Sentencing.[60]

In addition to the CALJIC No. 8.84.1's instruction on "the circumstances of the crime" under factor (a), the penalty jury was directed to consider as aggravation, under factor (b):

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the conduct prohibited so that the parties can prepare to meet the charge. (See, e.g., *Lanzetta* v. *New Jersey* (1939) 306 U.S. 451, 453.) When a state statute contains terms not "susceptible of objective measurement," with no reference to a "specific or definite act," it is unconstitutionally vague under the due process clause. (See, e.g., *Cramp* v. *Board of Public Instruction* (1961) 368 U.S. 278, 286.) Here, the phrase "circumstances of the crime" gives no notice as to what "specific or definite acts" to rebut in order to forestall a death sentence. Indeed, the phrase is so broad and incapable of definition that it is impossible to rebut this aggravating factor.

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This court has rejected similar claims previously (*People* v. *Fierro* (1991) 1 Cal.4th 173, 230-232). Appellant respectfully asks the issues involved be reconsidered.

> (b) The presence or absence of criminal activity by the defendant, other than the crimes for which defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence, or the express or implied threat to use force or violence.

Shortly thereafter, the court read to the jury another instruction, listing the prosecution's evidence in aggravation specifically in the terms of factor (b).

This instruction was unconstitutionally vague in the same ways as the factor (a) instruction, discussed *ante*, and incorporated by reference. The instruction afforded the jurors no guidance or limitations as to how to evaluate the incidents and was standardless, arbitrary, subjective and weighted toward death.

Without defining the crimes, the jury was not able to adequately evaluate the seriousness of the behavior involved in its weighing process. The jury could not even determine if a crime had taken place. The same is true as to force or violence. Opinions on whether particular conduct is violent or criminal, what that crime is, how serious that crime is and thus whether this factor is established, will vary from juror to juror, resulting in a risk of arbitrary sentencing. And the failure to require any resolution of these questions emphasizes the vague decision-making process involved.

The Eighth Amendment requires death penalty statutes to provide objective, specific guidelines which control the sentencer's discretion.

(*Maynard* v. *Cartwright*, *supra*, 486 U.S. 356; *Godfrey* v. *Georgia*, *supra*, 446 U.S. 420.) Where a capital punishment scheme has standards that could result in arbitrary and capricious sentencing, such a scheme is unconstitutionally vague. (*Maynard*, *supra*, 486 U.S. at pp. 362-365; *Godfrey*, *supra*, 446 U.S. at p. 428.) Decisions from other states have held that these precedents render sentencing factors similar to California's factor (b) unconstitutional.[61]

Factor (b) allowed the jury to impose death, at least in part, on the basis of ". . . criminal activity by the defendant which involved the use or attempted use of force or violence. . . ." The trial court did not give guidelines or place limits on this factor, or instruct the jury on the elements of the potentially relevant crimes, or define violence or force. Absent such directions, the jurors could not have determined whether appellant's conduct constituted a violation of a particular penal statute. Rather, without guidance, the uninstructed jurors

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E.g., the Georgia Supreme Court held unconstitutionally vague an aggravating circumstance allowing the death penalty where ". . . murder [is] committed by a person who has substantial history of serious assaultive convictions." (Ga. Ann. Code § 27-2534.1(b)(1); *Arnold* v. *State* (Ga. 1976) 224 S.E.2d 386.) The court found that this aggravating circumstance was constitutionally defective because it was "highly subjective."

A broader example is *State* v. *White* (Del. 1978) 395 A.2d 1082, where the Delaware Supreme Court held unconstitutionally vague an aggravating circumstance in which the victim was defined as "elderly" or "defenseless." The court held that those terms did not "have a common and ordinary meaning sufficiently definite to meet their usage in the context of the statute." (*Id.*, at 1090.)

were free to impose the death penalty on the basis of whether the conduct struck them subjectively and individually as "criminal" and "violent."

Therefore, factor (b) did not constitute the "objective standard" that properly channels the sentencer's discretion. Factor (b) necessarily allowed each juror to impose the death penalty based on that juror's idiosyncratic assessment of what constitutes criminal and/or violent conduct and how serious that conduct is. This is the arbitrary and capricious sentencing that *Stringer*, *Godfrey, Maynard, Arnold*, and *White* all hold forbidden by the Eighth and Fourteenth Amendments. Absent instructions defining the elements of the relevant criminal activity and the meanings of "force" and "violence", and guidance and limitations in evaluating the same, reliance on factor (b) as a basis for imposing the death sentence was unconstitutional.

D.
The Trial Court Failed To Delete Inapplicable Mitigating Factors, In Violation Of The Eighth And Fourteenth Amendments.

The trial court erred in failing to eliminate the inapplicable factors *sua sponte*.[62] CALJIC 8.84.1 told the jurors to consider factors which were

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This court has previously rejected similar arguments regarding the *sua sponte* obligation to delete inapplicable mitigating factors. (*People* v. *Miranda* (1987) 44 Cal.3d 57, 104; *People* v. *Kelly* (1990) 51 Cal.3d 931, 968.) Appellant respectfully asks that this court reconsider these issues.

irrelevant to this case,[63] in violation of the Eighth Amendment. The Eighth Amendment requires that the jury not be distracted from determining whether the death penalty is appropriate in light of the particular defendant and crime. *Booth* v. *Maryland* (1987) 482 U.S. 496, 507. Jury instructions must limit the jury's consideration to factors that are both relevant to the capital sentencing decision and rooted in the evidence before them. *See California* v. *Brown* (1987) 479 U.S. 538, 543; *McCleskey* v. *Kemp* (1987) 481 U.S. 279, 313-314, n. 37.

If the jury is to base its decision on all relevant sentencing factors raised by the evidence, then it must be instructed which relevant factors are raised by the evidence and that those are the only factors to be considered. To the contrary, the jurors here were instructed that they "*shall* consider, take into account and be guided by" all the factors listed, *i.e.*, that all factors were mandatory. Each juror was nonetheless left on her own to determine whether said factors were aggravating or mitigating here. These instructions improperly told the jurors to consider mitigating factors which were clearly inapplicable, giving rise to the equally clear message that the absence of evidence regarding a mitigating factor equaled aggravation. These instructions

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Factors irrelevant to this case included: factor (e) (victim participation); factor (f) (moral justification/extenuation); and (g) (duress).

violated the requirement that rational, objective criteria guide the sentencer's discretion and created an impermissible risk of arbitrary and capricious decision making. (*McCleskey* v. *Kemp*, *supra*, 481 U.S. at pp. 301-303.)

Furthermore, by the instruction's encouraging abstract, irrelevant considerations of the inapplicable factors in sentencing, appellant was deprived of his constitutional rights to an individualized sentencing determination (and meaningful appellate review of that sentence) based only on the "factors about the crime and the defendant . . . [that are] particularly relevant" (*Gregg* v. *Georgia*, *supra*, 428 U.S. 153, 192)[64] and the Eighth and Fourteenth Amendment's heightened level of due process and requirement of heightened reliability in capital cases. (*Ford* v. *Wainwright* (1986) 477 U.S. 399, 414; *Beck* v. *Alabama* (1980) 447 U.S. 625, 637-638 and n. 13; *see McElroy* v. *United States Ex Rel. Guagliardo*, *supra*, 361 U.S. at p. 255 (Harlan, J., diss.)).

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The court's instruction effectively, incorrectly made a threshold legal determination that all the factors in CALJIC NO. 8.84.1 (Rev. 1986) (Mod.) were relevant, violating well-established principles of state law (see *People* v. *Hannon* (1977) 19 Cal.3d 588, 597), in addition to the resulting constitutional violations, discussed *ante*. Additionally, the duty to edit standardized jury instructions which are written to apply to a theoretically wide range of cases also rests with the court in California and is not left to the jury. (*See, e.g.*, *People* v. *Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884 [editing CALJIC No. 2.20].) Such editing is necessary to avoid jury confusion and avoid injecting irrelevant considerations into the deliberations, both of which the court instead encouraged. Therefore, the instruction violated state law as well as federal constitutional guarantees, and reversal is mandated, even under the *Watson* standard.

The fact that the court effectively told the jurors that all factors were relevant, *i.e.*, to be considered, when several factors were not relevant, only exacerbated the error.

Finally, the language of the statute and instruction could lead a reasonable juror to conclude that the "whether or not" language preceding factors (d), (e), (f), (g), (h) and (j) means either of two equally erroneous propositions: 1) that those factors are always applicable and must be either aggravating or mitigating, or 2) the factors are always irrelevant, as "whether or not" is commonly used to as "irrespective of . . ." a given matter. Because this phrase precedes some factors which can only properly be considered in mitigation, interpretation 1) erroneously transformed mitigating factors into aggravating ones (*see People* v. *Benson*, *supra*, 52 Cal.3d at 801).

Vagueness in the statute and instruction undoubtedly lead to such erroneous interpretations and impermissibly tilted the sentencing decision toward death, based on entirely irrelevant factors, in violation of the Eighth and Fourteenth Amendments. (*Stringer* v. *Black*, *supra*, 503 U.S. 222.)

E.

Instructing the Jury In The Terms Of A Unitary List Of Aggravating And Mitigating Factors, Without Specifying Which Factors Were Aggravating And Which Were Mitigating, Without Limiting Aggravation To the Factors Specified, Or Without Properly Defining Aggravation And Mitigation, Violated The Fifth, Sixth, Eighth And Fourteenth Amendments.

The trial court failed to tell the jury which factors were aggravating or mitigating, or to give any definition or explanation of aggravation which might have served as a narrowing principle in their application. These errors resulted in unconstitutionally arbitrary and inconsistent sentencing in several distinct respects.

Permitting the jury to use mitigating evidence in aggravation impermissibly allows the imposition of the death sentence in an arbitrary[65] and unprincipled manner, violating the Eighth and Fourteenth Amendments. (*See* *Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 192; *Zant* v. *Stephens*, *supra*, 462 U.S. at p. 865.) The instructional omissions and ambiguities here made such errors even more likely, and in view of the prosecutor's summation, near certainly, demonstrate the unconstitutional vagueness of section 190.3 and

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With no guidance afforded to juries as how the state deems mental disturbance, victim participation, age, or substance abuse to be "particularly relevant to the sentencing decision" (*Gregg* v. *Georgia*, *supra*, 428 U.S. at 196), identically situated defendants will be sentenced differently depending purely upon the subjective predilections of the jurors involved.

CALJIC No. 8.84.1's unitary list and its death-bias. (*Stringer* v. *Black*, *supra*, 503 U.S. 222.)

The use of a unitary list also improperly allowed the jury to consider the absence of statutory mitigating factors as aggravating factors. The unconstitutional vagueness of section 190.3's and CALJIC 8.84.1's unitary list therefore gave the jury no guidance whatsoever, permitted and encouraged the prosecutor to manipulate the putatively mitigating factors to suit his own ends (including the conversion of mitigating evidence to aggravating evidence), and allowed the penalty decision process to deteriorate into a standardless, confused, subjective, arbitrary and unreviewable determination for each juror, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 192; *Godfrey* v. *Georgia*, *supra*, 446 U.S. at pp. 428-429; *Stringer* v. *Black*, *supra*, 503 U.S. 222; *Zant* v. *Stephens*, *supra*, 462 U.S. at p. 865.)

F.

Section 190.3 And CALJIC No. 8.84.1 Allowed The Jurors To Engage In An Undefined, Open-Ended Consideration Of Non-Statutory Aggravating Factors.

Section 190.3 and CALJIC No. 8.84.1 are unconstitutionally vague in failing to limit the jury to consideration of specified factors in aggravation; they fail to guide the jury, permit the prosecutor to argue non-statutory matters

as evidence in aggravation and allow the penalty decision process to proceed in an arbitrary, capricious, death-biased and unreviewable manner, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 192; *Godfrey* v. *Georgia*, *supra*, 446 U.S. at pp. 428-429; *Stringer* v. *Black*, *supra*, 503 U.S. 222; *Zant* v. *Stephens*, *supra*, 462 U.S. at p. 865.)

G.
In Accordance With The 1978 Death Penalty Law, The Trial Court Did Not Define Mental Illness As A Mitigating Factor Or Delete Factor (d)'s "Extreme" Modifier, Resulting in Unconstitutional Vagueness In Violation Of The Fifth, Sixth, Eighth And Fourteenth Amendments.

The version of CALJIC 8.84.1 which the court used instead instructed the jury that only an "extreme mental or emotional disturbance," per factor (d), or capacity questions involving impairment due to mental disease, defect or intoxication, per factor (h) were to be taken "into account" in ". . . determining which penalty is to be imposed . . .". That is, these factors could be considered either aggravating or mitigating. The court concluded the reading of CALJIC No. 8.84.1 by telling the jury that it might find relevant "any other" extenuating circumstance, per factor (k). This aspect of the instruction has three constitutional deficiencies.

First, this court has previously defined factor (d) as purely a mitigating

factor. (*People* v. *Davenport*, *supra*, 41 Cal.3d at p. 288.)[66] The threshold problem with the standard CALJIC instruction is that, absent an explicit limitation of factor (d) to mitigation, jurors may well consider it in aggravation. They may also consider the lack of mitigation as aggravation. Mental or emotional instability is not a factor which jurors will automatically or intuitively understand as mitigating in nature; they may well conclude that it is indicative of defendant's future dangerousness and therefore aggravating.[67] This aspect, standing alone, violates the Eighth Amendment.

The language of factors (d) and (h) injected unconstitutional arbitrariness into the penalty decision, using constitutionally vague terminology which impermissibly invites random choices and biases the process toward death. (*Stringer* v. *Black*, *supra*, 503 U.S.222.) Such terminology permits an unacceptable risk that there will be no principled distinction between those cases in which the death penalty is imposed and

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This characterization no doubt arose due to the ". . . belief, long held by this society, that defendants who commit criminal acts that are attributable to . . . emotional and mental problems, may be less culpable than defendants who have no such excuse." (*California* v. *Brown*, *supra*, 479 U.S. at p. 545 (O'Connor, J., conc.).)

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For an example of such attitudes by a judge, see *Miller* v. *State* (Fla. 1979) 373 So.2d 882, 883-885 [trial judge sentenced defendant to death based on defendant's incurable mental illness rendering defendant a future danger, ever after recognizing such disturbances are mitigating]; as to public attitudes, see Note, (1979) 12 John Marshall J. Prac. & Proc. 351, 365.

those in which it is not. (*Maynard* v. *Cartwright*, *supra*, 486 U.S. at pp. 361-362.) A sentence based on such vague instructions is unreviewable, in violation of the Eighth and Fourteenth Amendments. (*Godfrey* v. *Georgia*, *supra*, 446 U.S. at p. 428.)

The second problem with the standard CALJIC instruction, assuming the jury understood factor (d) to be mitigating, is its specification that only "extreme" mental illness may be considered. This language has all the constitutional infirmities discussed above,[68] plus others all its own.

A sentencing entity may not refuse to consider, or be precluded from considering, any relevant mitigating evidence. (*Mills* v. *Maryland* (1988) 486 U.S. 367, 374; *Locket* v. *Ohio* (1978) 438 U.S. 586, 604 (plur. opn., Burger, C.J.).) The "extreme" adjective preceding "mental or emotional disturbance"

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Aggravating factors that include constitutionally vague terms like "extreme" must also meet constitutional vagueness standards. "Extreme" does not provide sufficient guidance to avoid arbitrary and capricious sentencing, provides no principled basis for distinguishing between a death sentence and life without parole, and is death-biased; sentences based on such terms are also unreviewable, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Stringer* v. *Black*, *supra*, 503 U.S. 222; *Maynard* v. *Cartwright*, *supra*, 486 U.S. at pp. 361-362; *Godfrey* v. *Georgia*, *supra*, 446 U.S. at p. 428; see, e.g., *State* v. *David* (La. 1985) 468 So.2d 1126, 1129-1130 [holding vague an aggravating factor which allowed the jury to impose death based upon a "significant" history of criminal conduct]; *Arnold* v. *State*, *supra*, 224 S.E.2d at pp. 391-392 [holding vague an aggravating factor which allowed the jury to impose death based upon a "substantial" history of assaultive convictions].)

created a barrier to the jury's full consideration and assignment of mitigating weight to appellant's evidence, in violation of these authorities.

This Court recognized this limitation in *People* v. *Ghent*, *supra*, 43 Cal.3d at p. 776, but held that this constitutional defect was cured by the factor (k) language. (*Ibid.*; see *People* v. *Kelly* (1990) 51 Cal.3d 931, 968-969.) A reasonable juror could have understood these instructions to unconstitutionally limit one another, i.e., that the factor (k) language referred only to any evidence "other" than those areas explicitly discussed earlier in the same instruction, i.e., mental or emotional disturbances. (*See Francis* v. *Franklin* (1985) 471 U.S. 307, 315-316).[69] This undue limitation of the jury's ability to consider all relevant mitigating evidence resulted in the imposition of death in violation of the Eighth and Fourteenth Amendments. (*Lockett* v. *Ohio*, *supra*,

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This interpretation is required by rules of interpretation, e.g., the provisions that: specific rules take precedence over general rules, both as a matter of legal interpretation and common understanding (*Rose* v. *California* (1942) 19 Cal.2d 713, 723-724; *People* v. *Breyer* (1934) 139 Cal. App. 547, 550); and *expressio unius est exclusio alterius*, the "[e]xpression of one thing is the exclusion of another." (*Black's Law Dictionary* (West Rev. 4th Ed. 1968) p. 692; *id.*, *In Re Lance W.* (1985) 37 Cal.3d 873, 888.)

Here the jury was told that they ". . . shall consider, take into account, and be guided by the following factors . . . ," followed at "(D)" by whether appellant was ". . . under the influence of extreme mental or emotional disturbance . . ." The former clause defined the latter as the only form of mental disturbance to be considered, i.e., "extreme," and pre-empted any further use of evidence relating to the categorical field of mental or emotional disturbances.

438 U.S. at p. 604.)[70]

The third problem with factor (d) is that "extreme" requires the sort of subjective, vague, arbitrary, unreviewable determination by each juror as to what level of mental illness is adequate for consideration that has consistently been found constitutionally unacceptable. (*E.g.*, *Maynard* v. *Cartwright*, *supra*, 486 U.S. at pp. 363-364 ["especially"];[71] *Shell* v. *Mississippi* (1990) 498 U.S. 1, 4 ["especially"]; *Moore* v. *Clarke* (8th Cir. 1990) 904 F.2d 1226, 1232-1233 ["exceptional"].[72] The jury instructions on factor (d), alone and considered together with the penalty instructions as a whole, were prejudicially violative of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 192; *Godfrey* v. *Georgia*, *supra*, 446 U.S. at pp. 428-429; *Stringer* v. *Black*, *supra*, 503 U.S. 222; *Zant* v. *Stephens*, *supra*,

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Alternatively, at a minimum there is therefore a legitimate basis for finding ambiguity concerning the factors actually considered by the jury. (*California* v. *Brown*, *supra*, 479 U.S. at p. 546 (O'Connor, J., conc.).)

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Notably, the unconstitutionally vague "especially" is a synonym for "extremely" (*Random House Thesaurus, College Edition* (1984) p. 257), the adverbial form of "extreme." (*Webster's New World Dictionary, Second College Edition* (Simon & Schuster 1980), p. 498.)

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This constitutional flaw is also found in factor (g)'s ". . . *extreme* duress or . . . *substantial* domination . . ." as read to appellant's jury. The use of such modifiers in various instructions was unconstitutional, because it could have conveyed to a reasonable juror that only the most extreme versions of various potential mitigating factors which were in fact to be considered in mitigation.

462 U.S. at p. 865.)

H.
The Factors Listed in Section 190.3 And CALJIC No. 8.84.1 Are All Unconstitutionally Vague, Arbitrary And Result In Unreliable Sentences, In Violation Of The Eighth And Fourteenth Amendments.

In addition to the factors discussed *ante,* all the remaining factors in section 190.3 and CALJIC No. 8.84.1 as read fail constitutional scrutiny, when measured against the Eighth and Fourteenth Amendments' prohibitions against vagueness and arbitrariness (*Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 192; *Godfrey* v. *Georgia*, *supra*, 446 U.S. at pp. 428-429; *Stringer* v. *Black*, *supra*, 503 U.S. 222), particularly in view of the Eighth and Fourteenth Amendment's heightened level of due process and requirement of heightened reliability in capital cases. (*Ford* v. *Wainwright*, *supra*, 477 U.S. at p. 414; *Beck* v. *Alabama*, *supra*, 447 U.S. at pp. 637-638 and n. 13.)

Both on its face and in the context of appellant's case, section 190.3's factors provided the jury the same unguided, limitless, unreviewable discretion held constitutionally inadequate in *Furman* v. *Georgia*, *supra*, 408 U.S. at p. 295 (Brennan, J., conc. [". . . wholly unguided by standards governing that (death) decision. . . ."]), 309-310 (Stewart, J., conc. ["capriciously selected random handful"]).

This conclusion is reinforced by *Stringer* v. *Black*, *supra*, 503 U.S. 522, where the Court held that, in a weighing state (such as California), vague aggravating factors create randomness in sentence decision-making and create a bias in favor of death. (*Ibid.*) The factors listed in section 190.3 and CALJIC No. 8.84.1 failed to guide or limit the jury's discretion, made the jury death-biased, created the impermissible risk that vaguely-defined factors resulted in the arbitrary selection of appellant for execution, and afford no meaningful basis on which this court may review the sentence, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

The trial court's failure, in accordance with the 1978 death penalty statute, to require that individual aggravating factors be proven beyond a reasonable doubt, that any determination that aggravation outweighed mitigation be proven beyond a reasonable doubt, and that death be proven the appropriate penalty beyond a reasonable doubt, violated the Eighth and Fourteenth Amendments.

Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.[73] A fourth state, Utah, has reversed a death judgment, because that judgment

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(See Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and *State* v. *Goodman* (1979) 257 S.E.2d 569, 577.)

was based on the same standard of proof as applied in California, i.e., less than proof beyond a reasonable doubt.[74] *See People* v. *Brown* (1985) 40 Cal.3d 512, 539 (quoting *Zant* v. *Stephens*, *supra*, 462 U.S. at p. 874 and *Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 189, regarding the need to direct and limit the jury's discretion so as to minimize the risk of arbitrary, capricious action.)

The jurors here no adequate guidelines or standards by which to measure or weigh the evidence presented by either side. They were each faced with an amorphous, subjective, individual decision.[75]

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In *State* v. *Wood* (Utah 1982) 648 P.2d 71, the Utah Supreme Court reviewed a capital conviction where the trial court had found that a single aggravating factor outweighed three mitigating factors. The Utah Supreme Court held that proof beyond a reasonable doubt was required, and set forth the following standard for future capital case juries:

> After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and *you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances*.

(*Id.*, at p. 83; emphasis supplied.)

The Utah Supreme Court explained that this standard means that the sentencer must ". . . have no reasonable doubt as to . . . the conclusion that the death penalty is justified and appropriate after considering all the circumstances." (*Id.*, at p. 84.)

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Even assuming, arguendo, that the beyond a reasonable doubt standard was not required to establish the existence of any aggravating circumstance relied upon to impose a death sentence, or that death was the appropriate sentence, or that the aggravating circumstances outweighed mitigating

I.

The Trial Court's Failure To Read Necessary Instructions Related to the Burden of Proof and Beyond a Reasonable Doubt Violated The Fifth, Sixth, Eighth And Fourteenth Amendments.[76]

The instructions contained constitutional errors in section 190.3's factors and the related CALJIC instructions, which were unconstitutionally vague, failed to direct or limit the jury's discretion, encouraged the jury to act in a constitutionally arbitrary, capricious, unreviewable manner and skewed the sentencing process in favor of execution, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 192; *Godfrey* v. *Georgia*, *supra*, 446 U.S. at pp. 428-429; *Stringer* v. *Black*, *supra*, 503 U.S. 222; *Zant* v. *Stephens*, *supra*, 462 U.S. at p. 865; see *State* v. *Wood* (Utah 1982) 648 P.2d 71, 83.)

The instructions at issue related to the burden of proof, which must be judged in light of the Due Process Clause:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to instruct the fact finder concerning the degree of confidence our

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circumstances, the instructions given violated the Fifth, Sixth, Eighth and Fourteenth Amendments by failing to specify any burden of proof or burden of persuasion at all.

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Appellant is aware that this court has rejected similar contentions (*People* v. *Rodriguez*, *supra*, 42 Cal.3d at pp. 777-779; *People* v. *Allen* (1986) 42 Cal.3d 1222, 1285), but respectfully requests that the issue be reconsidered.

> society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

(*Addington* v. *Texas* (1979) 441 U.S. 418, 423, quoting *In Re Winship* (1970) 397 U.S. 358, 370 (Harlan, J., conc.; internal quotation marks omitted)). Criminal cases merit the highest standard, the beyond a reasonable doubt test:

> . . . 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.
> . . . [¶] . . . In cases involving individual rights, whether criminal or civil, the standard of proof at a minimum reflects the value society places on individual liberty.

(*Santosky* v. *Kramer* (1982) 455 U.S. 745, 755, quoting *Addington* v. *Texas*, *supra*, 441 U.S. at pp. 423, 415; quotation marks and brackets omitted.)

The imposition of a death sentence represents the ultimate imposition on individual liberty. Therefore, the Fourteenth Amendment's general concepts of due process and equal protection, and the Eighth and Fourteenth Amendment's heightened level of due process and requirement of heightened reliability in capital cases (*Ford* v. *Wainwright*, *supra*, 477 U.S. at p. 414; *Beck* v. *Alabama*, *supra*, 447 U.S. at pp. 637-638 and n. 13) mandate the use of the beyond a reasonable doubt standard in all decisions by capital case sentencers.

J.

The Provisions Of California's Death Penalty Statute Fail To Provide For Comparative Appellate Review To Prevent Arbitrary, Discriminatory Or Disproportionate Imposition Of The Death Penalty, In Violation Of The Fifth, Sixth, Eighth And Fourteenth Amendments.

At least thirty-one states that sanction capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the state Supreme Court determine whether "the sentence is disproportionate compared to those sentence imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards "further against a situation comparable to that presented in *Furman* [v. *Georgia*, *supra*]." (*Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 198). Toward the same end, Florida has judicially "adopted the type of proportionality review mandated by the Georgia statute." (*Profitt* v. *Florida* (1976) 428 U.S. 242, 259.) Twenty states have statutes similar to that of Georgia,[77] and seven have judicially instituted similar review.[78]

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(See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code

Section 190.3 does not require that either the trial court or this court undertake a comparison between this and other similar cases regarding the relative proportionality of sentence imposed, i.e., inter-case proportionality review. (See *People* v. *Fierro*, *supra*, 1 Cal.4th at p. 253.) California does not guard "against a situation comparable to that . . . in *Furman*." (*Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 198.)

Furman raised the question of whether, within a category of crimes for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. The California capital case system contains the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. Its failure violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted

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Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).)

78

(See *State* v. *Dixon* (Fla. 1973) 283 So.2d 1, 10, *Alford* v. *State* (Fla. 1975) 307 So.2d 433, 444; *People* v. *Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer* v. *State* (Ind. 1981) 417 N.E.2d 889, 899; *State* v. *Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State* v. *Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State* v. *Richmond* (Ariz. 1976) 560 P.2d 41, 51; *Collins* v. *State* (Ark. 1977) 548 S.W.2d 106, 121.)

in an arbitrary, unreviewable manner skewed in favor of execution (*Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 192; *Godfrey* v. *Georgia*, *supra*, 446 U.S. at pp. 428-429; *Stringer* v. *Black*, *supra*, 503 U.S. 222; *Zant* v. *Stephens*, *supra*, 462 U.S. at p. 865; see *Parker* v. *Dugger* (1991) 498 U.S. 308) and the Eighth and Fourteenth Amendment's heightened level of due process and requirement of heightened reliability in capital cases. (*Ford* v. *Wainwright*, *supra*, 477 U.S. at p. 414; *Beck* v. *Alabama*, *supra*, 447 U.S. at pp. 637-638 and n. 13.)

Additionally, this failure violates appellant's right to equal protection, under the Fourteenth Amendment, because such review is afforded non-condemned inmates, per section 1170, subdivision (f),[79] which, at the time of appellant's sentence,[80] read:

> Within one year after the commencement of the term of imprisonment, the Board of Prison Terms shall review the sentence to determine whether the sentence is disparate in comparison with the sentences in similar cases. If the Board of Prison Terms determines that the sentence is disparate, the board

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79

Appellant is aware that this court has previously rejected similar contentions (*People* v. *Marshall, supra* 50 Cal.3d at p. 945; *People* v. *Allen*, *supra*, 42 Cal.3d at p. 1285), but respectfully requests that the issue be reconsidered.

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Any subsequent changes in section 1170 are inapplicable to appellant as *ex post facto* violations, contrary to the United States Constitution (art. I, § 9. cl. 3, and § 10, cl. 1), insofar as such changes would amount to a lack of fair notice and governmental restraint when the legislature increases punishment beyond what was contemplated at the time of the crime. (*Weaver* v. *Graham* (1981) 450 U.S. 24, 29-31.)

> shall notify the judge, the district attorney, the defense attorney, the defendant, and the Judicial Council. The notification shall include a statement of the reasons for finding the sentence disparate. [¶] within 120 days of receipt of this information, the sentencing court shall schedule a hearing and may recall the sentence . . . and resentence the defendant . . . as if the defendant had not been sentenced previously . . .

Even assuming, *arguendo*, that appellant has no constitutional right to inter-case review, appellant is entitled to equal treatment with other inmates convicted of crimes occurring at the same time as those of which he has been convicted, i.e., the benefit of a determination of whether his "sentence is disparate in comparison with the sentences in similar cases." (*Ibid.*)

K.
California's Failure To Provide Any Of The Penalty Phase Safeguards Commonly Employed In Other Capital Case Jurisdictions Violates The Eighth And Fourteenth Amendments.[81]

This United States Supreme Court has repeatedly recognized that the death penalty is qualitatively different in nature from any other punishment. Therefore, capital case sentencing systems may not create a substantial risk that a death judgment and execution will be inflicted in an arbitrary and capricious manner. (*Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 189; *Godfrey* v.

81

Appellant recognizes that this court has rejected similar arguments previously (e.g., *People* v. *Sully* (1991) 53 Cal.3d 1195, 1251-1252), but respectfully asks that it reconsider the points at issue.

Georgia, *supra*, 446 U.S. at p. 431.) *Furman* and *Gregg* require that "the State must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case" justify the sentence. (*McCleskey* v. *Kemp*, *supra*, 481 U.S. at p. 305.) Accordingly, penalty phase aggravating factors in "weighing states," such as California, may not be unconstitutionally vague. (*Stringer* v. *Black, supra*, 503 U.S. 222.)

Various other states with capital sentencing laws or case law which require various safeguards to lessen the chance of an arbitrary or capricious death judgement.[82] Such safeguards have been instituted to attempt to eliminate the use of unconstitutionally vague penalty phase factors, eliminate death-biased proceedings, eliminate arbitrary and capricious death judgments and executions, and make death judgments meaningfully reviewable on appeal. Although the various states employ varying combinations of these and other safeguards to fulfill the described constitutional requirements, California's system singularly fails to employ any of these safeguards, or to employ

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82

The safeguards described, *ante*, generally include statutory or case law requirements of: 1) written findings as to the aggravating factors found by the jury; 2) proof beyond a reasonable doubt of the aggravating factors; 3) jury unanimity on the aggravating factors; 4) a finding that aggravating factors outweigh mitigating factors beyond a reasonable doubt; 5) a finding that death is the appropriate punishment beyond a reasonable doubt; 6) a procedure to enable the reviewing court to meaningfully evaluate the sentencer's decision; and 7) definition of which specified relevant factors are aggravating, and which are mitigating.

alternative but comparable measures. Therefore, California's capital case system is unconstitutional on its face and as applied (particularly in light of the prosecutor's arguments to the jury), under the Fifth, Sixth, Eighth and Fourteenth Amendments.

L.
The California Statutory Scheme's Provisions Fail To Perform The Constitutionally Required Function Of Narrowing The Population Of Death-Eligible Defendants, Particularly Those Charged Under Felony Murder Provisions, In Violation Of The Eighth And Fourteenth Amendments.

To avoid constitutionally arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions

> . . . must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

(*Zant* v.*Stephens*, *supra*, 462 U.S. at p. 877.) California's capital statutes fail these requirements, on four separate bases.

Section 190.2 contained twenty-nine special circumstances at the time of appellant's trial, which were not only numerous but also so broad in definition as to encompass nearly every first degree murder, per the drafters'

declared intent.[83] Section 190.2's all-embracing special circumstances were therefore created with an intent directly contrary to the

> . . . constitutionally necessary function at the stage of legislative definition: [that] they circumscribe the class of persons eligible for the death penalty.

(*Zant* v. *Stephens*, *supra*, 462 U.S. at p. 878.)

In *Godfrey* v. *Georgia*, *supra*, the United States Supreme Court reviewed a Georgia capital murder statute, which sanctioned the death penalty for a murder found to have been ". . . outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." (*Godfrey* v. *Georgia*, *supra*, 446 U.S. at p. 422.) Despite Georgia's argument that it had applied a "narrowing construction" to that statute (*Id.*, at pp. 429-430), the plurality opinion held:

> In the case before us the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the

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83

This was stated to be the purpose of Proposition 7, the initiative statute enacted into law on November 7, 1978, as section 190.2, by its proponents. In the 1978 Voter's Pamphlet, the proponents described certain murders not covered by the existing death penalty statute and then stated:

> And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*

(*See* p. 34, 1978 Voter's Pamphlet, p. 34, "Argument in Favor of Proposition 7" (emphasis added); hereafter cited as "1978 Voter's Pamphlet.")

> offense was "outrageously or wantonly vile, horrible and inhuman." There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman."

(*Id.*, at pp. 428-429.)

It might be argued that section 190.2 circumvents the literal *Godfrey* problem, because section 190.2 does not contain one special circumstance embracing "almost every murder," like the Georgia statue; section 190.2 instead has many individual special circumstances, which together embrace almost every murder. Such reasoning is contrary to the pertinent principle of *Godfrey* and the Eighth Amendment:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." (*Furman* v. *Georgia* [*supra*, 408 U.S. at p. 313 (conc. opn., White, J.)]; accord, *Godfrey* v. *Georgia* [*supra*, 446 U.S. at p. 427 (plur. opn.)].)

(*People* v. *Edelbacher*, *supra*, 47 Cal.3d 983, 1023.) Viewed in its proper light, section 190.2 conflicts with this Eighth Amendment principle by purposefully encompassing almost "every murderer."

Under *Godfrey*, it is constitutionally impermissible for a statute making

a defendant death eligible to have so broad and indiscriminate a sweep,[84] selecting as it does on the basis of common aspects of events attending many murders. Serious as these factors are individually, they are not those which society views as inherently being among the most "... grievous . . . affronts to humanity. . . ," as required by the Eighth Amendment. (*Zant* v. *Stephens*, *supra*, 462 U.S. at p. 877, n. 15, citing *Gregg* v. *Georgia*, *supra*, 418 U.S. at p. 184.) Moreover, a statute which specifically contemplates encompassing "every murderer" (1978 Voter's Pamphlet, p. 34) fails to account for different degrees of culpability involved in different types of murder, increasing the likelihood that juries will arbitrarily sentence defendants to death without proper regard for the defendant or the act, all in violation of the Fifth, Eighth, and Fourteenth Amendments.

M.

Sections 190 - 190.5 Afford The Prosecutor Complete Discretion To Determine Whether A Penalty Hearing Will Be Held, In Violation Of The Eighth And Fourteenth Amendments.

Sections 190-190.5 afford the individual prosecutor complete discretion

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84 The fact that California renders felony murder *simpliciter* death eligible, combined with the seemingly ever-increasing list of other special circumstances, leads to the result that virtually every first degree murder is death eligible.

to determine whether a penalty hearing will be held, in violation of the Eighth and Fourteenth Amendments. In *People* v. *Adcox* (1988) 47 Cal.3d 207, 275-276, Justice Broussard dissented on this ground, noting that it creates a substantial risk of county-by-county arbitrariness. The state's "arbitrary and disparate treatment ... in its different counties" violates equal protection guarantees in the constitution. *Bush v. Gore* (2000) 531 U.S. 98. *See also Moore v. Ogilve* (1969) 394 U.S. 814; *Gray v. Sanders* (1963) 372 U.S. 368.

There are no statewide standards to guide the prosecutor's discretion. Some offenders will be chosen as candidates for the death penalty by one prosecutor, while others with similar factors in different counties will not. These arbitrary choices can be made at the charging stage, prior to trial by accepting a plea to a non-death sentence, after the guilt phase and during or after the penalty phase. This range of opportunity, coupled with the absence of any standards to guide the prosecutor's discretion, permits reliance on constitutionally irrelevant and impermissible considerations, including race, sexual orientation, or economic status. Additionally, the prosecutor is free to seek death in virtually every first degree murder case on either a lying-in-wait theory, (*People* v. *Morales*, *supra*, 48 Cal.3d 527), a felony murder theory or a multiple murder theory.

The statutory scheme therefore allows arbitrary and wanton

prosecutorial discretion throughout the capital case process, in charging, prosecuting, submitting the case to the jury and opposing the automatic motion to modify the sentence. This compounds the effects of the vagueness and arbitrariness in the statutory scheme, described *ante*. Much like the arbitrary and wanton jury discretion condemned in *Woodson* v. *North Carolina*, *supra*, this unlimited discretion is contrary to the principled decision-making required in *Furman* v. *Georgia*, *supra*, 408 U.S. 238.

The jury therefore arrived at its death judgment by a tainted process involving unguided consideration of numerous improper factors, as improperly argued by the prosecutor. (See discussion, *ante*.) Under the Eighth and Fourteenth Amendments, as well as *Furman* and *Stringer*, reversal of the death judgment is mandated.

O.
These Errors Prejudiced Appellant And Mandate Reversal.

Section 190.3 (and its embodiment in CALJIC No. 8.84.1), the related instructions given, and the other instructional failures discussed herein violated the Fifth, Sixth, Eighth and Fourteenth Amendments, as described above. These errors are each prejudicial and mandate reversal individually and cumulatively.

As to all the unconstitutionally vague provisions of section 190.3 (manifested in large part in CALJIC No. 8.84.1), reversal is automatic, because the use of a vague aggravating factor in the weighing process created randomness and a bias in favor of execution. (*Stringer* v. *Black*, *supra*, 503 U.S. 222.)

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, as discussed above, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." *People v. Brown* (1988) 46 Cal.3d 432, 447. The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: 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– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina*, *supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard]).

As to all other errors, *ante*, reversal is mandated, as respondent can not demonstrate that they individually or collectively had no effect on the penalty verdict in this close case (*Caldwell* v. *Mississippi*, *supra*, 472 U.S. at p. 341; *Hitchcock* v. *Dugger* (1987) 481 U.S. 393, 399.)

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 67
SEVERAL OF THE AGGRAVATING FACTORS SET FORTH IN CALJIC 8.85 WERE VAGUE AND UNCONSTITUTIONAL AS APPLIED AND FAILED TO GUIDE THE JURY'S SENTENCING DISCRETION IN VIOLATION OF THE EIGHTH AMENDMENT

When a state chooses to impose capital punishment, the Eighth Amendment requires the state to "adopt procedural safeguards against arbitrary and capricious impositions of the death penalty." *Sawyer v. Whitley* 505 U.S.333 (1992). A death sentence based upon instructions that fail to guide the jury on the meaning of aggravating circumstances violates the Eighth and Fourteenth Amendments. *Godfrey v. Georgia,* 446 U.S. 420 (1980); *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988); *Stringer v. Black,* 503 U.S. 222 (1992) (an invalid aggravating factor in the weighing process improperly "creates the possibility . . . of randomness" by placing a "thumb [on] death's side of the scale").

If the "especially heinous, atrocious or cruel" circumstance of *Stringer* is too vague to guide a jury in determining whether the death penalty should be imposed, see 117 L.Ed.2d at pp. 382-383, then §190.3, subdivision (a) of the California death penalty statute certainly also qualifies as unconstitutionally vague. Factor (a) is worded as follows:

> The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

Since every case has "circumstances," then factor (a) applies to every defendant who comes before a penalty phase jury. An aggravating circumstance which could apply to every defendant is unconstitutional. *Arave v. Creech* 507 U.S. 463 (1993).

The "circumstances of the crime" factor merely instructs the jury to look at the "circumstances of the crime of which the defendant has been convicted in the present proceeding," without even attempting any further limitation or guidance. An aggravating factor which merely instructs the sentencer to look at the circumstances of the crime without further guidance is even more vague than the factors considered in those cases. *Maynard, Stringer, Arave, supra.*

A sentencer may not simply look at the circumstances of the crime and determine that the death penalty is appropriate. *See Maynard v. Cartwright, supra*, 486 U.S. at p. 363; *Godfrey v. Georgia, supra*, 446 U.S. at pp. 429-433; *Furman v. Georgia,* 408 U.S. 238 (1972). The Supreme Court has "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply those facts, to warrant the imposition of the death penalty." *Maynard, supra*, 486 U.S. at pp. 363.

"The discretion of a sentencer who can rely upon all of the

circumstances of a murder is as complete and unbridled as the discretion afforded the jury in *Furman*." *Cartwright v. Maynard* (10th Cir. 1987) 822 F.2d 1477, 1491, *aff'd*, 486 U.S. 356, 363. Therefore, on its face, the aggravating factor set forth in factor (a) of §190.3 is unconstitutionally vague.

By including everything, factor (a) defines nothing. A brief and partial review of how factor (a) has been applied to the facts of murder cases in California demonstrates the unacceptable vagueness of the provision. It has been used to make a defendant's "hatred of religion" an aggravating factor. *People v. Nicolaus*, 54 Cal.3d 551, 581-582 (1991). It also has been used to make the defendant's disposal of the victim's body in a manner making its recovery virtually impossible an aggravating factor. *People v. Bittaker*, 48 Cal.3d 1046, 1110, fn. 35 (1990). It has also been used to cover the circumstance where the defendant has threatened witnesses after his arrest. *People v. Hardy,* 2 Cal.4th 86, 204 (1992). The California Supreme Court has also used factor (a) as an umbrella for admission of all sorts of "victim impact" evidence. For example, the Court held in *People v. Fierro*, 1 Cal.4th 173, 234-235 (1991), that references in the prosecutor's closing argument to the murder's effect on the victim's wife of 50 years were proper under the rubric of factor (a).

Circumstances which are directly conflicting have been found to fall

under factor (a). This Court has affirmed the death verdict in a case where the fact the defendant attempted to cover up his crime was presented to the jury as aggravating under factor (a). *People v. Benson,* 52 Cal.3d 754 (1990). In another case, the fact that the defendant did not engage in a cover-up and thus appeared to have been proud of his crime was presented as an aggravating factor under factor (a). *People v. Adcox,* 47 Cal.3d 207 (1988). Similarly, the Court has affirmed a death verdict in a case in which the fact that defendant killed in cold blood was presented as an aggravating factor under factor (a). *People v. Visciotti*, 2 Cal.4th 1 (1992). On the other hand, it has also affirmed the death verdict in a case where the fact that the defendant killed in a so-called savage frenzy was presented as an aggravator under factor (a). *People v. Jennings,* 53 Cal.3d 334 (1991). The vagueness of the factor allows prosecutors to argue that virtually any murder involving any victim qualifies as an aggravating factor, weighing in favor of imposition of the death penalty. *Stringer* prohibits the use of vague aggravating circumstances in the weighing process.

Here, however, other offenses were presented to the jury during the penalty phase. The instructions failed to clarify whether the circumstances of those added crimes were to be considered under this factor. This failure allowed these crimes to be effectively "double counted" as aggravating

evidence. Since "factor (a)" did nothing to limit or guide the jury's discretion, it increased the risk of arbitrary and capricious application of the death penalty in violation of the Eighth Amendment.[85] *See, e.g.*, *Sochor v. Florida* 504 U.S. 527 (1992); *Maynard v. Cartwright*, 486 U.S. 356 (1988).

The failure to require unanimity as to aggravation is at odds with several decisions of the United States Supreme Court.[86] These decisions deal

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85. Indeed, the "circumstances of the crime" aggravating factor is unconstitutionally vague under the less rigorous standards of the due process clause as well. The due process clause requires that state statutes give clear notice of the conduct prohibited so that the parties can prepare to meet the charge. *See Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939). When a state statute contains terms not "susceptible of objective measurement," containing no reference to a "specific or definite act," the United States Supreme Court has declared the statute unconstitutionally vague under the due process clause. *See Cramp v. Board of Public Instruction,* 368 U.S. 278, 286 (1961); *Champlin Refinery Co. v. Corruption Commission of Oklahoma*, 286 U.S. 210, 243 (1932), *overruled on other grounds, Phillips Petroleum v. State of Oklahoma,* 340 U.S. 190 (1950); *United States v. L. Cohen Grocery Co.* 255 U.S. 81, 89 (1921).

In the instant case, the phrase "circumstances of the crime" did not give the defendant any notice as to all of the "specific or definite acts" he must rebut in order to forestall a death sentence. Indeed, it is impossible to rebut this aggravating factor since factor (a) is not amenable to objective measurement.

86. It is also contrary to that of the majority of jurisdictions which require the capital sentencer's consideration of factors in aggravating and mitigation. Most of those require that a death sentence be based only on aggravation found unanimously by a jury. See, e.g., 21 U.S.C. §848, subd. (k) (West Supp. 1993) [jury unanimity as to existence of specified aggravating circumstances]; Connecticut General Statutes (1990) §53a-46a, subd.(e) [same]; Maryland Annotated Code (1992) art.27, §413, subd.(j) [same]; Revised Statutes of Missouri (1991) §565.030 [same]; New Hampshire Revised Statutes

with the function of the jury in determining the truth vel non of the alleged aggravating facts and the fundamental role of the jury in a criminal trial under the Sixth Amendment to the United States Constitution. First, the determination of the factual aggravating circumstances is fundamentally different from the sentencing decision. *California v. Ramos*, 463 U.S. 992, 1007-1008 (1983); *Zant v. Stephens, supra*, 462 U.S. at pp. 872, 878-879; *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), *cert. denied*, 497 U.S. 1031 (1990). The finding of the existence or nonexistence of an aggravating circumstance involves the fundamental role that the Constitution grants to the jury: the focused determination of whether certain defined facts have been established. These findings involve the task of resolving "the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." *California v. Ramos, supra*, 463 U.S. at pp. 1008; *Beck v. Alabama*, 447 U.S. 625, 642 (1980) . Appellant had a Sixth Amendment right to a jury trial on the aggravating factors set forth in §190.3. *Ring v. Arizona* (2002) 536 U.S. _, 122 S. Ct. 2428; *Adamson v. Ricketts* (9th Cir. 1988,) 865 F.2d 1011, 1041-1044 *cert. denied*, 497 U.S.

Annotated §630:5, subd. (IV) [same]; New Jersey Statutes (1992) §2C:11-3, subd. (c)(3) [same]; North Carolina General Statutes (1992) 15A-2000, subd. (c) [same]; 21 Oklahoma Statutes (1992) §701.11 [same]; Tennessee Code Annotated (1992) §39-13-204, subd. (g)(2) [same]; Wyoming Statutes (1992) §6-2-102, subds. (d) (ii), (e) [same].

1031 (1990).

An essential part of the Sixth Amendment right to a jury trial in a criminal case is group deliberation. *See, e.g., Williams v. Florida* 399 U.S. 78, 100 (1970). These principles were extended to the issue of jury unanimity in *Burch v. Louisiana,* 441 U.S. 130 (1978). That Court held that a Louisiana statute allowing a criminal conviction upon the verdict of a non-unanimous six person jury interfered with the right to a jury trial:

> Much the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude now that conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee . . . .

Id., at p. 138.

Factor (b) of the California death penalty statute is unconstitutional because it allows the jury to use alleged prior, unadjudicated criminal activity as an aggravating factor without requiring that the jury unanimously agree beyond a reasonable doubt that the defendant committed such crimes.

On the one hand, the California Supreme Court has said that in order to use a criminal incident as an aggravating circumstance under factor (b) the prosecution must prove beyond a reasonable doubt that the defendant committed a crime. *See, e.g., People v. Monteil, supra*, 5 Cal.4th at p. 942. On the other hand, that court has rejected the view that the jury must agree

unanimously that the defendant is guilty beyond a reasonable doubt of the uncharged crime. *See, e.g., People v. Pride, supra*, 3 Cal.4th at p. 268. This position offers the defendant facing a death sentence with some but not all due process protections. It also encourages prosecutors to reserve all criminal allegations for which it knows it could not obtain a conviction to be used as factor (b) crimes at the penalty phase. This procedure denied appellant fundamental fairness in violation of the Fourteenth Amendment to the United States Constitution.

§190.3, subdivision (i) ["factor (i)"] provides that the fact-finder at the penalty phase of a special circumstances case may consider "the age of the defendant at the time of the crime." The California Supreme Court first interpreted factor (i), the age of the defendant at the time of the crime, as a factor in capital sentencing in its decision in *People v. Rodriguez* 42 Cal.3d 730 (1986). The *Rodriguez* opinion held that "mere chronological age . . . should not of itself be deemed an aggravating factor." *Id.* at p.789, emphasis omitted. In *People v. Lucky* 45 Cal.3d 259 (1988), however, that court retreated from the holding of *Rodriguez, supra*, and held that either party could argue age-related inferences.

This interpretation of factor (i) does not meet constitutional norms. The *Lucky* rationale that factor (i) actually permits consideration of "age-related

matters" rather than mere age cannot be squared with the plain language of the statute. Factor (i) states simply: "Age of the defendant at the time of crime" may be considered, if relevant, in determining whether defendant should be sentenced to death. Appellant was entitled to the most reasonable and favorable construction of the statute, which in this case is a construction in accord with the statute's express terms. *Dunn v. United States,* 442 U.S. 100, 112-113 (1979). This interpretation of the meaning of "age" has unreasonably expanded the scope of factor (i).

Use of the defendant's age as a factor in aggravation is improper because age is a status factor over which none of us has control. One's age is an immutable factor, just as is one's race, gender and ethnicity. In *Robinson v. California,* 370 U.S. 660 (1962), the Supreme Court invalidated a California penal statute which punished one for being a narcotics addict, irrespective of actual conduct. Factor (i) allows a jury hearing a capital case to penalize a defendant for being too young or too old, depending entirely upon the view of each juror about what age falls into the categories of young and old. Use of appellant's age as a factor in aggravation also constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments because it is contrary to the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 101 (1958).

As the United States Supreme Court noted in *Penry v. Lynaugh,* 492 U.S. 302, 331 (1989), "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." No state or federal death penalty statute categorizes the defendant's age, whether it be youthful, middle-aged or elderly, as an aggravating factor. Twenty-three of the death penalty statutes list age or youth of the defendant as a mitigating factor.[87] Three other states include the fact that defendant was under 18 years of age at the time of the commission of the crime as a mitigating factor.[88] No state statute specifically lists defendant's age as a possible aggravator. Moreover, the most recent federal death penalty statute, 22 U.S.C. §848, includes age (although not under the age of 18) as a mitigating factor. *Id.*, §848 (m)(5).

Factor (i), both as written and as interpreted by the California Supreme Court in the *Lucky* decision and its progeny, does just the opposite of what the

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87. See, e.g., Ala. Code §13A-5-51 [age]; Ariz. Rev. Stat. Ann. §16-11-103 (4)(a) [age]; Fla. Stat. Ann. §921.141 (6) (g) [age]; 42 Pa. Cons. Stat. §911 (e)(4) [age]; Ark. Code Ann. §5-4-605(4) [youth]; Nev. Rev. Stat. §200.035 (6) [youth]; Ohio Rev. Code Ann. §2929.04(b)(4) [youth]; Md. Code Ann., Art. 27, §413(g)(5) ["youthful age"]; Tenn. Code Ann. §39-13-204(j)(7) ["youth or advanced age"]; N.H. Rev. Stat. Ann. §630:5 (VI)(d) ["The defendant was youthful, although not under the age of 18."]

88. The three states in this group are: Connecticut, Indiana and Montana. The South Carolina death penalty statute lists as mitigating factors both "The age or mentality of the defendant." (S.C.Code §16-3-20(C)(b)(9).)

death penalty jurisprudence of the United States Supreme Court repeatedly has mandated. Instead of channeling the jury's discretion in sentencing, factor (i) leaves juries deciding capital cases in California with no firm standards for weighing the factor of defendant's age in the decision to choose a penalty of death or of life imprisonment without possibility of parole. Factor (i) promotes intolerable inconsistency in the capital sentencing process in California.

Instructing the jury with a list of factors without guidance as to which of those factors may be considered aggravating and which factors may only be considered as mitigating "creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." *Stringer v. Black, supra*, 117 L.Ed.2d at p. 382.

The failure to identify which factors are aggravating and which can only be considered as mitigating ultimately results in an arbitrary, capricious and inconsistent imposition of the death penalty in violation of the Eighth Amendment.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, as discussed above, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to

defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." *People v. Brown* (1988) 46 Cal.3d 432, 447. The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: 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– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina, supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard]).

The error undermined the reliability required by the Eighth and

Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 68
APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE TO HIS ACCOMPLICES, AND DISPROPORTIONATE AS TO BOTH APPELLANT'S INDIVIDUAL CULPABILITY UNDER AN INTRACASE REVIEW, AND WHEN COMPARED TO OTHERS WHO HAVE COMMITTED SIMILAR OFFENSES; THIS DISPROPORTIONALITY VIOLATES APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

The Eighth Amendment to the United States Constitution prohibits the imposition of "cruel and unusual punishment," including sentences which are grossly disproportionate to the offense as defined or committed, or to the individual culpability of the offender.

Assuming, arguendo, that appellant was guilty of the Comp USA robbery, he was not the actual shooter of Kathy Lee. In fact, the robbery was designed in a manner which would minimize the likelihood that anyone would be harmed during the robbery. Kathy Lee was killed when she unexpectedly happened on the robbery to pick up her son. Nokkuwa Ervin shot her a single time, without assistance or urging from anyone.

There was nothing vicious, heinous, cruel or even particularly unusual about this crime to distinguish it from other similar homicides. If the Comp USA robbery had been tried separately from the improperly-joined Ardell Williams shooting, appellant almost certainly would have gotten an LWOP

(life without the possibility of parole) sentence, had the special circumstances been found true.

None of the others arrested for the Comp USA robbery were sentenced to death. In fact, the prosecutor did not seek death against the other defendants. Nokkuwa Ervin and Eric Clark were separately convicted and sentenced to LWOP. Charges were dropped against Damian Wilson.

The United States Supreme Court has repeatedly stated that "death is different"; that is, the death penalty is qualitatively different than any other criminal punishment. As stated in *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976), "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

The fact that petitioner has been sentenced to death while the prosecutor did not even seek death against the other defendants demonstrates a lack of proportionality. Death is different, and an LWOP sentence does not compare to a sentence of death. Petitioner's death sentence is grossly disproportionate to the lack of punishment, and outright lack of prosecution, of coconspirator Damian Wilson. According to the prosecution, Damian Wilson and Eric Clark were intimately involved in the planning and carrying-out of the Comp USA robbery. Both were alleged to have been present at the "casing out" of the Comp USA when appellant took Ardell Williams to Del Taco for dinner. Both

were also placed at the Comp USA by Matt Weaver, who claimed that they each assisted in gaining his unknowing help in the robbery.

Nokkuwa Ervin clearly bore the highest degree of responsibility for the shooting of Kathy Lee. He shot her. The evidence showed that no one else intended that anyone would be shot. Nokkuwa Ervin made the decision to shoot her all on his own. And yet he received LWOP for his actions, while appellant received a death sentence based on him being held vicariously liable for Nokkuwa Ervin's actions. Appellant paid a higher price for Ervin's shooting of Lee than Ervin did.

It is true that appellant was tried and sentenced to death for both the Comp USA robbery and the Williams shooting. The prosecutor, however, opposed the severance. Moreover, the court failed to provide the jury with verdict forms which indicated in any way what the basis of the death sentence was. Thus, there is now no way to determine to what extent the jury's verdict was based on the Comp USA robbery, and to what extent it was based on the Williams shooting. Where it cannot be determined what the basis of a conviction or sentence was and one is faulty, reversal is required. *See, e.g., Suniga v. Bunnell*, 998 F.2d 664, 670 (9th Cir. 1993) ("Where two theories of culpability are submitted to the jury, one correct and the other incorrect, it is impossible to tell which theory of culpability the jury followed in reaching a

general verdict.") (*quoting Sheppard v. Rees*, 909 F.2d 1234, 1237-38 (9th Cir. 1989)).

Thus, it may be that appellant was sentenced to death based entirely on the Comp USA crimes, which rendered his sentence disproportionate in comparison to Ervin, Eric Clark and Damian Wilson. This result is entirely likely when one examines the evidence regarding each of the victims. Kathy Lee was the mother of Peter Lee, who worked at the Comp USA store and was a victim of the robbery. She was completely uninvolved in the events of that evening, and was tragically in the wrong place at the wrong time. Ardell Williams, on the other hand, had a lengthy criminal history. She had been convicted of grand theft and was on probation for it when she became acquainted with appellant. She committed additional crimes while on probation, including stealing from an employer–this time the Disney Corporation– and forging stolen and fraudulent checks in Las Vegas. She also went along with the others to the "casing" of the Del Taco and according to her, knew that it was to be robbed, but said nothing about it. In fact, she didn't come forward with any information about the Comp USA crimes until she needed help at sentencing for her Las Vegas case. The jury could well have decided that Kathy Lee was an entirely sympathetic victim while Ardell Williams was not, and weighed their verdict appropriately.

Imposition of the death penalty against petitioner fails to satisfy the constitutional requirement that a capital sentencing procedure rationally distinguish those who deserve the ultimate sanction from those who do not. *Godfrey v. Georgia,* 446 U.S. 420, 427 (1980). The necessity of particularized objective appellate review is a necessary component of a valid death penalty statute:

> The provision for appellate review in the Georgia capital sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury . . . [T]he appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

Gregg v. Georgia, supra, 428 U.S. at p. 206.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, as discussed above, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard

of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." *People v. Brown* (1988) 46 Cal.3d 432, 447. The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: 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– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina*, *supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard]).

Petitioner's death sentence is disproportionate to the crime committed and to the treatment of other principals in the crime. Petitioner's sentence violates the Fifth, Sixth, Eighth and Fourteenth Amendments, and must be vacated. Reversal is mandated, as the judgment here was entirely "swayed by the error," *Kotteakos v. United States, supra,* 328 U.S. at 765, and the error had substantial and injurious effect or influence in determining the

jury's verdict, resulting in actual prejudice. *Brecht v. Abrahamson, supra*, 507 U.S. at 623, 637, quoting *Kotteakos, supra*, 328 U.S. at 776.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 69
THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT A SENTENCE OF LIFE WITHOUT PAROLE MEANT THAT APPELLANT WOULD NOT BE PAROLED, AND THAT A SENTENCE OF DEATH MEANT THAT APPELLANT WOULD BE EXECUTED, VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, MANDATING REVERSAL

The trial court did not instruct the jury that a sentence of life without possibility of parole meant appellant would not be paroled at any time, and that a sentence of death meant appellant would be executed. These instructions were proper under *People* v. *Ramos* (1964) 36 Cal.3d 136, 159, n. 12, and *Caldwell* v. *Mississippi*, *supra*, 472 U.S. 320. *See also Simmons v. South Carolina* (1994) 512 U.S. 154.

There is a common perception that jurors do not believe that persons sentenced to die will be executed or that persons sentenced to serve life without parole will spend their entire lives in prison.[89]

The terms "life without the possibility of parole" and a "death sentence" were used in CALJIC 8.84, but were not defined.[90] This error violated

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89

(*See. e.g.*, *People* v. *Cox*, *supra*, 53 Cal.3d at p. 696 and *Bruce* v. *State* (1990) 569 A.2d 1254, 1268-1269 ["It is universally recognized that the literal words of a sentence to imprisonment are generally not an accurate indication of the effect of the sentence. . . ."].

90

If the trial court believed that such information was to be presumed, it should have so instructed the jury *sua sponte*. (*See People* v. *Fierro* (1991) 1

appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to liberty, fair trial, trial by jury, due process, notice, effective counsel, heightened capital case due process, reliable guilt determination, and individualized and reliable penalty determination. (*See Hicks*.v. *Oklahoma*, *supra*, 447 U.S. at p. 346; *Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 192; *Godfrey* v. *Georgia*, *supra*, 446 U.S. at pp. 428-429; *Stringer* v. *Black*, *supra*, 503 U.S. 222; *Zant* v. *Stephens*, *supra*, 462 U.S. at p. 865.)

There was an unacceptable risk that the jury did not choose the sentence with a full awareness of the gravity of their task, as required by the Eighth and Fourteenth Amendments, and reversal of the death judgment is required. (*Caldwell* v. *Mississippi*, *supra*, 472 U.S. at pp. 329-330.) The United States Supreme Court has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system. *See Jurek* v. *Texas*, 428 U.S. 262, 275 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (noting that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose"); *California* v. *Ramos*, 463 U.S. 992, 1003, n. 17 (1983) (explaining that it is proper for a sentencing

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Cal.4th 173, 250.)

jury in a capital case to consider "the defendant's potential for reform and whether his probable future behavior counsels against the desirability of his release into society").

The Due Process Clause forbids the execution of a person "on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977). The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death ought to be imposed. The Eighth Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case," *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976); *see also*, *e. g.*, *Godfrey* v. *Georgia*, 446 U.S. 420, 427-428 (1980); *Mills* v. *Maryland*, 486 U.S. 367, 383-384 (1988). It requires "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," *Gregg* v. *Georgia*, 428 U.S. 153, 190 (1976), and invalidates "procedural rules that tend to diminish the reliability of the sentencing determination," *Beck* v. *Alabama*, 447 U.S. 625, 638 (1980).

"An accurate description of sentencing alternatives helps the jury focus on its task of evaluating whether the circumstances of the case and the characteristics of the defendant warrant the imposition of a sentence of death." *Coleman v. Calderon*, 150 F.3d 1105, 1119 (9th Cir. 1998). This need for

heightened reliability mandates instructions on the meaning of the legal terms used to describe the sentences a jury is required to consider in making the reasoned moral choice between sentencing alternatives.

Appellant's parole ineligibility was "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death,'" *Skipper* v. *South Carolina*, 476 U.S. 1, 4-5 (1986) (*quoting Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978)). The jury should have been instructed that he would never be eligible for parole if he was sentenced to life without parole.

In *Simmons v. South Carolina, supra*, the Supreme Court explained:

> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole.

Id. at 163-64. It was error not to provide such instructions to the jury, considering the likelihood of confusion regarding whether appellant would truly spend the remainder of his life in prison.

The court's failure to explain to the jurors the actual effect of a sentence of life without the possibility of parole violated "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' " *Skipper v.*

South Carolina, 476 U.S. 1, 5, Fn. 1 (1986) (*quoting Gardner v. Florida,* 430 U.S. 349, 362 (1977)). Appellant was unable to challenge the mistaken "basis of information" (*Skipper, supra*, at p.5, fn. 1), which formed the juries' sentencing decision of death.

Further, the failure of the trial court to give the instruction violated the principles of *Caldwell v. Mississippi,* 472 U.S. 320 (1985), as interpreted in *Darden v. Wainwright,* 477 U.S. 168, 183, fn. 15 (1986), because it "misled the jury as to its role in the sentencing process in a way that allowed it to feel less responsible than it should for the sentencing decision." The effect of this choice between death and a life sentence, was to reduce, in the minds of the jurors, the gravity and importance of their sentencing responsibility. Because of their probable[91] distrust of "life imprisonment," the decision of the jury was simple. The jury selected the *only* choice of the two which they believed would keep appellant in jail for life.

91

Empirical studies in California establish that a substantial majority (77.8%) of death-qualified jurors disbelieve the literal language of "life without parole", believing instead that one who receives a sentence of "life without parole" will be released. *See* CACJ Forum (1994) Vol. 21, No. 2, pp. 42-45; see also, Haney, Sontag and Costanzo, Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death 50 Journal of Social Sciences No. 2 (Summer 1994). ["Four of five death juries cited as one of their reasons for returning a death verdict, the belief that a sentence of life without parole did not really mean that the defendant would never be released from prison..."].

These errors violated appellant's right to due process under the state and federal constitutions, and his right to reliability in the determination that death was the appropriate punishment, under the Eighth Amendment to the United States Constitution. The sentence of death must be reversed. As to each of these errors, reversal is mandated, as respondent can not demonstrate that they individually or collectively had no effect on the penalty verdict. (*Caldwell* v. *Mississippi*, *supra*, 472 U.S. at p. 341; *Hitchcock* v. *Dugger*, *supra*, 481 U.S. at p. 399.)

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, as discussed above, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

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and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: 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– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina*, *supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard]).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 70
THE DEATH PENALTY VIOLATES EQUAL PROTECTION PRINCIPLES UNDER BOTH THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW

Pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10 1984, Art 14 and 16, 23 I.L.M. 1027 (Entry into force for the United States November 20, 1994), Inter-American Convention on Human Rights, November 22 1969, Art 4 and 7, 1144 UNTS 123, 9 I.L.M. 673 (Entry into force July 18, 1978), International Covenant of Civil and Political Rights, December 19 1966, Art 2(3) and 6 -7, 999 UNTS 171, 6 I.L.M. 368 (Entry into force for the United States September 8, 1992), Second Optional Protocol to the International Covenant on Civil and Political Rights, December 15 1989, UN GAOR Supp. (No. 49) at 207, UN Doc. A/44/49 (1989) (Entry into force July 11, 1991), Article 18, Vienna Convention on the Law of Treaties, May 23 1969, Art 18, 1155 UNTS 331; 8 ILM 679 (Entry into force January 27, 1980), Bush v. Gore, 531 U.S. 98 (2000), as well as statutory and jurisprudential authorities cited below, and all other applicable constitutional, statutory, treaty, customary international law, evolving international standards, and jurisprudential authority, the death penalty is unconstitutional and otherwise

unlawful.

"The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (citations omitted). It is well established that when a defendant's life is at stake, a court must be "particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). This heightened standard of reliability is "a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The United States Supreme Court has repeatedly emphasized the principle that because of the exceptional and irrevocable nature of the death penalty, "extraordinary measures" are required by the Eighth and Fourteenth Amendments to ensure the reliability of decisions regarding both guilt and punishment in a capital

trial. *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). *See also Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); and *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

Under the Equal Protection principle that the Supreme Court announced in *Bush v. Gore*, 531 U.S. 98 (2000), current California law is unconstitutional because it fails to set forth uniform standards as to when a prosecutor should seek the death penalty in a potentially capital case. The intense reactions which greeted the *Bush* opinion in the fall of 2000 notwithstanding, the Supreme Court's holding in that case is quite simple: When fundamental rights are involved, the Equal Protection Clause of the Fourteenth Amendment requires that there be "uniform" and "specific" standards to prevent the arbitrary and disparate treatment of similarly situated people. *Bush*, 531 U.S. 106. Because the Florida Supreme Court did not set forth such standards in its opinion ordering a recount, but instead announced only that ballots should be counted according to a vague "intent of the voter" standard, the recount would not respect the "equal dignity owed to each voter." *Id.* at 104.

The California death penalty system concerns a right even more fundamental than the right to vote, that is, the right to life. As was true in the Florida recount, in California the lack of statewide standards to guide

prosecutors in determining which cases warrant seeking the death penalty inevitably leads to the disparate treatment of similarly situated people accused of potentially capital offenses. While the Supreme Court stated that its holding in *Bush v. Gore* was limited to the facts of that case, the principles it announced are sound and must be subject to respect as precedent. Those principles require that the method of deciding which defendants may face the death penalty be subject to at least as much scrutiny as the process of counting votes. The need for equality and non-arbitrariness when the state seeks to deprive a citizen of his life outweighs any benefits of unbridled prosecutorial discretion.

A. Because the right to life is a fundamental right which must be subject to at least the same constitutional protections as the right to vote, the state must establish safeguards to ensure that it does not treat its citizens in a disparate and arbitrary manner with respect to their lives.

If anything, courts must require more safeguards to ensure the equal treatment of all persons in the context of death penalty prosecutions than in that of an election recount. Whereas the right to vote is "fundamental" because of historical trends and legislative decisions, the right to life that is at stake in Georgia' system of capital punishment is the most fundamental of all rights, and accordingly is found in the very text of the Constitution.

In *Bush v. Gore* the Supreme Court recognized that the right to vote is not contained in the text of the Constitution: "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college." *Bush*, 531 U.S. at 104. However, "[h]istory has favored the voter," and since every state now chooses its electors through a statewide election, "the right to vote as the legislature has prescribed is fundamental." *Id.*

In contrast to the implied right to vote, the right to life is contained in the text of the Constitution. The Fifth and Fourteenth Amendments provide that neither the federal government nor the states shall deprive any person of "life, liberty, or property" without due process of law. U.S. Const. amend. V; amend. XIV, §1. The Supreme Court has long recognized the fundamental nature of the right to life, particularly in the context of the death penalty. *See*

Furman v. Georgia, 408 U.S. 238, 359 (1972) ("because capital punishment deprives an individual of a fundamental right (i.e., the right to life), . . . the State needs a compelling interest to justify it").

Because the right to life is fundamental, when a state implements a death penalty system it must establish mechanisms to ensure that system values the lives of its citizens equally. As the Supreme Court noted with respect to voting, "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104-05. By the same reasoning, since the Constitution has ensured the right to life and to the equal protection of the laws, a state may not, by arbitrary and disparate treatment, value one person's life over that of another. In the brief period since *Bush* was handed down, several commentators have taken notice of this result; *see* Laurence Benner et. al., *Criminal Justice in the Supreme Court: An Analysis of United States Supreme Court Criminal and Habeas Corpus Decisions (October 2, 2000 - September 30, 2001)*, 38 Cal. W. L. Rev. 87, 91 (forthcoming 2001) ("Certainly the *Bush v. Gore* equal protection principle ought to be no less applicable when a state permits "disparate treatment" of death eligible defendants because county prosecutors use differing standards for electing which defendants they will seek to execute"); Michael P. Seng, *Commentary:*

Reflections on when "We, the People" Kill, 34 J. Marshall L. Rev. 713, 717 (2001) ("Certainly, if a state or its courts cannot arbitrarily dilute or deny a person's right to vote because of the Equal Protection clause§, then human life must also be given equal protection"); Cass R. Sunstein, *Symposium: Bush v. Gore: Order without Law*, 68 U. Chi. L. Rev. 737, 758 (2001) (noting that the *Bush* holding might require that "methods be in place to ensure against the differential treatment of those subject to capital punishment").

California's lack of standards to ensure non-arbitrary treatment with regard to the fundamental right to life is enough in itself to establish an Equal Protection violation; a showing of intentional discrimination against a protected class is not required. *See Bush*, 531 U.S. at 106. While in traditional claims of discrimination against individuals, courts require evidence of discriminatory intent by a state actor in that particular case, *see, e.g., McCleskey v. Kemp*, 481 U.S. 279 (1987), in *Bush* the Court did not require any such showing. Unlike these traditional Equal Protection claims of intentional discrimination against a protected class, claims like this one and the one in *Bush* are not based on an individual act of discrimination, but rather challenge a system in which uncontrolled official discretion makes arbitrary and unequal treatment inevitable.

The California death penalty prosecution system must be subject to the

same Equal Protection constraints as the Florida recount. If the Equal Protection clause requires rules to ensure that localities do not treat "identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics" differently, *Bush*, 531 U.S. at 134 (Souter, J., dissenting) (agreeing with per curium that the lack of standards for the statewide recount violated the Equal Protection Clause but disagreeing as to the proper remedy), then it must require rules to ensure that localities do not treat similarly situated offenders committing the same types of crimes differently with respect to their lives. While the *Bush v. Gore* opinion declares that its "consideration is limited to the present circumstances," *Id.* at 109, suggesting that the principle announced might not apply to any other situations, the fundamental nature of the right to life requires that the principle also apply, as logically appropriate, to the death penalty system.

The *per curium* opinion explains the narrow scope of its holding by distinguishing the somewhat unusual situation of a court-ordered statewide recount from an ordinary election. In ordinary elections, the Court says, the Equal Protection Clause does not prohibit counties from developing "different systems for implementing elections." *Bush*, 531 U.S. at 109. One reason for this distinction is that once ballots have been cast, the "factfinder confronts a thing, not a person," and thus "[t]he search for intent can be confined by

specific rules designed to ensure uniform treatment." *Id.* at 106. Also, individual counties may have "expertise" that justifies letting them choose their own methods of conducting elections. *Id.* at 109. Another explanation is that "local variety [in voting machines and procedures] can be justified by concerns about cost, the potential value of innovation, and so on" whereas a "different order of disparity" occurs when, after ballots have been cast, physically identical ballots are hand-counted according to different rules. *Id.* at 134 (Souter, J., dissenting). Finally, of course, voting is different than capital punishment, and arguably the differences between the two might justify different constitutional analyses.

These explanations do not diminish the relevance of the *Bush* Equal Protection rule to California's death penalty system, however. Just as Florida counties can use different voting machines in their elections, California counties can certainly have separate prosecutors and can structure those prosecutors' offices differently; this allows the flexibility demanded by limited budgets and justified by local expertise, and takes into account the potential for innovation inherent in a system of local control. With regard to the Court's distinction between a "thing" and "person," although it is true that prosecutors charged with deciding when to seek the death penalty confront people and not things, this does not diminish the Equal Protection Clause's requirement of

non-arbitrariness. While it might be easier to design standards about whether to count "hanging chads" as legal votes, it is certainly possible to write standards to guide prosecutors in deciding whom to prosecute. *See, e.g., United States Attorneys' Manual* §9-10.010 et. seq. (1995) (laying out "federal protocol" for capital cases); U.S. Department of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review* (2001) 6, http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm. It is obviously true that elections and capital punishment are different, but the fact remains that both involve a fundamental right and therefore both require the same "minimum requirement for non-arbitrary treatment," *Bush*, 531 U.S. at 105. The Fourteenth Amendment protections required in an election recount do not derive from the candidates' right to have all the votes for them counted correctly, but from the "equal dignity owed to each voter," *Id.* at 104. Surely the equal dignity owed to each person's life requires no less.

B. The lack of standards to guide local prosecutors in their decisions as to whether to seek the death penalty inevitably leads to the arbitrary and disparate treatment of similarly situated defendants.

It is not necessary to imagine what disparities might result from a system wherein a multitude of local prosecutors each used different standards

for determining whether to seek the death penalty, because that is the system that exists in California today. California law provides no standards to guide prosecutors in their decisions as to when to seek the death penalty; instead, prosecutors in each county make such decisions on their own, according to unwritten and widely varying standards. The result is that whether a person charged with a capital crime will face the death penalty depends largely on arbitrary factors such as the county in which the crime occurred and, even more disturbingly, the race of the victim. While under the *Bush* standard it is not necessary to show that a standardless system has, or will have, a disparate or discriminatory impact, the evidence of such an impact in Georgia underlines the arbitrariness inherent in such a system. Statewide standards would remedy this blatant violation of the Equal Protection Clause.

Current Californiia law does not comply with the Equal Protection Clause's "minimum requirement for non-arbitrary treatment," *Bush*, 531 U.S. at 105, because it contains no standards as to when local prosecutors should seek the death penalty in a potentially capital case. While the law contains provisions to limit the class of offenders eligible for the death penalty and to allow for individualized sentencing determinations by juries, *see* Cal. Penal Code §§ 190.2, 190.3, it does not contain any standards to guide a prosecutor's decision as to whether or not to seek the death penalty. Cal. Penal Code §

190.2 defines special circumstances which narrows the class of alleged murderers who are potentially subject to the death penalty, but §190.3 does not indicate how local prosecutors are to distinguish among the class of defendants charged with murder to determine who should face a possible death sentence and who should not. Furthermore, the universe of cases that may be pursued as capital crimes in California is particularly broad because California defines felony murder simpliciter as being death-eligible. Cal. Penal Code §190.2(a)(17).

Worse, Georgia law does not even provide an "abstract proposition" or a "starting principle," *Bush*, 531 U.S. at 106, as to how local prosecutors ought to make these life-and-death decisions. In *Bush v. Gore*, the Florida Supreme Court had at least set forth a general principle about how the recount was to proceed; counties were to judge the "intent of the voter." By contrast, California law does not provide any such starting principle to guide prosecutors in their decision as to when to seek the death penalty.

The *Bush* Court surveyed some examples of the kinds of disparities in vote-counting procedures that the lack of uniform standards had allowed to occur. The examples were merely illustrative of the kinds of problems that would result from an Equal Protection Clause violation; a showing of inequality in the treatment of individual voters or protected classes of voters

was not required to prove that violation. As the Court noted, "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another." *Bush*, 531 U.S. at 106. Some counties changed their standards for what constituted a legal vote multiple times during the course of the recount, while in others different members of the county canvassing boards applied different standards. *Id.* The Court observed, "Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties." *Id.* at 107. Thus, a statistical disparity between the number of "new votes" discovered and the population of the counties was evidence of the unconstitutionality of the standardless system.

California's system, or lack of system, for determining who will face a possible death penalty results in levels of disparity and arbitrariness that dwarf the problems in the Florida election recount. As in the Florida recount, standards vary from county to county, and even within a county the standards may change dramatically when a new district attorney is elected. Whether life-and-death decisions are made according to legally relevant criteria or by whim is often impossible to determine, since standards are generally not written down.

The importance of the personal philosophy of individual District Attorneys in determining who will face the death penalty cannot be underestimated. "Indeed, the willingness of the local prosecutor to seek the death penalty seems to play by far the most significant role in determining who will eventually be sentenced to death." Richard Willing and Gary Fields, *Geography of the Death Penalty*, USA Today, December 20, 1999, at 1A.

The vast discretion that prosecutors have in seeking the death penalty creates unconstitutional arbitrariness in the infliction of the death penalty. Some prosecutors seek the death penalty frequently, some occasionally, and some never seek it. In California and other states where capital punishment is imposed, there are particular localities that sentence a vastly disproportionate number of people to die. The new death penalty statutes passed after *Furman v. Georgia* were supposed to end this arbitrariness, but have failed to do so.

The importance of race as a factor in the imposition of capital punishment is well documented. First, the evidence reveals disparity in the application of the death penalty depending on the race of the victim. Individuals charged with killing white victims are significantly more likely to receive the death penalty than individuals charged with killing non-white victims. Of numerous studies of death penalty outcomes reviewed by the congressional General Accounting Office (GAO), 82 percent found that

imposition of the death penalty was more likely in the case of a white victim than in the case of a black victim. One of the most thorough and elaborate death penalty studies in the country was conducted with data from Georgia by David Baldus, Charles Pulaski, and George Woodworth. *See* David C. Baldus et al., COMPARATIVE REVIEW OF DEATH SENTENCES: AN EMPIRICAL STUDY OF THE GEORGIA EXPERIENCE, 75 J. Crim. L. & Criminology 661 (1983); *see also* David C. Baldus et al., Equal Justice and the Death Penalty (1990). **A key finding in this study was the critical significance of the prosecutors' decision to seek the death penalty. After extensive controls, clear race-of-victim effects emerged.** Specifically, where there were three or four statutory aggravating factors, prosecutors were far more likely to seek the death penalty when the victims were white. David C. Baldus, Charles Pulaski, and George Woodworth, COMPARATIVE REVIEW OF DEATH SENTENCES: AN EMPIRICAL STUDY OF THE GEORGIA EXPERIENCE, 74 J. Crim. L. & Criminology 661, 709 (Baldus Study) (Fall 1983).

The Baldus study found that defendants in Georgia accused of killing white victims were 4.3 times more likely to be subject to capital prosecution and receive the death penalty than defendants accused of killing black victims. The Baldus study also found that more than 50 percent of those sentenced to death for killing a white person would not have received the death penalty had

they killed a black person. **According to the GAO, the effect of the victim's race on the sentencing outcome appears to be particularly pronounced at the earlier stages of the judicial process, such as the prosecutor's decision to charge the defendant with a capital offense and then whether or not to accept a guilty plea to lesser charges.** *Id.*

Second, while some of the evidence concerning the death penalty reveals that the race of the defendant alone does not result in unwarranted disparity, other evidence is to the contrary. It is at least true that the race of the defendant, when combined with the race of the victim, yields significant disparities in the application of the death penalty. The Baldus study concluded that blacks who killed whites were sentenced to death 22 times more frequently than blacks who killed blacks, and seven times more frequently than whites who killed blacks. **Again, this discrepancy appears to hinge on the exercise of prosecutorial discretion.**

In short, black defendants charged with killing white victims were the group most likely to receive the death penalty. Until 1991, when Donald Gaskins, a white man, was executed in South Carolina for the murder of a black victim, no white person had been executed for the murder of a black person since the Supreme Court's 1976 decision in *Furman v. Georgia* holding that capital punishment is not necessarily unconstitutional. The Baldus Study

revealed that of the seven individuals executed in Georgia between 1976 and 1986, all were convicted of killing whites, and six of them were black, despite the fact that of all homicides in Georgia during that period, only 9.2 percent involved black defendants and white victims, and 60.7 percent involved black victims. David C. Baldus, Charles Pulaski, and George Woodworth, COMPARATIVE REVIEW OF DEATH SENTENCES: AN EMPIRICAL STUDY OF THE GEORGIA EXPERIENCE, 74 J. Crim. L. & Criminology 661-753 (Baldus Study) (Fall 1983). When the fundamental right to life is implicated, the lack of statewide standards as to when prosecutors should seek the death penalty has led to a system lacking the "minimum requirement for non-arbitrary treatment," *Bush*, 531 U.S. at 105, that the Equal Protection Clause requires.

As was the case in the Florida recount, the lack of standards in California's death penalty prosecution system leads to glaring disparities in the number of people sent to death row in different counties. Just as the more lenient standards for counting ballots in Broward County as compared to Palm Beach County led to a "markedly disproportionate" number of new votes being discovered in Broward County, *Bush*, 531 U.S. at 107, the different standards employed by prosecutors in California leads to people being sentenced to death at rates markedly disproportionate their counties' populations and murder

rates.

Even more disturbing than the differences among county prosecutors' approaches to deciding whether to seek the death penalty are the racial disparities evident in their decisions. As discussed above, researchers have concluded that all other things being equal, Georgia prosecutors sought the death penalty in 70 percent of the cases involving black defendants and white victims, while seeking the death penalty in only 19 percent of the cases involving white defendants and black victims, and only 15 percent of the cases involving black defendants and black victims. David C. Baldus, Charles Pulaski, and George Woodworth, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," 74 J. Crim. L. & Criminology 661-753 (Baldus Study) (Fall 1983).

These racial disparities are a problem across the nation. A study done by the General Accounting Office found that 82% of studies done nationwide showed that the race of the victim influenced the likelihood of a defendant's being charged with capital murder or receiving the death penalty. That is, "those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks." United States General Accounting Office, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES, GDD-90-57, 5 (1990),

http://www.gao.gov/docdblite/summary.php?recflag=&accno=140845&rptno=GGD-90-57. The "evidence for the race of the victim influence was stronger for the earlier stages of the judicial process (e.g., prosecutorial decision to charge defendant with a capital offense, decision to proceed to trial rather than plea bargain) than in the later stages." *Id.* It is evidence like this that has led the New Jersey Supreme Court to "strongly recommend" that the state adopt "guidelines for use throughout the state by prosecutors in determining the selection of capital cases." *State v. Koedatich*, 548 A.2d 939, 955 (1988); *State v. Marshall*, 613 A.2d 1059, 1112 (1992). These guidelines would not only help to ensure uniformity, but would "be able to screen out any possible effects of race or socioeconomic status in the charging and selection process." *Marshall*, 613 A.2d at 1112. The *Bush* Equal Protection principle makes such a system not just beneficial, but constitutionally required.

C. The integrity of the rule of law and of the judicial system demands that courts treat the Equal Protection principle announced in *Bush v. Gore*

seriously and afford it precedential weight.

The circumstances surrounding the 2000 Presidential election and the *Bush* ruling were certainly unusual, but that fact cannot diminish the validity of the Court's reasoning or its applicability to future cases. The authority of our judicial system depends upon the presumption that court rulings are based on principles rather than on the personal political viewpoints of judges. This is ensured by the principle of *stare decisis*, which literally means, "to stand by things decided." Black's Law Dictionary, Seventh Edition, p. 1414 (1999). *Stare decisis* ensures that there will be stability and predictability in the legal system, and that decisions will be made according to law, not men. As Robert Bork has written:

> The requirement that the Court be principled arises from the resolution of the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic . . . [I]t follows that the Court's power is legitimate only if it has and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution . . . If it does not have such a theory but merely imposes its own value choices . . . the Court violates the postulates of the Madisonian model that alone justifies its power.

Robert H. Bork, NEUTRAL PRINCIPLES AND SOME FIRST AMENDMENT PROBLEMS, 47 Indiana L.J. 1, 2-3 (1971). To write off the *Bush* decision as

a politically motivated anomaly or to consider its rule to be valid on one day only would thus undermine the foundations upon which the judicial system depends.

Although some portions of the *Bush v. Gore* decision are vulnerable to criticism, its core Equal Protection holding is neither implausible nor unsupportable. While many judges and commentators have questioned parts of the ruling, that criticism has focused on the Court's remedy, which was to declare that a statewide recount could not be conducted under any circumstances. *Bush*, 531 U.S. at 127 (Stevens, J., dissenting), 135 (Souter, J., dissenting), 143 (Ginsburg, J., dissenting), 147 (Breyer, J., dissenting); David A. Strauss, SYMPOSIUM: BUSH V. GORE: WHAT WERE THEY THINKING?, 68 U. Chi. L. Rev. 737 (2001); Cass R. Sunstein, ORDER WITHOUT LAW, 68 U. Chi. L. Rev. 757 (2001). However, as the *per curium* opinion noted, seven Justices were in agreement on the basic premise that the Florida Supreme Court's recount order violated the Equal Protection Clause because it lacked standards to ensure the non-arbitrary treatment of voters. *Bush*, 531 U.S. at 111 (referring to Justices Souter and Breyer and the five Justices who signed the per curium opinion). Similarly, even critics who lambasted the decision allowed that the Equal Protection reasoning in the opinion, while not dictated by the Court's prior precedents, was reasonable and even

praiseworthy. Thus, erstwhile critics commented that the Court's interpretation of the Equal Protection clause "has considerable appeal," Sunstein, *supra*, at 773, and "can be seen both as an extension of the Warren Court's vision of democracy and as a logical implication of the view, seriously proposed a generation ago, that the Constitution limits the degree to which discretion can be vested in executive officials of both the state and federal governments." Strauss, *supra*, at 740. The closeness of the election and the political implications of the Court's decision cannot mean that the reasonable principle upon which its ruling was based can be ignored.

To the extent that the Equal Protection principle in *Bush v. Gore* conflicts with the Court's declaration that the holding only applies to the particular circumstances of the 2000 Presidential election, the principle must take precedence. It is certainly appropriate and wise for courts to limit their holdings to the facts of the particular case with which they are confronted. However, in a legal system based on precedent, a legal principle cannot be valid on one day and not the next. The reasoning of *Bush v. Gore*, like that of any of the Court's rulings, must apply in other situations to which it logically extends. The Equal Protection Clause means that when a fundamental right is concerned, states must establish standards to ensure that localities do not treat similarly situated citizens in an arbitrarily disparate manner. Thus,

California's death penalty prosecution scheme, which provides no standards to ensure the non-arbitrary treatment of capital offenders by prosecutors, is unconstitutional.

D. The need for non-arbitrary standards in the application of the death penalty outweighs any benefits of unbounded prosecutorial discretion.

No argument for prosecutorial discretion can justify a system that contains no safeguards to ensure that the lives of offenders are treated with equal dignity. Because the right to life is fundamental, if California is to maintain such a system, its justifications for that system would have to pass strict scrutiny. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (reversing an order to sterilize a felon because the law allowing for sterilization did not pass strict scrutiny, as it treated larceny and embezzlement differently despite their being essentially the same crime). In order to pass strict scrutiny, the state would have to show that allowing prosecutors unbridled discretion as to when to seek the death penalty is necessary to achieve a compelling governmental interest. Our constitutional structure does not bar courts from evaluating the Constitutionality of the system by which prosecutors decide whether or not to seek the death penalty. Neither do the arguments in favor of prosecutorial discretion that have been made over the years justify the arbitrary imposition of the death penalty.

The separation of powers doctrine does not bar courts from requiring some restraint on prosecutorial discretion. Courts can and do evaluate particular prosecutorial decisions for Equal Protection violations; *see, e.g., United States v. Armstrong*, 517 U.S. 456 (1996) (declining to allow discovery on defendant's selective prosecution claim but allowing that such discovery

could be allowed if petitioner had shown that the Government had declined to prosecute similarly situated persons of other races); *Wayte v. United States*, 470 U.S. 598 (1985) (evaluating the prosecution of a man for refusing to register with the Selective Service System under a "selective prosecution" Equal Protection analysis); *United States v. Batchelder*, 442 U.S. 114, 125 (1979) (noting that while it is broad, prosecutorial discretion is nonetheless "subject to constitutional constraints"); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1977) (same); *Oyler v. Boles*, 368 U.S. 448 (1962) (same); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (ordering the release of Chinese petitioners who were prosecuted and jailed for operating laundries without a permit while similarly situated Caucasian laundry operators were not prosecuted). In selective-prosecution and vindictive prosecution cases, courts are deferential to prosecutorial decisions and require "clear evidence" to rebut the presumption that prosecutors have acted legally. *Armstrong*, 517 U.S. at 464, *quoting United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926). Because of concerns about the separation of powers, courts refuse to force district attorneys and U.S. Attorneys to prosecute particular offenders, as doing so would "encroach[] on the prerogatives of another department of the Government." *United States v. Shaw*, 226 A.2d 366, 368 (1967); *see also Newman v. United States*, 382 F.2d 479 (1967); *United States v. Cox*, 342

F.2d 167 (1965). However, "there is an enormous difference between, on the one hand, forcing a prosecutor to charge or stripping him of authority to charge and, on the other, regulating that authority . . ." James Vorenberg, DECENT RESTRAINT OF PROSECUTORIAL POWER, 94 Harv. L. Rev. 1521, 1546 (1981). This claim is not attacking a particular decision of an individual prosecutor as vindictive or selective, nor is it asking this court to force a prosecutor to file charges in a particular case. Rather, it is alleging that the laws of Georgia violate the Equal Protection Clause by their failure to establish standards according to which prosecutors are to decide whether to seek the death penalty in a potentially capital case. "The law has long recognized the distinction between judicial usurpation of discretionary authority and judicial review of the statutory and constitutional limits to that authority." *Nader v. Saxbe*, 497 F.2d 676, n. 19 (1974). After conducting such a review, this court must conclude that Georgia' system of determining whether offenders will face the death penalty violates the Constitutional guarantee of equal protection.

As the Court noted in *Bush v. Gore*, despite the "limits on judicial authority" imposed by the Constitution, when Constitutional violations are brought to the attention of the courts, "it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." *Bush*, 531 U.S. at 111. When faced with a Constitutional

violation, courts cannot wait for the Legislature to take action.

The frequently cited reasons for allowing prosecutors broad discretion as to what charges to bring cannot justify a system which allows some defendants' lives to be arbitrarily valued less than others'. Because of the fundamental nature of the right to life, such rationale would have to pass strict scrutiny. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The primary justification for judicial noninterference with prosecutorial decisionmaking is that judicial review of individual prosecutorial decisions would be difficult or inefficient. *Wayte v. United States*, 470 U.S. 598, 607 (1985). One reason that courts may have difficulty reviewing prosecutors' decisions as to whether to seek the death penalty is that there are no clearly articulated, uniform standards by which those decisions are to be made. If such standards were in place, judicial review would be much more feasible. Further, the existence of statewide standards would not mean that courts would have to begin micro-managing prosecutors' offices; they could remain fairly deferential to prosecutors' decisions as long as prosecutors were able to justify their decisions according to the standards. *See* Vorenberg, *supra*, at 1546-47. Concerns about the increased burden on courts and prosecutors that would result from statewide standards certainly cannot justify ignoring constitutional requirements. Standards to guide a prosecutor's discretion as to when to seek

the death penalty would not constitute a mandatory death penalty, nor would they completely eliminate prosecutors' discretion or ability to consider the individual circumstances of each case. Statewide standards would simply provide "some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." *Bush*, 531 U.S. at 109.

Other rationale for broad prosecutorial discretion are similarly unable to excuse the disparities and arbitrariness of California's current system. Such considerations as the need for flexible use of prosecutorial resources based on changing enforcement priorities or the loss of deterrence which might result from revealing prosecutorial motives are not "compelling governmental interests" which can overcome the need for non-arbitrariness when the state decides whether to seek to take a defendant's life. While such explanations may justify broad discretion in the rest of the criminal justice system, they cannot do so when life is at stake. Allowing decisions as to whether to seek the death penalty to be made based on an individual prosecutor's feeling that a particular type of crime needs to be deterred more than another allows an unconstitutional degree of arbitrariness. Further, even if these reasons for allowing broad prosecutorial discretion were "compelling" by themselves, they cannot justify the risk that life-or-death decisions might be made on the basis of mere caprice or, worse, racial prejudice.

E. Statewide standards to guide prosecutorial discretion would advance the Eighth Amendment goal of non-arbitrariness in capital proceedings.

Requiring standards to ensure that prosecutors do not, through the exercise of unfettered discretion, arbitrarily value some peoples' lives over others' would not only ensure that the California death penalty system complied with the Equal Protection Clause, but would further the Eighth Amendment goal of reliability and consistency in the death penalty. In 1972 the Supreme Court invalidated the death penalty in part on the grounds that the standardless death penalty statutes then in effect allowed the ultimate punishment to be applied "wantonly and freakishly," *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring), and that in practice there was no meaningful basis for distinguishing between the cases in which it was applied and those in which it was not, *id.* at 313 (White, J., concurring). Four years later when the court approved new death penalty statutes, it held that state legislatures had confronted these problems by drafting statutes that provided the sentencer with guidance in determining the appropriate sentence and narrowed the sentencer's discretion to impose the death penalty. *Jurek v. Texas*, 428 U.S. 262, 270 (1976); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). The new statutes did not, however, require states to provide standards to guide prosecutors' decisions as to whether to seek the death penalty in the

first place. *See* Tex. Code Crim. Proc. art. 37.071 (2000). As Justice Brennan has pointed out,

> . . . discrimination and arbitrariness at an earlier point in the selection process nullify the value of later controls on the jury. The selection process for the imposition of the death penalty does not begin at trial; it begins in the prosecutor's office. His decision whether or not to seek capital punishment is no less important than the jury's. Just like the jury, then, where death is the consequence, the prosecutor's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." . . . The prosecutor's choices are subject to no standards, no supervision, no controls whatever . . . if the price of prosecutorial independence is the freedom to impose death in an arbitrary, freakish, or discriminatory manner, it is a price the Eighth Amendment will not tolerate.

DeGarmo v. Texas, 474 U.S. 973, 975 (1985) (Brennan, J., dissenting from denial of cert.). If imposing the death penalty on a freakishly and randomly selected subset of those who commit murder violated the Eighth Amendment, *see Furman*, then surely allowing prosecutors to choose, without any standards whatsoever, what subset of those accused of capital murder will face the death penalty is equally unconstitutional.

In light of the new Equal Protection analysis of *Bush v. Gore*, the Supreme Court's previous approval of California's system for selecting which defendants should face the death penalty must be revisited. The Court has

reasoned that such unbounded prosecutorial discretion does not violate the Eighth Amendment because a prosecutor's decision not to seek the death penalty when the law allowed him to do so involved the valid "decision to afford an individual defendant mercy" rather than the unconstitutional decision to impose the death penalty on a "capriciously selected group of offenders." *Gregg*, 428 U.S. at 199. This analysis considers arbitrariness only from the point of view of an individual defendant facing trial, not from the point of view of the death penalty system as a whole. While statutes channeling the discretion of the jury can reduce the dangers of arbitrary jury decisions in a particular case, they cannot change the arbitrariness inherent in a system in which the decision as to which capital defendants face that sentencing jury is not guided by any standards. Put another way, if local prosecutors decide to "afford mercy," that is, decline to seek the death penalty, based on vastly different standards, or racially discriminatory standards, or no standards at all, the result remains an arbitrary and capricious system. The insight of the *Bush v. Gore* Equal Protection reasoning is that arbitrariness can exist not just when an individual defendant (or ballot) is subjected to a judgment that is not guided by any standards, but also when an entire system lacks consistent standards so that defendants (or ballots) in each locality may be subjected to a different standard.

The evidence that individual prosecutors do, indeed, use vastly different standards to decide whether to seek the death penalty also requires a re-evaluation of the Supreme Court's approval of unbounded prosecutorial discretion. In a concurrence in *Gregg*, Justice White expanded on the reasons why he thought unbounded prosecutorial discretion did not violate the Eighth Amendment, writing that "absent facts to the contrary" he would not assume that prosecutors would "exercise [their] power in a standardless fashion." *Gregg*, 428 U.S. at 225 (White, J., concurring). Justice White assumed that "the standards by which [prosecutors] decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and innocence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong." *Id.* In fact, as discussed above, under the current system it is decidedly not the case that all prosecutors seek the death penalty in every death-eligible case unless they think that a jury would not return a death sentence. In view of these facts, the assumption that no channeling of prosecutors' discretion is necessary is obviously wrong.

The New Jersey Supreme Court, noting the constitutional problems inherent in a system wherein prosecutors employ widely varying standards in

deciding whether to seek the death penalty, has called for standards to "instill uniformity in charging and prosecuting practices throughout the state." *State v. Marshall*, 613 A.2d 1059, 1112 (1992). That court acknowledged that courts should not usurp the decision-making function of prosecutors, but argued that in light of the "need to promote uniformity in the administration of the death penalty," statewide standards were warranted. *State v. Koedatich*, 548 A.2d 939, 955 (1988). These recommendations were made on the basis of the Eighth Amendment requirements of reliability and non-arbitrariness in capital proceedings. Combined with the Equal Protection requirement of standards to ensure equality with regards to fundamental rights, such standards are not just advisable, but constitutionally required.

F. Other courts have recognized that the Fourteenth Amendment requires limiting discretion to ensure equality and non-arbitrariness in governmental decisionmaking.

Bush v. Gore was not the first time a court has held that a system in which government officials had unbounded discretion was unconstitutional. The Supreme Court and federal appellate courts have found violations of the Fourteenth Amendment when governments and governmental agencies have unlimited discretion to select among qualified applicants for licenses and government benefits. Those courts reasoned that allowing governmental

decisionmakers to make these choices without any uniform standards allowed an intolerable amount of arbitrariness. Although the these cases have not been widely followed, they provide further persuasive backing for the Equal Protection holding in *Bush* and for the necessity of some restraint of prosecutorial discretion in the Georgia death penalty system.

The Supreme Court has held that a lack of standards in a scheme of issuing permits, and the arbitrary and discriminatory refusal to grant permits to one group when they were routinely granted to other groups, violated the Equal Protection Clause. *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951) (alternative holding). In that case, a City Council refused to grant a permit to a group of Jehovah's Witnesses who wished to hold a meeting in a public park. While that case also involved the First Amendment and a prior restraint on the freedom of speech and religion, *id.* at 271, the Court found that the complete discretion vested in the City Council as to whether or not to grant permits in itself violated the Equal Protection Clause. The Fifth Circuit applied similar reasoning to a case not involving the First Amendment in *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964). The city of Atlanta's system for granting liquor licenses violated the Equal Protection Clause because it operated under no standards and allowed the city to arbitrarily deny the applications of eligible applicants. *Id.* at 610. The court rejected the city's argument that because

liquor licenses were not protected rights or entitlements but rather "privileges" the Equal Protection requirement of non-arbitrary standards did not apply. *Id.* While "government bodies have great latitude in enacting reasonable standards," they do not have the latitude to make decisions "on the basis of uncontrolled discretion and whim" or "without any established standards." *Hornsby v. Allen*, 330 F.2d 55, 55 (5th Cir. 1964) (denying petition for reh'g). For the same reason, the problems of arbitrariness inherent in a standardless system for choosing among "non-preference" applicants for public housing violated the Due Process Clause. *Holmes v. New York City Hous. Auth.*, 398 F.2d 262 (1968).

As in these cases, where governmental decisionmakers had complete discretion as to which eligible applicants they would grant permits to or accept into public housing, in the California death penalty prosecution system each individual prosecutor has complete discretion as to which death-eligible defendants will face a possible death sentence and which will not. This standardless system allows for the arbitrary treatment of defendants' lives and is thus unconstitutional. Even if a prosecutor's decision not to seek the death penalty is a "privilege" granted to some capital defendants but not others, the decision whether to grant that privilege cannot be left to the unfettered discretion of individual prosecutors. Such a system allows for an unacceptable

level of arbitrariness in a life-or-death context. Of course, mandating that prosecutors seek the death penalty in any death-eligible case would not solve these problems. Such a mandate would not only mean a tremendous misuse of time and money, but would run afoul of the Eighth Amendment requirement of individualized consideration of each offender and the related prohibition against "unduly harsh and unworkably rigid" mandatory death penalty statutes. *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976). While the reasoning in *Holmes* and *Hornsby* and the alternative holding in *Niemotko* have not been widely followed, their support for the reasoning in *Bush v. Gore* reinforces the validity of that case's reasoning and underlines the fact that a system of unfettered discretion, like California' standardless system for deciding whether to seek the death penalty in capital cases, violates the Equal Protection Clause.

CLAIM 71
APPELLANT'S DEATH SENTENCE IS ARBITRARY UNDER INTERNATIONAL LAW

The right to life is the most fundamental of the human rights contained in the International Bill of Rights. *See, e.g.*, Universal Declaration on Human Rights, GA Res. 217A (III), U.N. GAOR, 3d Sess. art. 3, U.N. Doc. A/810 (1948)("Everyone has the right to life, liberty, and security of the person"); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, 999 U.N.T.S. 171, 174-75 (*entered into force* Mar. 23, 1976)("Every human being has the inherent right to life"). A number of human rights instruments also provide that a state may not take a person's life "arbitrarily." *See, e.g.*, ICCPR, art. 6; American Convention on Human Rights, art. 4, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 4 EHRR 417, 21 I.L.M. 58, art. 4. In evaluating "arbitrary arrest and detention" (barred by Art. 9(1) of the ICCPR), the Human Rights Committee, relying on drafting history, concluded that "arbitrariness" is not to be equated with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.

The Inter-American Court on Human Rights has addressed the meaning of "arbitrary" executions in an advisory opinion regarding the

interpretation of the Vienna Convention on Consular Relations. OC-16/99, Inter-Am. Ct. H.R. (October 1, 1999). That Court observed that states may impose the death penalty only if they rigorously adhere to the due process rights set forth in the ICCPR. The court concluded that the execution of a foreign national after his consular notification rights have been violated would constitute an "arbitrary deprivation of life" in violation of international law. *Id.* at 76, para. 137. By analogy, the execution of an individual is prohibited as "arbitrary" if a state violates any of the principles contained in the ICCPR. As discussed *infra, supra,* appellant's conviction and sentence violate numerous provisions of the ICCPR.

Various delegates involved in the drafting of the ICCPR proposed the following definitions of the term "arbitrary" (1) fixed or done capriciously or at pleasure; (2) without adequate determining principle; (3) depending on the will alone; (4) tyrannical; (5) despotic; (6) without cause upon law; and (7) not governed by any fixed rule or standard. Schabas at 76. In *Van Alphen v. The Netherlands*, the Human Rights Committee held that "arbitrariness" encompasses notions of inappropriateness, injustice, and lack of predictability. (No. 305/1988), U.N. Doc. A/45/40, Vol. II, p. 108, §§5.8. *See also* Daniel Nsereko, *Arbitrary Deprivation of Life: Controls on Permissible Deprivations*, in The Right to Life in International Law 248

(Bertrand Ramcharan, ed., 1985)(deprivation of life is arbitrary if it is done in conflict with international human rights standards or international humanitarian law).

Appellant's death sentence is arbitrary under any of these criteria. The California statutory system fails to truly narrow the scope of death eligible offenses. The result is that virtually any first-degree murder satisfies one or more aggravating circumstances. Considering the small percentage of first degree murders which result in death sentences, there is little correlation between the severity of the offenses and the sentence imposed. Consequently, there is no predictability as to when a sentence of death will be rendered. The lack of any proportionality review exacerbates these infirmities. The result is that under whatever standard applied, appellant's death sentence is arbitrary.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, as discussed above, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable

probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." *People v. Brown* (1988) 46 Cal.3d 432, 447. The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: 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– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina, supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the

reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard]).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 72
APPELLANT'S RIGHT TO BE TRIED BEFORE AN IMPARTIAL TRIBUNAL WAS VIOLATED BY DEATH QUALIFICATION PROCEDURES

Article 14 of the ICCPR guarantees the right to a "fair and public hearing by a competent, independent, and impartial tribunal," and the right to be presumed innocent. ICCPR, art. 14(1); (2). In its Implementing Comments, the drafters stressed that Article 14 must be read as broadly as needed to root out the threat to fairness that arises in a particular proceeding. ICCPR, General Comment on Implementation, Para. 5. And finally, Article 26 specifically guarantees that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law." ICCPR, Art. 26. The Human Rights Committee has held that "[t]he right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception." *Gonzales del Rio v. Peru*, No. 263/1987, H.R. Comm. para. 5.2 (1992). Moreover, in *Richards v. Jamaica*, No. 535/1993, H.R. Comm. para. 7.2 (1997), the Committee found a violation of Article 14 in a capital case involving extensive pretrial publicity, and ruled that Jamaica could not lawfully carry out the execution. *Id.*

The Committee's decision in *Richards* is consistent with the notion that nations must rigorously observe a defendant's fair trial rights in capital cases, and may only impose the death penalty where these standards are observed.

William Schabas, The Abolition of the Death Penalty in International Law 108-09 (1997).

Appellant's jury was also selected after being "death qualified" pursuant to *Hovey* and *Witherspoon*. This selection process unfairly skewed the jury pool to conviction-prone and death-prone jurors, and resulted in a biased tribunal.

As noted above, appellant's jury was subjected to inflammatory and irrelevant evidence. This evidence served to arouse the passions of the jury and made them decide the case based on passion and not a careful weighing of the evidence. The misconduct of the prosecutor further exacerbated this error. The jury which rendered a verdict and sentence was not independent and impartial. Reversal is mandated.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, as discussed above, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

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> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: 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– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina*, *supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable

doubt standard]).

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 73
APPELLANT HAS A RIGHT TO LITIGATE VIOLATIONS OF HIS RIGHTS BEFORE INTERNATIONAL TRIBUNALS

The United Nations has established committees to monitor the enforcement of the ICCPR and the Torture Convention, but the United States does not accept their jurisdiction to hear individual complaints of treaty violations. As a result, individuals in the United States may not petition these committees to hear their individual cases. The United States failure to obey its treaty commitments violated the Constitution, which makes treaties the "Supreme Law of the Land." Customary international law also dictates that the United States accept jurisdiction from the body put in place to monitor and enforce the ICCPR.

There are two bodies that address human rights violations in the Americas: the Inter-American Commission of Human Rights, and the Inter-American Court on Human Rights. Individuals may file complaints with the Commission alleging violations of human rights set forth in the American Declaration of the Rights and Duties of Man and/or the American Convention on Human Rights. Individuals may also petition the Commission for "precautionary measures," or injunctive relief. In death penalty cases with imminent execution dates, appellants may request that the Commission issue precautionary measures that call for a stay of execution. The Commission

follows diplomatic protocol, and is not a court. When requesting a stay of execution, the Commission will send a letter to the U.S. Secretary of State describing the basis for its request. The State Department must then relay the request to the appropriate state authorities. Appellant has not yet filed any such complaints, out of respect for the jurisdiction of this Court. The Inter-American Commission also has the power to conduct on-site investigations and hearings.

The United States has not accepted the jurisdiction of the Inter-American Court on Human Rights to resolve "contentious cases," or cases in which an individual or country seeks redress for wrongdoing by the United States. As discussed above, this refusal violates both treaty law and customary international law.

The Inter-American Court has jurisdiction to issue advisory opinions "regarding the interpretation of the [American] Convention or other treaties concerning the protection of human rights in the American States." American Convention on Human Rights, Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996). On occasion, the United States will appear before the Court in such cases, thereby implicitly accepting the jurisdiction of the Court to issue "advisory opinions." One such case was the opinion issued October 1, 1999, regarding the Vienna Convention on Consular Relations. "The mere

fact that the Court has made a pronouncement in an advisory opinion rather than in a contentious case does not diminish the legitimacy or authoritative character of the legal principle enunciated by it." Thomas Buergental, International Human Rights in a Nutshell 220 (2d ed. 1995). The United States should not be free to accept jurisdiction only when it serves its interests.

International human rights have been a concern for the countries of the world for years. The United States likes to consider itself a leader in the human rights movement, and is, in fact, one of the most active participants in protecting human dignity and human rights. The International Covenant on Civil and Political Rights is an important human rights treaty which 138 nations, including the U.S., have ratified. This treaty bestows vital human rights to the citizens of the participating countries.

In order to satisfy its obligations under its treaty obligations as well as customary international law, the United States must allow appellant the opportunity to litigate his claims before the international tribunals charged with monitoring and enforcing his rights. Appellant has thus far not sought such relief, out of respect for the jurisdiction of this Court. Therefore, appellant requests that in the event that the Court denies all of his claims, the stay of execution remain in effect for a sufficient time to allow appellant to seek relief from the international tribunals discussed above. Alternatively,

appellant asks for a statement from the Court that it will not do so, to be issued forthwith, so that he can seek relief in those tribunals concurrently.

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 74
THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE LIKEWISE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT APPELLANT'S CONVICTIONS AND PENALTY BE SET ASIDE.

Appellant was denied his right to a fair trial by an independent tribunal, and his right to the minimum guarantees for the defense under customary international law as informed by the Universal Declaration of Human Right, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration). Additionally, appellant suffered racial discrimination during his trial and penalty phase which also constitutes violations of customary international law as evidenced by the equal protection provisions of the above-mentioned instruments and of the International Convention Against All Forms of Racial Discrimination.

While appellant's rights under state and federal constitutions have been violated, these violations are being tried under international law as well, as the first step in exhausting administrative remedies in order to bring appellant's claim in front of the Inter-American Commission on Human Rights. Should all appeals within the United States justice system fail, appellant intends to bring his claim to the Inter-American Commission on the basis that the violations appellant has suffered are violations of the American Declaration

of the Rights and Duties of Man.

A.

Background

The two principle sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank with federal statutes.[92] Customary international law is equated with federal common law.[93] International law must be considered and administered in United States courts whenever questions of right depending on it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Murray v. The Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 102, 118, 2 L.Ed. 208.) When

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92 Article VI, § 1, clause 2 of the United States Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and 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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

93 Restatement Third of the Foreign Relations Law of the United States (1987), p. 145, 1058. See also Eyde v. Robertson (1884) 112 U.S. 580.

a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of nations, if any possible construction remains . . ." (*Weinberger v. Rossi* (1982) 456 U.S. 25, 33.) The United States Constitution also authorizes Congress to "define and punish . . . offenses against the law of nations," thus recognizing the existence and force of international law. (U.S. Const. Article I, § 8.) Courts within the United States have responded to this mandate by looking to international legal obligations, both customary international law and conventional treaties, in interpreting domestic law. (*Trans World Airlines, Inc. v. Franklin Mint Corp.* (1984) 466 U.S. 243, 252.[94]

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[94] See also *Oyama v. California* (1948) 332 U.S. 633, 92 L.Ed. 249, 68 S.Ct. 269, which involved a California Alien Land Law that prevented an alien ineligible for citizenship from obtaining land and created a presumption of intent to avoid escheat when such an alien pays for land and then transfers it to a U.S. citizen. The court held that the law violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion stating that the UN Charter was a federal law that outlawed racial discrimination, noted "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned." (Id. at 673.) See also *Namba v. McCourt* (1949) 185 Or. 579, 204 P.2d 569, invalidating an Oregon Alien Land Law, "The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed . . . When our nation signed the Charter of the United Nations we thereby became bound to the following principles (Article 55, subd. c, and see Article 56): 'Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to

International human rights law has its historical underpinnings in the doctrine of humanitarian intervention, which was an exception to the general rule that international law governed regulations between nations and did not govern rights of individuals within those nations.[95] The humanitarian intervention doctrine recognized intervention by states into a nation committing brutal maltreatment of its nationals, and as such was the first expression of a limit on the freedoms of action states enjoyed with respect to their own nationals.[96]

This expression was furthered in 1920 by the Covenant of the League of Nations. The Covenant contained a provision relating to "fair and human conditions of labor for men, women and children." The League of Nations was also instrumental in developing an international system for the protection of minorities.[97] Additionally, early in the development of international law, countries recognized the obligation to treat foreign nationals in a manner that conformed with minimum standards of justice. As the law of responsibility for injury to aliens began to refer to violations of "fundamental human rights,"

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race, sex, language, or religion.' (59 Stat. 1031, 1046.)" (Id. at 604.)

[95] See generally, Sohn and Buergenthal, International Protection of Human Rights (1973) p. 137.

[96] Buergenthal, International Human Rights (1988) p.3.

[97] *Id.*, pp. 7-9.

what had been seen as the rights of a nation eventually began to reflect the individual human rights of nationals as well.[98]

It soon became an established principle of international law that a country, by committing a certain subject-matter to a treaty, internationalized that subject-matter, even if the subject-matter dealt with individual rights of nationals, such that each party could no longer assert that such subject-matter fell exclusively within domestic jurisdictions.[99]

B.

Treaty Development

The monstrous violations of human rights during World War II furthered the internationalization of human rights protections. The first modern international human rights provisions are seen in the United Nations Charter, which entered into force on October 24, 1945. The UN Charter proclaimed that member states of the United Nations were obligated to

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98 Restatement Third of the Foreign Relations Law of the United States, (1987) Note to Part VII, vol. 2 at 1058.

99 Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco (1923) P.C.I.J., Ser. B, No. 4.

promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[100] By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

In 1948, the UN drafted and adopted both the Universal Declaration of Human Rights[101] and the Convention on the Prevention and Punishment of the Crime of Genocide.[102] The Universal Declaration is part of the International

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100 Article 1(3) of the UN Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, entered into force October 24, 1945.

In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

> "The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere --without regard to race, language or religion -- we cannot have permanent peace and security in the world."
>
> Robertson, Human Rights in Europe, (1985) 22, n.22 (quoting President Truman).

101 Universal Declaration of Human Rights, adopted December 10, 1948, UN Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization (hereinafter Universal Declaration).

102 Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1951 (hereinafter Genocide Convention). Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. See generally, Buergenthal, International Human Rights, supra, p.48.

Bill of Human Rights,[103] which also includes the International Covenant on Civil and Political Rights,[104] the Optional Protocol to the ICCPR,[105] the International Covenant on Economic, Social and Cultural Rights,[106] and the human rights provisions of the UN Charter. These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing human rights through international obligations. Additionally, the United Nations has sought to enforce the obligations of member states through the Commission on Human Rights, an organ of the United Nations consisting of forty-three member states, which reviews allegations of human rights violations.

The Organization of American States, which consists of thirty-two member states, was established to promote and protect human rights. The OAS Charter, a multilateral treaty which serves as the Constitution of the

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[103] See generally Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills," (1991) 40 Emory L.J. 731.

[104] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976 (hereinafter ICCPR).

[105] Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, entered into force March 23, 1976.

[106] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, entered into force January 3, 1976.

OAS, entered into force in 1951. It was amended by the Protocol of Buenos Aires which came into effect in 1970. Article 5(j) of the OAS Charter provides, "[t]he American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex."[107] In 1948, the Ninth International Conference of American States proclaimed the American Declaration of the Rights and Duties of Man, a resolution adopted by the OAS, and thus, its member states. The American Declaration is today the normative instrument that embodies the authoritative interpretation of the fundamental rights of individuals in this hemisphere.[108]

The OAS also established the Inter-American Commission on Human Rights, a formal organ of the OAS which is charged with observing and protecting human rights in its member states. Article 1(2)(b) of the Commission Statute defines human rights as the rights set forth in the American Declaration, in relation to member States of the OAS who, like the United States, are not party to the American Convention on Human Rights. In practice, the OAS conducts country studies, on-site investigations, and has the power to receive and act on individual petitions which charge OAS member

[107] OAS Charter, 119 U.N.T.S. 3, entered into force Dec. 13, 1951, amended 721 U.N.T.S. 324, entered into force Feb. 27, 1970.

[108] Buergenthal, International Human Rights, supra, pp.127-131.

states with violations of any rights set out in the American Declaration.[109] Because the Inter-American Commission, which relies on the American Declaration, is recognized as an OAS Charter organ charged with protecting human rights, the necessary implication is to reinforce the normative effect of the American Declaration. [110]

The United States has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As an important player in the drafting of the UN Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[111] Though the 1950s was a period of isolationism, the United States renewed its commitment in the late 1960s and throughout the 1970s by becoming a signatory to numerous international human rights agreements and

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[109] Buergenthal, International Human Rights, supra. Appellant notes that this appeal is a step in exhausting his administrative remedies in order to bring his claim in front of the Inter-American Commission on the basis that the violations appellant has suffered are violations of the American Declaration of the Rights and Duties of Man.

[110] Buergenthal, International Human Rights, supra.

[111] Sohn and Buergenthal, International Protection of Human Rights (1973) pp. 506-9.

implementing human rights-specific foreign policy legislation.[112]

The United States has stepped up its commitment to international human rights by ratifying three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the International Covenant on Civil and Political Rights; President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial Discrimination,[113] and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[114] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[115]

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[112] Buergenthal, International Human Rights, supra, p. 230.

[113] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. _____ U.N.T.S. _____ (1994).

More than 100 countries are parties to the Race Convention.

[114] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, entered into force on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong., 2d Sess., 136 Cong. Rev. 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 20, 1994. _____ U.N.T.S. _____ (1994).

[115] Buergenthal, International Human Rights, supra, p.4.

United States courts generally do not give retroactive ratification to a treaty; the specific provisions of a treaty are therefore enforceable from the date of ratification onward.[116] However, Article 18 of the Vienna Convention on the Laws of Treaties provides that a signatory to a treaty must refrain from acts which would defeat the object and purpose of the treaty until the signatory either makes its intention clear not to become a party, or ratifies the treaty.[117] Though the United States courts have not strictly applied Article 18, they have looked to signed, unratified treaties as evidence of customary international law.[118]

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[116] Newman and Weissbrodt, International Human Rights: Law, Policy and Process, (1990) p. 579.

[117] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980), entered into force Jan. 27, 1980 (hereinafter Vienna Convention). The Vienna Convention was signed by the United States on April 24, 1970. Though it has not yet been ratified by the United States, the Department of State, in submitting the Convention to the Senate, stated that the convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec.Doc. L., 92d Cong., 1st Sess. (1971) at 1. Also, the Restatement Third of the Foreign Relations Law of the United States cites the Vienna Convention extensively.

[118] See for example *Inupiat Community of the Arctic Slope v. United States* (9th Cir. 1984) 746 F.2d 570 (citing the International Covenant on Civil and Political Rights); *Crow v. Gullet* (8th Cir. 1983) 706 F.2d 774 (citing the International Covenant on Civil and Political Rights); *Filartiga v. Pena-Irala* (2nd Cir. 1980) 630 F.2d 876 (citing the International Covenant on Civil and Political Rights).

See also Charme, The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma (1992) 25 Geo.Wash.J.Int'l.L. & Econ. 71. Ms. Charme argues that Article 18 codified the existing interim (pre-ratification) obligations of parties who are signatories

C.

Customary International Law

Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation.[119] The United States, through signing and ratifying the ICCPR, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. The substantive clauses of these treaties articulate customary international law and thus bind our government. When the United States has signed or ratified treaty, it cannot ignore this codification of customary international law and has no basis for refusing to extend the protection of human rights beyond the terms

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to treaties: "Express provisions in treaties, judicial and arbitral decisions, diplomatic statements, and the conduct of the International Law Commission compel, in the aggregate, the conclusion that Article 18 constitutes the codification of the interim obligation. These instances indicate as well that this norm continues as a rule of customary international law. Thus all states, with the exception of those with a recognized persistent objection, are bound to respect the obligation of Article 18."

[119] Restatement Third of the Foreign Relations Law of the United States, § 102. This practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state, and empirical evidence of the extent to which the customary law rule is observed.

of the U.S. Constitution.[120]

Customary international law is "part of our law." (*The Paquete Habana, supra*, at 700.) According to 22 U.S.C. § 2304(a)(1), "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."[121] Moreover, the International Court of Justice, the principal judicial organ of the United Nations, lists international custom as one of the sources of international law to apply when deciding disputes.[122] These sources confirm the validity of custom as a source of international law.

The provisions of the Universal Declaration are accepted by United States courts as customary international law. In *Filartiga v. Pena-Irala*, (2d Cir. 1980) 630 F.2d 876, the court held that the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights . . . ." (*Id.*) at 882. The United States, as a member state of the OAS, has international obligations under the OAS Charter and the American Declaration. The American

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[120] Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills," (1991) 40 Emory L.J.731 at 737.

[121] 22 U.S.C. § 2304(a)(1).

[122] Statute of the International Court of Justice, art. 38, 1947 I.C.J. Acts & Docs 46. This statute is generally considered to be an authoritative list of the sources of international law.

Declaration, which has become incorporated by reference within the OAS Charter by the 1970 Protocol of Buenos Aires, contains a comprehensive list of recognized human rights which includes the right to life, liberty and security of person, the right to equality before the law, and the right to due process of the law.[123] Although the American Declaration is not a treaty, the United States voted its approval of this normative instrument and as a member of the OAS, is bound to recognize its authority over human rights issues.[124]

The United States has acknowledged the force of international human rights law on other countries. Indeed, in 1991 and 1992 Congress passed legislation that would have ended China's Most Favored Nation trade status with the United States unless China improved its record on human rights. Though President Bush vetoed this legislation,[125] in May 1993 President Clinton tied renewal of China's MFN status to progress on specific human rights issues in compliance with the Universal Declaration.[126]

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[123] American Declaration of the Rights and Duties of Man, Resolution XXX, Ninth International Conference of American States, reprinted in the Inter-American Commission of Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser. L/V/II.50, doc. 6 (1980).

[124] Case 9647 (United States) Res. 3/87 of 27 March 1987 OEA/Ser. L/V/II.52, doc. 17, para. 48 (1987).

[125] See Michael Wines, Bush, This Time in Election Year, Vetoes Trade Curbs Against China, N.Y. Times, September 29, 1992, at A1.

[126] President Clinton's executive order of May 28, 1993 required the Secretary of State to recommend to the President by June 3, 1994 whether to

The International Covenant on Civil and Political Rights, to which the United States is bound, incorporates the protections of the Universal Declaration. Where other nations are criticized and sanctioned for consistent violations of internationally recognized human rights, the United States may not say: "Your government is bound by certain clauses of the Covenant though we in the United States are not bound."[127]

D.

Due Process Violations

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extend China's MFN status for another year. The order imposed several conditions upon the extension including a showing by China of adherence to the Universal Declaration of Human Rights, an acceptable accounting of those imprisoned or detained for non-violent expression of political and religious beliefs, humane treatment of prisoners including access to Chinese prisons by international humanitarian and human rights organizations, and promoting freedom of emigration, and compliance with the U.S. memorandum of understanding on prison labor. See Orentlicher and Gelatt, Public Law, Private Actors: The Impact of Human Rights on Business Investors in China (1993) 14 Nw. J. Int'l L. & Bus. 66, 79. Though President Clinton decided on May 26, 1994 to sever human rights conditions from China's MFN status, it cannot be ignored that the principal practice of the United States for several years was to use MFN status to influence China's compliance with recognized international human rights. See Kent, China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989-1994 (1995) 17 H. R. Quarterly, 1.

[127] Newman, United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures (1993) 42 DePaul L. Rev. 1241, 1242. Newman discusses the United States' resistance to treatment of human rights treaties as U.S. law.

The factual and legal issues presented herein demonstrate that appellant was denied his right to a fair and impartial trial in violation of customary international law as evidenced by Articles 6 and 14 of the International Covenant on Civil and Political Rights[128] as well as Articles 1 and 26 of the American Declaration.

The United States deposited its instruments of ratification of the ICCPR on June 8, 1992 with five reservations, five understandings, four declarations, and one proviso.[129] Article 19(c) of the Vienna Convention on the Law of Treaties declares that a party to a treaty may not formulate a reservation that is "incompatible with the object and purpose of the treaty."[130] The Restatement Third of the Foreign Relations Law of the United States echoes this provision.[131]

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[128] The substantive provisions of the Universal Declaration have been incorporated into the ICCPR, so these are incorporated by reference in the discussion above. Moreover, as was noted above, the Universal Declaration is accepted as customary international law.

[129] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep. No.23, 102d Cong., 2d Sess.

[130] Vienna Convention, *supra*, 1155 U.N.T.S. 331, entered into force Jan. 27, 1980.

[131] Restatement Third of the Foreign Relations Law of the United States, (1987) § 313 cmt. b. With respect to reservations, the Restatement lists "the requirement . . . that a reservation must be compatible with the object and purpose of the agreement."

The ICCPR imposes an immediate obligation to "respect and ensure" the rights it proclaims and to take whatever other measures are necessary to give effect to those rights. United States courts, however, will generally enforce treaties only if they are self-executing or have been implemented by legislation.[132] The United States declared that the articles of the ICCPR are not self-executing.[133] The Bush Administration, in explanation of proposed reservations, understandings, and declarations to the ICCPR, stated: "For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant ar not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated."[134]

But under the Constitution, a treaty "stands on the same footing of

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[132] Newman and Weissbrodt, International Human Rights: Law, Policy and Process, (1990) p. 579. *See also Sei Fujii v. California* (1952) 38 Cal.2d 718, 242 P.2d 617, where the California Supreme Court held that Articles 55(c) and 56 of the UN Charter are not self-executing.

[133] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep. No.23, 102d Cong., 2d Sess.

[134] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep. No.23, 102d Cong., 2d Sess. at 19.

supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. (*Asakura v. Seattle* (1924) 265 U.S. 332, 341, 68 L.Ed. 1041, 44 S.Ct. 515.)[135] Moreover, treaties designed to protect individual rights should be construed as self-executing. (*United States v. Noriega*, (1992) 808 F.Supp. 791.) In Noriega, the court noted, "It is inconsistent with both the language of the [Geneva III] treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs -- not to create some amorphous, unenforceable code of honor among the signatory nations. 'It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests . . . . Even if Geneva III is not self-executing, the United States is still obligated to honor its international commitment.'" (Id. at 798.)

Though reservations by the United States provide that the treaties may not be self-executing, the ICCPR is still a forceful source of customary

[135] Some legal scholars argue that the distinction between self-executing and non self-executing treaties is patently inconsistent with express language in Article 6, § 2 of the United States Constitution that all treaties shall be the supreme law of the land. See generally Jordan L. Paust, Self-Executing Treaties (1988) 82 Am. J. Int'l L. 760.

international law and as such is binding upon the United States.

Article 14 provides, "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article 6 declares that "[n]o one shall be arbitrarily deprived of his life . . . [The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court."[136] Likewise, these protections are found in the American Declaration: Article 1 protects the right to life, liberty and security of person; Article 2 guarantees equality before the law; and Article 26 protects the right of due process of law.[137]

In cases where the UN Human Rights Committee has found that a State party violated Article 14 of the ICCPR, in that a defendant had been denied a fair trial and appeal, the Committee has held that the imposition of the sentence of death also was a violation of Article 6 of the ICCPR.[138] The Committee further observed, "the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of

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[136] International Covenant on Civil and Political Rights, supra, 999 U.N.T.S. 717.

[137] American Declaration of the Rights and Duties of Man, supra.

[138] Report of the Human Rights Committee, p. 72, 49 UN GAOR Supp. (No. 40) p. 72, UN Doc. A/49/40 (1994).

the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal.'"[139]

Further, Article 4(2) of the ICCPR makes clear that no derogation from Article 6 ("no one shall be arbitrarily deprived of his life") is allowed.[140] An Advisory Opinion issued by the Inter-American Court on Human Rights concerning the Guatemalan death penalty reservation to the American Convention on Human Rights noted "[i]t would follow therefore that a reservation which was designed to enable the State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it."[141] Implicit in the court's opinion linking nonderogability and incompatibility is the view that the compatibility requirement has greater importance in human rights treaties, where reciprocity provides no protection

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[139] *Id.*

[140] International Covenant on Civil and Political Rights, supra, 999 U.N.T.S. 717.

[141] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of September 8, 1983, Inter-Amer.Ct.H.R., ser. A: Judgments and Opinions, No. 3 (1983), reprinted in 23 I.L.M. 320, 341 (1984).

for the individual against a reserving state.[142]

Appellant's rights under customary international law, as codified in the above-mentioned provisions of the ICCPR and the American Declaration, were violated throughout his trial and sentencing phase.

E.

Conclusion

The due process violations that appellant suffered throughout his trial and sentencing phase are prohibited by customary international law. The

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[142] Edward F. Sherman, Jr. The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation (1994) 29 Tex. Int'l L.J. 69. In a separate opinion concerning two Barbadian death penalty reservations, the court further noted that the object and purpose of modern human rights treaties is the "protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all individuals within their jurisdiction."Advisory Opinion No. OC-2/82 of September 24, 1982, Inter-Am.Ct.H.R., ser. A: Judgments and Opinions, No.2, para.29 (1982), reprinted in 22 I.L.M. 37, 47 (1983). These opinions are an indicator of emerging general principles of treaty law, and strengthen the argument that the United States death penalty reservation is impermissible because it is incompatible.

United States is bound by customary international law, as informed by such instruments as the ICCPR and the Race Convention. The purpose of these treaties is to bind nations to an international commitment to further protections of human rights. The United States must honor its role in the international community by recognizing the human rights standards in our own country to which we hold other countries accountable.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, as discussed above, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The errors undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 75
APPELLANT'S TRIAL WAS CLOSELY ENOUGH BALANCED AT BOTH THE GUILT AND PENALTY PHASES THAT THE ERRORS DEMONSTRATED HEREIN INDIVIDUALLY AND COLLECTIVELY REQUIRE THAT HE BE GRANTED A NEW TRIAL.

Appellant is entitled to a new trial, because of the trial court's error in not granting severance. Beyond these errors, however, the trial itself was plagued with mistakes that poisoned the minds of jurors against appellant, and eviscerated appellant's ability to defend himself and his right to present a defense to the charges against him.

This extraordinary manipulation of witnesses was the hallmark of how the case was developed against appellant. The heart of appellant's defense was to show that the case investigators, who were convinced from the day the victim was shot that appellant had done it, created rather than discovered the case against him. They molded the testimony of witnesses with threats and favors and substituted themselves whenever possible to buttress unreliable testimony with testimony that was often false.

In a case where the factual basis of the jury's verdicts is uncertain, the fact that they were given inadequate instructions deprived appellant of his right to a jury verdict on every element of the charges against him.

Each error asserted herein was serious; several were prejudicial. Prejudice may result from the cumulative impact of multiple deficiencies.

(*People v. Ashmus* (1991) 54 Cal.3d 932, 1006; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432 (1995 U.S. App. LEXIS 25611, 13.) The trial as a whole was fundamentally unfair.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, as discussed above, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." *People v. Brown* (1988) 46 Cal.3d 432, 447. The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: 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– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina*, *supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard]).

The errors undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CLAIM 76
EXECUTION OF PETITIONER AFTER PROLONGED CONFINEMENT VIOLATED PETITIONER'S RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT AND EQUAL PROTECTION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

Execution of petitioner after his prolonged confinement under a sentence of death would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Petitioner was sentenced to death on December 29, 1997. He has been confined under his sentence of death for nearly six years. Charges had been pending against him relating to this case since September, 1992. Thus, appellant has been confined since September of 1992 based on these charges.

In 1998, petitioner arrived on California's death row at San Quentin State Prison. There he lives with approximately 600 condemned men.

Appellant lives in a solitary cell, a 6' by 10' concrete box, consisting of three concrete walls and a fourth wall of metal bars and mesh screen. Appellant cannot see other prisoners through the barred wall; he can, however, hear the incessant din of prisoners yelling and guards using loudspeakers. Both in and out of his cell, he is under surveillance by one or more guards armed with loaded weapons. Appellant eats his meals in his cell and is

restricted in the amount and type of personal property that he is permitted to possess. His time outside his cell is restricted and, whenever he is transported to another location, he is handcuffed.

When he arrived on death row in 1998, appellant was suffering from bipolar disorder and from possible brain damage. San Quentin has failed to provide adequate mental health treatment.

Appellant was not appointed counsel for the instant appeal until December, 2002, a full five years after he was sentenced to death. No post-conviction counsel has been appointed by this Court. It will undoubtedly take several years for post-conviction counsel, should counsel be appointed, to prepare, file and litigate a petition for writ of habeas corpus in this Court. Should this Court deny relief, appellant would then proceed to federal court for federal habeas review. That process, including likely exhaustion proceedings in this Court, will take additional years. The setting of any execution date is many years away, even setting aside the likelihood of clemency or additional stays of execution.

Execution of petitioner following such confinement under his sentence of death for this lengthy a period of time constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., joined by Breyer, J., respecting the

denial of certiorari; *Ceja v. Stewart*, 1998 U.S. App. LEXIS 960 (9th Cir. 1998) (Fletcher, J., dissenting from order denying stay of execution).

If appellant is executed, his sentence will be more than eleven years of solitary confinement in a tiny cell in the most horrible portion of prison – death row – followed by execution.

Carrying out appellant's death sentence after this extraordinary delay is violative of the Eighth Amendment's punishments clause in two respects:

a. It constitutes cruel and unusual punishment to confine an individual, such as petitioner, on death row for this extremely prolonged period of time. *See, e.g., Ceja v. Stewart, supra*; *McKenzie v. Day,* 57 F.3d 1461 (9th Cir. 1995).

b. After the passing of such a period of time since his conviction and judgment of death, the imposition of a sentence of death upon petitioner would violate the Eighth Amendment, because the State's ability to exact retribution and to deter other serious offenses by actually carrying out such a sentence is drastically diminished. *Ceja v. Stewart, supra.*

As for the first basis supporting this claim, confinement under a sentence of death subjects a condemned inmate to extraordinary psychological duress, as well as the extreme physical and social restrictions that inhere in life

on death row; accordingly, such confinement, in and of itself, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

Over a century ago, the United States Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890).

In *Medley*, the period of uncertainty was just four weeks. As recognized by Justice Stevens, Medley's description should apply with even greater force in a case such as this, involving a delay that has lasted almost fourteen years. *Lackey v. Texas*, *supra,* 514 U.S. 1045.

As for the second basis supporting this claim, the penological justification for carrying out an execution disappears when an extraordinary period of time has elapsed between the conviction and the proposed execution date, and actually executing a defendant under such circumstances is an inherently excessive punishment that no longer serves any legitimate purpose. *Ceja v. Stewart*, *supra*; *see also Furman v. Georgia*, *supra*, at 312 (White, J., concurring).

The imposition of a sentence of death must serve legitimate and substantial penological goals in order to survive Eighth Amendment scrutiny.

When the death penalty "ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Id.*, at 312 (White, J., concurring); *see also Gregg v. Georgia*, *supra*, at 183 ("The sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.").

In order to survive Eighth Amendment scrutiny, "the imposition of the death penalty must serve some legitimate penological end that could not otherwise be accomplished. If 'the punishment serves no penal purpose more effectively than a less severe punishment,' (*Furman v. Georgia*, *supra*, at 280 (Brennan, J., concurring)), then it is unnecessarily excessive within the meaning of the Punishments Clause." *Ceja v. Stewart*, *supra*.

The penological justifications that can support a legitimate application of the death penalty are twofold: "retribution and deterrence of capital crimes by prospective offenders." *Gregg v. Georgia*, *supra,* at 183. Retribution, as defined by the United States Supreme Court, means the "expression of society's moral outrage at particularly offensive behavior." *Ibid.*

The ability of the State of California to further the ends of retribution

and deterrence has been drastically diminished here as a result of the extraordinary period of time that has elapsed since the date of petitioner's conviction and judgment of death. *See Lackey v. Texas, supra*; *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J. respecting denial of cert.).

Because it would serve no legitimate penological interest to execute petitioner after this passage of time and because petitioner's confinement on death row for eleven years, in and of itself, constitutes cruel and unusual punishment, execution of petitioner is prohibited by the Eighth Amendment's Punishments.

CLAIM 77
THE UNCONSTITUTIONAL USE OF LETHAL INJECTION RENDERS APPELLANT'S DEATH SENTENCE ILLEGAL

Appellant's sentence of death is illegal and unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution, because execution by lethal injection, the method by which the State of California plans to execute him, violates the prohibition of cruel and unusual punishment.

The state of California plans to execute appellant by means of lethal injection. In 1992, California added as an alternative means of execution "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections." (Penal Code §3604.) As amended in 1992, Penal Code §3604 provides that "[p]ersons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection." As amended, §3604 further provides that "if either manner of execution . . . is held invalid, the punishment of death shall be imposed by the alternate means . . . ."

In 1996, the California Legislature amended Penal Code §3604 to provide that "if a person under sentence of death does not choose either lethal gas or lethal injection . . ., the penalty of death shall be imposed by lethal

injection."

On October 4, 1994, the United States District Court for the Northern District of California ruled in *Fierro v. Gomez* (N.D. Cal. 1994) 865 F.Supp. 1387 that the use of lethal gas is cruel and unusual punishment and thus violates the constitution. In 1996, the Ninth Circuit affirmed the district court's conclusions in *Fierro*, concluding that "execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments." *(Fierro v. Gomez* (9th Cir. 1996) 77 F.3d 301, 309.) The Ninth Circuit also permanently enjoined the state of California from administering lethal gas. (*Ibid.*) Accordingly, lethal injection is the only method of execution currently authorized in California.

In 1996, the Ninth Circuit concluded, in *Bonin v. Calderon* (9th Cir. 1996) 77 F.3d 1155, 1163, that because the use of lethal gas has been held invalid by the Ninth Circuit, a California prisoner sentenced to death has no state-created constitutionally protected liberty interest to choose his method of execution under Penal Code §3604(d). Under operation of California law, the Ninth Circuit's invalidation of the use of lethal gas as a means of executions leaves lethal injection as the sole means of execution to be implemented by the state. (*Ibid.*; see Penal Code §3604(d).) Because Bonin did not argue that execution by lethal injection is unconstitutional, the Ninth Circuit concluded,

with no discussion nor analysis, that the method of execution to be implemented in his case was applied constitutionally. *(Ibid.)*

The lethal injection method of execution is authorized to be used in thirty-one states in addition to California. Between 1976 and 1996, there were 179 executions by lethal injection.[143] Of the 56 people executed in the United States in 1995, only seven died by other means. Lethal injection executions have been carried out in at least the following states: Arizona, Arkansas, Delaware, Idaho, Illinois, Louisiana, Maryland, Missouri, Montana, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Virginia and Wyoming.

Consequently, there is a growing body of evidence, both scientific and anecdotal, concerning these methods of execution, the effects of lethal injection on the inmates who are executed by this procedure, and the many instances in which the procedures fail, causing botched, painful, prolonged and torturous deaths for these condemned persons.

Both scientific evidence and eyewitness accounts support the proposition that death by lethal injection can be an extraordinarily painful death, and that it is therefore in violation of the prohibition against cruel and unusual punishment set forth in the Eighth Amendment of the United States

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[143] This figure includes all lethal injection executions in the United States through January 22, 1996.

Constitution. The Eighth Amendment is applicable to the states through the Fourteenth Amendment. (*Robinson v. California* (1962) 370 U.S. 660.)

The drugs authorized to be used in California's lethal injection procedure are extremely volatile and can cause complications even when administered correctly. The procedure exposes the inmate to substantial and grave risks of prolonged and extreme infliction of pain if these drugs are not administered correctly.

Medical doctors are prohibited from participating in executions on ethical grounds. The Code of Medical Ethics was set forth in the Hippocratic Oath in the fifth century B.C. and requires the preservation of life and the cessation of pain above all other values.[144] Medical doctors may not help the state kill an inmate.[145] The American Nurses Association also forbids members from participating in executions.

The first lethal injection execution in the United States took place in

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The Oath provides: "I will follow the method of treatment which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to anyone if asked, nor suggest any such counsel."

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During the American Medical Association's annual meeting in July 1980, their House of Delegates adopted the following resolution: "A physician, as a member of a profession dedicated to the preservation of life when there is hope of doing so, should not be a participant in a legally authorized execution. [However, a] physician may make a determination or certification of death as currently provided by law in any situation."

1982 and was plagued by mishaps from the outset. Because of several botched executions, the New Jersey Department of Corrections contacted an expert in execution machinery and asked him to invent a machine to minimize the risk of human error. Fred Leuchter's lethal injection machine, designed to eliminate "execution glitches," was first used on January 6, 1989 for an execution in Missouri.

The dosages to be administered are not specified by statute, but rather "by standards established under the direction of the Department of Corrections." (Penal Code §3604(a).) The three drugs commonly used in lethal injections are Sodium Pentothal, Pancuronium Bromide and Potassium Chloride.

The Sodium Pentothal renders the inmate unconscious. The Pancuronium Bromide then paralyzes the chest wall muscles and diaphragm so that the subject can no longer breathe. Finally, the Potassium Chloride causes a cardiac arrhythmia which results in ineffective pumping of blood by the heart and, ultimately, a cardiac arrest.

The procedures by which the State of California plans to inject chemicals into the body are so flawed that the inmate may not be executed humanely, so as to avoid cruel and unusual punishment.

Death by lethal injection involves the selection of chemical dosages and

combinations of drugs by untrained or improperly skilled persons. Consequently, non-physicians are making medication dosing decisions and prescriptions that must otherwise be made by physicians under the law.

Since medical doctors may not participate or aid in the execution of a human being on ethical grounds, untrained or improperly skilled, non-medical personnel are making what would ordinarily be informed medical decisions concerning dosages and combinations of drugs to achieve the desired result. The effects of the lethal injection chemicals on the human body at various dosages are medical and scientific matters, and properly the subject of medical decision-making. Moreover, the efficacy of the drugs will vary on different individuals depending on many factors and variables, which would ordinarily be monitored by medical personnel.

There is a risk that the dosages selected by untrained persons may be inadequate for the purposes for which they were selected, may result in unanticipated or inappropriate effects in a particular individual for medical or other reasons, and may inflict unnecessarily extreme pain and suffering.

There is a risk that the order and timing of the administration of the chemicals would greatly increase the risk of unnecessarily severe physical pain and/or mental suffering.

The desired effects of the chemical agents to be used for execution by

lethal injection in California may be altered by inappropriate selection, storage, and handling of the chemical agents.

Improperly selected, stored and/or handled chemicals may lose potency, and thus fail to achieve the intended results or inflict unnecessary, extreme pain and suffering in the process.

Improperly selected, stored, and/or handled chemicals may be or become contaminated, altering the desired effects and resulting in the infliction of unnecessary, extreme pain and suffering. California provides inadequate controls to ensure that the chemical agents selected to achieve execution by lethal injection are properly selected, stored and handled.

Since medical doctors cannot participate in the execution process, non-medical personnel will necessarily be relied upon to carry out the physical procedures required to execute petitioner.

These non-medical technicians may lack the training, skill and experience to effectively, efficiently and properly prepare the apparatus necessary to execute petitioner, prepare petitioner physically for execution, ensure that he is restrained in a manner that will not impede the flow of chemicals and result in a prolonged and painful death, insert the intravenous catheter properly in a healthy vein so that chemicals enter the blood stream and not infiltrate surrounding tissues, and administer the intravenous drip properly

so that unconsciousness and death follow quickly and painlessly.

Moreover, inadequately skilled and trained personnel are unequipped to deal effectively with any problems that arise during the procedure. They may fail to recognize problems concerning the administration of the lethal injection. Once problems are recognized, these untrained personnel may not know how to correct the problems or mistakes. Their lack of adequate skill and training may unnecessarily prolong the pain and suffering inherent in an execution that goes awry.

The use of unskilled and improperly trained technicians to conduct execution by lethal injection and the lack of adequate procedures to ensure that such executions are humanely carried out have resulted in the unwarranted infliction of extreme pain, resulting in a cruel, unusual, and inhumane death for the inmate in numerous cases across the United States in recent years.

In 1982, Charles Brooks of Texas was the first person executed by lethal injection in the United States. The Warden of the Texas prison reportedly mixed all three chemicals into a single syringe. The chemicals had precipitated; thus, the Warden's initial attempt to inject the deadly mixture into Brooks failed.

On March 13, 1985, Steven Peter Morin laid on a gurney for forty-five minutes while his Texas executioners repeatedly pricked his arms and legs

with a needle in search of a vein suitable for the lethal injection. (Michael Graczyk, *Convicted Killer in Texas Waits 45 Minutes Before Injection is Given,* Gainesville Sun, March 14, 1985; *Murderer of Three Women is Executed in Texas,* New York Times, March 14, 1985.) Problems with the execution prompted Texas officials to review their lethal injection procedures for inmates with a history of drug abuse. (*Ibid.*)

Over a year later, on August 20, 1986, Texas officials experienced such difficulty with the procedure that Randy Wools had to help his executioners find a good vein for the execution. (*Texas Executes Murderer,* Las Vegas Sun, August 20, 1986.)

Similarly, on June 24, 1987, in Texas, Elliot Johnson laid awake and fully conscious for thirty-five minutes while Texas executioners searched for a place to insert the needle.

On December 13, 1988, in Texas, Raymond Landry was pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the execution, the syringe came out of Landry's vein, spraying the deadly chemicals across the room towards witnesses. The execution team had to reinsert the catheter into the vein. The curtain was pulled for 14 minutes so witnesses could not observe the intermission. (Michael Graczyk, *Landry*

Executed for '82 Robbery Slaying, Dallas Morning News, December 13, 1988; and Michael Graczyk, *Drawn-Out Execution Dismays Texas Inmates,* Dallas Morning News, December 15, 1988.)

On May 24, 1989, in Huntsville, Texas, Stephen McCoy had such a violent physical reaction to the drugs (heaving chest, gasping, choking, etc.) that one of the witnesses fainted, crashing into and knocking over another witness. Houston attorney Karen Zellars, who represented McCoy and witnessed the execution, thought the fainting would catalyze a chain reaction among the witnesses. The Texas Attorney General admitted the inmate "seemed to have a somewhat stronger reaction," adding, "The drugs might have been administered in a heavier dose or more rapidly." (*Man Put to Death for Texas Murder,* The New York Times, May 25, 1989; *Witnesses to an Execution,* Houston Chronicle, May 27, 1989.)

On January 24, 1992, in Varner, Arkansas, it took the medical staff more than 50 minutes to find a suitable vein in Rickey Ray Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the ordeal Rector, who suffered serious brain damage from a lobotomy, tried to help the medical personnel find a patent vein. The administrator of the State's Department of Corrections Medical Programs said, paraphrased by a newspaper reporter, "the moans

came as a team of two medical people, increased to five, worked on both sides of Rector's body to find a suitable vein." The administrator said that may have contributed to his occasional outbursts. (Joe Farmer, *Rector, 40, Executed for Officer's Slaying,* Arkansas Democrat-Gazette, January 25, 1995; Sonja Clinesmith, *Moans Pierced Silence During Wait,* Arkansas Democrat-Gazette, January 26, 1992.)

On March 10, 1992, in McAlester, Oklahoma, Robyn Lee Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered, the muscles in his jaw, neck and abdomen began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag. Death came eleven minutes after the drugs were administered. *Tulsa World* reporter, Wayne Greene said, "The death looked scary and ugly." *(Witnesses Comment on Parks' Execution,* Durant Democrat, March 10, 1992; *Dying Parks Gasped for Life,* The Daily Oklahoman, March 11, 1992; *Another U.S. Execution Amid Criticism Abroad*, New York Times, April 24, 1992.)

On April 23, 1992, Billy Wayne White died 47 minutes after his executioners strapped him to the gurney in Huntsville, Texas. White tried to help prison officials as they struggled to find a vein suitable to inject the killing drugs. (*Man Executed in '76 Slaying After Last Appeals Rejected,*

Austin (Tex) American-Statesman, April 23, 1992; *Killer Executed by Lethal Injection*, Gainesville Sun, April 24, 1992; Michael Graczyk, *Veins Delay Execution 40 Minutes*, Austin American Statesman, April 24, 1992; Kathy Fair, *White Was Helpful at Execution*, Houston Chronicle, April 24, 1992.)

On May 7, 1992, in Texas, Justin Lee May had a violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the *Item* in Huntsville, Texas, May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze...." Associated Press reporter Michael Graczyk wrote, "He went into a coughing spasm, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back, if he had not been belted down. After he stopped breathing, his eyes and mouth remained open." (Michael Graczyk, *Convicted Texas Killer Receives Lethal Injection*, (Plainview, Texas) Herald, May 7, 1992; *Convicted Killer May Dies*, (Huntsville, Texas) Item, May 7, 1992; *Convicted Killer Dies Gasping*, San Antonio Light, May 8, 1992; Michael Graczyk *Convicted Killer Gets Lethal Injection*, (Denison, Texas) Herald, May 8, 1992.)

On May 10, 1994, in Illinois, after the execution had begun, one of the three lethal drugs used to execute John Wayne Gacy clogged the tube, preventing the flow of the drugs. Blinds were drawn to block the scene,

thereby obstructing the witnesses' view. The clogged tube was replaced with a new one, the blinds were reopened, and the execution resumed. Anesthesiologists blamed the problem on the inexperience of prison officials who conducted the execution. Doctors stated that the proper procedure taught in "IV 101" would have prevented this error. (Rob Karwath and Susan Kuczka *Gacy Execution Delay Blamed on Clogged T.B. Tube*, Chicago Tribune, Page 1, May 11, 1994.)

On May 3, 1995, Emmitt Foster was executed by the State of Missouri. Foster was not pronounced dead until 29 minutes after the executioners began the flow of lethal chemicals into his arm. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit the witnesses' view. Executioners finally reopened the blinds three minutes after Foster was pronounced dead. According to the coroner who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney. The coroner believed that the tightness stopped the flow of chemicals into the veins. Several minutes after the strap was loosened, death was pronounced. The coroner entered the death chamber 20 minutes after the execution began, noticed the problem, and told the officials to loosen the strap so that the execution could proceed.

The Constitution prohibits deliberate indifference to the known risks

associated with a particular method of execution. (*Cf. Estelle v. Gamble* (1976) 429 U.S. 97, 106.) As illustrated in the above accounts and will be demonstrated in detail at an evidentiary hearing, following discovery, investigation, and other opportunities for full development of the factual basis for this claim, there are a number of known risks associated with the lethal injection method of execution, and the State of California has failed to take adequate measures to ensure against those risks.

The Eighth Amendment safeguards nothing less than the dignity of man, and prohibits methods of execution that involve the unnecessary and wanton infliction of pain. Under *Trop v. Dulles* (1958) 356 U.S. 86, 100, the Eighth Amendment stands to safeguard "nothing less than the dignity of man."

To comply with constitutional requirements, the State must minimize the risk of unnecessary pain and suffering by taking all feasible measures to reduce the risk of error associated with the administration of capital punishment. (*Glass v. Louisiana* (1985) 471 U.S. 1080, 1086; *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 709-711 (Reinhart, J., dissenting); see also, *Zant v. Stephens* (1985) 462 U.S. 862, 884-85 [state must minimize risks of mistakes in administering capital punishment]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (O'Connor, J., concurring) [same].)

It is impossible to develop a method of execution by lethal injection that

will work flawlessly in all persons given the various individual factors which have to be accessed in each case. Petitioner should not be subjected to experimentation by the State in its attempt to figure out how best to kill a human being.

California's use of lethal injection to execute prisoners sentenced to death unnecessarily risks extreme pain and inhumane suffering. Such use constitutes cruel and unusual punishment, offends contemporary standards of human decency, and violates the Eighth Amendment of the United States Constitution.

The Eighth Amendment prohibits methods of execution that involve the "unnecessary and wanton infliction of pain." (*Gregg v. Georgia*, *supra*, at 173.) Petitioner's sentence must be reversed.

CLAIM 78
THE CUMULATIVE EFFECT OF THE ERRORS RENDERS THE VERDICT AND SENTENCE UNCONSTITUTIONAL

The Sixth Amendment guarantees criminal defendants the right to a fair trial. The cumulative effect of multiple constitutional errors can deprive defendants of this right. "Prejudice may result from the cumulative impact of multiple deficiencies." *Ewing v. Williams*, 596 F.2d 391, 395 (9th Cir. 1979) (citing *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (en banc) (9th Cir. 1978), cert. denied, 440 US 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979).

Capital cases in particular require a careful examination of the cumulative prejudice created by multiple errors. *Lockett v. Ohio*, 438 US 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In *Johnson v. Mississippi* (1988) 486 US 578, 585, 108 S.Ct. 1981, 100 L.Ed.2d 575, the Supreme Court stated:

> "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment, in any capital case.' Although we have acknowledged that there can be no perfect procedure for deciding which cases governmental authority should be used to impose death, we have also made it clear that such decisions cannot be predicated on a mere 'caprice' or on

'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'"

Each of the errors need not be individually of a degree that demands reversal. "Multiple errors, even if harmless individually, may entitle a appellant to habeas relief if their cumulative effect prejudiced the defendant." *Ceja v. Stewart*, 97 F.3d 1246, 1254 (9th Cir. 1996); see also *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992); *United States v. Tucker*, 716 F.2d 576, 595 (9th Cir. 1983); *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975).

The death judgment rendered here must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases. (*See People* v. *Hayes*, *supra*, 52 Cal.3d at p. 644 [court weighs prejudice of guilt phase instructional error against prejudice in penalty phase].)

The jury was instructed at the penalty phase to consider all of the evidence which has been received during any part of the trial. However, because the issue resolved at the guilt phase is fundamentally different from the question resolved at the penalty phase, the possibility exists that an error might be harmless as to the guilt determination, but still prejudicial to the penalty determination. (*Smith* v. *Zant* (11th Cir. 1988) 855 F.2d 712, 721-722 [admission of confession harmless as to guilt but prejudicial as to sentence].)

Appellant has demonstrated numerous guilt phase errors, including errors in charging, admission of evidence, and numerous instructional errors among others. The significance these errors is magnified by the incomplete appellate record.

Penalty phase errors are manifestly prejudicial to the penalty phase determination. (See *Woods* v. *Dugger* (11th Cir. 1991) 923 F.2d 1454; *Lesko* v. *Lehman* (3d Cir. 1991) 925 F.2d 1527.) Appellant has shown numerous penalty phase errors.

Even if this court were to hold that no one of the guilt or penalty errors, by itself, was prejudicial, the cumulative effect of these errors sufficiently undermines the confidence in the integrity of the penalty phase proceedings so that reversal is required. Here, each initial guilt phase error formed a foundation on which each subsequent penalty phase error was cumulatively laid, giving rise to a structure of error housing the death judgment.

Reversal of the death sentence is mandated, because the state will fail in any effort to show that all the foregoing constitutional violations had no effect whatever on the jury. (*See Caldwell* v. *Mississippi*, *supra*, 472 U.S. at p. 341; *Hitchcock* v. *Dugger*, *supra*, 481 U.S. at p. 399; *Penry* v. *Lynaugh*, *supra*, 492 U.S. at p. 328.) Moreover, in this context, any violation of state

law would also offend the Fifth, Eighth and Fourteenth Amendment rights to liberty, due process and heightened capital case due process, given that such state law error occurred in this capital case and was inextricably interwound in the process which resulted in appellant being condemned. (*See Hicks* v. *Oklahoma*, *supra*, 447 U.S. at p. 346.) Therefore, the foregoing *Caldwell* standard must be applied to evaluate all errors against the penalty phase judgment,[146] and reversal of the death judgment is mandated.

The instant appeal has detailed numerous constitutional errors. Even if the individual errors were not sufficient on their own, taken cumulatively they denied appellant a fair trial. The foregoing created a web of prejudice. Each violation of defendant's rights caused the creation of another constitutional error, until the trial was covered with a blanket of prejudice, smothering any possibility of a fair trial. The foregoing errors combined to form the strong, but unsupported by lawful evidence, impression that defendant was an evil, sadistic killer who would be a threat to society as long as he lived. As the penalty decision was a close one, any error or misconduct that prejudiced defendant had a crucial impact on his right to a fair and reliable

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146

The failure to make such an application would violate the Eighth and Fourteenth Amendment rights to due process and heightened capital case due process. (*Lockett* v. *Ohio*, *supra*, 438 U.S. at p. 604; *Gardner* v. *Florida*, *supra*, 430 U.S. at pp. 357-362; *Chambers* v. *Mississippi*, *supra*, 41 U.S. at p. 294; *Beck* v. *Alabama*, *supra*, 447 U.S. at pp. 637-638.)

sentence.

None of these numerous trial errors may be considered in a vacuum. The cumulative effect of the prejudice deprived defendant of a fair trial on the issue of guilt and special circumstances and denied him an individualized and reliable determination of death as the proper penalty. The resulting conviction and death verdict are therefore flawed and must be overturned.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, as discussed above, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836.

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." *People v. Brown* (1988) 46 Cal.3d 432, 447. The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: 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– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina*, *supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard]).

The errors undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North*

Carolina (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

CONCLUSION

For all the foregoing reasons, the judgment and sentence of death must be reversed. In the event that the judgment is otherwise affirmed, the cause must be remanded for a new hearing on the automatic motion to modify the judgment of death.

DATED: May __, 2005

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CERTIFICATION OF WORD COUNT

The text of this brief, including footnotes, includes 193,579 words, according to the WordPerfect 10 word count feature.

DATED: May __, 2005

PETER GIANNINI

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I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is12304 Santa Monica Boulevard, Suite 105, Los Angeles, California 90025-2586.

On May __, 2005, I served the foregoing document described as APPELLANT'S OPENING BRIEF on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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Matthew Campbell
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I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is12304 Santa Monica Boulevard, Suite 105, Los Angeles, California 90025-2586.

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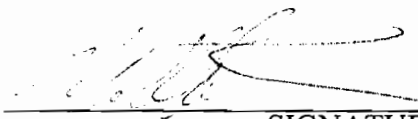

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