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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CEDRIC JEROME JOHNSON, Defendants and Appellants.	Los Angeles County Sup. Ct. No. TA037977-01

APPELLANT'S OPENING BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, County of Los Angeles

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Glasser v. United States
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Johnson v. Zerbst
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Republican Party of Minnesota v. White
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Ring v. Arizona
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Roper v. Simmons
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Rushen v. Spain
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Sacher v. United States
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Santobello v. New York
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Schell v. Witek
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Schneckloth v. Bustamonte
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Smith v. Lockhart
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Sullivan v. Louisiana
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Tanner v. United States
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Taylor v. Hayes
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Taylor v. Illinois
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Trop v. Dulles
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United States v. Calabro
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United States v. Welty
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Vasquez v. Hillery
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Victor v. Nebraska
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Wilson v. Mintzes
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Witherspoon v. Illinois
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Wood v. Georgia
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Broadman v. Commission on Judicial Performance
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Caple v. Superior Court
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College Hospital, Inc. v. Superior Court
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In re Freeman
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Lee v. State Bar
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People v. Alcala
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People v. Anderson
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People v. Avila
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People v. Bonin
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People v. Dent
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Western Landscape Construction v. Bank of America
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3 Millman et al., Cal. Criminal Defense Practice (2007)
Trial Preparation, § 70.22[2][b], p. 70-132 43

ABA Standards for Criminal Justice: Special Functions of the
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Blume, et al., *Competent Capital Representation: the Necessity of Knowing and Heeding What Jurors Tell Us about Mitigation* (2008) 36 Hofstra L. Rev. 1035 . . . . 72, 222

Eisenberg, et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing* (1998) 83 Cornell L. Rev. 1599 . . . . 73, 122, 123, 223

Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 72, 122, 123, 223

Geimer & Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases* (1988) 15 Am. J. Crim. L. 1 . . . . 73, 123

http://www.beatmyspeedingticket.com [promising "5 Easy Steps To Win . . . Even If You *Were* Speeding"].) 235

Public Disclosures of Jury Deliberations (1983) 96 Harv. L. Rev. 886 324

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Richard A. Rosen, *Reflections on Innocence*,
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The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing (1984) 94 Yale L.J. 351 369

Vapnek, Cal. Practice Guide: Professional Responsibility
(The Rutter Group 2007) ¶ 7:41 . . . . 152, 153

IN THE SUPREME COURT OF CALIFORNIA

	)
THE PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	)
	) No. S075727
vs.	)
	) Los Angeles Co.
CEDRIC JEROME JOHNSON,	) Sup. Court No.
	) TA 037977
Defendant and Appellant.	)
	)

APPELLANT'S OPENING BRIEF

INTRODUCTION

This is a case like no other.

For the first time in the history of this country, a capital defendant was tried in absentia from jury selection through penalty verdict – the jury found the defendant guilty and returned a verdict of death without ever seeing or hearing from the defendant, and without the defendant ever seeing the jurors or confronting a single witness. The trial judge expelled the defendant from his entire trial because the defendant got into a fight with his attorney seven weeks before the trial began.

The judge also barred the defendant from attending every hearing – including those held *outside* the presence of the jury – even though the defendant could have appeared at each hearing in full restraints.

Thus, the judge prevented the defendant from attending the hearings on whether the defendant would ever be allowed back in the courtroom. Consequently, the judge never heard the defendant's side of the fight.

The judge also prevented the defendant from attending the hearing on whether defense counsel had a conflict as a potential witness during the penalty phase due to his fight with the defendant. The judge further excluded the defendant from hearings on whether the defendant would testify during the guilt phase and a separate hearing on whether he would testify during the penalty phase. As a result of the hearings, the judge found that the defendant had voluntarily waived his right to testify during both phases – although the defendant wanted to testify. Had he been present, the defendant would have contributed to the fairness of these hearings.

Under no circumstances may a judge – cloaked with the presumption of honesty – deceive a defendant. But here, the judge did so when he represented to the defendant that the jury would observe him testify from his jail cell over closed-circuit television. The judge explained to the defendant that he would not be able to see the jury in the courtroom, given the one-way nature of the video feed, but that the jury would see and hear him. The judge, however, did not allow the jury in the courtroom to watch the defendant testify, though the defendant believed that the jury was seeing and listening to him have his day in court. The judge then taunted the defendant by telling of his "little surprise," that the jury was not actually in the courtroom and that, instead, the defendant had waived his right to testify before the jury.

The defendant requests his day in court, finally.

STATEMENT OF APPEALABILITY

This is an automatic appeal from a final judgment of death. (Pen. Code, § 1239, subd. (b); Cal. Rules of Court, rule 8.204(a)(2)(B).)[1]

STATEMENT OF THE CASE

The Los Angeles County District Attorney filed an information against defendants Cedric Jerome Johnson and Terry Betton on November 10, 1997 (1CT 190), amended it on February 19, 1998 (1CT 258) and November 5, 1998 (19CT 5365), and each time alleged that they murdered (§ 187) Gregory Hightower (count one) and Lawrence Faggins (count two) on September 26, 1996. (19CT 5366.)[2]

Each count of the second amended information also alleged against both defendants a multiple-murder special circumstance (§ 190.2, subd. (a)(3)), and that each offense was a serious felony (§ 1192.7, subd. (c)(8) and a principal was armed with a firearm in the commission of each offense (§ 12022, subd. (a)(1)). Count one alleged personal use of a firearm against Johnson (§ 12022.5, subd. (a)), while count two alleged personal use of a firearm against both defendants. (19CT 5366; 39CT 11538; 40CT 11616; 24RT 1439 [oral amendment].)[3]

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

[2] "CT" means the Clerk's Transcript. "SCT II" means part II of the Supplemental Clerk's Transcript. "RT" means the Reporter's Transcript. The page numbers for the reporter's transcript of the second trial begin with "2-." Thus, 23RT 2-1293-1303 means the pages numbered 2-1293 through 2-1303 of volume 23 of the reporter's transcript.

[3] The second amended information further alleged that Betton had prior convictions for voluntary manslaughter (§ 192, subd. (a)), sodomy in (continued...)

Trial began before Judge Jack Morgan with jury selection on May 20, 1998. (1CT 287.) Johnson attended the trial – from jury selection to deliberations – and testified on his own behalf at the guilt phase. (1CT 287; 18CT 5229-5257; 2RT 2784-13RT 2882.) The jury was unable to reach any verdict, and the court declared a mistrial on June 19, 1998. (18CT 5333.)[4]

On September 17, 1998, the parties and the court, with Judge John Cheroske then presiding, appeared in the jury assembly room to distribute hardship questionnaires to the approximately 400 prospective jurors present. (17RT 2-12, 18, 64.) There, Johnson and his appointed counsel, Steven Hauser, engaged in an altercation where Johnson purportedly punched Hauser and Hauser fell off his chair. (17RT 2-18-29, 53, 69.) Without hearing Johnson's side of the scuffle, Judge Cheroske summarily ruled that Johnson would never be allowed back in the courtroom under any circumstances – not for the guilt phase, not for any penalty phase, not ever to see or be seen by the jury, and not for any hearings held outside the presence of the jury. (17RT 2-25; 18CT 5342.) Hauser, who remained as Johnson's counsel, did not object to the court's ruling; nor did he argue that Johnson should be present at his own trial. (17RT 2-25.) Judge Cheroske then declared a mistrial at the behest of the presiding judge. (17RT 2-39, 41.)

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[3](...continued)
concert (§ 286, subd. (d)), and assault with a deadly weapon (§ 245, subd. (a)(1)). (19CT 5367.)

[4] The jury took seven ballots, finally hanging against both defendants 6-6 on count one and 11-1 in favor of guilt on count two. (15RT 3454-3489.)

The retrial before Judge Cheroske began with jury selection on November 5, 1998. (39CT 11500.) Consistent with his prior order permanently excluding Johnson, Judge Cheroske did not allow Johnson back in the courtroom, even to testify. Instead, Judge Cheroske promised Johnson that the jury would be present in the courtroom if Johnson wanted to testify from his holding cell over one-way closed circuit television. Johnson said he would testify. Judge Cheroske, however, with the complicity of Hauser and the prosecutor, kept the jury from the courtroom, while deliberately failing to inform Johnson that he had done so, though Johnson, as Judge Cheroske acknowledged, thought the jury was present while he testified from his holding cell. When Johnson did not conform to a question-and-answer format and made comments, Judge Cheroske revealed his "little surprise" to Johnson – that the jurors were not present at all in spite of Judge Cheroske's promise – and ruled that Johnson had permanently waived his right to testify. (23RT 2-1293-1303, 2-1364-1367.)

On November 25, 1998, the jury returned guilty verdicts against Johnson on both counts, and found true the special circumstance, as well as the gun-use and arming enhancements. (39CT 11543; 40CT 11611-11612.)[5]

The penalty phase began on December 1, 1998. (40CT 11618.) Again Judge Cheroske did not allow Johnson in the courtroom or permit him to testify in any manner. (40CT 11618-11621.) The jury returned a

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[5] The jury found Betton guilty of count two (Faggins), hung on count one (Hightower), and found true the enhancements and prior convictions; the court dismissed count one against Betton (and by implication the multiple-murder special circumstance allegation) and sentenced him to 89 years to life. (40CT 11617; 1SCT II 360, 377, 418.)

death verdict against Johnson on December 3, 1998. (40CT 11644.)

Judge Cheroske denied Johnson's motions to modify the verdict and for a new trial and imposed a sentence of death. (40CT 11678.)

STATEMENT OF FACTS

A. Guilt Phase

1. Introduction

Gregory Hightower and Lawrence Faggins were shot at the Jordan Down housing projects in Los Angeles at about 10 p.m. on September 26, 1996. (21RT 2-871, 915, 921, 926; 22RT 2-1023.) Hightower was given CPR at the scene, but later died at a hospital. (20RT 688; 21RT 871, 884.) No evidence of Faggins's time of death was presented, though he too was hospitalized. (21RT 2-921.)

No physical evidence tied defendant Cedric Johnson to their deaths. Instead the prosecution relied on the testimony of three persons – Tyrone Newton, Leonard Greer, and Robert Huggins – to support the claim that Johnson was involved in the shootings. But as the prosecution informed the jury in closing argument, it would be "ridiculous" for the jury to make its decision based on any one of these three individuals because each repeatedly made inconsistent statements regarding the shootings. (24RT 2-1559-1560.) In fact all three admitted lying about witnessing the shootings. (RT 21RT 2-795, 799, 801, 938; 22RT 2-991, 1125, 1132, 1143.)

2. The Hightower and Faggins Shootings

At trial Tyrone Newton denied having any personal knowledge about the shootings of Hightower and Faggins. (20RT 2-779-780.) When the shootings occurred, Newton, who knew the defendants and the victims, was home in Hawthorne. (21RT 2-778-780.) The next day Newton went to

Jordan Downs, where some of his family members lived, and heard that Hightower and Faggins had been shot. (21RT 2-795, 799, 800.)

Newton testified under oath that two weeks later on October 11, 1996, he was in jail after his arrest at Jordan Downs for cocaine possession. (21RT 2-794, 800.) The arresting officer asked Newton if he knew about the Hightower and Faggins shootings, and Newton said no. (21RT 2-801.) Newton spoke to four police officers who explained to Newton what they thought had happened when Hightower and Faggins were shot; they further told Newton that he could provide them with some information regarding the shootings. (21RT 2-805.)

On prior occasions when Newton had been arrested, he was released in return for providing information to the police. (21RT 2-807.) On this occasion the arresting officer instructed Newton that if he provided him with information about the shootings, he would drop Newton's cocaine possession case. (21RT 2-801.) According to Newton, the police officer "said some words, and I followed along with it." (21RT 2-800.)

After discussing the shootings with the four officers, Newton spoke separately – not under oath – with Detective Waters, who had already been informed that Newton could provide her with information about the shootings; Waters videotaped the interview. (21RT 2-806; 22RT 2-1098; 2SCT II 343.) While talking to Detective Waters, Newton felt that if he provided the statement that the police wanted, he would obtain a benefit in his cocaine possession case. (21RT 2-807.)

Because the arresting officer promised to drop Newton's case, Newton lied to Detective Waters, told her that he had witnessed the shootings, and made up a story that Hightower and Faggins were killed because they were snitches. (21RT 2-795, 799, 801.) Although he was

arrested immediately after Waters interviewed him, Newton was released shortly after the arrest. (21RT 2-807; 23RT 2-1266.) He was never prosecuted for the cocaine possession. (21RT 2-807.)[6]

Newton told Waters that the shootings occurred on September 25 in the afternoon, around 4:00 or 5:00 p.m. (2SCT II 324, 344-345), when they actually occurred late at night the next day at about 10:00 p.m. (22RT 2-1023). He said the shootings took place on 97th Street (2SCT II 326, 346), though they happened on 99th Place (22RT 2-1024-1026, 1177). Newton asserted that Hightower and Faggins were shot with the same gun (2SCT II 331), while in fact they were shot with two different guns. (21RT 2-900-903; 23RT 2-1204).

Newton also related to Waters that the shooter reached inside the car and shot Hightower (2SCT II 348), yet the medical examiner testified that if that had been the case, there would have been gunshot residue on Hightower, but there was not (21RT 2-887-888). Detective James Vena testified, moreover, that the shots were not fired from inside the car, but were fired from outside Hightower's car. (23RT 2-1235.)

Newton said to Waters that Faggins was shot in the head, face, shoulder, and arm (2SCT II 330, 347-348), but he was not – Faggins was shot only in the back (21RT 2-917.) Newton told Waters that Johnson shot both Hightower and Faggins "with a Tech. A .40. A little Sheldon" (2SCT II

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[6] The prosecutor did not call the arresting officer to rebut any part of Newton's trial testimony that he had been arrested for cocaine possession, initially said he knew nothing about the shootings, was told that he would be released if he provided information about the shootings, was provided with information about the shootings from several police officers, lied about witnessing the shootings, and had the charges dropped against him in return for a videotaped statement regarding the shootings.

331) because they were "snitches" (2SCT II 324, 327), but there was no corroborating evidence that a .40 caliber was used, no evidence what a "Tech" was, no evidence what a "little Sheldon" was, and no evidence that Hightower was a "snitch."[7]

Finally, Newton said that Betton, acting as Johnson's backup, only had a rifle, which he did not fire (2SCT II 331-332), but according to the prosecutor, Betton shot at Faggins repeatedly with a handgun (24RT 2-1466-1467, 1470).[8]

Betton's then-girlfriend, Rochelle Johnson (no relation to defendant Cedric Johnson), testified that while attending nursing school, she lived in Jordan Downs near the scene of the shootings and rushed to offer help at what she thought was a car accident. (20RT 2-676, 685-687, 755.) She found her friend, Hightower, who was also Cedric Johnson's very good friend, alive and sitting in the driver's seat of his car, "full of blood." She gave Hightower CPR before he was driven away; then she walked home crying and called her mother, Annette Johnson, because Rochelle needed her. (20RT 2-688, 691, 694.)[9]

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[7] Newton testified that he had never heard of either victim snitching on anybody. (21RT 2-801.) The prosecutor then elicited that Newton had told Sgt. Waters that Faggins had snitched on someone named Mo-C. (21RT 2-814.) Mo-C did not testify. There was no evidence that Mo-C was in any way connected to either defendant or that either defendant knew about Faggins allegedly having snitched on him.

[8] The jury found Betton guilty of the first degree murder of Faggins and true the allegation that Betton personally used a handgun, not a rifle, in the commission of the crime. (2SCT II 360.)

[9] Because each has the same last name, Rochelle Johnson will be referred to as Rochelle, Annette Johnson will be referred to as Annette, and

(continued...)

Annette testified that while at home in another part of Los Angeles on the night of the shootings, she received a call from Rochelle. (20RT 2-676, 742-743, 745.) After the call, Annette phoned her son, Leonard Greer, to take her to Rochelle's home; Greer arrived later at Annette's house with his girlfriend, Dinky, who drove Greer and his mother to Jordan Downs. (20RT 2-743-744, 757.)

Like Newton, Greer was incarcerated when he testified for the prosecution; Greer had been convicted of several felonies including rape, assault on a police officer with a firearm, burglary, and robbery. (22RT 2-1111-1112.) Originally, Greer claimed to the police that he had witnessed the Jordan Downs shootings, but admitted at trial that he had lied. (22RT 2-1132, 1143.)[10]

According to Greer, he went to a police station in March 1997 to register as a sex offender and asked to speak to the detective in charge of the Hightower case. (22RT 2-1127.) Detective Vena, the investigating officer in charge, testified that he interviewed Greer for an hour, and Greer stated that he had seen the shootings. (23RT 2-1214.) A detective for 15 years, Vena believed that Greer was telling the truth about witnessing the shootings. (23RT 2-1214-1215.)

At trial Greer admitted that when he told Detective Vena that he was at a party at Jordan Downs on the night of the shootings, that was not true. Greer admitted that when he told Detective Vena that he saw who shot at Faggins, that also was not true. He further told Detective Vena that he saw

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[9](...continued)
Cedric Johnson will be referred to as Johnson.

[10] The prosecutor conceded to the jury that Greer lied in telling the police that Greer had seen the shootings. (24RT 2-1565.)

Hightower get shot and killed, but that was not true. (22RT 2-1154.) He also admitted that he fabricated a motive for the killings. Greer told Detective Vena that the shootings took place because Betton had been beaten out of some cocaine, but, as Greer admitted, that too was not true. (22RT 2-1155.)

Greer lived in Hollywood in what he described was "like a whore house," but testified that he happened to be at Jordan Downs on the night of September 26, 1996. (22RT 2-1114, 1133, 1144.) There, he heard 10 or more shots in a bunch, all together, contradicting other testimony that there were two shootings separated by two to three minutes. (21RT 2-854, 955, 1136-1137, 1166.) Greer said he ran toward the scene because he was nosy and wanted to see the shootings, but claimed he was not interested enough to actually reach the scene. (22RT 2-1114, 1138, 1142, 1146-1147.) Greer explained that hearing 10-plus gunshots nearby "was interesting, but it wasn't that interesting." Greer's claim that he saw the defendants flee together was uncorroborated and reported only after he admitted lying about seeing the actual shootings; he never told Detective Vena that he had seen them running away. (22RT 2-1143.) No witness corroborated Greer's claim that he was there at any point.

Greer told the jury that he saw his sister Rochelle walking towards him, crying and covered in blood. (22RT 2-1115-1120.) Greer testified that Rochelle said, "They didn't have to kill him. They didn't have to kill him." and "CJ didn't have to kill him." (22RT 2-1116.) Johnson's nickname is CJ. (20RT 2-679.)[11]

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[11] As demonstrated in Argument 8, Judge Cheroske erred in admitting Greer's testimony regarding Rochelle's hearsay statement, which (continued...)

At trial Greer was adamant that he passed on to his friend, Police Officer Christian Mrakich, what Rochelle had purportedly said to Greer. (22RT 2-1158-1159, 1170-1171.) But Officer Mrakich testified that in the over two years that he had contacts with him, Greer never said any such thing to Mrakich. (23RT 2-1259.)

Rochelle testified that she did not see or talk to Greer while walking home, but was positive that he arrived at her home later with their mother, after Rochelle called Annette in tears asking for help. (20RT 2-691, 693-694, 713, 715, 723.) Annette confirmed that Greer, along with his girlfriend Dinky, drove Annette to Jordan Downs that night. (20RT 2-743-744.)

Moreover, when Greer was interviewed by the police just after the shootings, he did not tell them that he saw Johnson and Betton; nor did he mention anything about Rochelle's saying that "they" or "CJ" did not "have to kill him." (22RT 2-1162.)

Finally, contrary to his mother's testimony, Greer testified that he did not ride to Jordan Downs with Dinky, even though he told the jury that he drove to Jordan Downs from Dinky's house and also that Dinky was present at Rochelle's home when Greer and his mother were there. (22RT 2-1133, 1145, 1150-1151.) According to Greer, like his mother, Dinky just happened to be at Jordan Downs on the night of the shootings. (22RT 2-1134-1135.) Greer also falsely stated under oath that he could not remember Dinky's real name, but then recanted while still refusing to provide her real name. (22RT 2-1134.)

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[11](...continued)
effectively asserted that Johnson killed someone without any showing that Rochelle had witnessed the shooting.

Robert Huggins, Hightower's brother, testified that he witnessed the shootings, but denied seeing Greer or Newton anywhere in the area. (21RT 2-945-946; 22RT 2-997-998.) Similarly, Greer said he did not see Huggins. (22RT 2-1167.)

Huggins testified that on the night of the shootings, he saw Hightower and Faggins at a party in Jordan Downs. (21RT 2-816-817, 823.) At the first trial, however, Huggins testified that he did not see Hightower at the party. (22RT 2-987.)[12]

Huggins testified at the second trial that he saw both Johnson and Betton at the party, though he told the police that neither was at the party. (21RT 2-820, 946; 23RT 2-1201.) Shetema White hosted the party and testified that neither Johnson nor Betton attended. (23RT 2-1283-1284, 1291.)

Huggins further testified, "the whole thing was a setup in the first place" (21RT 2-961), and "[t]hey was already plotting to kill [Faggins] already from when we first got to the party," something Huggins said that he knew of his own knowledge, though Huggins did not inform the jury who the plotters were or how he knew about a setup or plot to kill Faggins. (21RT 2-962-963.)

Huggins testified that he left the party with Hightower to go to Hightower's house, and that while Huggins walked to his own car, Hightower followed with Charles Lewis in Hightower's car. (21RT 2-822.) Faggins left the party at the same time. (21RT 2-823.)

Lewis testified that he had known Huggins for a long time, but did

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[12] The first trial was in May and June 1998. (1CT 287; 18CT 5333.)

not see Huggins at the party or any other time that evening. (22RT 2-1064-1065.) Rochelle Johnson and Shetema White testified that Huggins, whom Rochelle called a very good friend, was not at the party. (20RT 2-681, 719; 23RT 2-1291.) Although Huggins testified that he left the party with Toby's brother-in-law and Toby – whose last name Huggins did not know and who was never contacted by the police – neither testified to confirm that Huggins attended the party. (21RT 2-947; 23RT 2-1217.) No witness did.

Although Huggins testified at the preliminary hearing that he was drunk at the time the shootings took place so that his memory of that night was not clear, he testified at the second trial that he was not drunk and his memory was clear. (22RT 2-991, 1017.) Huggins also testified at the preliminary hearing that he drank about a fifth of cognac before the shootings, but at trial he said that he shared the bottle with five others. (22RT 2-1008, 1014.)

Huggins admitted that when he testified at the preliminary hearing, he was not completely truthful; he claimed that he was concerned about his safety, though he had never been threatened. (21RT 938; 22RT 981.) Before the preliminary hearing he had been in lockup with Johnson and Betton, where Johnson did not threaten him, but asked Huggins why Huggins said all the things he said about Johnson. (21RT 2-934-936; 22RT 2-981.) Huggins did not inform anyone that he should not be in the same cell as Johnson. (21RT 2-939.)[13]

In an earlier proceeding, Huggins testified that he did not leave the

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[13] The prosecutor conceded that Johnson did not say anything threatening to Huggins. (24RT 2-1448.)

party until after the shooting was over. (21RT 2-947.) At the preliminary hearing, Huggins testified that he could not see the shootings because it was dark. (22RT 2-991.) At trial, however, Huggins testified that after he, Toby, and Toby's brother-in-law left the party, they sat in Huggins's car, and Huggins saw the shooting. (21RT 2-833.)

Although Huggins told Detective Vena that at the party Faggins had a small black gun, possibly a .380, and that Faggins later dropped a gun that Johnson picked up and fired at Faggins, at trial Huggins testified that Johnson had a fully automatic Uzi and a big automatic gun that looked like a 9 mm, perhaps a Berreta. (21RT 2-840, 941-943; 23RT 2-1198-1199.) According to Huggins at trial, Johnson stopped shooting, and then Betton began firing a .25 caliber automatic at Faggins while holding two handguns. Huggins told the police, however, that Betton probably had two 9 mm guns. (21RT 2-842, 943.)[14]

Faggins was shot with three or four .25 auto caliber bullets. (21RT 2-902; 23RT 2-1204; see also 24RT 1449 [prosecutor's opening argument].) Two Los Angeles Police Department experts testified for the prosecution. Criminalist Daniel Rubin was unaware of an Uzi that could shoot a .25 caliber bullet (21RT 2-908), and firearms examiner Anthony Paul, who analyzed the cartridges found at the scene, concluded that there was no evidence that an Uzi was involved in this case (22RT 2-1074). Four different kinds of discharged cartridge cases were recovered near the scene of the shootings – .25 auto caliber, .380 auto caliber, .45 auto caliber, and 9 mm Luger caliber. (21RT 2-893-894.)

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[14] Contrary to Huggins's statements to Vena, the prosecutor argued to the jury that Faggins did not have a gun at all. (24RT 1561-1562.)

At trial Huggins told the jury that Johnson shot Faggins at close range with something like a 9 mm Beretta, while Faggins was facing Johnson. (21RT 2-951, 953-955.) The medical examiner, however, testified that Faggins was shot only in the back. (21RT 2-917.) Huggins also testified that Johnson shot Faggins with the Uzi, spraying him with bullets and causing Faggins to collapse. (21RT 2-843.)[15]

Huggins further testified at trial that some individuals walked over to look at Faggins after he had been shot, though at the first trial he testified that no one went over to see what happened to Faggins. (21RT 2-952, 968.) He also testified at the second trial that the gunmen yelled to leave Faggins alone, though he never mentioned this to the police. (21RT 2-968; 23RT 2-1230.)

According to Huggins, two or three minutes after the Faggins shooting, Johnson and Betton walked up to Hightower's car, passing by Lewis who had gotten out of Hightower's car to remove a bicycle in front of the car. (21RT 2-845, 850, 851, 854.) Johnson stood right at the driver's door long enough to have a short conversation with Hightower, and then with his hand close to but not inside the car, Johnson began firing at Hightower. (21RT 2-848-849, 955.) Hightower was shot with .45 caliber bullets. (21RT 2-870-871, 875, 901-903.) According to the medical examiner, had Hightower been shot with a .45 caliber bullet at the close range that Huggins asserted, there would have been gunpowder residue on Hightower, but there was none. (21RT 2-887-888.)

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[15] The prosecutor did not believe Huggins's testimony that Johnson shot Faggins. In argument to the jury, the prosecutor candidly admitted that, based on the evidence, there was no way to tell who shot Faggins. (24RT 1466.)

Huggins said to Detective Vena that Lewis told Huggins that Hightower expressed to Johnson that it was wrong to shoot his homey Faggins. (22RT 2-1087.) Lewis denied making the statement to Huggins. (22RT 2-1047.)

Huggins testified at the preliminary hearing that he did not really get a good look at who shot his brother. (21RT 2-967.) Although Huggins testified previously that Johnson used the same gun to shoot both Faggins and Hightower, at trial he testified that he did not know if it was the same gun. (21RT 2-955.)

At trial Huggins testified that after the Hightower shooting, he got out of his car, walked over to Hightower's car, saw Hightower leaning forward onto the steering wheel, did not notice any blood – even though Hightower suffered massive bleeding from his three gunshot head wounds that would have been obvious because, as the medical examiner testified, "Head and scalp wounds bleed profusely" – did not provide any medical assistance, did not then call an ambulance, did not open the car door, and did not ask Toby to get help while Huggins waited with Hightower; instead, Huggins said that he pulled his brother back, saw that he had been shot in the head, laid him back down, and then ran back to his car. (21RT 2-855, 879, 885, 888, 960; 22RT 2-979, 988-989; 23RT 2-1211.) None of the dozens of witnesses to the shooting corroborated any part of Huggins's testimony including his walking over to and reaching his brother. (20RT 2-688.)

Huggins told Detective Vena that after the shootings, he drove west on 99th Street, parked his car, and ran to his sister's house. (23RT 2-1198.) But at the first trial, Huggins testified that he left his car behind before going home. (22RT 2-994.) Finally, at the second trial, he testified that he

drove to his girlfriend's house with Toby and his brother-in-law, and she called for an ambulance. (21RT 2-855-856, 966.) Huggins also said that while at his girlfriend's house, he called his sister to phone for an ambulance as well. (21RT 2-856, 2-966.) Huggins's girlfriend did not testify. Neither did Toby or his brother-in-law. No corroborating evidence regarding any 911 calls was presented at trial.

At the first trial, Huggins testified that he did not return to the scene of the shootings. (22RT 2-1000.) At the second trial, he testified that he returned to Jordan Downs five minutes after the shootings and saw police yellow tape around the area, but did not see any police – even though, as Joyce Tolliver testified, many police officers were present. (22RT 2-998-999; 23RT 2-1328.)

Though his brother and Faggins were shot in September 1996, Huggins did not talk to the police about the shootings until over three months later, after he had been arrested and incarcerated for spousal abuse. (21RT 2-933-934, 946; 22RT 2-982-983, 1092-1093; 23RT 2-1217.) Huggins testified that he did not come forward earlier because Johnson was still out on the streets, though Johnson had been in jail for three weeks before Huggins finally spoke. (21RT 2-860; 23RT 2-1393.)

Huggins testified that he described the shooting to his stepfather (Mr. Hightower) only days after it happened. (21RT 2-860, 944; 22RT 2-1001.) But this was inconsistent with his stepfather's statements and conduct. Mr. Hightower talked to Vena and his partner, Sgt. Waters, several times within a month of the shooting. (23RT 2-1209.) Mr. Hightower gave no indication that he knew who had killed his son, although he suggested that Huggins might know. (23RT 2-1210.) Mr. Hightower even talked to police about offering a reward for information about the shooting. (23RT 1210.)

Jocelyn Smith, Johnson's wife, testified that on September 26, 1996, she saw Johnson asleep at their home in Jordan Downs at about 7:30 or 8:00 p.m. (23RT 2-1326, 1344, 1346.) She left to attend a party and did not see Johnson again until she went back to their apartment to tell Johnson, who was still asleep, that she was going to the hospital because Hightower and another person had been shot. (23RT 2-1343-1344, 1346.)

According to Smith, Johnson had a key to 2149 East 99th Place and possibly could have been at that unit while she was at the party, though Smith did not think so. (23RT 2-1356-1357.)

Maureen Wallace, who lived on East 99th Place close to the scene of the shootings, was driving near her apartment on September 26, 1996, when she heard probably more than 10 gunshots. (23RT 2-1373, 1377.) A minute or two after, she saw a couple of unknown men, one big and the other short, running in her direction; one had a handgun and the other had a dog on a leash. (23RT 2-1376, 1378, 1386.) She knew both Johnson and Betton, Johnson for about 11 or 12 years, and the men she saw was neither. (23RT 2-1377, 1382.) Afraid, she jumped out of her van, grabbed her grandson, and fled into an apartment. (23RT 2-1379.) She waited five or six minutes before leaving and driving to Hightower's location, where she saw Hightower, who had been shot. (23RT 2-1379-1380.) She was there for about two hours; she saw Hightower's girlfriend, Monica, attending to Hightower, and Rochelle Johnson, giving him mouth-to-mouth. (23RT 2-1379-1381, 1386.)

Joyce Tolliver, unhappy that her daughter, Jocelyn Smith, married Johnson, testified that about 10:00 or 11:00 p.m. on September 26, 1996, she was at her home on East 99th Place when she heard the shootings. (23RT 2-1319, 1327.) She phoned her sister, who also lived on East 99th

Place near the scene of the shootings, and then left for her sister's apartment when she saw two young, unknown men walking by her door. (23RT 2-1323-1324, 1335.) The first wore a black and white Pendleton jacket, weighed over 200 pounds, was stocky, had a medium complexion, and carried an Uzi-like gun. (23RT 2-1324-1325.) She asked him what had happened, and he said that he did not know. (23RT 2-1334.) The second man was taller, about 6 feet, and thin with a medium complexion. (23RT 2-1325, 1338.)

Tolliver walked over to her sister's apartment, which was less than five minutes away, where she heard that two persons had been shot. (23RT 2-1327, 1331.) On her way back home, she stopped at the crime scene and spoke to two of the many police officers present. (23RT 2-1328-1331.)

She saw the two men again when she was opening her back door to return home. (23RT 2-1332.) They were riding in a big white vehicle, like a van, with a flat hood. (23RT 2-1331-1332.)

She has known Johnson since he was a child and Betton since he was a baby. Neither of the two unknown men was Johnson nor Betton. (23RT 2-1325-1326.)

B. Penalty Phase

Johnson had a single prior felony conviction from 1993 for selling marijuana. (25RT 2-1698-1699.)

Larry Hightower testified about his son Gregory, survived by three children, twelve siblings, and parents, and the effect of Gregory's death on the family. (25RT 2-1713-1714, 1717, 1728-1729.) Gregory served seven years in the California Youth Authority as an accessory to the murder of an insurance salesman at Jordan Downs during the 1980s. (25RT 2-1716-1717.) In the early 1990s, when he was about 28 years old, Gregory and a

partner founded a shoe store with the help of Maxine Waters, Jim Brown, and Jesse Jackson. (25RT 2-1718, 1721.) He also worked with Brown and Waters in establishing a truce among the gangs after the riots in 1992. (25RT 2-1729-1730.)

Two deputy sheriffs testified that on September 17, 1998, Johnson struck Hauser's head in the jury assembly room. (25RT 2-1706, 1708.) It looked as if Johnson was trying to continue to attack Hauser. (25RT 2-1706-1707.) He kicked at and spat at Hauser. (25RT 2-1711.)

Hauser called psychiatrist Marshall Cherkas. (25RT 2-1742.) After spending no more than five minutes with Johnson and reviewing (1) some of Johnson's medical records, which apparently Cherkas later "tossed" out, (2) 1978 records from the UCLA hospital indicating that Johnson came from a chaotic and violent home with nine children and was an aggressive, angry, and disruptive child, (3) various tests suggesting problems of actual brain function, and (4) school records showing that Johnson had a low normal intellect, had difficulty with his behavior in the classroom, had a lisp, and was violent, threatening, negativistic, uncooperative, inappropriate, not entirely logical, and guarded, Cherkas opined that Johnson appeared to be illogical and irrational and had an underlying psychotic core that manifested a thinking disorder and a distorted perception of reality. (25RT 2-1741, 1743, 1745-1751.)

ARGUMENT

1.

BECAUSE DEFENDANT CEDRIC JOHNSON WAS TRIED BEFORE A BIASED JUDGE, HE WAS DENIED A FAIR TRIAL.

A. Introduction

Due process demands that an impartial judge preside over a defendant's trial. John J. Cheroske, the judge who presided over the second trial in this case, was not impartial.

As demonstrated below, Judge Cheroske was repeatedly and consistently biased against defendant Cedric Johnson – from the times when Judge Cheroske presided over proceedings before the first trial, to the second trial itself. The judge's extreme bias was ultimately reflected during the second trial when he deceived Johnson into believing the jury was present in the courtroom to see and hear Johnson – as he testified over one-way, closed-circuit television from his holding cell – though the jury was not present in the courtroom.

Judge Cheroske's actual bias was also shown by acts such as expelling Johnson from the courtroom when Johnson made a proper objection while acting in pro per; forcing Johnson to argue his case for ancillary funds in open court in the presence of the prosecutor; threatening to revoke Johnson's pro per status "in a heartbeat" if Johnson did not behave as a lawyer at every pretrial proceeding; representing that he would continue the date of the first trial, but then denying Johnson's continuance motion after substantially misstating the contents of Johnson's moving papers; and abusing his power by revoking Johnson's pro per status in an instant.

Accordingly, the entire judgment must be reversed. (*Bracy v. Gramley* (1997) 520 U.S. 899, 904-905; *Arizona v. Fulminante* (1991) 499 U.S. 279, 308 [lack of an impartial judge can never be harmless so that judgment is reversible per se]; *People v. Perkins* (2003) 109 Cal.App.4th 1562, 1564].)

B. Facts

Judge Jack Morgan presided over Johnson's first trial, which ended in a guilt phase mistrial when the jury was unable to reach a verdict. Johnson was present and testified at that trial. (18CT 5229-5265.)

As detailed below, Judge Cheroske heard many of the matters before the first trial. (See, e.g., 1CT 194, 236, 238, 254-255, 262, 264, 271, 273, 275-278.) He also presided over the second trial. (19RT 2-579.)

The jury in the second trial never saw Johnson in the courtroom because Judge Cheroske ejected him before the second trial began and never gave him an opportunity to return. (18CT 5342.) And although Johnson wanted to testify during the guilt phase, Judge Cheroske barred him from testifying to the jury, even from his holding cell. (39CT 11535; (23RT 2-1296-1297.)

Unlike the mistrial presided over by Judge Morgan, the second trial presided over by Judge Cheroske resulted in guilt and death verdicts against Johnson. (40CT 11611-11612, 11644.)

C. Law

"[A]n impartial judge is essential to due process." (*Republican Party of Minnesota v. White* (2002) 536 U.S. 765, 776; *Bracy v. Gramley, supra*, 520 U.S. at pp. 904-905 [Due Process Clause "clearly" requires a fair trial before a fair judge].) Impartiality in the judicial context "guarantees a party that the judge who hears his case will apply the law to him in the same

way he applies it to any other party." (*Republican Party*, at p. 776.) Thus, fundamental fairness forbids a judge from having any actual bias against the defendant. (*Bracy v. Gramley, supra*, 520 U.S. at p. 905.) The court proceedings and surrounding circumstances may demonstrate the judge's actual bias. (*Stivers v. Pierce* (9th. Cir. 1995) 71 F.3d 732, 741, citing *Taylor v. Hayes* (1995) 418 U.S. 488, 501-504].)[16]

Generally, a party seeking to prevail on a due process claim based on judicial bias must overcome a presumption of honesty and integrity in the judge. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1026, citing *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813, 820, 824-825 and *Withrow v. Larkin* (1975) 421 U.S. 35, 47; see also *Franklin v. McCaughtry* (7th Cir. 2005) 398 F.3d 955, 959 ["[t]he general presumption is that judges are honest, upright individuals and thus that they rise above biasing influences"].)[17]

In *Haas v. County of San Bernardino, supra*, 27 Cal.4th 1017, this Court noted that "adjudicators challenged for reasons other than financial interest have in effect been afforded a presumption of impartiality . . . ."

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[16] Fundamental fairness also forbids a judge from having any interest in the outcome of the defendant's particular case (*Bracy v. Gramley, supra*, 520 U.S. at p. 905), being "embroiled in a running, bitter controversy" with the defendant that threatens the judge's ability to remain detached and fair (*Mayberry v. Pennsylvania* (1971) 400 U.S. 455, 465), or having any "part of the accusatory process" (*In re Murchison* (1955) 349 U.S. 133, 137).

[17] The presumption of impartiality does not apply, however, where a party challenges a judge for having a financial interest in the case, which requires the party merely to show that the financial interest would offer a possible temptation to the average "judge not to hold the balance nice, clear and true." (*Haas v. County of San Bernardino, supra*, 27 Cal.4th at p. 1026.)

(*Id.* at p. 1026.) In support, *Haas* cited *Withrow v. Larkin*, *supra*, 421 U.S. at p. 47, where the high court wrote that a judicial bias claim "must overcome a presumption of honesty and integrity in those serving as adjudicators." Thus, this Court equates a presumption of honesty and integrity with a presumption of impartiality. And a judge who lacks honesty and integrity towards a defendant lacks impartiality towards the defendant as well.

Judicial misconduct may also prejudicially deprive a defendant of due process and the right to a fair trial. (*People v. Perkins*, *supra*, 109 Cal.App.4th at p. 1564; see also *People v. Harmon* (1992) 7 Cal.App.4th 845, 852 [trial judge has a duty to be impartial, courteous and patient and violating this duty may be so serious as to constitute reversible error].)

D. Code of Judicial Ethics

This Court adopted the Code of Judicial Ethics, effective January 15, 1996. (Cal. Code Jud. Ethics, Preface.) Although the Code does not have the force of law, the Court expects that all judges will comply with its canons; furthermore, the Code reflects a judicial consensus on appropriate behavior and is "'helpful in giving content to the constitutional standards under which disciplinary proceedings are charged.'" (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 882, fn. 5, quoting *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 838.)[18]

The following canons (or parts) in effect at the time of Johnson's trial are relevant here:

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[18] All "canon" references are to the California Code of Judicial Ethics.

Canon 1. A judge shall uphold the integrity and independence of the judiciary.

Canon 2A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3. A judge shall perform the duties of judicial office impartially and diligently.

Canon 3B(4). A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers and of all court staff and personnel under the judge's direction and control.

Canon 3B(5). A judge shall perform judicial duties without bias or prejudice.

Canon 3B(7). A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law.

Canon 3B(8). A judge shall dispose of all judicial matters fairly, promptly, and efficiently.

Canon 3E. A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.

Although Judge Cheroske violated other canons as well, for example, canon 2's command to avoid impropriety and the appearance of impropriety in all of the judge's activities, and canon 3B(2)'s requirement that a judge shall maintain professional competence in the law, the canons cited above pertain directly to the constitutional requirement of judicial impartiality. Hence, Judge Cheroske's repeated violations of those canons in this case demonstrate his bias against Johnson.

E. Judge Cheroske Committed Many Acts of Misconduct Against Johnson, Culminating in Actual Bias When Judge Cheroske Deceived Johnson into Believing That He Was Testifying to the Jury over a Television Monitor, When in Fact the Jury Was Not in the Courtroom.

1. Judge Cheroske summarily denied Johnson's motion to disqualify standby counsel – without even reading Johnson's filed motion.

A stark indication of the type of bias that Judge Cheroske brought to Johnson's second trial occurred when he ruled on Johnson's pretrial motion to disqualify Steven Hauser as standby counsel. On February 18, 1998, with Johnson acting in pro per, Judge Cheroske appointed Hauser as standby counsel over Johnson's objection. (1RT 148-149.) Judge Cheroske advised Johnson that if he wanted to contest this action, he needed to file a motion. When Johnson informed the court that he had already filed a motion to disqualify Hauser (1RT 151-152; 1CT 210-218), Judge Cheroske, without reading Johnson's motion, denied the motion, stating as follows: "Therefore, having elected, as your own attorney, not to follow the court's advice and not to file a motion, your motion is denied." (1RT 150-152.)

This type of attitude toward a criminal defendant is exactly the kind of conduct that this Court condemned in *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, where the Court found that a judge's refusal to listen to defendants, who were attempting to address the court, amounted to prejudicial conduct consisting of the denial of the parties' full right to be heard. (*Id.* at p. 325.)

By denying Johnson's motion to disqualify Hauser without reading the written motion filed by Johnson, Judge Cheroske denied Johnson's fundamental right to procedural due process (see *Bradley v. Henry* (9th Cir. 2007) 510 F.3d 1093, 1097-1098 (en banc) (plur. opn. of Noonan, J.)

["Audi alteram partem – hear the other side – is what makes the legal process work in an adversary system"]), and violated canon 3, which requires a judge to perform the duties of judicial office impartially, canon 3B(5), which requires that a judge shall perform judicial duties without bias, canon 3B(7), which requires a judge to accord to every person who has a legal interest in a proceeding the full right to be heard according to law, and canon 3B(8), which requires a judge to dispose of all judicial matters fairly.

2. Judge Cheroske forced Johnson to argue his motion for ancillary funds in open court with the prosecutor present – after Johnson asked that Judge Cheroske hear the matter ex parte – in blatant violation of section 987.9's charge that the motion be heard ex parte and in camera.

During the same February 18 hearing, Johnson asked Judge Cheroske to consider his motion for ancillary funds ex parte. Judge Cheroske declined to hear it ex parte and proceeded to discuss and rule on Johnson's motion in the presence of all counsel, including the deputy district attorney. (1RT 160-161.)

Section 987.9 governs a capital defendant's request for ancillary funds. Subdivision (a) provides that the defendant's motion is confidential and the court's ruling "shall be made at an in camera hearing." By refusing Johnson's request to have his motion heard ex parte, but instead hearing the motion in open court, Judge Cheroske abused his authority, disregarded the law and Johnson's Fifth Amendment rights, and violated the confidentiality requirement of section 987.9 (*People v. Anderson* (1987) 43 Cal.3d 1104, 1133 [confidentiality requirement protects defendant's federal constitutional right against self-incrimination]), canon 2A, which requires a judge to

respect and comply with the law, canon 3, which requires a judge to perform the duties of judicial office impartially, and canon 3B(4), which requires a judge to be patient, dignified and courteous to litigants (*People v. Alvarez* (1996) 14 Cal.4th 155, 236), canon 3B(5), which requires that a judge shall perform judicial duties without bias, and canon 3B(8), which requires a judge to dispose of all judicial matters fairly.[19]

3. Judge Cheroske expelled Johnson from the courtroom without basis when Johnson tried to make a proper objection while acting in pro per.

At a hearing the following day, February 19, 1998, the court called the case, and, although Judge Cheroske informed Johnson the previous day that Hauser would not be representing Johnson "at all," but was there "to represent the court" as "stand-by counsel" (1RT 148), Judge Cheroske referred to Hauser as "stand-by counsel for Mr. Johnson." (1RT 165.) Immediately, while acting as his own lawyer, Johnson stood and tried to object:

Mr. Johnson: I object to –

The Court: Oh, sit down. Just be quiet. It's not time for you to object.

Mr. Johnson: I object to the stand-by counsel.

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[19] Before becoming a judge, John Cheroske was a criminal defense attorney who represented a capital defendant from preliminary hearing through verdict. (*Duncan v. Ornoski* (9th Cir. 2008) 528 F.3d 1222, 1227; *Caple v. Superior Court* (1987) 195 Cal.App.3d 594, 596; *Cairy v. Superior Court* (1987) 192 Cal.App.3d 840, 841; *People v. Denson* (1986) 178 Cal.App.3d 788, 790.) Judge Cheroske, moreover, had presided over at least one capital case before Johnson's. (*People v. DeWayne Michael Carey*, California Supreme Court No. S058489, Los Angeles County Superior Court No. TA042208.)

The Court: Let me tell you something right now. You're in the wrong place, partner, to start your antics, because I'm going to find good cause real shortly – if you continue to do the interruptions, destroy the courtroom decorum, I'm going to order that you wear a REACT belt.

Now, do you understand me?

Mr. Johnson: your honor, I, for the record –

The Court: You're a pro at this.

Mr. Johnson: I have not did nothing outrageous. I can object to anything you say. That is the law. You can show me –

The Court: I'm going to give you five, and then you're out of here. One, two, three – are you going to keep talking, or am I going to talk?

Mr. Johnson: No, your honor, speak.

I'm letting you know –

The Court: Fine. Remove him.

Mr. Johnson: Let the record reflect –

The Court: Let the record reflect that you're through the door.

Mr. Johnson: Let the record reflect he violating the oath he has swore.

I can speak. I can object.

The Court: Yes, you certainly can. I wouldn't allow a lawyer to get by with what you're doing. I won't let you do it. You heard what I have to say?

Mr. Johnson: Yes, sir.

I will continue to do that.

The Court: That's right.

(1RT 165-166.) Johnson was removed from the courtroom for a brief time. (1RT 166.) Johnson later explained that he did not mean to be rude or disrespectful, but he objected to the court telling him that Hauser was *Johnson's* standby counsel. (1RT 203; see generally *People v. Blair* (2005) 36 Cal.4th 686, 725 ["'Standby counsel' is an attorney appointed for the benefit of the court whose responsibility is to step in and represent the defendant if that should become necessary because, for example, the defendant's in propria persona status is revoked"].)

By (1) not allowing Johnson to complete his well-founded objection to Judge Cheroske's reference to Hauser as "stand-by counsel for Mr. Johnson," given that the day before Judge Cheroske carefully explained to Johnson that Hauser did not represent Johnson at all, but actually represented the court as standby counsel, (2) ordering Johnson, while acting in pro per, to sit down and be quiet, (3) calling Johnson "partner" rather than by his name, (4) threatening for no good reason that Johnson would have to wear a 50,000-volt REACT belt (*Hawkins v. Comparet-Cassani* (9th Cir. 2001) 251 F.3d 1230, 1239), (5) belittling Johnson as a "pro at this," and (6) expelling Johnson from the courtroom without good cause, Judge Cheroske abused his authority, disregarded the law, and violated canon 2A, which requires a judge to respect and comply with the law, canon 3, which requires a judge to perform the duties of judicial office impartially, canon 3B(4), which requires a judge to be patient, dignified, and courteous to litigants, canon 3B(5), which requires a judge to perform judicial duties without bias, canon 3B(7), which requires a judge to accord a litigant the full right to be heard, and canon 3B(8), which requires a judge to dispose of

all judicial matters fairly. (*Kennick v. Commission on Judicial Performance*, *supra*, 50 Cal.3d at pp. 324-325; *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 378 [judge guilty of wilful misconduct and prejudicial conduct in part for abusing judicial authority and engaging in personal attacks].)

4. Judge Cheroske intentionally flouted constitutional law – with which he personally disagreed – by threatening to revoke Johnson's self-representation "in a heartbeat" if Johnson did not always behave like a lawyer at every pretrial proceeding.

At the next pretrial conference on February 23, 1998 (1RT 193), Judge Cheroske continued his campaign to stifle and eventually eliminate Johnson's participation in his own trial when the judge admonished Johnson on his pro per status as follows:

> The appellate courts in their decisions involving a pro per seem to go into great detail with regard to commending trial judges for their infinite patience in dealing with pro pers who are disruptive, who don't follow protocol, and are just – are just difficult to deal with.
>
> I frankly don't understand why an appellate court would ask a trial court to have to put up with *anything* from a pro per.
>
> . . .
>
> So I want you to know from this point on that *you will behave like a lawyer. In the event you do not, sir, don't make any mistake about it – I'm different than any of the other judges you've dealt with as a pro per – make it clear to you, I would revoke your pro per status in a heart beat. And there*

will be no hearing about it. That's how it's going to happen.
(1RT 199-201, italics added.)[20]

No California published appellate decision has held that a trial court may revoke a defendant's fundamental right to self-representation merely for the defendant's failure to behave like a lawyer. In fact, at the time Judge Cheroske threatened to revoke Johnson's pro per status for this reason, the high court, this Court, and the Ninth Circuit permitted revocation only if the defendant committed serious and obstructionist behavior that threatened the integrity of the trial. (*Faretta v. California* (1975) 422 U.S. 806, 834, fn. 46 [a trial court "may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct," citing *United States v. Dougherty* (D.C. Cir. 1972) 473 F.2d 1113, 1124-1126 (courts may revoke pro per status if defendant's obstreperous behavior subverts core concept of trial)]; *People v. Clark* (1992) 3 Cal.4th 41, 115 [same quote from *Faretta*]; *Ferrel v. Superior Court* (1978) 20 Cal.3d 888, 891 ["an accused should *only* be deprived of that right [of self-representation] when he engages in disruptive in-court conduct which is inconsistent with its proper exercise," italics added]; see also *United States v. Flewitt* (9th Cir. 1989) 874 F.2d 669, 674 ["*Faretta* states only that a defendant's right to self-representation does not allow him to engage in uncontrollable and disruptive behavior in the

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[20] Judge Cheroske's comment – that he was different from other judges whom Johnson had dealt with while acting in pro per – suggests that Judge Cheroske was influenced by matters outside Judge Cheroske's own experience with Johnson, perhaps even rumors, which may explain, though not justify, Judge Cheroske's intemperate and biased conduct.

courtroom"].)[21]

Furthermore, no California published appellate decision has held that a trial court may revoke a defendant's fundamental right to self-representation in a heartbeat without *any* sort of hearing, as Judge Cheroske also threatened. On the contrary, in *Carson*, this Court directed the Court of Appeal to remand "the matter to the trial court for a *full hearing* as to the reasons for and necessity of terminating defendant's right of self-representation." (*People v. Carson*, (2005) 35 Cal.4th at pp. 13-14, italics added; cf. *Wilson v. Superior Court* (1978) 21 Cal.3d 816, 822, 825-827 [holding that, because of the importance of out-of-court pro per privileges to the exercise of the constitutional right of self-representation, due process principles require (except in an emergency) notice, an opportunity to be heard, and a decision before an impartial hearing body before a defendant's pro per privileges are taken away].)

Finally, Judge Cheroske made his threat to revoke Johnson's pro per status three months before trial began. (1CT 271, 287.) But a defendant's "'[p]retrial activity is relevant only if it affords a strong indication that the defendant[] will disrupt the proceedings in the courtroom'" during the actual trial. (*People v. Jenkins* (2000) 22 Cal.4th 900, 963, quoting *United States v. Flewitt*, *supra*, 874 F.2d at p. 674; *People v. Carson*, *supra*, 35 Cal.4th at p. 10 ["Misconduct that is more removed from the trial proceedings, more subject to rectification or correction, or otherwise less

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[21] Since Johnson's trial, this Court has confirmed that when a defendant's "deliberate dilatory or obstructive behavior threatens to subvert the core concept of a trial or to compromise the court's ability to conduct a fair trial, the defendant's *Faretta* rights are subject to forfeiture." (*People v. Carson*, *supra*, 35 Cal.4th 1, 10, citations and internal quotation marks omitted].)

likely to affect the fairness of the trial may not justify complete withdrawal of the defendant's right of self-representation," citing among others, *United States v. Flewitt, supra*, 874 F.2d at pp. 673- 675 and *Ferrel v. Superior Court, supra*, 20 Cal.3d at p. 892].) A mere failure to behave like a lawyer at a pretrial conference is not a strong indication that the defendant will disrupt the trial itself; nor does it justify complete withdrawal of the defendant's right of self-representation.

Judge Cheroske had an ethical duty to follow the law. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction"]; canon 2A ["A judge shall respect and comply with the law"].) Notwithstanding that the high court in *Faretta*, this Court in *Clark* and *Ferrel*, and the Ninth Circuit in *Flewitt* had made clear that a defendant's constitutional right to self-representation may only be terminated where the defendant had deliberately engaged in serious and obstructionist misconduct that endangered the trial, Judge Cheroske threatened Johnson with instant revocation of his self-representation if Johnson did not behave like a lawyer at every proceeding beginning three months before trial.

By threatening Johnson with the unlawful revocation of self-representation, Judge Cheroske abused his authority (*Gonzalez v. Commission on Judicial Performance, supra*, 33 Cal.3d at pp. 371, 378 [overreaching and abuse of judicial authority]; *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 529 [threatening contempt for no apparent reason]), intentionally disregarded the law, impinged Johnson's fundamental right to self-representation, and violated canons 2A, 3B(4), 3(B)(5), 3B(7), and 3(B)(8).

5. Judge Cheroske said he would continue the date of the first trial, but then denied Johnson's continuance motion after substantially misstating the contents of Johnson's moving papers.

On February 10, 1998, Johnson informed Judge Cheroske that a March 6, 1998, trial date would be too soon. (1RT 135-136.) Judge Cheroske advised Johnson that if he was going to ask to continue "***the case***" – Judge Cheroske's term – then Johnson would have to file and serve a motion to change the trial date. (1RT 136, emphasis added.) Johnson's motion was filed on February 23, 1998. (1SCT II 183-187.)

At the February 23, 1998, pretrial conference, Judge Cheroske heard Johnson's motion to continue the case:

> The Court: Well, I don't read anything in your motion that tells me what it is you're trying to continue. It just says, "the case."
>
> Mr. Johnson: Your honor, this investigation, the seriousness of this case –
>
> The Court: No, I mean, what is it you're trying to continue?
>
> Mr. Johnson: What is you talking about, what I'm trying to continue?
>
> The Court: That's two.
>
> Mr. Johnson: It's obvious. You asked me what I'm trying to continue. I told you. It's obvious.
>
> The Court: You're being disruptive. You're attacking the court personally. I don't take that from lawyers. You do it, and you're going to lose the pro per status. I thought you understood all that.

Mr. Johnson: The final – Okay. Excuse me.

The final facts that make a continuance necessary in this case is, one, based on seriousness of the charges and the necessary investigation that need to be conducted on every aspect on everything in here, witnesses, documents, testimony.

The Court: Let me stop you there for a moment.

Mr. Johnson: Yes, your honor.

The Court: All I'm trying to ask you is what you want to continue.

The trial date?

Mr. Johnson: *The case. Yes.*

The Court: That's what I'm asking you.

Mr. Johnson: I thought you knew. It was a continuance – you wasn't – excuse me your honor. I'm not trying to be rude. You got to be specific, too. I didn't understand where you were coming from.

The Court: What's your trial date – March 6th? – in this case now?

Mr. Wright: Yes.

The Court: *That's not a realistic date anyhow.*

Do you have a specific date that you're talking about?

Mr. Johnson: No, your honor.

The Court: When would you know?

Mr. Johnson: I would like to come back within the next couple of weeks.

The Court: That's fine. I have no problem with that.

Let's see. The 6th of March is –

Mr. Wright: 57 of 60.

The Court: *I will agree that there's no way this case is going to be ready for trial on March 6th.*

But today is the 23rd – why don't we do this: why don't we just come back the week of the 2nd of March, other than the 6th.

Mr. Johnson: Yes.

The Court: Any date that week, so that we don't have to change the trial date yet and get waivers and that sort of thing.

What date is good for all of you folks?

. . .

The Court: So that's the 5th at 1:30. And *it would be for the motion to continue the trial date* and any other motions that are filed ahead of that time.

Everybody should be on notice we won't have a trial on the 6th of March.

Mr. Taylor: So we should vacate that date, your honor?

The Court: We won't do it yet. That's why I want to set it for the same date. Mr. Johnson will be better prepared, I think, at that time to get a better idea as to what he's talking about in time.

Mr. Johnson: Would that be over the –

The Court: That's within your trial date.

Mr. Johnson: I see.

(1RT 220-223, italics added.)

Judge Cheroske ordered that the hearing on Johnson's *motion to continue the trial date* be reset for March 5, 1998, as expressly reflected in the court's minute order. (1CT 272; see also 1RT 224.) Although Judge Cheroske said at the February 23, 1998 pretrial conference that March 6 was not a realistic trial date, this case was not going to be ready for trial on March 6, everybody should be on notice that the trial would not occur on March 6, and the only reason that the hearing on Johnson's motion to continue the trial date was rescheduled for March 5 was so that Johnson could be better prepared to inform the court of the specific date that Johnson wanted the trial continued to, Judge Cheroske denied Johnson's motion to continue the trial date on March 5, 1998, as follows:

> The Court: Okay.
>
> Now, the next issue I had here was that Mr. Johnson, in his behalf, had filed a notice of motion to continue pursuant to Penal Code section 1050. *I have read it.* It basically directs my attention to some things like the codefendant doesn't need to agree to a continuance.
>
> *The motion itself, as filed, does not state any grounds for continuing anything. It doesn't say what it is to be continued or that the request is to continue. It sets forth no grounds. So that motion to continue whatever it was to continue is denied as being defective.*
>
> Mr. Johnson: Let the record reflect we went over this last week on the 19th – or was it the – excuse me. Strike that. The 23rd. I specifically stated for the record, ~~and the record~~ will speak loudly for itself.
>
> This Court have a habit of trying to disregard previous

statements that have been made, trying to tell me what I have said and haven't.

It's factual – I put the factual basis in there why it should be continued. They don't have to be long, which is part of the California Rules of Court. I can be very brief and short.

I didn't bring my motions. There's numerous grounds for continuing. This is a serious charge. I'm filing several motions. I just submitted one more motion to –

The Court: I don't want to talk about that yet.

Mr. Johnson: All right. The grounds is there. The factual basis is there. It speaks for itself.

The Court: I've ruled. It's defective. *There is not going to be a continuance of anything for the reasons I've said.*

(1RT 233-234, italics added.)[22]

Johnson's five-page motion to continue included the notice of motion, a supporting declaration, and points and authorities. (1SCT II 183-187.) Judge Cheroske stated that he had read the motion and there was nothing in the papers that told him what Johnson was trying to continue or the grounds for a continuance. Nevertheless, Johnson's motion mentioned *seven* times that he sought to continue the trial date. (*Id.* at p. 186 ["THE COURT HAS AUTHORITY TO DELAY THE TRIAL"]; *ibid.* ["The court has the discretion to continue a trial date"]; *id.* at p. 187 ["the statutory

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[22] Eventually, Judge Cheroske continued the date set for the first trial (presided over by Judge Morgan) after Judge Cheroske revoked Johnson's pro per status. (1CT 273, 287.)

preference for joint trials (Pen. C § 1098) constitute [sic] good cause to delay the trial"]; *ibid.* ["'if the precipitating cause for trial delay is justifiable"]; *ibid.* ["good cause to delay the trial"]; *ibid.* ["if good cause exist for the continuance of a trial"]; *ibid.* ["the trial of codefendant shall also be continued"].) Moreover, Johnson stated a continuance was "necessary to serve the end of justice" (*id.* at p. 183), and "necessary [b]ased on the seriousness of the charges, and on the necessary investigation that need to be conducted on 'every' aspect of the case" (*id.* at p. 185).

By first informing Johnson that "we won't have a trial on the 6th of March" because there was "no way" the case would be ready for trial by that date, but then denying Johnson's motion to continue the trial date, Judge Cheroske acted with caprice and bias. Furthermore, by misrepresenting the contents of Johnson's moving papers, failing to properly consider those papers, and not according Johnson his full right to be heard, Judge Cheroske lacked impartiality, violated canons 2A, 3, 3(B)(5), 3B(7), and 3B(8), and abused his authority. (*Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 795 [stating general principle that judge overreaches authority by deciding cases for reasons other than the merits].)

6. Without just cause, Judge Cheroske instantly revoked Johnson's constitutional right to represent himself.

As promised, Judge Cheroske revoked in a heartbeat Johnson's right to represent himself because Johnson did not argue as a lawyer might. By doing so, Judge Cheroske exhibited extreme bias against a pro per defendant.

During the February 23, 1998 pretrial conference, Judge Cheroske denied Johnson's second motion for ancillary funds to hire an investigator

and experts including, for example, a ballistics expert, on the ground that the motion lacked specificity. (1RT 219 [Judge Cheroske: "If you want to pursue this by filing specific requests in the proper form, setting forth . . . as to the necessity for a specific appointment of a specific expert for a specific purposes"].) Johnson then asked Judge Cheroske, "is that your procedure towards all attorneys, that, uh, they give a specific – as far as experts they are going to use, the names of the experts and so forth? . . . They give you the names?" Judge Cheroske answered yes. (1RT 220.)

At the March 5, 1998 pretrial conference, after Judge Cheroske denied Johnson's motion to continue the trial date, the following conversation occurred. (1RT 234-238.)

> Mr. Johnson: Let the record reflect he have been – as far as me, he have denied me funds to get even for a investigator. I have requested 500 hours of – 500 hours fee for a investigator.
>
> The Court: We've already dealt with this.
>
> Mr. Johnson: He have misrepresented the law, stating that I must tell him the people's names, which is not the truth.
>
> The Court: Mr. Johnson, your pro per status is revoked. Standby counsel, you are the attorney.

(1RT 238.)

Johnson was correct. Judge Cheroske had misstated the law in asserting that Johnson had to provide the specific names of the experts Johnson intended to use before Judge Cheroske could grant his motion. Rather, Johnson merely "had the burden of showing that the investigative services were reasonably necessary by reference to the *general lines of inquiry* he wished to pursue, being as specific as possible." (*People v.*

Beardslee (1991) 53 Cal.3d 68, 100, italics added; *People v. Blair, supra,* 36 Cal.4th 686, 733 ["As section 987.9 makes clear, the right to ancillary services arises only when a defendant demonstrates such funds are 'reasonably necessary' for his or her defense by reference to the general lines of inquiry that he or she wishes to pursue."].) Judge Cheroske, in turn, was compelled to view Johnson's motion for funds "with considerable liberality." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1085.) Thus, although Johnson had the burden of being as specific as possible regarding the general lines of inquiry, e.g., by indicating (as he did) ballistics as a general line of inquiry, he was not required to specify the names of any experts, and no published appellate opinion has ever held that a capital defendant need do so.

"Ordinarily, in granting a [section 987.9] motion for funds to pay an expert, the court will appoint an expert from the county's expert list who has the requisite knowledge and expertise." (3 Millman et al., Cal. Criminal Defense Practice (2007) Trial Preparation, § 70.22[2][b], p. 70-132.) In fact, this has been the practice in Los Angeles County Superior Court, the site of this case. (*Doe v. Superior Court* (1995) 39 Cal.App.4th 538, 542 [section 987.9 appointments must be from Los Angeles County Superior Court approved expert lists; trial court approved funds for expert, but not specific expert defendant requested].) Thus, once a court has granted the defendant's motion for ancillary funds, the court is free to choose an expert from the list of approved experts. This is common sense. Section 987.9 does not demand that a defendant line up an expert before the defendant has even shown the court the reasonable necessity for one, particularly since a defendant has no right to choose an expert of the defendant's personal liking. (*Id.* at p. 545, citing *Ake v. Oklahoma* (1985) 470 U.S. 68, 83.)

But even if Johnson's view of the law were incorrect or he failed to act as a lawyer should in addressing the court, Judge Cheroske had no basis whatsoever for revoking in a heartbeat Johnson's fundamental right to self-representation. As stated above, a trial court may terminate a defendant's *Faretta* rights only if the defendant's "deliberate dilatory or obstructive behavior threatens to subvert the core concept of a trial or to compromise the court's ability to conduct a fair trial . . . ." (*People v. Carson*, *supra*, 35 Cal.4th at p. 10, citations and internal quotation marks omitted]; *id.* at p. 11 ["Not every obstructive act will be so flagrant and inconsistent with the integrity and fairness of the trial that immediate termination is appropriate"].) Johnson's three spoken sentences did not remotely qualify for the termination of his *Faretta* rights under this standard.

Moreover, Johnson's assertion that Judge Cheroske had "misrepresented the law" is no indication, let alone "strong indication" that Johnson would disrupt the trial three months hence. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 963, quoting *United States v. Flewitt*, *supra*, 874 F.2d at p. 674.) Finally, summarily depriving Johnson of his constitutional right violates due process. (*People v. Carson*, *supra*, 35 Cal.4th at pp. 10-13 [remanding for a full hearing to consider the nature of the misconduct, its impact on the trial proceedings, and the availability and suitability of alternative sanctions]; see *Wilson v. Superior Court*, *supra*, 21 Cal.3d at pp. 822, 825-827 [before a defendant's out-of-court pro per privileges may be taken away, due process requires notice, an opportunity to be heard, and an impartial decision maker].)

Judge Cheroske was not merely wrong on the law in revoking Johnson's pro per status. Because there was no support in the law or the record for what he did to Johnson, Judge Cheroske acted out of bias against

a pro per defendant. Moreover, in lacking even scant good cause to deprive Johnson of his constitutional right to represent himself, Judge Cheroske abused his authority (*Gonzalez v. Commission on Judicial Performance*, *supra*, 33 Cal.3d at pp. 371, 378 ; *McCartney v. Commission on Judicial Qualifications*, *supra*, 12 Cal.3d at p. 529 [threatening contempt for no apparent reason]), intentionally disregarded the law, and violated canons 2A, 3, 3B(4), 3(B)(5), 3B(7), and 3(B)(8).

7. Judge Cheroske deceived Johnson into believing that the jury was present to see and hear Johnson, as he testified from his holding cell over one-way closed circuit television, though the jury was not present in the courtroom.

On April 22, 1998, the case was assigned to Judge Jack Morgan for the first trial. (1CT 278-280.) The guilt phase began with jury selection on May 19, 1998 (1CT 287) and ended with a hung jury and a mistrial on June 19, 1998, after the jury heard testimony from Johnson, who was present during the trial (18CT 5244, 5255, 5333).

Judge Cheroske returned to the case on August 25, 1998, to preside over the second trial. (18CT 5336.) Before the second trial even began, Judge Cheroske permanently barred Johnson from the courtroom due to an altercation between Johnson and Hauser. (18CT 5342; 17RT 2-23-2-24, 2-65, 2-69.)

On November 17, 1998, Judge Cheroske ruled that Johnson would be able to testify during the guilt phase, not in the courtroom with the jury present, but from a jail cell through an audio/video transmission. Johnson would be able to hear the questions by counsel, and the jury would be able to see and hear Johnson on the monitor, but because the *video* transmission was one way, Johnson would not be able to see the jury or anything else in

the courtroom. Judge Cheroske ordered Hauser to advise Johnson that should he be disruptive, Judge Cheroske would first switch off the audio/video transmission and then admonish Johnson and, if necessary, the jury. Further, Hauser was to advise Johnson that should he fail to comply with these rules, it might be necessary, depending on the seriousness of his disruptions, to terminate the audio/video transmission entirely, in which event his testimony would also terminate. (23RT 2-1293.)

Later Judge Cheroske connected Johnson to the courtroom and explained to him that he was on live television, broadcast into the courtroom, and that his lawyer and the district attorney were in the courtroom. Judge Cheroske explained further that it was time to determine if Johnson intended to testify because any such testimony would take place the next morning. Judge Cheroske represented to Johnson that if he testified, the setup would be the same as then. That is, the jurors would not see that he was in custody. They would only see Johnson's head and shoulders and would hear Johnson through a series of speakers, while Johnson would hear questions by counsel. Johnson replied that he would testify. (23RT 2-1296-1297.)

Judge Cheroske informed Johnson that if he tried to disrupt, delay, or inject error into the proceedings, or engage in profanity, Judge Cheroske would disconnect him by way of a master switch that Judge Cheroske controlled. At that point Judge Cheroske would give Johnson a chance to reconsider his behavior. If Johnson did not want to conform, or said he would conform, but again violated the rules, Judge Cheroske would terminate any further testimony. (23RT 2-1297-1298.)

When asked by Judge Cheroske whether he was going to follow the rules, Johnson answered that he would do what he thought was best for

himself and understood what Judge Cheroske would like him to do. Judge Cheroske replied: "It's not what I'd like you to do. It's what you will do, Mr. Johnson." Johnson responded: "I understand what you would like me to do, and there is no need for no further discussion. Let's wait until tomorrow and see what's going to happen." (23RT 2-1299.)

Johnson and Judge Cheroske engaged in further colloquy, with Judge Cheroske finally stating, "You will testify tomorrow and follow the rules as any other witness. If you violate those rules, you know right now I will terminate your testimony; and you will never have an opportunity to testify before the jury." (23RT 2-1301.)

After Hauser advised Johnson not to testify, Judge Cheroske terminated the audio/video connection. Hauser then stated as follows: "[B]ased on his behavior today, . . . I would prefer that he not testify. I don't believe he's going to cooperate with me at all. And I don't think it's going to help his case." Hauser next "request[ed] that prior to him actually testifying, that we have a little test run, out of the presence of the jury, just to see if he is going to cooperate. [T]omorrow morning, if we just start out, and I will just ask a few preliminary questions. And if it goes fine, then I'd like to pause and have the jury come back in." Deputy District Attorney Wright objected, without specifying what he objected to. Hauser further stated that he would not ask Johnson any questions such as what Johnson was going to testify to, but would start asking Johnson "some questions as if I'm questioning him." (23RT 2-1303.)

Thus, Hauser suggested a dry run without the jury present, while Hauser would ask Johnson questions as if he were examining Johnson on direct. Then if Johnson cooperated, the jury would be brought in. Hauser did not suggest that Johnson should be deceived into believing that the jury

would be present to see and hear the dry run. That suggestion was made later by the prosecutor.

Judge Cheroske answered: "Well, we'll see how it plays. I'll try it in the morning with him one more time." Wright added, "I would object to that procedure. I think if he wants to testify, *he should be told that he's in front of the jury as well.*" (Italics added.) Judge Cheroske responded: "*He will be. We will do that before the jurors ever come in.*" (23RT 2-1303, italics added.) Hauser did not object to the prosecutor's request and Judge Cheroske's plan to tell Johnson that the jury was present to see and hear him testify, even though the jury would not be.

The next morning Judge Cheroske made the following comments for the record.

> Based on his disruptive record and upon yesterday's comments, "we'll wait and see what will happen," also based on Hauser's request for some sort of a test on how Mr. Johnson will behave in front of this jury, and also based on my concern as to what sort of damage, irreparable damage, Mr. Johnson might be able to cause at this, the end of our second jury trial, I'm going to do the following:
>
> *The jury will not be present.*
>
> The bailiffs will tell Mr. Johnson that he's about to be on the hookup.
>
> I will activate the TV audio system.
>
> I will then tell Mr. Hauser to call his next witness. He will call Mr. Johnson.
>
> I will administer the oath. And I will then tell Mr. Johnson that the attorneys will be questioning him.

I'll ask each attorney to introduce themselves by their names so that he becomes familiar with the voice.

And I will tell him then that Mr. Hauser is going to be then questioning him as his attorney.

And then, Mr. Hauser, I'll ask you to pose the first question to him . . . .

Based on whatever happens at that point in time, we'll make the decision as to whether the jury is going to be brought out and hear his testimony.

(23RT 1361-1362, italics added.)

Judge Cheroske activated the audio/video connection, Johnson appeared on the video screen in the courtroom, Judge Cheroske administered the oath to Johnson to tell the truth "so help you God," and Hauser began the examination.

Q Mr. Johnson, back on September 26th of 1996, where were you living?

A First of all, I wish to greet the jury.
Good morning to y'all.
And I apologize for not being able to be present at my so-called trial, but it's beyond my control.
First of all, you do not represent my interests and never have.
And all three of you attorneys work together. Everything you got going is totally illegal, and I'm totally opposed to it.

Q Is that where you live?

The court: Did you hear the question?

The witness: Excuse me?

Q By Mr. Hauser: Where do you live?

A You do not represent my interest and never have.
What y'all doing is illegal.
You have never tried to do nothing to benefit me.
Y'all all working together.
I oppose what's going on.
I'm not illiterate, neither am I dyfunctional (sic). It shouldn't be conducted this way.

This is reasonable doubt, ladies and gentlemen, what's going on in this trial.

Q So you don't want to testify. Is that you're saying?

A You do not represent my – I would appreciate if y'all read that letter I filed to the court Monday as a form of protest to what's going on to the jury to let them know that I'm not fooled or blind to what's going on.
This is a concerted effort to intentionally dump me in that courtroom, ladies and gentlemen. Consider that.

Q Mr. Johnson, this is your chance. Now, are you going to testify or not?

A You do not represent my interest and never have, Mr. Hauser.
I do not need to talk to you.

Q Does that mean "no"?

A You have not – what about the tapes and everything y'a have to show that these witnesses was lying?
Y'all knew they was lying and tried to withhold that evidence.
That's discriminatory in nature, and what y'all doing is a crime.

Q Are you going to answer my questions?

A Do you understand that you are committing a crime? You do not represent my interests and never have.

The court: All right. Mr. Johnson, I take it then by your comments that you do not intend to follow the normal witness rules of question and answer, and you will continue to make these kinds of comments. Is that what you're going to do?

The witness: Yes, Judge Cheroske.

The court: *Well, I have a little surprise for you, Mr. Johnson. The jury is not present.* This was a test see what kind of person you would be. You have proven by your conduct that you're not going to be able to testify in this case.

The witness: That's right.

(23RT 1364-1366, italics added.) Judge Cheroske deactivated Johnson's audio; cited case authority for the proposition that a defendant can waive the right to testify by disruptive conduct; found that Johnson, *thinking the jury was present*, began his disruptive conduct by making comments and not following a question-and-answer format; and ruled that Johnson had given up his right to testify over closed-circuit television. (23RT 2-1367.)

Honesty is a minimum qualification expected of every judge. (*Kloepfer v. Commission On Judicial Performance*, *supra*, 49 Cal.3d at p. 865.) "'Judges have a special responsibility to deal honestly and forthrightly with all who appear before them, and when a judge displays a lack of integrity, . . . confidence in the entire judiciary is weakened.'" (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1097 quoting the Commission on Judicial Performance; see

Disciplinary Counsel v. O'Neill (Ohio 2004) 815 N.E.2d 286, 293 ["'a judge who misrepresents the truth tarnishes the dignity and honor of his or her office'" because "'[t]ruth and honesty lie at the heart of the judicial system, and judges who conduct themselves in an untruthful manner contradict this most basic ideal.'"]; *In re Inquiry Concerning McCormick* (Iowa 2002) 639 N.W.2d 12, 17 ["A dishonest judge directly threatens public confidence in the judicial system and tarnishes its respect and integrity. (Citation.) The harm is extensive. Even a single incident can have grave consequences"].) Thus, under no circumstances is a judge permitted to deceive a party.[23]

But judicial deceit is precisely what happened here. Judge Cheroske joined with Hauser and the prosecutor to deceive Johnson into believing

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[23] In supervising the lower courts, this Court has repeatedly recognized the importance of judicial honesty. (*Broadman v. Commission on Judicial Performance*, *supra*, 18 Cal.4th at pp. 1087, 1089, 1093, 1095-1097, 1112 [judge "tricked" criminal defendant into waiving time for sentencing]; *In re Youngblood* (1983) 33 Cal.3d 788, 789 [judge ordered person to appear before him under false pretenses]; *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 631 [judge interrogated attorney to obtain evidence for possible contempt citation against attorney, without informing attorney of judge's purpose for interrogation; had attorney "known the purpose of the interrogation he could have invoked his privilege not to testify"].) Moreover, a third party, which would include a judge, is prohibited from colluding with counsel to deceive a defendant. (Bus. & Prof. Code, § 6128, subd. (a); § 182, subds. (a)(1), (5); *Davis v. Superior Court* (1959) 175 Cal.App.2d 8, 16; see generally *Borre v. State Bar* (1991) 52 Cal.3d 1047, 1051 [attorney's intentional deception of own client violates § 6128, subd. (a)]; *Price v. State Bar* (1982) 30 Cal.3d 537, 542, 547-548 [prosecutor's deceit or collusion with intent to deceive defendant violates § 6128, subd. (a)]; see also *Cutler v. State Bar* (1969) 71 Cal.2d 241, 252-253 ["A member of the State Bar should not under any circumstances attempt to deceive another person, . . . and it is immaterial whether any harm was done."].)

that the jury would be present for Johnson's testimony.

What if Johnson had not testified in a narrative form, but had complied with the question-and-answer format? Would Judge Cheroske have then apprised Johnson that he had been deceived? Or would Judge Cheroske have compounded his deceit further?

Having been deceived by Judge Cheroske, how could Johnson trust him again? Later during the penalty phase, Johnson was purportedly asked whether he wanted to testify. (25RT 2-1780.) Given that Judge Cheroske tricked Johnson once about testifying during the guilt phase, Johnson predictably declined to be tricked again during the penalty phase.

Of course, Judge Cheroske treated no prosecution witness in this manner. He also did not ask a prosecution witness to "solemnly swear" to tell the truth to a phantom jury "so help you God." And he did not taunt a prosecution witness with a "little surprise" that the jury was not present to finally hear his testimony.

Therefore, because Judge Cheroske did those things and deceived defendant Cedric Johnson, he did not act with impartiality, he violated canons 1, 2A, 3, 3(B)(4), 3B(5), 3B(7), 3B(8), and 3(E), and by presiding over Johnson's second trial, denied Johnson due process and a fair trial before an unbiased judge. (*Republican Party of Minnesota v. White*, *supra*, 536 U.S. at p. 776; *Bracy v. Gramley*, *supra*, 520 U.S. at pp. 904-905; *Withrow v. Larkin*, *supra*, 421 U.S. at p. 47; *Haas v. County of San Bernardino*, *supra*, 27 Cal.4th at p. 1026; *People v. Perkins*, *supra*, 109 Cal.App.4th at p. 1564.)

F. Conclusion

"It should not be necessary to state that the obligation of a judge is to uphold the law . . . . In exercising its authority, the court cannot lose sight

of its duty to follow the law and maintain the integrity of the judicial system." (*Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 393.)

But here, Judge Cheroske did lose sight in dealing with a pro per defendant. For reasons known only to Judge Cheroske, he treated Johnson unfairly from the outset when he refused to read Johnson's motion to disqualify Hauser as standby counsel, but denied the motion anyway. Next he forced Johnson to argue his motion for section 987.9 funds in open court before the prosecutor, though Johnson asked that the motion be heard ex parte and in camera, as the law requires. Then, after Johnson tried to make a proper objection, the judge threatened that Johnson would have to wear a life-threatening stun belt and expelled Johnson from the courtroom without cause.

Judge Cheroske told Johnson that he would continue the trial date, but then denied Johnson's continuance motion after substantially misstating the contents of Johnson's moving papers. Then, as he promised he would, Judge Cheroske revoked in a heartbeat Johnson's constitutional right to represent himself at trial, apparently because Johnson did not address the court properly at a conference held three months before trial even began.

And finally, Judge Cheroske violated the most basis ideal of judicial office when he deceived Johnson into believing that the jury heard his plea.

Defendant Cedric Johnson was tried by a partial judge, who committed numerous acts of misconduct against Johnson. "A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him." (*Edwards v. Balisok* (1997) 520 U.S. 641, 647.) Moreover, given the Eighth Amendment's insistence on heightened reliability in a case that might result in a death sentence (*Oregon v. Guzek* (2006) 546 U.S. 517, 525, citing *Woodson v.*

North Carolina (1976) 428 U.S. 280, 305), reversal is especially warranted.

The judgment must be set aside in its entirety.

2.

JUDGE CHEROSKE ERRED IN BARRING JOHNSON FROM THE COURTROOM FOR HIS ENTIRE TRIAL.

A. Introduction

The United States Supreme Court has declared that it is "deplorable" for a judge to remove a noncapital defendant from trial, even for a short time; therefore, the high court demands that a judge satisfy certain strict requirements before expelling a noncapital defendant from the courtroom for any part of the trial. (*Illinois v. Allen* (1970) 397 U.S. 337, 343, 347.) Judge John J. Cheroske met none of those requirements before *summarily* banishing *capital* defendant Cedric Johnson from his *entire* trial.

Furthermore, Judge Cheroske wrongly excluded Johnson from the hearing on the critical question of whether Johnson should be excluded from his trial, failed to accord Johnson the essentials of due process at the hearing, and violated the Eighth Amendment's demand for reliable decision-making in capital cases.

B. Facts

Judge Jack Morgan presided at Johnson's first trial. (1CT 287; 2RT 356.) On June 19, 1998, after Johnson was present during the trial and testified (18CT 5244; 13RT 2784-2882), the jury hung while deliberating guilt, and Judge Morgan declared a mistrial. (18CT 5333.)

On September 17, 1998, the parties and the court, with Judge Cheroske then presiding, appeared in the jury assembly room to distribute hardship questionnaires to the approximately 400 prospective jurors present. (17RT 2-12, 18, 64.) Before the prospective jurors were sworn, Johnson and his appointed counsel, Steven Hauser, engaged in an altercation where, according to later testimony, Johnson punched Hauser

and Hauser fell off his chair. (17RT 2-18-29, 53, 69.)[24]

Judge Cheroske noted that Hauser's face started to swell after the encounter. (17RT 2-44.) Although Judge Cheroske's minute order stated that "the defendant Johnson brutally attack[ed] his attorney" (18CT 5342) and Judge Cheroske asserted on the record that Johnson "viciously attacked" (17RT 2-24) and "violently attacked" Hauser (17RT 2-64), Hauser insisted he could continue to represent Johnson, "as if this had never happened." (17RT 2-25.)

Without hearing Johnson's side of the scuffle, Judge Cheroske summarily ruled, "I will not allow him back in this courtroom." (17RT 2-25; 18CT 5342.) Hauser did not object to the court's ruling or argue that Johnson should be present at his own trial. Judge Cheroske declared a mistrial at the behest of the presiding judge. (17RT 2-39, 41.)[25]

On September 21, 1998, Judge Cheroske rescheduled the trial for November 5, 1998. (17RT 2-41, 53; 18CT 5345.)

On October 2, 1998, Hauser asserted that Johnson's attack on him was "merely a tool to either delay the trial or to eventually wind up defending himself," which Hauser believed was Johnson's goal. (17RT 2-58.)

On October 19, 1998, Judge Cheroske held a hearing on the issue of

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[24] One bailiff testified during the penalty phase that Johnson struck Hauser in the head. (25RT 2-1706.) Another bailiff testified that Johnson also attempted to kick Hauser and spat at him. (*Id.* at p. 1711.) Hauser argued to the penalty phase jury that Johnson "sock[ed]" him. (*Id.* at p. 1801.)

[25] Johnson does not contest Judge Cheroske's erroneous decision to summarily exclude him from the trial set for September 17, 1998, because the mistrial made the issue moot.

Johnson's absence; Hauser purported to waive Johnson's presence for the hearing (17RT 2-62), and the judge issued a second order barring Johnson from trial (18CT 5345, 5351-5352; 17RT 2-53), this time relying on alleged events dating back to July 1998 (16RT 3498; 17RT 2-27, 48, 51):

> In reference to Mr. Johnson and his voluntarily absenting himself from all further proceedings in this case, despite extensive research that I've conducted, I've been unable to find any reported case in which any defendant has intentionally disrupted the proceedings to the extent of the conduct displayed by Mr. Johnson.
>
> On at least six occasions, Mr. Johnson has demonstrated that he has no intention to correct his disruptive behavior. It is clear to this court that despite any promises to the contrary, Mr. Johnson will continue to do any and everything possible to prevent the trial from proceeding.
>
> Mr. Johnson has on two occasions spit saliva on his attorney. He violently attacked Mr. Hauser in front of a panel of 400 jurors. He then, despite the activation of the REACT belt, initiated a second attack on Mr. Hauser. He again was not subdued by the second activation of the REACT belt, and it took approximately six bailiffs to contain his violent actions.[26]

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[26] A bailiff later explained that for some reason, the belt failed to work the first time. (25RT 2-1707.) Given that when activated, the REACT belt delivers a 50,000-volt shock lasting eights seconds, causes incapacitation in the first few seconds and severe pain during the entire period, may lead to involuntary defecation and urination, may cause the (continued...)

Mr. Johnson, upon finding Mr. Hauser would not request to be relieved and thus necessitate another delay, then threatened to kill both Mr. Hauser and his family.[27]

Even after being excluded from this courtroom and while in the courtroom holding cell area, Mr. Johnson continually slammed against the metal doors, creating such a disturbance that it was very difficult to hear in this courtroom or to conduct any further proceedings.

This court finds that continually warning Mr. Johnson regarding such disruptions and accordingly making daily findings as to his voluntarily absenting himself from the courtroom, as such would not only seriously jeopardize the security of this court, but, further, that any "promise" by Mr. Johnson to correct his conduct would be simply a subterfuge to gain access to the courtroom and allow him to continue his offensive, violent and outrageous conduct.

This court has also considered, should Mr. Johnson agree to conform his behavior to a standard of reasonableness and thus be allowed to rejoin the court proceedings, that I would have no alternative but to employ the use of all possible security measures. Mr. Johnson would have to be

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[26](...continued)
victim to collapse as well as muscular weakness for approximately 30-45 minutes, and is suspected of having triggered a fatal cardiac arrhythmia, a fair conclusion is that the belt did not actually activate the first time. (*Hawkins v. Comparet-Cassani* (9th Cir. 2001) 251 F.3d 1230, 1234.)

[27] Hauser did not take seriously the purported threat, empty as it was. (17RT 2-49.)

> manacled and/or shackled, . . . in that the less visibly offensive REACT belt was neither a deterrent nor physical effect on Mr. Johnson.
>
> The court has also weighed the impact of the jury observing Mr. Johnson in such a physically restrained condition and the resulting suggestion that Mr. Johnson has the disposition to commit violent crimes. I've weighed that against his *mere absence* accompanied by appropriate jury admonitions and jury instructions.
>
> The court has also considered the possible prejudice to Mr. Betton should his codefendant be manacled and/or shackled.
>
> Accordingly, Mr. Johnson will be here in the courthouse for every day of the court proceedings. He will, therefore, be accessible to his attorney. However, for the reasons stated, and based on the entire record of the prior proceedings involving Mr. Johnson's disruptive behavior, he will not be physically present in this courtroom.
>
> And, further, having personally refused to have a holding cell equipped with *any equipment* allowing him to monitor the court proceedings, no such arrangements will be made. He will not, therefore, be in the court lockup area adjacent to this courtroom.

(17RT 2-64-66, italics added.)

Despite being asked by Judge Cheroske whether counsel had anything to say in response, Hauser said nothing, while the prosecutor said he was "unable to find any cases on point." (17RT 2-66.) Thus, Hauser

again did not argue that Johnson should be present in the courtroom at his own trial or that his "mere absence" was a violation of Johnson's constitutional right to be present. Nor did Hauser argue that Johnson should be given the choice between being excluded from his trial or being restrained.

Moreover, Hauser did not correct Judge Cheroske's assertion that Johnson did not want "*any* equipment allowing him to monitor the court proceedings." (Italics added.) Johnson had merely declined for the time being to listen to proceedings from his holding cell through a *speaker*, or so said Hauser at an earlier hearing. (17RT 2-47-48.)

On November 5, 1998, trial began before Judge Cheroske with jury selection. (39CT 11500.) Excluded by Judge Cheroske, Johnson was not present. (17RT 2-76.)

The prosecutor, while again noting that he had not "found any case directly on point with what we're doing" to Johnson, suggested that Johnson watch the trial through a video feed. (17RT 2-93.) Hauser did not join in the prosecutor's request. Judge Cheroske agreed with the prosecutor that there was no "case on point." (17RT 2-94.) And even though 12 days later, Judge Cheroske would rule that Johnson could testify from his jail cell to the courtroom using a video feed (23RT 2-1293), Judge Cheroske stated that he did not know whether there was any authority for having a video feed, the court had no facilities for a video feed, wiring a video camera from the courtroom to Johnson "wherever he would be housed" would create a delay, and having a television in the custody area would cause a security problem. (17RT 2-94.)

The prosecutor also requested that Johnson execute a written waiver indicating his desire not to be physically present during the trial, but Judge

Cheroske denied the request because he was convinced that Johnson wanted to be present. (17RT 2-95.)

Although seven weeks had passed since Judge Cheroske first decreed that Johnson would not be allowed in the courtroom, Judge Cheroske still had not held a hearing to learn Johnson's side of the encounter; instead, Judge Cheroske remained intransigent and restated his order that Johnson would be excluded from the trial for its entirety. (17RT 2-94 ["That man will never be in this courtroom under any conditions that I can foresee"].)

Twenty days later, without ever seeing Johnson or hearing him testify, the jury returned guilty verdicts against Johnson, followed shortly by a death verdict. (39CT 11543, 11611-11612; 40CT 11644.)

C. The Court Erred in Excluding Johnson from His Entire Trial Because (1) It Wrongly Barred Johnson from the Hearing on this Critical Question, (2) It Failed to Accord Johnson the Essentials of Due Process at the Hearing, (3) It Violated the Eighth Amendment's Insistence on Reliable Decision-making, and (4) It Denied Johnson His Rights to Confrontation and Due Process.

1. Judge Cheroske erred by barring Johnson from the critical October 19 hearing on whether Johnson should be excluded from his entire trial.

The federal Constitution guarantees a defendant "the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745 [right under the confrontation clause of the Sixth Amendment and separate right under the due process clause of the Fourteenth Amendment to be present]; cf. *People v. Davis* (2005) 36 Cal.4th 510, 530 [a defendant's presence is required

under the federal Constitution if it bears a reasonable and substantial relation to the defendant's full opportunity to defend against the charges].) A capital defendant, moreover, has statutory rights to be present at all proceedings. (*Davis*, at p. 531, citing §§ 977, 1043.)

Johnson had the right to be present at the critical hearing on October 19, 1998, where Judge Cheroske decided to permanently expel Johnson from his upcoming trial.

Hauser's attempt to waive Johnson's presence did not validly relinquish Johnson's constitutional or statutory rights to presence at the hearing. In *People v. Davis*, *supra*, 36 Cal.4th 510, this Court addressed for the first time whether counsel may waive the defendant's federal constitutional right to presence. *Davis* concluded that any such waiver must be voluntary, knowing and intelligent and held that a defendant does not knowingly and intelligently waive the right to presence unless there is some evidence that the defendant consented to waiver by counsel and "understood the right he was waiving and the consequences of doing so." (*Id.* at p. 532; cf. *Taylor v. Illinois* (1988) 484 U.S. 400, 417-418 & fn. 24 [citing waiver of the right to be present during trial as an example of a "basic right[] that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client"].)

There is no evidence that Johnson was even aware of any waiver. In fact Johnson wanted to be present in the courtroom, as Judge Cheroske acknowledged. When the prosecutor asked Judge Cheroske to consider obtaining from Johnson a daily written waiver of his presence, Judge Cheroske responded, "I'm not going to ask him if he wants to be physically present, because I'm convinced that he would say he does . . . ." (17RT 2-95.) Furthermore, given that section 977, subdivision(b)(2) requires that

any waiver of a criminal defendant's presence must be written, Johnson did not waive his statutory right to be present either.

Although a criminal defendant may waive the right to be present in the courtroom due to disruptive activity (*People v. Davis*, *supra*, 36 Cal.4th at p. 531), Johnson did not waive his right to attend the hearing – where no jury was present – as a result of his conduct. Judge Cheroske explained in his order permanently expelling Johnson from his trial that he considered manacling and/or shackling Johnson during trial, but found it too prejudicial. No such similar concerns applied, however, to the permanent-exclusion hearing. Johnson could have been fully restrained at the hearing. At least then Judge Cheroske would have heard directly from Johnson.

Moreover, Johnson did not even have to be physically present at the hearing. As evidenced by Johnson's later appearance at a hearing by way of closed-circuit television from his holding cell (23RT 2-1295), Johnson could have appeared in this same fashion at his permanent-exclusion hearing. Finally, at the very least, Judge Cheroske could have resorted to Johnson's appearing by way of telephone. But Judge Cheroske chose to exclude Johnson altogether, without hearing one word from Johnson on the extremely critical question of whether he would ever be allowed in the courtroom for his capital trial.[28]

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[28] Regardless of Hauser's attempt at waiver, Judge Cheroske would not have allowed Johnson to be present. (17RT 2-62.) On September 17, 1998, Judge Cheroske said that he would not allow Johnson back in the courtroom. (17RT 2-25.) On September 21, 1998, Judge Cheroske noted that he had already ordered that Johnson would not be brought back into the courtroom. (17RT 2-47.) And on October 19, 1998, Judge Cheroske declared, "I'm not going to have him in this courtroom no matter what he promises." (17RT 2-67.) Hauser's purported waiver was thus pointless.

Clearly, Johnson's presence would have contributed to the fairness of the October 19 hearing. (*Kentucky v. Stincer*, *supra*, 482 U.S. at pp. 744-745.) His presence would have also borne a reasonable and substantial relation to his full opportunity to defend against the charges. (*People v. Davis*, *supra*, 36 Cal.4th at p. 530.)

In his order permanently excluding Johnson from the courtroom, Judge Cheroske recognized the possibility that Johnson would "agree to conform his behavior to a standard of reasonableness and thus be allowed to rejoin the court proceedings . . . ." (17RT 2-65.) Had Johnson been present at the October 19 hearing, he could have reassured Judge Cheroske that he would conform his behavior once he was aware that the alternative would have been permanent exclusion. Moreover, although Judge Cheroske found that Johnson and his co-defendant would suffer prejudice if Johnson were manacled and/or shackled, Judge Cheroske should have heard from Johnson and Betton on this question. Perhaps both would have chosen Johnson's manacled and/or shackled presence over Johnson's absence. Johnson might have also suggested to Judge Cheroske that any prejudice that Betton might have suffered could have been solved by separate trials.

If Johnson had been present at the hearing, he could have explained any mitigating circumstances surrounding his encounter with Hauser. Perhaps Hauser said something provocative. Perhaps Johnson overreacted to Hauser's never once objecting to Johnson's being subjected to the life-threatening REACT belt, which Johnson was wearing when he knocked Hauser off his chair. (17RT 2-21; *Hawkins v. Comparet-Cassani*, *supra*, 251 F.3d at p. 1234.) Perhaps something else triggered Johnson's behavior; a change in medication, for example. Judge Cheroske should

have heard from Johnson personally on the critical issue of whether Johnson should have been excluded from a trial that could result in his execution. (See *People v. Perry* (2006) 38 Cal.4th 302, 313 ["We do not dispute that a defendant may be entitled to be present at a conference called to consider whether to remove his counsel for conflict of interest or any other reason, because the removal of counsel will affect defendant's representation at trial, and is a matter on which defendant's views should be heard"].)

Thus, it was fundamentally unfair for Judge Cheroske to make the crucial decision to permanently eject Johnson from his capital trial without ever hearing from Johnson. (See *Bradley v. Henry* (9th Cir. 2007) 510 F.3d 1093, 1097-1098 (en banc) (plur. opn. of Noonan, J.) ["Audi alteram partem – hear the other side – is what makes the legal process work in an adversary system"].) For this reason alone, Judge Cheroske erred in excluding Johnson from his entire trial.

2. Judge Cheroske erred by failing to provide Johnson the essentials of due process at the October 19 hearing on whether Johnson would be excluded from his entire trial.

In impulsively expelling Johnson from his trial and then stubbornly sticking to the ruling – even though seven weeks eventually passed between the altercation and the November 5 trial – Judge Cheroske failed to provide Johnson the basic due process necessities of a meaningful hearing and unconflicted counsel. (See *Sacher v. United States* (1952) 343 U.S. 1, 8 ["Summary punishment always, and rightly, is regarded with disfavor and, if imposed in passion or pettiness, brings discredit to a court as certainly as the conduct it penalizes"].)

In *King v. Superior Court* (2003) 107 Cal.App.4th 929, the trial

court found that Mr. King forfeited his right to counsel because he had attacked and threatened his various trial counsel. King petitioned the Court of Appeal for a writ of mandate or prohibition, which was denied. He then petitioned this Court, which ordered the matter transferred to the Court of Appeal with directions to treat the petition as one for a writ of mandate and to issue an alternative writ addressing the issue of whether the trial court erred in finding King had forfeited his right to counsel. (*Id.* at p. 937.)

The appellate court reversed the forfeiture on two separate grounds. First, the trial court failed to protect the fundamental constitutional right to counsel by providing adequate due process. And second, King was denied effective assistance of counsel because King's attorney at the forfeiture hearing offered no argument in favor of King's retaining his right to counsel or even that the forfeiture proceeding violated King's due process rights; in addition, he violated his duty of loyalty to his client by offering evidence of King's other violent behavior, evidence the lawyer obtained in his position as King's attorney. The Court of Appeal found reversible error per se, reasoning that since the lawyer denied King effective assistance of counsel, it was as if King had no lawyer at the forfeiture hearing, a critical stage of the proceeding. (*King v. Superior Court*, *supra*, 107 Cal.App.4th at pp. 949-950, citing *United States v. Cronic* (1984) 466 U.S. 648, 659, fn. 25; see *Florida v. Nixon* (2004) 543 U.S. 175, 189 [*Cronic* presumption of prejudice is "reserved for situations in which counsel has entirely failed to function as the client's advocate"].)

King remanded the matter and ordered the trial court to conduct a hearing on the issue of forfeiture, give the defendant notice of the hearing, and allow the defendant to be present, to have the assistance of counsel, to present evidence, and to cross-examine witnesses. Moreover, the appellate

court required the trial court to find the facts supporting forfeiture by clear and convincing evidence, and set forth its factual findings in the record. (*Id.* at p. 949.)

Given that, like the Sixth Amendment's right to counsel, the Sixth Amendment's right to personal presence at trial is fundamental (*Rushen v. Spain* (1983) 464 U.S. 114 117; *Illinois v. Allen*, *supra*, 397 U.S. at p. 338 ["One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial"]), the same procedural protections required by *King* should have been provided to Johnson. Once misconduct was alleged, Judge Cheroske should have held a hearing, given Johnson notice of the hearing, and allowed Johnson to be present, to introduce evidence, and to cross-examine witnesses. Judge Cheroske should have also found any facts supporting forfeiture by clear and convincing evidence.

Furthermore, Judge Cheroske should have provided Johnson with the assistance of counsel other than Hauser, in light of Hauser's conflict in representing Johnson's interests and protecting his own. (17RT 2-51 [Judge Cheroske's expressing concern for Hauser's safety].) Even absent the conflict, counsel other than Hauser was mandated due to Hauser's complete failure to advocate on Johnson's behalf. Not once did Hauser object to Judge Cheroske's exclusion of Johnson for his entire trial. Not once did Hauser argue for a video feed for Johnson, though the deputy district attorney raised the issue. (17RT 2-93.) And not once did Hauser ask for a hearing or even for the process due Johnson before Judge Cheroske ruled that Johnson had waived his right to attend his own trial. On the other hand, like the attorney in *King* who offered evidence of his client's violent behavior, Hauser advocated against his own client and

breached his duty of loyalty when he alleged that Johnson's attack on him was "merely a tool to either delay the trial or to eventually wind up defending himself," which Hauser believed was Johnson's goal. (17RT 2-58.)

At the permanent-exclusion hearing, Johnson was entitled to an attorney who, unlike Hauser, acted in accordance with "the overarching duty to advocate the defendant's cause." (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) Instead, it was if Johnson had no counsel at all, a reversible per se deprivation. (*King v. Superior Court, supra*, 107 Cal.App.4th at p. 950.)

Accordingly, Judge Cheroske erred in deciding to permanently expel Johnson from his trial because, at the hearing where he made that decision, the judge failed to provide Johnson the essential protections compelled by due process and the right to counsel.

3. Judge Cheroske erred by excluding a capital defendant from his entire trial, thereby depriving Johnson of the reliable decision-making required by the Eighth Amendment.

Trying a capital defendant completely in absentia, thereby preventing the defendant from confronting all witnesses, and then finding the defendant guilty is unprecedented in this country. Sentencing the defendant to death – without the jury ever seeing or hearing from the him – takes the unprecedented to an alarming level.

The United States Supreme Court "has stressed the 'acute need' for reliable decisionmaking when the death penalty is at issue." (*Deck v. Missouri* (2005) 544 U.S. 622, 632; *Oregon v. Guzek* (2006) 546 U.S. 517, 525 [Eighth Amendment insists on reliability in penalty determination].)

That acute need extends to both the guilt and penalty phases. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.) This Court agrees with the high court that "death is different" and thus recently wrote: "The punishment at issue in capital cases makes it all the more important to ensure fairness and arrive at accurate outcomes." (*Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 728-729, citing among others, *Ring v. Arizona* (2002) 536 U.S. 584, 605.) By expelling Johnson from his entire trial, Judge Cheroske failed to ensure the reliable decision-making and fairness that the federal Constitution mandates in a death penalty case.

As the Statement of Facts demonstrates, this case turned largely on the credibility of one witness, Robert Huggins. Huggins testified at both the first and second trials that he saw Johnson premeditatedly shoot and kill Huggins's brother, Gregory Hightower. Specifically, Huggins told both juries that he witnessed Johnson approach the driver's side of Hightower's car, where Hightower was sitting, and shoot Hightower multiple times. After Johnson shot Hightower, Huggins walked over to the car and lifted Hightower off the steering wheel. (8RT 1851-1854, 1962; 21RT 2-845, 849, 851, 854-855, 955-956.)

The first jury deliberated for eight days before eventually hanging on all charges. (15RT 3410, 3412, 3440, 3442, 3444, 3461, 3476, 3486.) On the final ballot, six jurors voted to acquit Johnson of the first degree murder of Hightower. (15RT 3484, 3489.) Clearly those six jurors did not entirely accept Huggins's testimony as truthful beyond a reasonable doubt.

Johnson was present in the courtroom during the first trial while Huggins testified. (18CT 5237.) He was not present in the courtroom during the second trial when Huggins testified. (39CT 11518-11519.)

"The Sixth Amendment gives a criminal defendant the right 'to be

confronted with the witnesses against him.'" (*Coy v. Iowa* (1988) 487 U.S. 1012, 1015.) In fact, except for circumstances not pertinent here (*Maryland v. Craig* (1990) 497 U.S. 836, 860) "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." (*Coy*, at p. 1016.)

> The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. . . . The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses. . . .

(*Coy v. Iowa*, *supra*, 487 U.S. at p. 1015, citations omitted.)

Here, by barring Johnson from his entire trial, Judge Cheroske deprived Johnson of a face-to-face meeting with Huggins, his principal accuser. Huggins was therefore free to be more convincing when he testified about Johnson behind his back during the second trial, an indulgence Huggins did not have when Johnson confronted him during the first trial. In view of the fact that six jurors – present in the courtroom during the first trial when Johnson confronted Huggins – voted for acquittal, it is virtually undeniable that Johnson's expulsion from his second trial had a devastating effect on the guilt phase of his capital trial. In light of the federal Constitution's demand for "reliable decisionmaking when the

death penalty is at issue" (*Deck v. Missouri*, *supra*, 544 U.S. at p. 632), Judge Cheroske was wrong to eject Johnson from the courtroom, particularly when the prosecution's most important witness testified.

Permanently banishing Johnson from the courtroom had the further effect of denying him the opportunity to influence the jury's verdicts.

> It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. [Citation.] At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a *powerful influence* on the outcome of the trial.

(*Riggins v. Nevada* (1992) 504 U.S. 127, 142 (conc. opn. of Kennedy, J., italics added).) That powerful influence is magnified in a capital sentencing proceeding, where "assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies." (*Id.* at p. 144 (conc. opn. of Kennedy, J.).)

Studies show that a capital defendant's demeanor during trial, particularly if it shows remorse, may have a compelling effect on the jury's penalty verdict. (Blume, et al., *Competent Capital Representation: the Necessity of Knowing and Heeding What Jurors Tell Us about Mitigation* (2008) 36 Hofstra L. Rev. 1035, 1037 [empirical studies reveal that one of the three primary considerations that drive juror decision-making at the

penalty phase of a capital trial is the defendant's remorse or lack thereof]; Eisenberg, et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing* (1998) 83 Cornell L. Rev. 1599, 1617 ["jurors tended to believe in a defendant's remorse if he appeared 'uncomfortable or ill at ease'" and "jurors were more likely to believe in a defendant's remorse if they detected a change in his 'mood or attitude' after the guilty verdict"]; *id.* at p. 1633 ["if jurors believed that the defendant was sorry for what he had done, they tended to sentence him to life imprisonment, not death"]; *id.* at p. 1637 ["confirm[ing] the widespread conviction that remorse makes a difference to the sentence a defendant receives"]; Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum. L. Rev. 1538, 1560 ["Lack of remorse is highly aggravating"]; *id.* at p. 1567 [defendant should show jury some remorse for what he has done]; Geimer & Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases* (1988) 15 Am. J. Crim. L. 1, 51 [32 percent of the jurors interviewed mentioned the defendant's demeanor as a contributing factor in the sentence recommendation].)

Thus, by expelling Johnson from his capital trial entirely and denying him the opportunity to show remorse to the jurors, Judge Cheroske deprived Johnson of a potent means to influence the jury's penalty verdict.

The United States Supreme Court has never sanctioned shutting out a disruptive capital defendant from even part of the trial, let alone the entire trial. (*Drope v. Missouri* (1975) 420 U.S. 162, 182 [leaving undecided whether it is constitutionally permissible to exclude capital defendant from part of trial]; *Diaz v. United States* (1912) 223 U.S. 442, 455 [our courts "have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right" to be present at trial]

[dictum]; *United States v. Mitchell* (9th Cir. 2007) 502 F.3d 931, 988, fn. 20 [Supreme Court has never directly ruled on whether capital defendant can waive the right to presence].)

Although in *People v. Medina* (1995) 11 Cal.4th 694, 738, this Court held that a capital defendant behaving disruptively may as a result waive the federal constitutional right to be present at a portion of the trial, *Medina* is distinguishable from this case. First, unlike Johnson, the defendant in *Medina* was not excluded from his entire trial. (*Id.* at p. 737.) Second, Medina declined to be present in the courtroom during testimony so that, unlike Johnson, he voluntarily waived his right to confront the witnesses. (*Ibid.*) Third, when Medina was removed from the courtroom because of his disruptive behavior, he was excluded but only "until he evinced a willingness to participate in a nondisruptive manner." (*Id.* at p. 738.) Here, Judge Cheroske decided to expel Johnson and not allow him back in the courtroom even if "Johnson agree[d] to conform his behavior to a standard of reasonableness . . . ." (17RT 2-65.) And fourth, unlike Judge Cheroske, who gave Johnson no warnings, the *Medina* trial judge "repeatedly made it clear to defendant that he would continue to be removed if his disruptive conduct persisted, and that he could return to the courtroom once he agreed to behave properly." (*Id.* at p. 739.)

In contrast to what Judge Cheroske did to Johnson, this Court has never held that the federal Constitution permits a trial court to expel a capital defendant involuntarily during the giving of testimony due solely to the defendant's disruptive behavior. (Cf. *People v. Majors* (1998) 18 Cal.4th 385, 413-415 [no federal constitutional violation where trial court granted capital defendant's request to be absent from penalty phase *and* defendant threatened disruption]; *People v. Price* (1991) 1 Cal.4th 324,

405-406 [as a matter of federal constitutional law, a capital defendant may voluntarily waive presence during guilt phase, and as a matter of state statutory law, trial may proceed in the absence of a capital defendant who has been removed for disruptive behavior]; *People v. Sully* (1991) 53 Cal.3d 1195, 1239 [defendant expressly waived his constitutional right to remain in courtroom by disrupting trial, demanding to be taken from courtroom, *and* declining several invitations to return].) Therefore, Judge Cheroske's actions in permanently expelling Johnson from the courtroom on the single ground of misconduct – even while witnesses testified – is unprecedented in the Court.

Moreover, in deciding to bar Johnson from his capital trial, Judge Cheroske never even mentioned the possibility that Johnson faced the death penalty as a factor in his decision-making process. Without controlling authority permitting the total exclusion of a capital defendant, as Judge Cheroske conceded he lacked (17RT 2-93-94), and without taking into account Johnson's status as a capital defendant, Judge Cheroske nonetheless invoked the harshest of remedies, ignored the acute need for reliable decision-making in a capital case, and violated the very notion of fundamental fairness.

4. By barring Johnson from his trial, Judge Cheroske violated his rights to confrontation and due process.

Under controlling federal constitutional law, Judge Cheroske erred in excluding Johnson from even *part* of his trial. (*Illinois v. Allen*, *supra*, 397 U.S. at pp. 343, 347.) The standard in reviewing a claim of error in this context is de novo. (*People v. Perry* (2006) 38 Cal.4th 302, 311.) In addition, this Court "must indulge every reasonable presumption against

the loss of constitutional rights." (*Illinois v. Allen*, *supra*, at p. 343, citing *Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)[29]

"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." (*Illinois v. Allen*, *supra*, 397 U.S. at p. 338; *Kentucky v. Stincer*, *supra*, 482 U.S. 735, 744-745 [defendant has separate due process right to be present].) Thus, in order to protect a defendant's fundamental right to presence, the high court has required that certain strict conditions must exist before a trial court may exclude a noncapital defendant from the courtroom during a *portion* of the trial:

> we explicitly hold today that a defendant can lose his right to be present at trial if, *after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a*

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[29] Although Judge Cheroske acknowledged that there was no "case on point" (17RT 2-94), he cited section 1043, subdivision (b)(1), *People v. Arias* (1996) 13 Cal.4th 92, and *People v. Hayes* (1991) 229 Cal.App.3d 1226, in support of Johnson's permanent exclusion. (23RT 2-1403, 1407.) As will be shown in the text, Judge Cheroske violated section 1043, subdivision (b)(1) by excluding Johnson. In *People v. Arias*, this Court simply observed that disruptive conduct *during trial*, which forced the accused's removal from the courtroom, had already been recognized by the United States Supreme Court and this Court as a waiver of the right to be present at a part of the trial. (13 Cal.4th at p. 147.) A capital case, *Arias* ruled that the trial court did not err in refusing the defendant's request to be absent from parts of the trial; *Arias* did not hold that the Sixth Amendment permits a trial court, as here, to completely exclude a capital defendant from trial. (*Id.* at pp. 147-148.) *People v. Hayes* merely stands for the proposition that a noncapital defendant may be removed from the courtroom after repeated warnings from the judge that his frequent outbursts *during trial* could result in his exclusion. (229 Cal.App.3d at p. 1233.)

> *manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.*

(*Illinois v. Allen*, *supra*, 397 U.S. 337 at p. 343, italics added, footnote omitted.) After *Allen* was issued in 1970, the California Legislative incorporated the preceding italicized language virtually verbatim into section 1043. (§ 1043, subds. (b)(1), (c); Stats. 1970, ch. 1255, § 1, p. 2267; *People v. Lewis* (1983) 144 Cal.App.3d 267, 276 [§ 1043 is consistent with *Illinois v. Allen*].)[30]

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[30] Section 1043 provides in part:

> b) The absence of the defendant in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases:
> (1) Any case in which the defendant, *after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom.*
> (2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent.
> (c) Any defendant who is absent from a trial pursuant to paragraph (1) of subdivision (b) *may reclaim his right to be present at the trial as soon as he is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.*

(continued...)

Therefore, five conditions must exist before a court may commit the "deplorable" act of removing a noncapital defendant from trial, even for a short time (*Illinois v. Allen*, *supra*, 397 U.S. at p. 347): (1) the defendant must have been present at the beginning of the trial; (2) the defendant must have committed misconduct that disrupted the trial; (3) the judge must have warned the defendant that repeated misconduct could result in the defendant's removal from the courtroom (*id.* at p. 350 (conc. opn. of Brennan, J.) ["no action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and *warned of the possible consequences of continued misbehavior*," italics added]); (4) the defendant's continued misconduct during trial must have made it impossible to carry on the trial with the

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[30](...continued)
(Italics added.) In contrast to section 1043, subdivision (b)(2)'s prohibition against excluding from trial a "voluntarily absent" capital defendant, as Judge Cheroske so characterized Johnson (17RT 2-64), a defendant in a noncapital felony case may waive the right to presence without a warning from the judge if the defendant is voluntarily absent after trial has begun. (*Taylor v. United States* (1973) 414 U.S. 17, 20 (*per curiam*) [although not expressly warned by trial judge that he had right to be present at trial and that trial would continue in his absence, defendant knew as much because he was at liberty on bail, had attended opening session, and had duty to be present at trial, and judge, jury, witnesses and lawyers were present and ready to continue trial; he therefore effectively waived Sixth Amendment right to be present when he voluntarily fled during trial]; *People v. Howze* (2001) 85 Cal.App.4th 1380, 1394 ["section 1043, subdivision (b) allows a court to continue with a trial in the absence of a defendant only when a trial has commenced in the defendant's presence and a defendant is disruptive or has voluntarily absented himself"]; cf. *King v. Superior Court*, *supra*, 107 Cal.App.4th 929, 943 [reading *Allen* and *Taylor* to permit loss of a constitutional right based on misconduct in noncapital case under certain circumstances, even without a prior warning].)

defendant in the courtroom; and (5) the judge must inform the defendant that the right to be present can be reclaimed if the defendant is willing to conduct himself appropriately. If any one of these five circumstances was not present when Judge Cheroske barred Johnson from his entire trial, then Judge Cheroske erred. Indeed, all five were absent.

a. Johnson was not present in the courtroom when his trial began.

In *People v. Concepcion* (2008) 45 Cal.4th 77, this Court confirmed that for the purposes of section 1043 (and indirectly *Illinois v. Allen*), trial begins with jury selection. (*Id.* at p. 80, fn. 4, citing *People v. Granderson* (1998) 67 Cal.App.4th 703, 709 ["the Legislature intended the word 'trial' in the phrase 'after the trial has commenced in [the defendant's] presence' to include the critical stage of jury selection [so that] section 1043(b)(2) authorized the court in this case to proceed with the criminal trial after defendant voluntarily absented himself during voir dire"].)[31]

Judge Cheroske did not allow Johnson in the courtroom when jury selection began on November 5, 1998 (39CT 11500), thereby delivering on his earlier promises of September 17, 1998 ("I will not allow him back in this courtroom" (17RT 2-25)), September 21, 1998 ("Mr. Johnson will not be brought back into this courtroom. I've already ordered it" (17RT 2-47)), October 19, 1998 ("I'm not going to have him in this courtroom no matter what he promises" (17RT 2-67)), and November 5, 1998 ("That man will never be in this courtroom under any conditions that I can foresee" (17RT

[31] Under *Concepcion*, the trial scheduled for September 17, 1998 (later declared a mistrial), had not yet begun when the altercation between Johnson and Hauser occurred because the prospective jurors had not been sworn to begin the voir dire. (17RT 2-41, 53.)

2-94)). Hence, the trial did not commence in Johnson's presence.[32]

b. Johnson did not commit any misconduct during the trial.

Given that Judge Cheroske did not permit Johnson inside the courtroom for his own trial, Johnson did not commit any misconduct *during* trial, nor did he disrupt the trial.

c. Judge Cheroske did not warn Johnson that his misconduct could result in his permanent expulsion from trial.

Judge Cheroske did not warn Johnson that continued misconduct could result in his permanent removal from the courtroom. (*People v. Sully*, *supra*, 53 Cal.3d at p. 1240 ["The manifest purpose of the warning requirement in [section 1043] is to *inform* a defendant of the consequences of *further disruptions* so as to allow him a final opportunity to correct his behavior," italics added].)

In *King v. Superior Court*, *supra*, 107 Cal.App.4th 929, the trial court found that the defendant had forfeited his right to counsel as a result of serious misconduct, including head-butting his first attorney, threatening to have someone kill his second attorney, threatening the life of his third

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[32] Similarly, rule 43 of the Federal Rules of Criminal Procedure, the federal counterpart to section 1043, does not allow trial to start without the defendant's presence; thus it does not permit full trials in absentia. (*Crosby v. United States* (1993) 506 U.S. 255, 262 ["The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial."].) The *Crosby* Court found that requiring a defendant's presence at the beginning of a trial serves to assure that any waiver is a knowing one. (*Id.* at p. 261.)

attorney, and assaulting and threatening to crush the head of his fourth attorney, among other transgressions. But before finding forfeiture, the trial court did not warn the defendant that he could lose his Sixth Amendment right to counsel. (*Id.* at p. 936.)

The Court of Appeal acknowledged *Illinois v. Allen's* explicit holding that a defendant can lose the Sixth Amendment right to be present at trial after a warning by the judge. (*King v. Superior Court*, *supra*, 107 Cal.App.4th at p. 941.) The appellate court then found that the trial court should have warned Mr. King after he attacked his *first* lawyer that if he persisted in his misconduct, he could lose the Sixth Amendment right to counsel. (*Id.* at pp. 943-944.)

Judge Cheroske failed to warn Johnson at any time that he could lose his right to be personally present at trial. Moreover, instead of warning Johnson after the encounter with Hauser, Judge Cheroske hastily ruled that he would not allow Johnson back in the courtroom. (17RT 2-25.)

d. Johnson's behavior during trial did not make it impossible to conduct the trial.

Johnson's conduct during his November 5 trial did not make it impossible to carry on the trial with Johnson in the courtroom, again because he was not in the courtroom at all during the trial.

During his trial, the defendant in *Illinois v. Allen* argued with the judge in a most abusive and disrespectful manner, continued to talk without the court's permission, said the judge was "going to be a corpse here," tore a file, threw papers on the floor, continued to talk back to the judge after being warned that he would be removed from the courtroom with one more

outbreak, made more abusive remarks, was removed from the courtroom, was allowed to return after a second warning, continued to talk without the court's permission, was removed a second time, returned to the courtroom for purposes of identification, responded to one of the judge's questions with vile and abusive language, was removed again, was promised that he could return to the courtroom whenever he agreed to conduct himself properly, gave some assurances of proper conduct, and was permitted to be present through the remainder of the trial. (*Illinois v. Allen*, *supra*, 397 U.S. at pp. 339-341.) Thus, all of the defendant's misconduct occurred *during* trial and made it impossible to carry on the trial.

Similarly, this Court upholds the exclusion of a defendant from part of the trial only if the defendant's disruptive conduct occurs during trial. (E.g., *People v. Huggins* (2006) 38 Cal.4th 175, 202 [under section 1043 "capital defendants may not voluntarily absent themselves during the taking of evidence at their trials unless they have *disrupted the trial* and the court has reason to believe the disruptive behavior will continue," italics added]; *People v. Welch* (1999) 20 Cal.4th 701, 773 ["a defendant may waive his right to be present at his trial by being *disruptive at the trial*," citing *Illinois v. Allen*, *supra*, 397 U.S. at p. 343, italics added]; *People v. Medina*, *supra*, 11 Cal.4th at p. 738 [a continuous pattern of hostile and *disruptive conduct during trial* fully justified the court's decision to remove defendant from the courtroom]; *People v. Price*, *supra*, 1 Cal.4th at p. 405-406 [by continuing capital trial in defendant's absence, trial court did not violate section 1043 after defendant *disrupted trial* by announcing that he would not appear before jury in chains, walked out of courtroom, and declined to dress in civilian clothes to be returned to courtroom]; *People v. Sully*, *supra*, 53 Cal.3d at p. 1239 [defendant expressly waived his

constitutional right to remain in courtroom by actually *disrupting trial*, hurling obscenities at court and jurors and demanding to be taken from courtroom]; see also *People v. Majors*, *supra*, 18 Cal.4th 385, 415 [affirming trial court's exclusion of defendant from portion of trial based on defendant's request to be absent from penalty phase and his representation during trial that he was likely to be disruptive].)

Accordingly, under *Illinois v. Allen* and section 1043, a defendant may be excluded from a portion of the trial due to repeated disruptive conduct only if the disruptions occurred during trial. Because no disruption occurred during the November 5 trial, Judge Cheroske erred in excluding Johnson from any part of that trial. (See *Douglas v. State* (Alaska App. 2007) 166 P.3d 61, 80-81 ["it would be error to indefinitely bar a defendant from attending their trial or sentencing proceedings based merely upon their past misconduct and the surmise that the disruptive conduct may continue. Such an approach would violate the mandate of *Illinois v. Allen*, which states that defendants must be allowed to reclaim the right to attend their trial by altering their behavior."].)

Although under *Allen* and section 1043, pretrial conduct is not the issue, if this Court concludes otherwise, then Johnson's conduct before the November 5 trial did not make it impossible to carry on the trial. On September 21, 1998, four days after Judge Cheroske declared a mistrial, he rescheduled the trial for November 5, 1998. (17RT 2-41, 53; 18CT 5345.) On October 19, 1998, Judge Cheroske ruled that Johnson would be barred from the November 5 trial. (18CT 5345, 5351-5352; 17RT 2-53.) He based his ruling not only on the September 17, 1998 altercation with Hauser, but also on the grounds that around the same time, Johnson purportedly spat at Hauser twice, threatened to kill Hauser and his family

(hollow language that Hauser did not take seriously), and slammed against the metal doors of his holding cell. (17RT 2-48-49, 51, 64-65.) Judge Cheroske's stated grounds, however, did not constitute good cause for a finding that Johnson's pretrial conduct made it impossible to carry on the November 5 trial with him in the courtroom.

Reduced to their essence, Judge Cheroske's grounds for excluding Johnson from trial were Johnson's antagonistic relationship with his appointed counsel and his banging on the doors of the holding cell after Judge Cheroske removed him from the courtroom, all based on events occurring well before the trial. Banging on doors to protest his *exclusion* from the trial set for September 17 is no indication that Johnson would disrupt the November 5 trial, 45 days later.

The issue then is whether Johnson's relationship with Hauser made it impossible for the trial to proceed. Trying a capital defendant in absentia because of the defendant's tumultuous relationship with his appointed lawyer is an extraordinarily harsh remedy that cannot pass constitutional muster, especially because other less drastic options were available to Judge Cheroske.

In *Illinois v. Allen*, the high court recognized that no one formula applies to all situations, but there were *at least* three ways for a trial judge to deal with an obstreperous defendant: "(1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." (397 U.S. at pp. 343-344.) Thus, the high court understood that a trial court should exercise its judgment by considering the various options available. (See *King v. Superior Court*, *supra*, 107 Cal.App.4th at p. 943 [the option least burdensome to defendant's fundamental constitutional right should be

applied]; *State v. Chapple* (2001) 145 Wash.2d 310, 320 [trial court should select least severe alternative that will prevent disruption].)

Although Judge Cheroske mentioned restraining Johnson and speculated that co-defendant Betton would be prejudiced if Johnson were restrained (17RT 2-64-65), the judge did not explain how an unrestrained Betton could possibly be harmed or why prejudice to Betton was a factor given that Betton's trial could have been severed from Johnson's.

Moreover, Judge Cheroske failed to consider giving Johnson the choice between absence and restraints; relieving Hauser as counsel; appointing a second capital defense counsel under *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 434 ("If it appears that a second attorney may lend important assistance in . . . presenting the case, the court should rule favorably on the request. [I]n general, under a showing of genuine need, . . . a presumption arises that a second attorney is required"); separating Johnson and Hauser at counsel's table, perhaps with a plain-clothed bailiff sitting in between them; or having Johnson participate in the trial by way of two-way closed circuit television.

Furthermore, to ascertain whether Johnson would conform his conduct as jury selection proceeded, Judge Cheroske should have considered starting the trial with Johnson present, while only swearing in a few prospective jurors rather than a full venire, thereby avoiding a possible mistrial if disruption did occur. Assuming Johnson was not disruptive, Judge Cheroske could have then brought in the remainder of the venire.

Given that this Court "must indulge every reasonable presumption against the loss of constitutional rights" (*Illinois v. Allen*, *supra*, 397 U.S. at p. 343), the Court cannot conclude – with the required level of certainty that would justify denying a capital defendant the fundamental due process

right to be present at his own trial – that Johnson would have made it impossible to carry on the trial merely because of his feelings towards his attorney. Johnson survived the entire first trial with Hauser as his counsel. Johnson could have done it again if he had been warned of the consequences for his failing to conduct himself appropriately.

e. Judge Cheroske failed to inform Johnson that he could reclaim the right to be present if he was willing to conduct himself properly.

On or after expelling Johnson from the courtroom, Judge Cheroske should have informed Johnson directly or through a conduit that Johnson's right to be present could be reclaimed if he was willing to conduct himself appropriately. (*Illinois v. Allen*, *supra*, 397 U.S. at p. 344 [to deal with an obstreperous defendant, the trial court may "take him out of the courtroom until he promises to conduct himself properly"]; *id.* at p. 346 ["Allen was constantly informed that he could return to the trial when he would agree to conduct himself in an orderly manner"]; see *State v. Chapple*, *supra*, 145 Wash.2d at p. 326 ["We hold that the trial court's requirement that defense counsel speak with the defendant and report back to the court was appropriate in these circumstances and adequate to give the defendant an opportunity to reclaim his right to return."]; *Chavez v. Pulley* (E.D. Cal. 1985) 623 F.Supp. 672, 681-682 ["this court holds that a trial judge who has removed a criminal defendant from the courtroom because of his disruptive behavior must offer the defendant the opportunity to reclaim the right of presence"]; *State v. Fletcher* (1984) 252 Ga. 498, 314 S.E.2d 888, 890-891 [Georgia Supreme Court holding that trial court erred in not bringing defendant back to courtroom to inform him of his ability to reclaim his right to be present, where defendant was removed without

warning]; ABA Standards for Criminal Justice: Special Functions of the Trial Judge (3d ed. 2000) § 6-3.8 ["The removed defendant should . . ., at appropriate intervals, be offered on the record an opportunity to return to the courtroom upon assurance of good behavior"].)

Although Judge Cheroske found "that any 'promise' by Mr. Johnson to correct his conduct would be simply a subterfuge to gain access to the courtroom and allow him to continue his offensive, violent and outrageous conduct" (17RT 2-65), there is no basis in the law that allowed Judge Cheroske to ignore the requirements of *Allen* and section 1043 to inform the defendant that "[o]nce lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." (*Illinois v. Allen*, *supra*, 397 U.S. at p. 343; § 1043, subd. (c).)

Accordingly, because Johnson was not present at the beginning of the November 5 trial; he did not commit misconduct during that trial; Judge Cheroske failed to warn Johnson that continued misconduct could result in his permanent removal from the courtroom; Johnson's conduct during the trial did not make it impossible to carry on the trial with him in the courtroom; and Judge Cheroske failed to inform Johnson that his right to be present could be reclaimed if he was willing to conduct himself appropriately, Judge Cheroske denied Johnson his constitutional and statutory rights to presence.

f. Conclusion

In sum, based on a scuffle between Johnson and his counsel *seven weeks* before the actual trial began, Judge Cheroske summarily ruled that Johnson would never be allowed back in the courtroom. Judge Cheroske

made his ruling without ever hearing Johnson's side of the story. Moreover, Judge Cheroske reaffirmed his ruling at a hearing where Johnson was represented by an attorney who failed utterly to advocate on Johnson's behalf. Instead, Hauser purported to waive Johnson's presence at the hearing, did not join the prosecutor's request for a video feed to Johnson, argued against Johnson, and most important, failed to object to Johnson's permanent exclusion from his own capital trial.

Judge Cheroske wrongly excluded Johnson from attending the beginning of his trial, thereby depriving Johnson of any chance to show the court that he would not be disruptive during his trial. Before permanently excluding Johnson from his entire trial, Judge Cheroske failed to give Johnson a mandatory warning that repeated disruptive behavior might result in his exclusion from trial. Judge Cheroske did not afford Johnson the requisite opportunity to return to the courtroom during trial if Johnson expressed a willingness to participate in a nondisruptive manner. And by permanently banishing Johnson from the courtroom, Judge Cheroske prevented Johnson from confronting any of the witnesses against him and influencing the jury's view of him, thereby subverting any chance that the result of Johnson's trial would attain the level of accuracy and fairness the law demands when a defendant's life is at stake.

D. The Errors Were Prejudicial.

Where a defendant is erroneously excluded from the entire trial, reversal should be automatic because such error is "structural" in that "[t]he entire conduct of the trial from beginning to end is obviously affected . . . ." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150 [deprivation of constitutional right with consequences "'necessarily unquantifiable and indeterminate . . .

unquestionably qualif[ies] as "structural error,""" quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 282].)

Constitutional violations that defy harmless-error review "contain a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.' Such errors 'infect the entire trial process,' and 'necessarily render a trial fundamentally unfair.' Put another way, these errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" (*Neder v. United States* (1999) 527 U.S. 1, 8-9, citations omitted.)

Imposing the death penalty on a defendant erroneously tried in absentia, as here, would be unmistakably unfair on the most fundamental level. (See *Riggins v. Nevada*, *supra*, 504 U.S. at p. 137 [efforts to prove or disprove prejudice would be futile where court erred in ordering antipsychotic drugs be administered to defendant during trial]; *Rushen v. Spain*, *supra*, 464 U.S. 114, 119, fn. 2 [right to be present during critical stages of proceedings is subject to harmless error analysis, "unless the deprivation, by its very nature, cannot be harmless"]; *State v. Lopez* (2004) 271 Conn. 724, 737 [defendant's absence from in-chambers inquiry regarding possible conflict of interest on part of defense counsel was structural error]; *State v. Brown* (2003) 362 N.J.Super. 180, 189 [defendant's absence during readback of testimony to jury, unsupervised by judge, was structural error]; *State v. Bird* (2002) 308 Mont. 75, 83 [defendant's exclusion from in-chambers individual voir dire proceedings was structural error]; *State v. Padilla* (N.M.App. 2000) 129 N.M. 625, 630 [defendant's absence at beginning of trial was structural error]; *State v.*

Calderon (2000) 270 Kan. 241, 253 [absence of defendant's interpreter during closing arguments violated defendant's fundamental right to be present at trial and was structural error]; *State v. Garcia-Contreras* (1998) 191 Ariz. 144, 149 [defendant's involuntary absence from entire jury selection was structural error]; see also *Hegler v. Borg* (9th Cir. 1995) 50 F.3d 1472, 1476 ["a defendant's absence from certain stages of a criminal proceeding may so undermine the integrity of the trial process that the error will necessarily fall within that category of cases requiring automatic reversal"].)

Hence, the entire judgment should be reversed due to Judge Cheroske's structural error in barring Johnson from his entire trial.

Furthermore, because Johnson was constructively denied counsel at the critical stage when Judge Cheroske decided to permanently expel Johnson, that error was also structural and reversible per se. (*Bell v. Cone* (2002) 535 U.S. 685, 695-696, citing *United States v. Cronic, supra*, 466 U.S. at p. 659; *Roe v. Flores Ortega* (2000) 528 U.S. 470, 483 ["the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice"]; *French v. Jones* (6th Cir. 2003) 332 F.3d 430, 438 ["the [Supreme] Court has often held, both before and after *Cronic*, that absence of counsel during a critical stage of a trial is per se reversible error"].)

Even under the *Chapman* prejudice standard for errors under the federal Constitution – here, the Sixth Amendment right to confrontation and the Fourteenth Amendment right to due process (*Kentucky v. Stincer, supra*, 482 U.S. at pp. 744-745) – the judgment must be reversed. (*People v. Davis, supra*, 36 Cal.4th 510, 532 [federal constitutional error pertaining to defendant's absence from pretrial hearing evaluated under *Chapman v.*

California (1967) 386 U.S. 18, 24].)

In *Coy v. Iowa*, *supra*, 487 U.S. 1012, the Court enunciated the proper analysis for testing prejudice under *Chapman's* harmless-beyond-a-reasonable-doubt standard when a defendant has been wrongly deprived of the Sixth Amendment right to confront witnesses: "An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and *harmlessness must therefore be determined on the basis of the remaining evidence*." (*Id.* at pp. 1021-1022, italics added.)

Here, Judge Cheroske prevented Johnson from confronting any witnesses at all, most importantly, star witness Robert Huggins. Eliminating any consideration of the testimony of Huggins and other witnesses whom Judge Cheroske prevented Johnson from confronting plainly means that respondent will be unable to meet its heavy burden of showing that the erroneous exclusion of Johnson from the entire trial was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Finally, even if in analyzing prejudice the Court considers the unconfronted testimony of every witness against Johnson, the state would still be unable to satisfy its burden. Johnson confronted every witness at his first trial – including Huggins – and six jurors voted to acquit Johnson on the Hightower first degree murder charge. (18CT 5237; 15RT 3484, 3489.) Johnson did not confront a single witness at his second trial, and the jury found him guilty on those same charges. Because a face-to-face confrontation between a defendant and a witness for the prosecution "may confound and undo the false accuser" (*Coy v. Iowa*, *supra*, 487 U.S. at p.

1020), this Court cannot say that Johnson's erroneous exclusion from his entire second trial was harmless beyond a reasonable doubt. (*People v. Murphy* (2003) 107 Cal.App.4th 1150, 1157-1158 [wrongfully denying defendant the right to confront victim-witness was not harmless beyond a reasonable doubt "especially since the pivotal issue was the alleged victim's credibility"].) Reversal of the judgment in its entirety is warranted.

3.

JUDGE CHEROSKE ERRED IN FINDING THAT JOHNSON WAIVED HIS RIGHT TO TESTIFY AT BOTH THE GUILT AND PENALTY PHASES.

A. Introduction

Judge John J. Cheroske found that defendant Cedric Johnson voluntarily waived his right to testify at the guilt phase and then later voluntarily waived his right to testify at the penalty phase. Judge Cheroske twice erred in so finding, requiring reversal of the judgment in its entirety.

B. Law

A defendant has the "fundamental" right to testify at trial. (*Rock v. Arkansas* (1987) 483 U.S. 44, 51-53 [defendant's right to testify arises from due process clause of the Fourteenth Amendment, compulsory process clause of the Sixth Amendment, and Fifth Amendment's guarantee against compelled self-incrimination].) The same right exists during the penalty phase of a capital trial. (*People v. Nakahara* (2003) 30 Cal.4th 705, 717.)

This Court reviews de novo whether a defendant voluntarily waived an important constitutional right. (*People v. Buttram* (2003) 30 Cal.4th 773, 792.) A defendant's right to testify is personal and any waiver of the right must be knowing, intentional, and voluntary. (*United States v. Pino-Noriega* (9th Cir. 1999) 189 F.3d 1089, 1094.) Courts indulge every reasonable presumption against waiver of fundamental constitutional rights. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 241 ["A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial."].)

C. Johnson Did Not Waive His Right to Testify at the Guilt Phase.

As set forth in Argument 1 at pages 45-53, incorporated here by reference, Judge Cheroske, Steven Hauser (defendant Cedric Johnson's counsel), and the prosecutor colluded at a meeting to deceive Johnson into believing that the jury would be present in the courtroom to see and hear Johnson when he testified over closed-circuit television from his holding cell. Relying on Judge Cheroske's representation that the jury would be present – though it was not – Johnson began to testify in a narrative form. Because Johnson did not follow a question-and-answer format and made comments, Judge Cheroske found that Johnson had voluntarily waived his right to testify due to disruptive conduct. (23RT 2-1364-1367.)

Judge Cheroske's finding was reversible error for three reasons: (1) Judge Cheroske should have given Johnson another warning and chance to conform his behavior, and failed to consider less severe options to waiver; (2) Johnson was not represented by counsel at the meeting and hearing that resulted in the waiver finding, nor was Johnson present to represent his interests; and (3) Judge Cheroske induced Johnson to relinquish his right to remain silent, breached his promise to Johnson that the jury would be present, and then used Johnson's statements against him to deny Johnson the right to testify.

1. Background facts

On November 17, 1998, Judge Cheroske ruled that Johnson would be able to testify during the guilt phase, not in the courtroom with the jury present, but from a jail cell through an audio/video transmission. Johnson would be able to hear the questions by counsel, and the jury would be able to see and hear Johnson on the monitor, but because the *video* transmission

was one way, Johnson would not be able to see the jury or anything else in the courtroom. (23RT 2-1293.)

Later, Judge Cheroske connected Johnson to the courtroom and explained to him that he was on live television, broadcast into the courtroom, and that his lawyer and the district attorney were in the courtroom. Judge Cheroske explained further that it was time to determine if Johnson intended to testify because any such testimony would take place the next morning. Judge Cheroske represented to Johnson that if he testified, the setup would be the same as then. That is, the jurors would not see that he was in custody. They would only see Johnson's head and shoulders and would hear Johnson through a series of speakers, while Johnson would hear questions by counsel. Johnson replied that he would testify. (23RT 2-1296-1297.)

Judge Cheroske informed Johnson that he would not be allowed to be disruptive during his testimony and would have to follow the rules and abide by a question-and-answer format like any other witness. (23RT 2-1297.) Then, in an apparent attempt to comply with the United States Supreme Court's mandate in *Illinois v. Allen* (1970) 397 U.S. 337, 343, 346, that a defendant receive repeated warnings and opportunities to conform his behavior, Judge Cheroske stated:

> Now, in the event you do not follow the rules, if you try to use the opportunity to do the things I've just mentioned or engage in profanity, which you have done that enough times, I will then – I have here a master switch in front of me. I will kill both the audio and the video portion. At that point in time, you will be given a chance to reconsider your behavior. [¶] In the event that you don't want to conform, or if you say that

> you will and we reinstitute your testimony and you once again violate the rules, I want you to know right now that I would terminate any further testimony. You will have then voluntarily given up your right to testify in this trial by your own actions.

(23RT 2-1298.)

When asked by Judge Cheroske whether he was going to follow the rules, Johnson answered that he would do what he thought was best for himself and understood what Judge Cheroske would like him to do. Judge Cheroske replied: "It's not what I'd like you to do. It's what you will do, Mr. Johnson." Johnson responded: "I understand what you would like me to do, and there is no need for no further discussion. Let's wait until tomorrow and see what's going to happen." (23RT 2-1299.)

Johnson and Judge Cheroske engaged in further colloquy, with Judge Cheroske finally stating, "You will testify tomorrow and follow the rules as any other witness. If you violate those rules, you know right now I will terminate your testimony; and you will never have an opportunity to testify before the jury." (23RT 2-1301.)

The next day Judge Cheroske activated the audio/video connection, Johnson appeared on the video screen in the courtroom, Judge Cheroske administered the oath to Johnson to tell the truth "so help you God" – presumably to the jury, though unknown to Johnson, the jury was not present – and Hauser began the examination.

> Q Mr. Johnson, back on September 26th of 1996, where were you living?
>
> A First of all, I wish to greet the jury.
> Good morning to y'all.

And I apologize for not being able to be present at my so-called trial, but it's beyond my control.

First of all, you do not represent my interests and never have. And all three of you attorneys work together. Everything you got going is totally illegal, and I'm totally opposed to it.

Q Is that where you live?

The court: Did you hear the question?

The witness: Excuse me?

Q By Mr. Hauser: Where do you live?

A You do not represent my interest and never have.

What y'all doing is illegal.

You have never tried to do nothing to benefit me.

Y'all all working together.

I oppose what's going on.

I'm not illiterate, neither am I dyfunctional (sic). It shouldn't be conducted this way.

This is reasonable doubt, ladies and gentlemen, what's going on in this trial.

Q So you don't want to testify. Is that you are saying?

A You do not represent my – I would appreciate if y'all read that letter I filed to the court Monday as a form of protest to what's going on to the jury to let them know that I'm not fooled or blind to what's going on. This is a concerted effort to intentionally dump me in that courtroom, ladies and gentlemen. Consider that.

Q Mr. Johnson, this is your chance. Now, are you going to testify or not?

A You do not represent my interest and never have, Mr. Hauser I do not need to talk to you.

Q Does that mean "no"?

A You have not – what about the tapes and everything y'a have to show that these witnesses was lying?
Y'all knew they was lying and tried to withhold that evidence. That's discriminatory in nature, and what y'all doing is a crime.

Q Are you going to answer my questions?

A Do you understand that you are committing a crime? You do not represent my interests and never have.

The court: All right. Mr. Johnson, I take it then by your comments that you do not intend to follow the normal witness rules of question and answer, and you will continue to make these kinds of comments. Is that what you're going to do?

The witness: Yes, Judge Cheroske.

The court: Well, I have a little surprise for you, Mr. Johnson. The jury is not present. This was a test see what kind of person you would be. You have proven by your conduct that you're not going to be able to testify in this case.

The witness: That's right.

The court: And the case on that, for the attorneys' benefit, of People versus Hayes, 289 Cal. App. –

The witness: It doesn't make no difference.

The court: I've deactivated Mr. Johnson's audio, because his

profanity was about to begin.

. . .

Mr. Johnson, thinking of course, the jury was here, began his comments, as did his wife.

(23RT 1364-1367, italics added.) Judge Cheroske found that Johnson waived his right to testify due to disruptive conduct. (23RT 2-1367.)[33]

2. Judge Cheroske erred in finding waiver because he should have given Johnson another warning and chance to conform behavior, and considered less severe options to waiver.

Judge Cheroske's decision that Johnson waived his right to testify was erroneous because Judge Cheroske did not give Johnson another warning and opportunity to conform his behavior, and did not even consider less severe options to depriving Johnson of his constitutional right to testify. (*Illinois v. Allen*, *supra*, 397 U.S. 337, 343, 346; *People v. Hayes* (1991) 229 Cal.App.3d 1226, 1233; *United States v. Ives* (9th Cir. 1974) 504 F.2d 935, 942.)

People v. Hayes, *supra*, and *United States v. Ives*, *supra*, both noncapital decisions, acknowledged that a defendant may waive the right to

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[33] It is unclear what Johnson meant by "That's right" because Judge Cheroske turned off the audio and Johnson was not asked his meaning. According to Judge Cheroske, Johnson was about to speak profanities, which suggests that Johnson was angry because he had been duped by Judge Cheroske into believing that the jury was present to see and hear him testify, and then taunted by Judge Cheroske with his "little surprise." Johnson could have also been responding to his wife who, according to Judge Cheroske, was making comments. In any event, Johnson's exclamation, "That's right," was not an intelligent, knowing and voluntary waiver of the right to testify, particularly given the deceit practiced on him by Judge Cheroske, which was compounded by Hauser's betrayal.

testify by contumacious conduct. (*People v. Hayes*, *supra*, 229 Cal.App.3d at pp. 1233-1234; *United States v. Ives*, *supra*, 504 F.2d at p. 941.) Each relied on *Illinois v. Allen*, *supra*, 397 U.S. 337, which held that a noncapital defendant's disruptive conduct in the courtroom during trial may constitute a waiver of the defendant's constitutional right to be present for some portion of the trial – after the defendant was "repeatedly warned by the trial judge that he would be removed from the courtroom if he persisted in his unruly conduct," and he was "constantly informed that he could return to the trial when he would agree to conduct himself in an orderly manner." (*Id.* at p. 346.)

In *Hayes*, the appellate court concluded that the defendant – twice removed from the courtroom and given "numerous warnings" from the judge on "several occasions" that his "continued outbursts" during trial could result in his removal – waived his right to assert a *desire* to testify as a consequence of his removal from the courtroom. (*People v. Hayes*, *supra*, 229 Cal.App.3d at pp. 1231, 1233-1234.) In *Ives*, after the trial court several times warned and removed the defendant and allowed him to return to the courtroom, the Ninth Circuit held, "as did the Court in *Illinois v. Allen*, that the defendant must be warned of the consequences of his actions before a court can determine that he has waived his privilege to testify." (*United States v. Ives*, *supra*, 504 F.2d at pp. 942, 944, fn. 19.) Thus, at the very least, before a defendant may lose the right to testify, the defendant must be given another warning and chance to return to the courtroom and testify.

Here, Judge Cheroske did not act in conformity with *Allen*, *Hayes*, and *Ives*. Judge Cheroske warned Johnson once that his behavior could lead to a waiver of his right to testify, and Judge Cheroske gave Johnson

one feigned chance to testify, though the *Allen* trial judge gave repeated warnings and opportunities to return to the courtroom. (*Illinois v. Allen*, *supra*, 397 U.S. at p. 346.) Contrast, too, Judge Cheroske's treatment of Johnson with the trial judges' conduct in *Hayes*, where the court twice removed the defendant from the courtroom and provided numerous warnings (*People v. Hayes*, *supra*, 229 Cal.App.3d at pp. 1231, 1233-1234), and in *Ives*, where the court warned the defendant five times, removed him four times, allowed him to return to the courtroom four times, and removed him for a fifth and final time (*United States v. Ives*, *supra*, 504 F.2d at pp. 942-945). Thus, under any interpretation of the cases, Judge Cheroske's actions are not supportable.

Allen also recognized that no one formula would be best in all situations, and that there were *at least* three ways for a trial judge to deal with an obstreperous defendant: "(1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." (*Illinois v. Allen*, *supra*, 397 U.S. at pp. 343-344.) Thus, the high court understood that a trial court should exercise its discretion by considering the various options available to handle the situation.

Judge Cheroske, too, should have examined the options available to him before prohibiting Johnson from testifying, for example, contempt proceedings, substituting other counsel for Hauser, or adding second counsel to examine Johnson under *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 434 ("If it appears that a second attorney may lend important assistance in . . . presenting the case, the court should rule favorably on the request. [I]n general, under a showing of genuine need, . . . a presumption arises that a second attorney is required").

Keenan counsel would have been especially appropriate as a compromise in order to preserve Johnson's crucial right to testify. According to Hauser, Johnson cooperated with him during the presentation of the defense case at the first trial, and the two got along well and had a good relationship from that point on. (17RT 2-69.) The trial judge, Jack Morgan, even commended Johnson for communicating regularly with Hauser during the first trial. (11RT 2575.) Nevertheless, as shown in Argument 5 (incorporated by this reference), Hauser repeatedly breached his duty of loyalty to Johnson, making it impossible for Johnson to trust Hauser and causing a complete breakdown in communication between attorney and client. But assuming for the sake of argument that this Court finds that no irreconcilable conflict existed between Johnson and Hauser, the facts remain that time and again Hauser violated Johnson's trust and failed to advocate his client's cause, particularly in never once objecting to the court's imposition of physical restraints on Johnson, including the life-threatening stun belt Johnson wore while he testified during the first trial. Having *Keenan* counsel examine Johnson would have been the right thing to do given that Johnson's life was at stake and six jurors voted to acquit Johnson on the Hightower first degree murder charge after they heard Johnson testify during the first trial. (15RT 3484, 3487-3488.)

Moreover, as a last resort, Judge Cheroske should have considered substituting Johnson's former testimony from his first trial for live testimony in the second trial. (Evid. Code, § 1291, subd. (a)(2) ["Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and . . . [t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine

the declarant with an interest and motive similar to that which he has at the hearing]; § 240, subd. (a)(2) ["'unavailable as a witness" means that the declarant is . . . [d]isqualified from testifying to the matter"].)

Johnson's direct testimony during the first trial covers approximately 12 pages of reporter's transcript. He testified that he was asleep in his girlfriend's home at the time of the shootings and was Hightower's good friend. (12RT 2785-2796.)

The same prosecutor cross-examined Johnson during the first trial as would have cross-examined him at the second trial. Johnson's cross-examination covers over 50 pages and included a weekend break, allowing the prosecutor to fully prepare for the final stage of cross-examination. (12RT 2796-13RT 2882.) In light of Johnson's spare direct examination and the prosecutor's exhaustive cross-examination during the first trial, it would have been fair from the state's point of view to substitute Johnson's prior testimony at the second trial, especially since the law requires a court to consider the option least burdensome to the defendant's fundamental constitutional right to testify.

Most important, Judge Cheroske should have given Johnson the opportunity to testify to the jury. As Judge Cheroske explained to Johnson, the court had the power to cut Johnson off with the flip of a master switch. (23RT 2-1298.) Because Judge Cheroske could terminate Johnson's testimony in an instant, no harm would have resulted if Johnson attempted to speak directly to the jury. And even if Johnson did testify in a narrative, leaving no role for Hauser, this Court has implicitly sanctioned that method where, as here, defense counsel is opposed to the client's testifying (23RT 2-1301), but the client nevertheless insists on his "absolute right to testify over counsel's objection." (*People v. Guzman* (1988) 45 Cal.3d 915, 941-

946.)

Accordingly, Judge Cheroske's waiver finding was error because he did not give Johnson repeated warnings and any real chance to testify, and did not consider less severe options to the draconian one of depriving Johnson of his constitutional right to testify.

3. No one represented Johnson's interests at the meeting and hearing that resulted in the finding that Johnson waived his right to testify – although present, Hauser actually plotted against and deceived Johnson, while Johnson was excluded from the meeting and hearing altogether.

a. Johnson was not represented by counsel at the critical meeting and hearing that resulted in the court's decision to deny Johnson his right to testify.

It is "well established that the accused has a fundamental right to testify in his own behalf, even if contrary to the advice of counsel." (*People v. Guzman*, *supra*, 45 Cal.3d at p. 962; *People v. Lancaster* (2007) 41 Cal.4th 50, 100 [recognizing defendant's fundamental right to testify on his own behalf].) Thus, the defendant, not counsel, has the "ultimate authority" to determine whether to testify in his or her own behalf. (*Florida v. Nixon* (2004) 543 U.S. 175, 187.)

Here, Hauser did not want Johnson to testify because, according to Hauser, he did not believe Johnson was going to cooperate with him and did not think Johnson's testimony would help his case. "The defendant's insistence upon testifying may in the final analysis be harmful to his case, but the right is of such importance that every defendant should have it in a criminal case." (*People v. Allen* (2008) 44 Cal.4th 843, 860.) Hauser

advised Johnson not to testify, and Johnson overruled him (23RT 2-1303), but rather than honor his client's choice and respect Johnson's wishes and the law, Hauser schemed with Judge Cheroske and the prosecutor to deceive Johnson into waiving his right to testify.

The meeting where Hauser, Judge Cheroske, and the prosecutor hatched their plot to mislead Johnson, as well as the hearing that followed the next day, were critical stages of Johnson's trial because they "held significant consequences" for Johnson – they resulted in Judge Cheroske's finding that Johnson waived his right to testify. (*Bell v. Cone* (2002) 535 U.S. 685, 696.) Johnson was therefore entitled under the Sixth Amendment to the representation of counsel at these critical stages. (*Ibid.*)

But instead of protecting Johnson's choice to testify, Hauser plotted with Judge Cheroske and the prosecutor at the meeting to deceive Johnson and completely failed to represent Johnson at the hearing the next day. Because Hauser failed to object at the meeting to the prosecutor's request that Judge Cheroske misinform Johnson that the jury would be present in the courtroom, acquiesced in Judge Cheroske's adoption of the plan, actively participated in deceiving Johnson at the hearing, breached his duty of loyalty by failing to disclose to Johnson the real intent of the hearing (*Flatt v. Superior Court (Daniel)* (1994) 9 Cal.4th 275, 289), did not object to Judge Cheroske's waiver finding, and did not even propose to admit Johnson's testimony from the first trial (Evid. Code, §§ 1291, subd. (a)(2), 240, subd. (a)(2)), Hauser completely failed to represent Johnson so that Johnson was constructively denied counsel at these critical stages. (23RT 2-1302-1303, 1361-1367.) Thus, Judge Cheroske erred in finding Johnson waived the right to testify. (*King v. Superior Court* (2003) 107 Cal.App.4th 929, 950 [since defendant's counsel completely denied defendant effective

assistance of counsel at hearing, it was as though defendant had no counsel at forfeiture-of-counsel hearing so that forfeiture finding was error].)

b. Judge Cheroske deprived Johnson of his right to be present at the critical meeting and hearing.

Johnson had a constitutional right to be present at every critical stage of his criminal proceedings if his presence would have contributed to the fairness of the procedure. (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745; cf. *People v. Davis* (2005) 36 Cal.4th 510, 530 [a defendant's presence is required under the federal Constitution if it bears a reasonable and substantial relation to the defendant's full opportunity to defend against the charges].) In *Stincer*, the high court held that the defendant's rights under the Due Process Clause were not violated by his exclusion from a hearing because the defendant provided no indication that his presence "would have been useful in ensuring a more reliable determination . . . ." (482 U.S. at p. 747; *United States v. Gagnon* (1985) 470 U.S. 522, 527 [defendants' absence did not violate due process because their presence was not needed to "ensure fundamental fairness" and they "could have done nothing had they been at the conference, nor would they have gained anything by attending"].)

Moreover, as a capital defendant, Johnson was permitted by statute to be absent from the courtroom only if he was removed for disruptive behavior or executed a written waiver. (*People v. Davis*, *supra*, 36 Cal.4th at p. 531, citing §§ 977, 1043.)

Judge Cheroske excluded Johnson from the critical meeting and hearing that resulted in Judge Cheroske's decision that Johnson waived his right to testify. (23RT 2-1367.) Because Johnson was so excluded, and

Hauser colluded in the deception that led to the waiver finding and did not object to the finding, no one represented Johnson's interests at the meeting and hearing.

Even if Johnson's conduct waived his right to be present in front of the jury, he did not waive his right to attend proceedings held without the jury. In permanently expelling Johnson, Judge Cheroske explicitly chose not to manacle or shackle Johnson in front of the *jury* during trial because he thought it was too prejudicial. (17RT 2-65-66.) But no such prejudice concerns applied to the meeting and hearing, because the jury was not present. Johnson could have been fully restrained at both. Moreover, Johnson did not even have to be physically present; he could have appeared at the hearing by way of closed-circuit television from his holding cell as he did later. (23RT 2-1295.) Finally, at the very least, Johnson could have appeared by telephone.

Thus, Johnson should have been present to protect his interests and contribute to the fairness of the meeting, hearing, and trial. For example, he obviously would have voiced his opposition at the meeting to the prosecutor's proposal to deceive Johnson into believing that the jury would be present, though it would not be. Had he been present at the meeting where the plot was hatched, he would have told the court that he would testify only if the jury was actually present in the courtroom to see and hear him speak from his holding cell. More likely, had Johnson been present, the court and counsel would not have devised their scheme, which eliminated Johnson's right to testify. That alone would have contributed to the fairness of the trial.

Moreover, at the hearing where Judge Cheroske decided that Johnson had waived his right to testify, Johnson could have discussed

options to a waiver finding that were available to Judge Cheroske. Johnson wanted to testify, but did not want Hauser acting as his counsel. Johnson could have asked Judge Cheroske to appoint second counsel under *Keenan v. Superior Court*, *supra*, 31 Cal.3d at p. 434, solely for the purpose of examining Johnson. Johnson could have discussed with the court the possibility of his testifying in narrative form without any assistance from Hauser. (See *People v. Guzman*, *supra*, 45 Cal.3d 915, 942, 946 [implicitly approving narrative testimony where defendant takes the stand against the advice of counsel].) Johnson had wanted to represent himself at trial. (15RT 3497.) Perhaps Judge Cheroske would have agreed to Johnson's self-representation for this limited purpose so that the jury would hear Johnson's side of the story. Johnson even could have suggested that the court consider admitting a transcript of Johnson's testimony from the first trial in lieu of live testimony. (Evid. Code, § 1291, subd. (a)(2).)

Johnson could have reminded the court that his life was on the line and that in his first trial, six jurors voted to acquit him on the Hightower charge after they heard Johnson testify, underscoring the importance of his testimony. (15RT 3484, 3487-3488.)

Finally, Johnson could have argued that he should be given a chance to testify to the jury and that Judge Cheroske could simply flip the master switch if the court found him disruptive.

Because Judge Cheroske excluded Johnson from the meeting and hearing, and Hauser did not represent Johnson's interests at them, the judge heard none of these possible suggestions. Johnson, therefore, should have been allowed to participate in the meeting and hearing. By excluding Johnson from both and by finding that Johnson had waived his right to testify, Judge Cheroske erred.

4. Judge Cheroske denied Johnson due process by inducing Johnson to relinquish his right to remain silent, breaching a promise to Johnson, and then using Johnson's statements against him to deny Johnson the right to testify.

In a unique chain of events, Judge Cheroske first misrepresented to Johnson that the jury was present, thereby inducing him to waive his right to remain silent, then used Johnson's resulting comments to find a waiver of his right to testify. Because both waivers ultimately rested on the court's own deception, neither was valid.

"The freedom of a defendant in a criminal trial to remain silent 'unless he chooses to speak in the unfettered exercise of his own will' is guaranteed by the Fifth Amendment and made applicable to state criminal proceedings through the Fourteenth." (*Carter v. Kentucky* (1981) 450 U.S. 288, 305, quoting *Malloy v. Hogan* (1964) 378 U.S. 1, 8.) The defendant not only has an absolute right not to testify, the defendant has an absolute right not to be called as a witness. (*People v. Carter* (2005) 36 Cal.4th 1114, 1198.)

The decision to remain silent and not to testify is fundamental and made by the defendant. (*People v. Carter*, *supra*, 36 Cal.4th at p. 1198.) Generally, a right that is fundamental and personal to the defendant may only be waived if there is evidence in the record demonstrating "an intentional relinquishment or abandonment of a known right or privilege" (*Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464), meaning that the waiver must be voluntary, knowing and intelligent (*People v. Davis*, *supra*, 36 Cal.4th at p. 531).

Here, Johnson decided to waive his Fifth Amendment right to remain silent because he believed – based on Judge Cheroske's promise – that the

jury would be present in the courtroom to see and hear him as he spoke over closed-circuit television. (See *State v. Tourtellotte* (1977) 88 Wash.2d 579, 584 ["If a defendant cannot rely upon an agreement made and accepted in open court, the fairness of the entire criminal justice system would be thrown into question."].) Judge Cheroske acknowledged that Johnson began to speak because Johnson thought the jury was present. The jury, however, was not in the courtroom. (23RT 2-1367.)

Clearly, because of Judge Cheroske's deception, Johnson did not choose to speak in the unfettered exercise of his own will. (See *Moran v. Burbine* (1986) 475 U.S. 412, 421 [in the custodial context, the relinquishment of the right to remain silent must have been voluntary in the sense that it was the product of a free and deliberate choice and not "deception"].) Had Johnson known that the jury was absent, he could have invoked his right to remain silent.

In *People v. Quartermain* (1997) 16 Cal.4th 600, the state's representative – the prosecutor – promised the defendant that in return for the defendant's waiver of his constitutional right to remain silent, the state would not use in court any statement by the defendant. In reliance on the state's promise, the defendant spoke to the prosecutor, but the prosecutor breached his promise and used the defendant's statements to impeach him at trial. Relying on *Santobello v. New York* (1971) 404 U.S. 257, 262 (holding that where a plea rests on a significant promise of the prosecutor and the prosecutor breaches the plea agreement, due process requires that the promise be fulfilled) and *Doyle v. Ohio* (1976) 426 U.S. 610, 618 (holding that it is fundamentally unfair and a denial of due process to introduce at trial evidence of a defendant's silence after the prosecutor promised it would not be used), *Quartermain* held that the prosecutor's

breach in using the defendant's statement against him denied the defendant due process. (16 Cal.4th at p. 606; see *Machibroda v. United States* (1962) 368 U.S. 487, 493 ["A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void"].)

Although, unlike *Santobello*, *Quartermain* did not involve a plea agreement, this Court was guided by the *Santobello* principle, which was reaffirmed by the United States Supreme Court in *Mabry v. Johnson* (1984) 467 U.S. 504, that when a prosecutor, the state's representative, "makes a promise that induces a defendant to waive a constitutional protection and act to his or her detriment in reliance on that promise, the promise must be enforced." (*People v. Quartermain, supra*, 16 Cal.4th at p. 618, citing *Mabry*, at pp. 509-510.)

Similarly, here, the state's representative, a judge, made a promise – the jury would be present – that induced the defendant to waive a constitutional protection – the right to remain silent – to the defendant's detriment in reliance on that promise. That is, like the defendant in *Quartermain*, Johnson "did act to his detriment in reliance on the [state's] promise by waiving his right to remain silent and making a statement." (*People v. Quartermain, supra*, 16 Cal.4th at p. 620.) Hence, because Judge Cheroske used Johnson's statements against him to deny Johnson the right to testify, Judge Cheroske denied Johnson due process. (*Id.* at p. 621 [concluding "that defendant was denied his federal constitutional right to due process by the prosecution's use of the [defendant's] statement"].)

In *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, the judge interrogated an attorney to obtain evidence for a possible contempt citation against the attorney, without informing the attorney of the judge's purpose in conducting the interrogation. This Court concluded that

had the attorney "known the purpose of the interrogation he could have invoked his privilege not to testify. To attempt to take him unawares was an abuse of the judicial process [and] constituted wilful misconduct." (*Id.* at p. 631, citation omitted.)

Like the lawyer in *Wenger*, had Johnson known the court's true purpose in examining Johnson, he could have invoked his privilege not to testify.

Therefore, Johnson's waiver of his right to remain silent and his statements to the court in response to the examination were not voluntary. And because "'*any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law'" (*New Jersey v. Portash* (1979) 440 U.S. 450, 459, quoting *Mincey v. Arizona* (1978) 437 U.S. 385, 398, original emphasis), Judge Cheroske denied Johnson due process by using Johnson's statements to find that Johnson had waived his right to testify. It follows, moreover, that because Judge Cheroske deceived Johnson into waiving his right to testify, any waiver was invalid because it was not knowing, intentional, and voluntary. (*United States v. Pino-Noriega*, *supra*, 189 F.3d at p. 1094.)

D. Johnson Did Not Waive His Right to Testify at the Penalty Phase.

Judge Cheroske held two conferences on whether Johnson would testify during the penalty phase, but excluded Johnson from both. The court then found that Johnson had waived his right to testify during the penalty phase. Judge Cheroske erred in excluding Johnson and finding a waiver.

1. Facts.

At a penalty phase conference, from which Judge Cheroske excluded Johnson (40CT 11618), the prosecutor wondered aloud whether Johnson

wanted to testify. Defense counsel Hauser stated that he would not call Johnson as a witness. According to Judge Cheroske, Hauser's decision made it "a dead issue." (25RT 2-1760.)

At a conference the next day, from which Judge Cheroske once more excluded Johnson (40CT 11620), the prosecutor again raised the issue of Johnson's testifying and insisted that Johnson state on the record or through Hauser that he did not wish to testify. (25RT 2-1779.) After a short recess, Hauser informed the court that at the bailiff's suggestion, the bailiff called the sergeant to ask Johnson if he would be willing to talk to Hauser about testifying. The bailiff responded that "Mr. Johnson said to the sergeant that he doesn't want anything to do with Mr. Hauser or anything to do with the trial." Judge Cheroske replied, "Well, that answers that then." (25RT 2-1780.)

2. Judge Cheroske violated Johnson's constitutional and statutory rights to presence by excluding Johnson from the two conferences on whether Johnson would testify at the penalty phase.

Johnson had constitutional and statutory rights to be present at the two critical conferences on whether he would testify at the penalty phase because "his presence would have contributed to the fairness of the procedure." (*Kentucky v. Stincer*, *supra*, 482 U.S. at p. 745; *id.* at p. 747 [holding that the defendant's rights under the Due Process Clause were not violated by his exclusion from a hearing because the defendant provided no indication that his presence "would have been useful in ensuring a more reliable determination"]; *United States v. Gagnon*, *supra*, 470 U.S. at p. 527; *People v. Lucero* (2000) 23 Cal.4th 692, 717;§§ 977, subd. (b)(1), 1043.)

Johnson's presence at the conferences undoubtedly would have been

useful in ensuring a more reliable determination because he could have expressly stated on the record whether he wished to testify. Johnson testified at the first trial. (12RT 2784-2796.) At the retrial, he expressed a desire and tried to testify during the guilt phase. (23RT 2-1295, 1364.) Given his prior testimony and attempt to testify at the retrial, a strong inference is that Johnson wanted to testify to the jury during the penalty phase, if given the opportunity. Johnson therefore should have been present in the courtroom during the conferences. (40CT 11678; 25RT 2-1827.) Excluding Johnson from the conferences violated his constitutional and statutory rights to presence.

Furthermore, Johnson did not waive his right to presence at the two conferences.

First, Johnson did not waive his statutory rights to be present at the conferences because there was no written waiver. (*People v. Davis*, *supra*, 36 Cal.4th at p. 531, citing §§ 977, 1043.)

Second, Hauser, on his own or acting through the bailiff, did not waive Johnson's constitutional right to be at the conferences. In *People v. Davis*, this Court addressed whether counsel may waive a defendant's constitutional right to be present. *Davis* found that there must be some evidence that the defendant understood the right being waived and the consequences of a waiver. There, the defendant's counsel informed the court that counsel had discussed the hearing with the defendant and that the defendant would waive his presence. Finding this "scant evidence of consent," *Davis* noted that there was no evidence that defense counsel had informed the defendant of his right to attend the hearing or evidence that the defendant understood that by absenting himself he would not be able to contribute to the discussion on the contents of certain audiotapes, the

purpose of the hearing. *Davis* concluded that the defendant did not knowingly and intelligently waive his right to presence at the hearing. (*People v. Davis*, *supra*, 36 Cal.4th at p. 531.)

Similarly, after Johnson was excluded from the first conference without even a hint of a waiver by his counsel, Hauser relied on the bailiff to call the sergeant to ask Johnson if he would be willing to talk to Hauser about testifying. The bailiff's thirdhand assertion, that "Mr. Johnson said to the sergeant that he doesn't want anything to do with Mr. Hauser or anything to do with the trial" (25RT 2-1780), is scant evidence – actually it fails to qualify as evidence at all – that Johnson consented to his absence from both conferences on the issue of his testifying, particularly because Johnson had no reason to believe that Judge Cheroske would permit his presence given that Judge Cheroske had wrongfully excluded Johnson from the entire trial, as set forth in Argument 2. Moreover, there is no evidence that by allegedly telling the sergeant that he wanted nothing to do with Hauser or the trial that Johnson understood that he had the right to attend the conferences on whether he would testify or understood the consequences of his failure to attend the conferences.

Third, even if, because of disruptive behavior, Judge Cheroske had rightly excluded Johnson previously from the courtroom while the jury was present, Judge Cheroske should not have excluded Johnson from the critical conferences held outside the presence of the jury to determine whether Johnson would testify at the penalty phase. Sixteen days after Judge Cheroske held the second conference on whether Johnson would testify, Johnson stood in the courtroom before Judge Cheroske in full restraints for sentencing. (40CT 11678; 25RT 2-1827.) Nothing in the records suggests that Johnson could not have likewise appeared before Judge Cheroske for

the conferences on whether Johnson would testify. Moreover, Johnson could have appeared by telephone. Judge Cheroske erred in excluding Johnson from the two conferences and as a result, erred in finding that Johnson waived his right to testify at the penalty phase.

3. Judge Cheroske erred in finding that Johnson waived his fundamental right to testify at the penalty phase.

Johnson did not waive his fundamental right to testify during the penalty phase. (*Rock v. Arkansas*, *supra*, 483 U.S. at pp. 51-53; *People v. Nakahara*, *supra*, 30 Cal.4th at p. 717.)

First, because the decision was Johnson's to make, and not Hauser's, Judge Cheroske was wrong to conclude that because Hauser opposed Johnson's testifying, Johnson would not be allowed to testify. (*Jones v. Barnes* (1983) 463 U.S. 745, 751; *People v. Nakahara*, *supra*, 30 Cal.4th at p. 717.)

Second, Hauser's attempt to waive Johnson's right to testify by relying on the bailiff who relied on the sergeant who purportedly spoke to Johnson was not a knowing, intentional, and voluntary waiver of *Johnson's* right to testify at the penalty phase. (*United States v. Pino-Noriega*, *supra*, 189 F.3d at p. 1094; *United States v. Pennycooke* (3d Cir. 1995) 65 F.3d 9, 11; see *People v. Davis*, *supra*, 36 Cal.4th at p. 531 [finding there must be some evidence defendant understood right being waived and consequences of waiver].) The bailiff's thirdhand statement to the court that Johnson told the sergeant who told the bailiff that Johnson did not want to have anything to do with Hauser or the trial did not reliably waive Johnson's right to testify, particularly given that "courts indulge in every reasonable presumption against waiver of fundamental rights . . . ." (*Johnson v. Zerbst*,

supra, 304 U.S. at p. 464, internal quotations and citations omitted.)

Moreover, thirdhand statements are inherently suspect. The sergeant or the bailiff or both could have lied, misunderstood the speaker, taken the speaker's words out of context, or been mistaken for some other reason. (*Williamson v. United States* (1994) 512 U.S. 594, 598 ["[O]ut-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener."].)

Furthermore, any assertion that Johnson did not want to testify was undermined by Johnson's clearly stated desire and attempt to testify during the guilt phase of the retrial, as well as by his actual testimony at the guilt phase of the first trial, where the jury hung after it heard Johnson testify. (12RT 2784-13RT 2882; 23RT 2-1297; 18CT 5333.)

But even assuming the sergeant and bailiff accurately transmitted Johnson's response in its entirety, the question asked Johnson by the sergeant is not in the record. The bailiff informed the court that she called the sergeant to ask Johnson if he would be willing to talk to Hauser about testifying. The bailiff was not present when the sergeant asked Johnson any question. Nor did the bailiff tell the court whether the sergeant related to her the substance of the question asked Johnson by the sergeant. At no time did anyone ask Johnson directly whether he wished to testify, and at no time did Johnson expressly state that he did not want to testify. A matter of such fundamental importance should not have been treated so cavalierly.

Third, under the circumstances of this case, even if Johnson had expressed a desire not to testify, any such expression would not constitute a knowing, intentional, and voluntary waiver. Both Judge Cheroske and

Hauser had deceived Johnson into believing the jury was present during the guilt phase when Johnson attempted to testify. Instead of having the jury present, Judge Cheroske taunted Johnson with his "little surprise" – that the jury did not hear or see Johnson – contrary to what Judge Cheroske led Johnson to believe. (23RT 2-1367.) Because of the prior charade during the guilt phase and the likelihood that it would color Johnson's response to whether he wished to testify during the penalty phase, it was especially necessary for Judge Cheroske to address Johnson directly on the issue, and that something other than a thirdhand waiver be obtained.

Judge Cheroske therefore erred in finding that Johnson waived the right to try to save his life though his own voice.

E. The Errors Call For Reversal of the Conviction and Sentence.

Structural Error

The denial of the assistance of counsel at a critical stage of the proceeding is structural error. (*Bell v. Cone*, *supra*, 535 U.S. at pp. 695-696, citing *United States v. Cronic* (1984) 466 U.S. 648, 659; *Roe v. Flores Ortega* (2000) 528 U.S. 470, 483, ["the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice"]; see *French v. Jones* (6th Cir. 2003) 332 F.3d 430, 438 ["the [Supreme] Court has often held, both before and after *Cronic*, that absence of counsel during a critical stage of a trial is per se reversible error"].) Because Hauser did not represent Johnson's interests at the guilt phase conspiracy meeting and the sham hearing, but actually colluded with Judge Cheroske and the prosecutor to deceive Johnson, Johnson was constructively denied counsel at these two critical stages, which resulted in Judge Cheroske's finding that Johnson had waived the right to testify, so

that the judgment must be reversed in its entirety.

Judge Cheroske's federal constitutional errors in excluding Johnson from the guilt phase meeting and hearing and the two penalty phase conferences were also structural. (See *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150 [structural errors affect the framework within which the trial proceeds, defy analysis by harmless-error standards, and have consequences that are necessarily unquantifiable and indeterminate]; *Rushen v. Spain* (1983) 464 U.S. 114, 119, fn. 2 [right to be present during critical stages of proceedings is subject to harmless error analysis, "unless the deprivation, by its very nature, cannot be harmless"]; *State v. Lopez* (2004) 271 Conn. 724, 737 [defendant's exclusion from conference on defense counsel's potential conflict of interest amounted to structural error]; *State v. Brown* (2003) 362 N.J.Super. 180, 189 [defendant's absence during readback of testimony to jury, unsupervised by judge, was structural error]; *State v. Bird* (2002) 308 Mont. 75, 83 [defendant's exclusion from in-chambers individual voir dire proceedings was structural error]; *State v. Padilla* (N.M.App. 2000) 129 N.M. 625, 630 [defendant's absence at beginning of trial was structural error]; *State v. Calderon* (2000) 270 Kan. 241, 253 [absence of defendant's interpreter during closing arguments violated defendant's fundamental right to be present at trial and was structural error]; *State v. Garcia-Contreras* (1998) 191 Ariz. 144, 149 [defendant's involuntary absence from entire jury selection was structural error]; *Hegler v. Borg* (9th Cir. 1995) 50 F.3d 1472, 1476 ["a defendant's absence from certain stages of a criminal proceeding may so undermine the integrity of the trial process that the error will necessarily fall within that category of cases requiring automatic reversal"]; but see *People v. Davis*, *supra*, 36 Cal.4th at p. 532 ["Under the federal Constitution, error

pertaining to a defendant's presence is evaluated under the harmless beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 23"]; *Campbell v. Rice* (9th Cir. 2005) 408 F.3d 1166, 1172 (en banc) ["The Supreme Court has never held that the exclusion of a defendant from a critical stage of his criminal proceedings constitutes a structural error," citing *Rushen v. Spain*, *supra*, 464 U.S. at p. 117].) Hence, the guilt phase verdicts, special circumstance findings, and death penalty should be automatically set aside.

Automatic reversal is likewise required because Judge Cheroske wrongfully refused to allow Johnson to testify during the guilt phase and penalty phase. (See *United States v. Gonzalez-Lopez*, *supra*, 548 U.S. at p. 150; but see *People v. Allen*, *supra*, 44 Cal.4th at p. 871 [holding that the erroneous denial of a defendant's right to testify is subject to *Chapman* prejudice test].)

Here, simple trial error did not occur. Johnson's entire guilt phase testimony *and* penalty phase testimony were barred by Judge Cheroske. The consequences of their absences were necessarily unquantifiable and indeterminate so that Judge Cheroske's errors in causing those absences are reversible per se.

Prejudicial Error

Assuming this Court finds that *Chapman* applies, then the state will be unable to meet its heavy burden of proving that Judge Cheroske's guilt and penalty phase errors in connection with Johnson's testimony were harmless beyond a reasonable doubt. (*People v. Brown* (1988) 46 Cal.3d 432, 448 [state law error at the penalty phase must be assessed by asking whether it is reasonably possible the error affected the verdict]; *People v. Abilez* (2007) 41 Cal.4th 472, 525 [the *Chapman* and *Brown* standards are

the same in substance and effect].)

No portion of a criminal defendant's trial is more important than when the defendant tells the jury the defense side of the case (*Rock v. Arkansas*, *supra*, 483 U.S. at p. 52 ["the most important witness for the defense in many criminal cases is the defendant himself"]), particularly where, as here, the defendant was barred from the rest of the trial so that the jury never even saw or heard from him.

Johnson would have testified at the second trial, as he did at the first, that he was asleep in his girlfriend's apartment at the time of the shootings and that he and Hightower were very good friends. (12RT 2784-2796.)

The first jury deliberated for eight days before eventually hanging on all charges. (15RT 3410, 3412, 3440, 3442, 3444, 3461, 3476, 3486.) On the final Hightower ballot, the vote was 6-6. (15RT 3484, 3486, 3489.)

The difference between the first trial where the jury hung and the second trial where the jury convicted Johnson was that he was present and testified at the first trial and was altogether absent at the second.

In *People v. Allen*, *supra*, 44 Cal.4th 843, this Court cautioned that because the issue of the defendant's credibility is for the jury to resolve, "'it is only the most extraordinary of trials in which a denial of the defendant's right to testify can be said to be harmless beyond a reasonable doubt. [Citation.]'" (*Id.* at p. 872, quoting *Martinez v. Ylst* (9th Cir.1991) 951 F.2d 1153, 1157.)

This is not one of those most extraordinary of cases. The jury could have believed Johnson and acquitted him. Or the jury might have had lingering doubt of his guilt and returned a verdict of life. (*People v. Brown* (2003) 31 Cal.4th 518, 567 [under federal and state Constitutions, it is proper for penalty phase jury to consider lingering doubt in determining

penalty].) In short, the state will not be able to show that Judge Cheroske's errors in preventing Johnson from testifying were harmless.

Furthermore, preventing Johnson from testifying had the effect of denying him the opportunity to influence the jury, particularly on the question of remorse.

> It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. . . . At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a *powerful influence* on the outcome of the trial.

(*Riggins v. Nevada* (1992) 504 U.S. 127, 142 (conc. opn. of Kennedy, J., italics added).) That powerful influence is magnified in a capital sentencing proceeding, where "assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies." (*Id.* at p. 144 (conc. opn. of Kennedy, J.).)

Studies even show that a capital defendant's demeanor during trial, particularly if it shows remorse, may have a compelling effect on the jury's penalty verdict. (Blume, et al., *Competent Capital Representation: the Necessity of Knowing and Heeding What Jurors Tell Us about Mitigation* (2008) 36 Hofstra L. Rev. 1035, 1037 [empirical studies reveal that one of the three primary considerations that drive juror decision-making at the penalty phase of a capital trial is the defendant's remorse or lack thereof]; Eisenberg, et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing* (1998) 83 Cornell L. Rev. 1599, 1617 ["jurors tended to believe

in a defendant's remorse if he appeared 'uncomfortable or ill at ease'" and "jurors were more likely to believe in a defendant's remorse if they detected a change in his 'mood or attitude' after the guilty verdict"]; *id.* at p. 1633 ["if jurors believed that the defendant was sorry for what he had done, they tended to sentence him to life imprisonment, not death"]; *id.* at p. 1637 ["confirm[ing] the widespread conviction that remorse makes a difference to the sentence a defendant receives"]; Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum. L. Rev. 1538, 1560 ["Lack of remorse is highly aggravating"]; *id.* at p. 1567 [defendant should show jury some remorse for what he has done]; Geimer & Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases* (1988) 15 Am. J. Crim. L. 1, 51 [32 percent of the jurors interviewed mentioned the defendant's demeanor as a contributing factor in the sentence recommendation].)

The United States Supreme Court "has stressed the 'acute need' for reliable decisionmaking when the death penalty is at issue" (*Deck v. Missouri* (2005) 544 U.S. 622, 632), during both the guilt phase (*Beck v. Alabama* (1980) 447 U.S. 625, 638) and the penalty phase (*Oregon v. Guzek* (2006) 546 U.S. 517, 525). Furthermore, this Court agrees with the high court that "death is different" and thus recently wrote: "The punishment at issue in capital cases makes it all the more important to ensure fairness and arrive at accurate outcomes." (*Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 728-729, citing among others, *Ring v. Arizona* (2002) 536 U.S. 584, 605.)

But by keeping Johnson from testifying at the guilt and penalty phases of his capital trial, Judge Cheroske prevented Johnson from telling his side of the story and precluded the jury from assessing Johnson's

credibility. Moreover, Judge Cheroske foreclosed Johnson from having a powerful influence on the jury during both phases, particularly with respect to his character and remorse. In the process Judge Cheroske failed to ensure the reliable decision-making and fairness that the federal Constitution requires at both phases of a capital trial.

Accordingly, the guilt verdicts, special circumstances findings, and death sentence must be set aside.

4.

THE LOWER COURT ERRED THRICE IN SUMMARILY DENYING JOHNSON'S MOTIONS TO REMOVE COUNSEL WITHOUT HOLDING A *MARSDEN* HEARING.

A. Introduction

Three times defendant Cedric Johnson tried to discharge his appointed counsel, Steven Hauser, in favor of the appointment of other counsel, but each time was met with summary denials. The rulings were abuses of discretion, violated Johnson's rights to assistance of counsel under the Sixth Amendment and due process under the Fourteenth Amendment, and article I, section 15 of the California Constitution, were prejudicial per se, and mandate reversal and a new trial. (*People v. Abilez* (2007) 41 Cal.4th 472, 490; *People v. Marsden* (1970) 2 Cal.3d 118, 123-126.)

B. Facts

The first of the two trials in this case began on May 19, 1998. (1CT 287; 3RT 635.) Earlier that day Johnson specifically requested a "*Marsden*" hearing, which Judge Jack Morgan summarily denied. (1CT 287; 2RT 365.) Nevertheless, Judge Morgan held a hearing the next day to address Johnson's complaints regarding Hauser, something Judge Morgan would do periodically throughout the first trial, while never removing Hauser as Johnson's counsel. (3RT 611-619; 5RT 1053-1071; 6RT 1345-1349; 7RT 1591-1593; 8RT 1834-1836; 9RT 2061-2071; 18CT 5229, 5232, 5239.)

On June 19, 1998, after the jury deliberated for over six days on guilt and was unable to reach any verdicts, Judge Morgan declared a mistrial. (18CT 5333; 15RT 3486.) Johnson noted that his appointed counsel was

upset because Hauser expected a guilty verdict. Hauser did not deny Johnson's charge. Johnson immediately moved to represent himself, but the court summarily denied the motion. (15RT 3497.) Eighteen days later Judge Morgan stated his reasons for the denial. (16RT 3500-3503.)

At a status conference on July 7, 1998, two and a half weeks after the first trial ended, Johnson moved for the appointment of an attorney to replace Hauser, but Judge Morgan summarily denied the motion without holding a *Marsden* hearing. (16RT 3503 [Johnson: "I ask that I be allowed another attorney." The Court: "I'm not getting you another attorney."].) The prosecutor said nothing.

On July 14, 1998, at a status conference before Judge Kenneth Gale, Johnson again requested the appointment of an attorney in place of Hauser, and again the court summarily denied his motion without holding a *Marsden* hearing. (16RT 3508 [Johnson: "I would like a continuance and another counsel. Under the Sixth Amendment – ." The court: "Denied."].) The prosecutor said nothing.

On September 17, 1998, the parties and the court, with Judge John J. Cheroske presiding, appeared in the jury assembly room to distribute hardship questionnaires to the approximately 400 prospective jurors present. (17RT 2-12, 18, 64.) Before the prospective jurors were sworn, Johnson and Hauser engaged in an altercation and Hauser fell off his chair. (17RT 2-18-29, 53, 69.) While restrained by deputies, Johnson expressed that he did not want Hauser as his counsel because Hauser did not represent his interests. (17RT 2-23 ["I don't want you. I do not want this man. He do not represent my interest, ladies and gentlemen. I'm qualified to represent myself. This man has intentionally dumped me in trial."].)

Without hearing Johnson's specific reasons for not wanting Hauser

as his lawyer, Judge Cheroske summarily expelled Johnson from the courtroom for his entire trial. (17RT 2-25; 18CT 5342.) Judge Cheroske then deferred to Hauser's choice to remain as Johnson's attorney. (17RT 2-25.) The prosecutor said nothing about Johnson's assertion that he did not want Hauser as his counsel.

The second trial began on November 5, 1998, with Judge John Cheroske presiding and Hauser representing Johnson throughout. (39CT 11500.) The jury returned guilt and penalty verdicts against Johnson. (39CT 11543, 11611-11612; 40CT 11644.)[34]

C. The Lower Court Constitutionally Erred in Failing to Hold *Marsden* Hearings in Response to Johnson's Requests for a New Lawyer.

In *Marsden*, this Court held that a defendant is deprived of the constitutional right to effective assistance of counsel and the due process right to a fair trial when the trial judge denies the defendant's motion to substitute one appointed counsel for the other, without giving the defendant an opportunity to offer grounds for the motion. (*People v. Marsden*, *supra*, 2 Cal.3d at p. 126; *People v. Mungia* (2008) 44 Cal.4th 1101, 1127.) In addition to permitting the defendant to articulate any causes of dissatisfaction with counsel, *Marsden* imposes the duties on a trial court to inquire into any suggested ineffective assistance of defense counsel, to question counsel as necessary to ascertain the veracity of the defendant's claims, and to make a record sufficient to show the nature of the

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[34] Although Judge Morgan erred in failing to remove Hauser during the first trial, the court's error was arguably rendered moot by the mistrial because Johnson received a new trial. Therefore, this argument addresses only the final three *Marsden* motions made by Johnson *after* the first trial ended in a mistrial and before the second trial began.

defendant's grievances and the court's response to them. (*People v. Mendez* (2008) 161 Cal.App.4th 1362, 1368.)[35]

The lower court executed none of the duties required by *Marsden*. Instead, when Johnson moved to replace Hauser after the first trial ended, each judge erred by summarily denying Johnson's motions without conducting a *Marsden* hearing, which should have included giving Johnson an opportunity to state the reasons for each request to remove Hauser.

Johnson made his motions to remove Hauser on July 7, July 14, and September 17, 1998. (16RT 3503, 3508; 17RT 2-23.) Before those dates, Johnson last discussed Hauser's performance with the lower court in camera on June 1, 1998 – a discussion that occurred during the first trial. (9RT 2054, 2061-2071). After that discussion nine witnesses testified for the prosecution, numerous prosecution exhibits were admitted with no objections by the defense, and the defense called seven witnesses. (18CT 5239, 5241, 5243, 5244, 5255, 5256.) Johnson might have had concerns over Hauser's handling of some of this evidence, but the judges below refused to allow Johnson an opportunity to voice them.

Moreover, after the first trial ended and before he made his *Marsden* motions, Johnson had weeks to examine the record of his counsel's trial

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[35] Assuming the trial court gives the defendant an opportunity to state grounds in support of a *Marsden* motion, the "defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Abilez*, *supra*, 41 Cal.4th at p. 488, internal quotation marks and citations omitted.) On a proper showing, the defendant is entitled to the appointment of substitute counsel at any time – pretrial, trial, posttrial or postconviction. (*People v. Smith* (1993) 6 Cal.4th 684, 692.)

performance. (§ 190.9, subd. (a)(1) [court reporter required to prepare daily transcript in capital case]; 2RT 302 [on May 13, 1998, Judge Morgan orders that daily transcripts of the first trial be prepared for Johnson to read]; 1CT 286.) Upon reflecting on the way the trial unfolded, Johnson might have catalogued acts and events that established Hauser's inadequate representation or the existence of an irreconcilable conflict between Johnson and Hauser. (*People v. Abilez*, *supra*, 41 Cal.4th at p. 488.)

For example, as detailed in the next argument, Johnson could have explained that Hauser never once objected to the court's imposition of physical restraints on Johnson, including a life-threatening stun belt. Johnson twice witnessed Hauser deceive the court – thereby undermining any confidence Johnson might have had in Hauser's trustworthiness – first about Hauser's status on the case and then about whether a *Marsden* motion had already been heard. Hauser concealed from Johnson that he went behind Johnson's back and appeared before Judge Hom where Hauser misrepresented to the court that he was standby counsel, though he clearly knew that he was not. Hauser eventually obtained his lucrative appointment as standby counsel by misrepresenting to the lower court that he had attended every hearing in this case, though he had not. Hauser filed a public document under penalty of perjury that Johnson was mentally unstable and had a violent background. Hauser also regularly violated Johnson's trust by revealing confidential communications in open court, often to deflect responsibility for Hauser's own actions.

These are some *recorded* examples of Hauser's incompetence and breaches of loyalty that Johnson should have been allowed to communicate at the *Marsden* hearings. Johnson well could have offered more, perhaps for example, Hauser's failure to call witnesses that could have assisted the

defense. The lower court erred in failing to provide Johnson proper *Marsden* hearings.

D. The Errors Were Prejudicial Per Se.

Each judge's error in failing to hold a *Marsden* hearing deprived Johnson of the constitutional right to effective assistance of counsel and a fair trial, and each error was prejudicial. (See *Glasser v. United States* (1942) 315 U.S. 60, 76 ["The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial"].) As in *Marsden*, there is "no doubt" prejudice occurred because this Court cannot determine whether Johnson had a meritorious claim of ineffective assistance. (*People v. Marsden, supra*, 2 Cal.3d at p. 126.) And as shown, had Judges Morgan and Gale complied with *Marsden's* requirements, Johnson "might have catalogued acts and events beyond the observations of the . . . judge[s] to establish the incompetence of his counsel." (*Ibid.*; *People v. Mendez, supra*, 161 Cal.App.4th at p. 1368.) Thus, each failure to grant a proper *Marsden* hearing in response to Johnson's requests for substitute counsel is reversible error per se. (*Marsden, supra*, 2 Cal.3d at p. 126; *People v. Hill* (1983) 148 Cal.App.3d 744, 755 ["*Marsden* error is typically treated as prejudicial per se, since the very nature of the error precludes meaningful appellate review of its prejudicial impact," citing *Marsden*, 2 Cal.3d at p. 126, *People v. Hidalgo* (1978) 22 Cal.3d 826, 827 ("the judgment in this case *must be reversed* for *Marsden* error" because trial court denied defendant's motion for substitution of appointed counsel without giving defendant an opportunity to state specific grounds for his dissatisfaction with counsel [italics added]), *People v. Lewis* (1978) 20 Cal.3d 496, 499 (outright reversal because error in failing to hold requested *Marsden*

hearing was "no doubt" prejudicial), *People v. Munoz* (1974) 41 Cal.App.3d 62, 67, & *People v. Groce* (1971) 18 Cal.App.3d 292, 296-297]; cf. *People v. Mack* (1995) 38 Cal.App.4th 1484, 1487 [acknowledging that *Marsden* error is "typically treated as prejudicial per se," but applying harmless error test because on appeal and in related petition for habeas corpus, new counsel fully investigated and presented defendant's numerous claims of ineffective assistance of trial counsel].)

Nevertheless, 28 years ago, three members of this Court opined that *Marsden* did not enunciate a per se reversible error test given that the *Marsden* Court cited *Chapman v. California* (1967) 386 U.S. 18. (*People v. Chavez* (1980) 26 Cal.3d 334, 348-349.) This assertion in *Chavez* was by a minority of the Court, however, and therefore "lacks authority as precedent." (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 918 [stare decisis does not apply to a three-justice plurality opinion].)

Moreover, *Chavez* did not even address a *Marsden* claim; rather, the issues were whether the trial court erred in failing to appoint the specific attorney requested by the defendant instead of another lawyer selected by the court, and whether any error was prejudicial. Three justices found error and none found prejudice. And as *Chavez* expressly noted, it was distinguishable from *Marsden* because in contrast to *Marsden*, there was no showing in *Chavez* that the defendant questioned the ability or desire of his new appointed counsel to represent fully the defendant's best interests. (*Chavez*, 26 Cal.3d at p. 349.) According to *Chavez*, "reversal was necessary" in *Marsden* because, without hearing from the defendant regarding his counsel's inadequacies, it was impossible for the Court to determine whether the defense had suffered as a result of the relationship

between the defendant and his counsel. (*Ibid.*) Thus, the statement in *Chavez* regarding *Marsden* was mere dictum, a statement unnecessary to the *Chavez* decision, and has no precedential value. (*Western Landscape Construction v. Bank of America* (1997) 58 Cal.App.4th 57, 61; see also *Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279, 1301 [even California Supreme Court dicta has "no force as precedent," citing *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.])

Chavez's lack of persuasive effect on this point probably explains why in the almost three decades since the plurality decision was announced, only one appellate court – though not this Court – cited it in a published opinion for the proposition that *Marsden* did not establish a rule of per se reversible error. (*People v. Washington* (1994) 27 Cal.App.4th 940, 944, citing *Chavez*, 26 Cal.3d at pp. 348-349.) Tellingly, however, *Washington* cited *Chavez* as if it were a majority opinion and failed to acknowledge that the *Chavez* statement was at best dictum made by only three members of the Court.

Here, as in *Marsden*, *Hidalgo*, and *Lewis*, Johnson questioned Hauser's ability and desire to represent Johnson's best interests. (See, e.g., 15RT 3497.) Hence, if *Chavez* provides any authority, it supports the view that reversal is necessary because Johnson was deprived of the opportunity to catalogue Hauser's inadequacies after he questioned Hauser's ability and desire to represent Johnson's best interests.[36]

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[36] *Chavez's* plurality view – that a showing of prejudice was required and a per se reversal was inappropriate where the trial court erroneously failed to appoint an indigent defendant's counsel of choice – was implicitly disapproved by the high court's adoption of the reversal per se rule in *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, which held

(continued...)

Furthermore, the *Chavez* plurality opinion did not and could not overrule *Hidalgo* and *Lewis's* unanimous holdings two years earlier that prejudice occurs beyond question and reversal is required when a trial court refuses to hold a *Marsden* hearing despite the defendant's request for different counsel.

Without using the precise language, *Marsden*, *Hidalgo*, and *Lewis* all effectively found "structural error," as that term was explicated years later by the United States Supreme Court in *Arizona v. Fulminante* (1991) 499 U.S. 279. There, the high court recognized two categories of federal constitutional error: structural error, which, like the deprivation of counsel and trial before a biased judge, defies analysis by harmless error standards due to the inability to assess the error's effect on the defendant's conviction; and trial error, which occurs during the presentation of the case to the jury and has effects that may be quantitatively evaluated in the context of other evidence to determine whether the error was harmless beyond a reasonable doubt. (*Id.* at pp. 307-310; *United States v. Gonzalez-Lopez*, *supra*, 548 U.S. at pp. 148-149 [contrasting structural error, which affects the framework within which the trial proceeds, and trial error, which is simply an error in the trial process itself]; *id.* at p. 150 [structural error has "consequences that are necessarily unquantifiable and indeterminate"].)

Marsden concluded that it could not ascertain whether the defendant had a meritorious claim of ineffective assistance of counsel that might have

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[36](...continued)
that the erroneous deprivation of the right to retained counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error," resulting in automatic reversible. (*Id.* at p. 150.)

affected the conviction, but there was "no doubt" that the defendant was prejudiced because the defendant might have offered facts establishing his counsel's incompetence. (*People v. Marsden, supra,* 2 Cal.3d at p. 126.) Thus, *Marsden* found structural error due to the inability to assess the error's effect on the defendant's conviction.

The high court decision in *Holloway v. Arkansas* (1978) 435 U.S. 475 provides some support for the view that depriving the defendant of an opportunity to be heard on a Sixth Amendment ineffective assistance of counsel claim is reversible per se. In *Holloway*, a single lawyer jointly represented three defendants and repeatedly moved for the appointment of separate counsel for each client after he objected that he could not adequately represent their conflicting interests. The trial court denied the motions without making any inquiry into whether defense counsel actually labored under a conflict of interests. The Court held that the trial court's failure "either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel" denied defendants their Sixth Amendment right to the assistance of counsel. (*Id.* at p. 484.)

Holloway automatically reversed the judgment without a finding of prejudice because "an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." (*Holloway v. Arkansas, supra,* 435 U.S. at p. 491.) The Court noted that in the usual application of the harmless error rule, the error occurred at trial, its scope is readily identifiable, and "the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury." (*Ibid.*)

Two years later, the Court discussed *Holloway* in *Cuyler v. Sullivan*

(1980) 446 U.S. 335. *Sullivan* first observed that the trial court in *Holloway* erred in failing to respond to and investigate the defendants' objections, did not even consider whether the alleged conflict of interests actually existed, and therefore unconstitutionally endangered the right to counsel. (*Id.* at pp. 345-346.) *Sullivan* then noted that under *Holloway*, "a defendant who objects to multiple representation *must have the opportunity to show* that potential conflicts impermissibly imperil his right to a fair trial," and absent that opportunity, a reviewing court must presume that the possibility for conflict has resulted in ineffective assistance of counsel. (*Id.* at p. 348, italics added; *Wheat v. United States* (1988) 486 U.S. at p. 161 [acknowledging the instruction in *Holloway* "that the trial courts, when alerted by objection from one of the parties, have an independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment"].) Thus, *Sullivan* reaffirmed *Holloway's* principle that prejudice is presumed and the judgment is automatically reversed where a trial court denies the defendant an opportunity to be heard on a Sixth Amendment conflict of interest claim.

And because conflict of interest claims are simply a category of ineffective assistance of counsel claims (*People v. Rundle* (2008) 43 Cal.4th 76, 169, citing *Mickens v. Taylor* (2002) 535 U.S. 162, 166), the same principle should apply to Johnson's Sixth Amendment/*Marsden* claim where the lower court failed to permit Johnson to state reasons for his dissatisfaction with Hauser. Hence, the judgment against Johnson must be automatically reversed without a finding of prejudice because (1) an inquiry into a claim of harmless error would require "unguided speculation" (*Holloway v. Arkansas*, *supra*, 435 U.S. at p. 491) into the effect of the failures below to hold *Marsden* hearings, and (2) a reviewing

court must presume that the "possibility" of ineffective assistance of counsel has resulted in a denial of the defendant's Sixth Amendment right to the assistance of counsel (*Cuyler v. Sullivan, supra*, 446 U.S. at p. 348).

Mickens v. Taylor, supra, 535 U.S. 162, also provides authority for this conclusion. *Mickens* recognized that the purpose of the *Holloway* rule of automatic reversal without a finding of prejudice was "to apply needed prophylaxis in situations where *Strickland* [*v. Washington* (1984) 466 U.S. 668, 684-685] itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." (535 U.S. at p. 176.) To obtain a reversal of a conviction or death sentence under *Strickland*, a defendant alleging ineffective assistance of counsel must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the conviction or death sentence would have been different. (*Strickland v. Washington, supra*, 466 U.S. 668, 687, 694.)

Here, *Strickland* is inadequate to assure vindication of Johnson's Sixth Amendment right to counsel so that automatic reversal is required. Johnson first attempted to raise a *Marsden* claim two and half weeks after the first trial ended in a mistrial, and over three months before the beginning of the second trial, which resulted in convictions and a death sentence. (18CT 5333; 39CT 11543, 11611-11612; 40CT 11644; 15RT 3486; 16RT 3503, 3508.) It is highly unlikely that any unprofessional errors committed by Hauser during the first trial could have affected the second jury's guilt and death verdicts, which this appeal seeks to reverse.

Under *Strickland*, "a violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced." (*United States v. Gonzalez-Lopez, supra*, 548 U.S. at p. 147.) But Johnson suffered no prejudice in the *Strickland* sense as a result of Hauser's

ineffective assistance during the first trial because Johnson was given a new trial after the first jury hung. Thus, *Strickland* is of no assistance to Johnson's contention that he was denied his Sixth Amendment rights during the first trial, and the *Marsden* and *Holloway* exceptions to proving prejudice must apply.

Finally, as stated, *United States v. Gonzalez-Lopez* held that the erroneous deprivation of the right to retained counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error," resulting in automatic reversal. (548 U.S. 140 at p. 150.) Although the error in *Gonzalez-Lopez* denied the defendant the right to *retained* counsel, the prejudice analysis applies equally to the erroneous denial of the right to substitute *appointed* counsel in this case. *Gonzalez-Lopez* reasoned in part that different lawyers will pursue different strategies and in fact "the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the 'framework within which the trial proceeds,' – or indeed on whether it proceeds at all." (*Ibid.*, quoting *Arizona v. Fulminante*, *supra*, 499 U.S. at p. 310.)

Here, if the judges below had held proper *Marsden* hearings, Johnson might have stated facts establishing Hauser's ineffective assistance during the first trial, thereby warranting Hauser's removal before the start of the second trial. As the high court recognized, different counsel pursue different strategies – including whether to plea bargain – so that a retrial might never have occurred in this case had Hauser been replaced. Thus, the consequences of the judges' failures to hold *Marsden* hearings are

necessarily unquantifiable and indeterminate. And as in *Marsden* itself, the failures to hold those hearings unquestionably qualify as structural error.

Accordingly, because each judge below declined to hold a *Marsden* hearing, notwithstanding Johnson's requests, each judge committed per se reversible error, or to the same effect, each undoubtedly committed prejudicial error beyond a reasonable doubt because Johnson might have catalogued acts and events to establish a Sixth Amendment violation.

E. This Court Should Reverse the Judgment and Order a New Trial.

Every case involving *Marsden* error before this Court has resulted in outright reversal and a new trial. The same result should occur here.

In *People v. Lewis, supra*, 20 Cal.3d 496, the defendant made a pretrial *Marsden* motion, which the trial judge denied without permitting the defendant to state the reasons his court-appointed counsel should be discharged. The court then proceeded with jury selection. (*Id.* at p. 498.) On appeal, this Court ruled that the trial court violated *Marsden*, found the error was necessarily prejudicial, and – citing *People v. Marsden, supra*, 2 Cal.3d at p. 126 as authority – reversed the judgment, thereby ordering a new trial. (20 Cal.3d at p. 499; *People v. Moore* (2006) 39 Cal.4th 168, 174 ["If the court reverses a judgment without further directions, that unqualified reversal is an order for a new trial, placing the parties in the same position as if the cause had never been tried," citing § 1262].)[37]

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[37] *Lewis* also cited *People v. Munoz* (1974) 41 Cal.App.3d 62, 66. (*People v. Lewis, supra*, 20 Cal.3d at p. 499.) In *Munoz*, the appellate court found that the trial court had committed *Marsden* error in failing to inquire into the defendant's complaints about his counsel made on the morning of the date set for trial. Trial proceeded and the defendant was convicted. The (continued...)

In *People v. Hidalgo*, *supra*, 22 Cal.3d 826, this Court reversed the conviction on appeal because the trial court denied the defendant's pretrial motion for substitution of appointed counsel without giving the defendant an opportunity to state the specific grounds for his dissatisfaction with counsel. (*Id.* at pp. 827-828.) Because the Court did not otherwise direct, the reversal was deemed an order for a new trial. (§ 1262.)

The defendants in *Lewis* and *Hidalgo* both went to trial *after* their *Marsden* motions were denied. But this Court did not examine the trial record to determine whether each defendant's counsel was competent because, as *Marsden* explained, whether a defendant actually has a meritorious claim of incompetence of counsel is not the test. (*People v. Marsden, supra*, 2 Cal.3d at p. 126.) This Court's commitment to outright reversal in the *Marsden* context is so strong that in *Hidalgo*, the Court automatically reversed for *Marsden* error at an earlier hearing even though the defendant was given the opportunity at a later hearing to state the reasons for his dissatisfaction with counsel. (*People v. Hidalgo, supra*, 22 Cal.3d at p. 827, fn. 1.)

Nevertheless, in *People v. Minor* (1980) 104 Cal.App.3d 194, the Court of Appeal reversed for *Marsden* error, and citing Penal Code section 1260 as authority, directed the trial court to conduct a hearing and order a new trial if the lower court determined that good cause for appointment of new counsel had been shown, or reinstate the verdict if it had not. (*Id.* at p. 200.) Other appellate courts have adopted the *Minor* remedy. (E.g., *People v. Mejia* (2008) 159 Cal.App.4th 1081, 1087; *People v. Olivencia*

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[37](...continued)
appellate court reversed, thereby granting a new trial. (41 Cal.App.3d at pp. 66-67.)

(1988) 204 Cal.App.3d 1391, 1401; see *Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1021, fn. 3, 1027-1028 [reversing denial of habeas petition and remanding to district court for hearing on defendant's *Marsden*/Sixth Amendment claim, while acknowledging "usual remedy in California for failure to hold a *Marsden* hearing is to remand the case to the trial court for a post-trial *Marsden* hearing"].) In dictum this Court has also recognized the *Minor* remedy as an example where limited remand may be preferable to outright reversal of the judgment. (*People v. Johnson* (2006) 38 Cal.4th 1096, 1100, citing *People v. Hall* (1983) 35 Cal.3d 161, 170.)

The *Minor* remedy, however, violates the doctrine of stare decisis (see *People v. Johnson*, *supra*, 38 Cal.4th at p. 1100) because this Court has never *held* that the *Minor* remedy is appropriate for a *Marsden* violation, but has contrarily concluded in *Marsden*, *Lewis*, and *Hidalgo* that outright reversal is the appropriate one.

Moreover, *Minor's* application of *Marsden* is unsound. A trial is either fair or unfair. And as this Court expressly held in *Marsden*, an unfair trial results when the judge forces the defendant to trial with an attorney whom the defendant wants to replace, without first hearing the defendant's complaints about the attorney. (*People v. Marsden*, *supra*, 2 Cal.3d at p. 126 ["the trial judge's denial of the motion without giving defendant an opportunity to [establish the incompetence of his counsel] denied him a fair trial"].) Nowhere in *Minor* is there even mention of *Marsden's* actual holding that failure to conduct a hearing denies the defendant a fair trial. It is patently illogical to suggest that something occurring *after* an unfair trial – like the hearing on remand that *Minor* ordered – can transform an unfair trial into a fair one. *Minor's* remedy of reversal and remand therefore ignored the essential footing on which *Marsden* reversed the judgment and

granted a new trial, and for that reason the *Minor* remedy must be rejected as contravening *Marsden*.

Further, having ignored *Marsden's* essence, *Minor* reasoned that remand was appropriate because the trial record was otherwise free of prejudicial error and there was no indication in the record of inadequacy on the part of trial counsel. (*People v. Minor*, *supra*, 104 Cal.App.3d at pp. 199-200.) Thus, under *Minor*, a defendant wrongly denied a *Marsden* hearing may only defeat a remand and obtain outright reversal and a new trial if the defendant shows on appeal that the trial contained prejudicial error or defense counsel was inadequate at trial. But a defendant who is able to show prejudicial error or inadequacy of trial counsel would have no need to show *Marsden* error because the matter would be reversed on appeal in any event. *Marsden* avoided such fatuity by opting for outright reversal and new trial.

Even if a remand for a *Marsden* hearing was appropriate in *Minor*, it is not here. *Minor* was an appeal from an order committing the defendant for treatment as a mentally disordered sex offender after a jury found him guilty of certain sex offenses. (*People v. Minor*, *supra*, 104 Cal.App.3d at p. 196.) As a non-capital case, presumably the time between Mr. Minor's motion to relieve counsel at his arraignment and the remand after reversal was not long. In any event, the appellate court did not address passage of time.

In contrast to *Minor*, this is a capital case – no capital case has adopted the *Minor* remedy for *Marsden* error – and the passage of time dictates in favor of an outright reversal and new trial. It would be unrealistic to expect Johnson to recall over 10 years later which of Hauser's inadequacies he had in mind when he attempted to make his motions for

substitute counsel. For example, during the first trial Johnson questioned Hauser's competence in cross-examining two witnesses (Robert Huggins and Leonard Greer), insisting that Hauser had not been thorough and had not adequately tested the evidence; Judge Morgan merely responded that Hauser's cross-examination and his actions were "very competent" (10RT 2347-2348), though the judge was required to do more. (*People v. Valdez* (2004) 32 Cal.4th 73, 96 [trial court must conduct sufficient inquiry into defendant's claims against counsel]; *In re Miller* (1973) 33 Cal.App.3d 1005, 1021 [court erred in failing to inquire into grounds for defendant's dissatisfaction with counsel and denying *Marsden* motion based on court's own opinion that counsel was competent].)

In complaining to the court about Hauser's lack of thoroughness and his failure to test the evidence, Johnson must have been thinking of specific deficiencies by Hauser. More than 10 years later, it would be asking too much for Johnson to recall those failings, particularly given the Eighth Amendment's insistence on heightened reliability in a case that might result in a death sentence. (*Oregon v. Guzek* (2006) 546 U.S. 517, 525.) Furthermore, given the already "heavy burden" that a defendant bears in raising a *Marsden* claim and appealing to the wide discretion of a trial court (*People v. Bills* (1995) 38 Cal.App.4th 953, 961), the passage of time would make that burden overwhelming.

Also, it would be unrealistic for a judge, presumably Judge Morgan, to assess Hauser's inadequacies in the context of a long-ago trial. As the Statement of Facts in this brief demonstrates, the trial was a credibility contest and Huggins was the prosecution's star witness. Even if Johnson was able to remember his thoughts on how Hauser should have attacked Huggins's credibility, perhaps by ruffling his demeanor (see *Elkins v.*

Superior Court (2007) 41 Cal.4th 1337, 1358 [emphasizing the importance of demeanor in assessing witness's credibility]), it is not likely that Judge Morgan could properly assess those attacks on a witness about whom Judge Morgan has probably completely forgotten.

Finally, a factor that weighs in favor of outright reversal as the fair and adequate remedy is that the lower court put Johnson in his present situation only by thrice ignoring its well-established duty to give Johnson an opportunity to state the reasons for his request to remove Hauser. Moreover, the prosecutor stood idly by, saying nothing. (See *People v. Dent* (2003) 30 Cal.4th 213, 222, fn. 2 [noting that the prosecution bore some responsibility for outright reversal of conviction and death sentence for reversible per se error under *Faretta v. California* (1975) 422 U.S. 806, where prosecutor could have prompted trial court to inform defendant of his nearly absolute right to represent himself].) Here, the prosecutor should have reminded the lower court of the obvious, that Johnson was entitled to be heard on his motions to substitute counsel.

Accordingly, the judgment should be reversed in its entirety and a new trial ordered.

5.

JOHNSON WAS CONSTRUCTIVELY DENIED COUNSEL AT HIS SECOND TRIAL DUE TO THE COMPLETE BREAKDOWN IN COMMUNICATION WITH HIS ATTORNEY THAT BEGAN AT THE END OF THE FIRST TRIAL.

A. Introduction and Factual Background

Although defendant Cedric Johnson and his counsel, Steven Hauser, had difficulties in their relationship virtually from its inception, Johnson cooperated with Hauser during the presentation of the defense case at the first trial. According to Hauser, the two got along well and had a good relationship from that point until the end of that trial. (17RT 2-69.) The trial judge, Jack Morgan, even commended Johnson for communicating regularly with Hauser during the first trial. (11RT 2575.) But on June 19, 1998, Judge Morgan declared a mistrial after the jury deliberated for over six days on guilt and was unable to reach any verdicts. (18CT 5333; 15RT 3486.) Johnson noted that his appointed counsel was upset because Hauser expected a guilty verdict. Hauser did not deny Johnson's charge. Johnson immediately moved to represent himself, but the court summarily denied the motion. (15RT 3497.) Johnson did not communicate with Hauser again. (17RT 2-69.)

Months before the second trial began, Johnson moved for new counsel to replace Hauser on July 7 and July 14, 1998, before Judges Morgan and Kenneth Gale, respectively, but each judge summarily denied Johnson's motion without affording Johnson an opportunity to state the bases for his motion. (16RT 3503, 3508; 39CT 11500.) On September 17, 1998, Johnson expressed again that he did not want Hauser as his counsel

because Hauser did not represent his interests. (17RT 2-23.)

Without any communication from Johnson, Hauser nevertheless represented his client throughout the second trial that began on November 5, 1998; the jury returned guilt and penalty verdicts. (39CT 11500, 11543, 11611-11612; 40CT 11644; 17RT 2-69.) Because of the complete breakdown in communication between attorney and client, caused by Hauser's repeated breaches of loyalty as shown below, Johnson was constructively denied counsel at the second trial, and the judgment must be reversed in its entirety.

B. Law

A criminal defendant has a right to counsel's undivided loyalty and conflict-free representation under the Sixth Amendment. (*Daniels v. Woodward* (9th Cir. 2005) 428 F.3d 1181, 1196, citing *Wood v. Georgia* (1981) 450 U.S. 261, 272.) Compelling a defendant to undergo a trial with an attorney with whom the defendant has become embroiled in an irreconcilable conflict constitutes a constructive denial of counsel and violates the Sixth Amendment. (*Daniels*, *supra*, at p. 1197; *People v. Welch* (1999) 20 Cal.4th 701, 728 [under Sixth Amendment right to counsel, defendant is entitled to substitute another appointed attorney if record clearly shows that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result]; *Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166, 1169 [defendant constructively denied counsel where he "was forced into a trial with the assistance of a particular lawyer with whom he was dissatisfied, with whom he would not cooperate, and with whom he would not, in any manner

whatsoever, communicate"].)[38]

Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel. This is true even where the breakdown is a result of the defendant's refusal to speak to counsel, unless the defendant's refusal to cooperate demonstrates "'unreasonable contumacy.'" (*Daniels v. Woodford*, *supra*, 428 F.3d at p. 1198, citations omitted.) "A trial court is not required to conclude that an *irreconcilable* conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel and has not given counsel a fair

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[38] The federal circuits are nearly unanimous in imposing on the trial courts a duty under the Sixth Amendment to appoint substitute counsel in the face of an irreconcilable conflict or a complete breakdown in communication between counsel and client. (*United States v. Mullen* (4th Cir. 1994) 32 F.3d 891, 897 [holding that the trial court abused its discretion in refusing to appoint substitute counsel where "there was a total breakdown in communication between [counsel and client]" that "ma[de] an adequate defense unlikely"]; *Smith v. Lockhart* (8th Cir. 1991) 923 F.2d 1314, 1320 [explaining that a defendant is entitled to a substitution of counsel where there exists "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant"]; *United States v. Padilla* (10th Cir. 1987) 819 F.2d 952, 955 [same]; *Wilson v. Mintzes* (6th Cir. 1985) 761 F.2d 275, 280 [same]; *United States v. Welty* (3d Cir. 1982) 674 F.2d 185, 188 [same]; *United States v. Young* (5th Cir. 1973) 482 F.2d 993, 995 [same]; *United States v. Calabro* (2d Cir. 1972) 467 F.2d 973, 986 [same]; see also *United States v. Zillges* (7th Cir. 1992) 978 F.2d 369, 372 [in evaluating motion to substitute counsel, court must consider several factors, including "whether the conflict between the defendant and his counsel was so great that it resulted in a total lack of communication preventing an adequate defense"]; *United States v. Allen* (1st Cir. 1986) 789 F.2d 90, 92 [same]; cf. *United States v. Graham* (D.C. Cir. 1996) 91 F.3d 213, 221 ["A defendant [has] the right to effective representation by appointed counsel, and this right may be endangered if the attorney-client relationship is bad enough."].)

opportunity to demonstrate trustworthiness."
(*People v. Crandell* (1988) 46 Cal.3d 833, 860, italics in original.)

To determine whether an irreconcilable conflict existed between a defendant and appointed counsel, and whether the trial court abused its discretion in refusing to substitute counsel, this Court considers the following three factors, borrowed from the Ninth Circuit Court of Appeals and found consistent with *People v. Marsden* (1970) 2 Cal.3d 118, 123-126: (1) timeliness of the motion; (2) adequacy of the court's inquiry into the defendant's complaint; and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense. (*People v. Abilez* (2007) 41 Cal.4th 472, 488, 490.)[39]

Under the similar *Marsden* standard, the trial court must permit the defendant to explain the claim's basis and to relate specific instances of the attorney's inadequate performance. If the record clearly shows that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result, substitution of counsel is required. An appellate court will not find an abuse of discretion unless the failure to substitute counsel would substantially impair the

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[39] Although Johnson was also entitled to substitution of counsel on the ground that Hauser did not provide competent representation (*People v. Abilez*, *supra*, 41 Cal.4th at p. 488), that claim will be asserted in any habeas corpus proceeding, if necessary (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267 [ineffective assistance claims are often more appropriately litigated in a habeas proceeding].) In any event, even if a defendant's counsel is competent, a serious breakdown in communication can result in an inadequate defense. (*United States v. Adelzo-Gonzalez* (9th Cir. 2001) 268 F.3d 772, 778.)

defendant's right to effective assistance of counsel. (*People v. Abilez*, *supra*, 41 Cal.4th at pp. 487-488.)

Applying the federal or state test yields the same result – a finding that defendant Cedric Johnson was constructively denied his Sixth Amendment right to counsel.

C. Reversal Is Required Because the Court Failed to Inquire into Johnson's Timely Motions to Discharge Hauser After Johnson and Hauser Experienced a Complete Breakdown in Communication, Caused by Hauser's Repeated Breaches of Loyalty.

1. Timeliness of motion

Johnson tried to discharge Hauser on July 7, July 14, and September 17, 1998. (16RT 3503, 3508; 17RT 2-23.) Trial began on November 5, 1998. (18CT 5335; 39CT 11500.) First made over four months before the actual trial, Johnson's motions were timely. (*People v. Roldan* (2005) 35 Cal.4th 646, 681 ["A criminal defendant is entitled to raise his or her dissatisfaction with counsel at any point in the trial when it becomes clear that the defendant's right to effective legal representation has been compromised by a deteriorating attorney-client relationship"]; *United States v. Adelzo-Gonzalez*, *supra*, 268 F.3d at pp. 778-779 [motion to substitute counsel made approximately six weeks before trial was timely]; *United States v. Moore* (9th Cir. 1998) 159 F.3d 1154, 1161 [finding timely a motion to substitute counsel made over two weeks before trial].)

2. Adequacy of court's inquiry

"When a trial court is informed of a conflict between trial counsel and a defendant, 'the trial court should question the attorney or defendant "privately and in depth," and examine available witnesses. . . .' A conflict inquiry is adequate if it 'ease[s] the defendant's dissatisfaction, distrust, and

concern' and 'provide[s] a "sufficient basis for reaching an informed decision."' (*Daniels v. Woodford*, *supra*, 428 F.3d at p. 1198, citations omitted, brackets provided by court; *People v. Mendoza* (2000) 24 Cal.4th 130, 157 [trial court's duty to inquire is triggered where there is at least some clear indication of defendant's desire to discharge attorney].) On and after July 7, 1998, when Johnson initially tried to discharge Hauser weeks after the first trial, no judge inquired into Johnson's clear desire to discharge Hauser. Thus, each judge's response to Johnson was wholly inadequate.

3. Extent of the conflict

Described below are some of the many instances in the record of Hauser's misconduct that caused the extreme and steady conflict between Hauser and Johnson, ultimately resulting in a total lack of communication between attorney and client and preventing an adequate defense at the second trial. All of the instances set forth below, except for those mentioned in section m., occurred after Hauser was initially appointed Johnson's counsel and before Johnson made his motions before Judges Morgan and Gale to remove Hauser.

a. Hauser breached his duty of loyalty by putting his pecuniary interests ahead of Johnson's interests, while publicly disparaging Johnson and revealing confidences.

On October 10, 1997, the lower court appointed Hauser to represent Johnson. (1CT 30.) Five days later, Hauser submitted a proposal to be paid $125,000 to act as Johnson's counsel; Hauser's proposal and supporting declaration were not filed under seal. (1CT 44-47.) Hauser's declaration under penalty of perjury stated as follows:

> I . . . interviewed the defendant at the arraignment. The defendant appears to be mentally unstable, in that he has difficulty relating to counsel and expressed a desire to represent himself, which he apparently did in a recent case with a charge of felon in possession of a firearm (he was convicted). He ranted on continuously about incompetent defense attorneys. In court he waivered [sic] and expressed a desire for co-counsel. Because he refused to make a legal decision about waiving time for purposes of a demurrer, the court revoked his pro per status and appointed me as counsel. I anticipate a lot of extra time to be taken with trying to convince the defendant that he is better off with appointed counsel and to obtain his cooperation in presenting a meaningful defense.
>
> Furthermore, I am informed that Cedric Jerome Johnson was prosecuted in another double murder case that occurred in 1995. He was not convicted in that case.
>
> . . .
>
> [Johnson] has a violent background, with alleged murders.

(1CT 46-47.)

From the get-go, Hauser breached his duty of loyalty to Johnson and violated any trust that Johnson had placed in him, while putting his own interests above Johnson's. The attorney and client stand in a fiduciary relationship of the very highest character. (*Lee v. State Bar* (1970) 2 Cal.3d 927, 939.) The most fundamental quality of the relationship is the absolute and complete loyalty owed by the attorney to his or her client. (*Flatt v. Superior Court (Daniel)* (1994) 9 Cal.4th 275, 289; *Alkow v. State Bar*

(1971) 3 Cal.3d 924, 935 ["An attorney owes the highest duty of fidelity to his clients"].) The Sixth Amendment itself imposes an undivided duty of loyalty on defense counsel. (*Daniels v. Woodward*, *supra*, 428 F.3d at p. 1196, citing *Wood v. Georgia*, *supra*, 450 U.S. at p. 272; *Strickland v. Washington* (1984) 466 U.S. 668, 692, ["the duty of loyalty [is] perhaps the most basic of counsel's duties"].)

Thus, it is the duty of every attorney "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Bus. & Prof. Code, § 6068, subd. (e)(1).) This duty is not simply a rule of professional conduct, but reflects a public policy of paramount importance (*In re Jordan* (1972) 7 Cal.3d 930, 940–941) and is broader than the attorney-client privilege (*Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621). Accordingly, "'[i]t is . . . an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent.'" (*Santa Clara County Counsel Attys. Ass'n v. Woodside* (1994) 7 Cal.4th 525, 548, quoting *Anderson v. Eaton* (1930) 211 Cal. 113, 116.)

Here, for the sole purpose of obtaining higher attorney's fees, Hauser disclosed in a *public document* that Johnson appeared to be mentally unstable and ranted continuously. Hauser also claimed that Johnson had been convicted of possessing a firearm and charged, but not convicted of double murder. He further swore under penalty of perjury that Johnson had a violent background. Publicly disparaging his client, alleging Johnson's embarrassing history, gratuitously stating Johnson had been charged with heinous crimes, and asserting as accepted fact that Johnson was violent – all with the aim of making more money – was a gross breach of loyalty and

violation of the Sixth Amendment.

Even if some of the purported information disclosed by Hauser was public, Hauser still had a duty to protect Johnson. (Vapnek, Cal. Practice Guide: Professional Responsibility (The Rutter Group 2007) ¶ 7:41 ["The duty to protect client secrets is not limited to information communicated in confidence by the client; it applies to all information relating to client representation, whatever its source."].) In *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, the State Bar Court disciplined an attorney in part for violating "the most strongly worded duty binding on a California attorney" – Business & Professions Code section 6068, subdivision (e)(1)'s demand that an attorney maintain inviolate the client's confidence and at every peril to himself or herself preserve the client's secrets – because the attorney disclosed to another that his client had a prior felony conviction. The State Bar Court relied on this Court's decision in *Dixon v. State Bar* (1982) 32 Cal.3d 728, 735, 739, in concluding that section 6068 "prohibits an attorney from disclosing facts and even allegations that might cause a client or a former client public embarrassment." (*Johnson*, at p. 189.)

Rule 3-100(A) of the California Rules of Professional Conduct provides: "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client . . . ." As the Discussion to this rule states: "Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. . . . Paragraph (A) thus recognizes a

fundamental principle in the client-lawyer relationship, that, in the absence of the client's informed consent, *a member must not reveal information relating to the representation.* (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)" (Italics added.)

The issue here is not whether any part of Hauser's declaration would have been appropriate in a confidential application filed under seal. The issue is whether Hauser's filing of a *public* document disparaging Johnson and revealing confidences was a breach of loyalty. After interviewing Johnson, Hauser publicly accused Johnson in an application for money of being mentally unstable and having – without qualification – a violent background. Moreover, for some inexplicable reason, he disclosed that Johnson was previously charged, though not convicted, of another double murder.

What client would trust a lawyer who made such gratuitous public statements? No reasonable client would, and eventually Johnson did not.

b. Hauser regularly violated Johnson's trust by revealing confidential communications.

Consistent with his cavalier attitude about maintaining a client's confidences, Hauser repeatedly breached his pledge to remain silent and violated his duty of loyalty in the process. On one occasion during the trial, a gunshot was fired in the adjoining courtroom – a bailiff shot and killed a defendant. (9RT 2111.) Hauser and Johnson heard the gunshot, while the court and prosecutor heard screaming. Hauser, acting as Johnson's sole counsel, moved for a mistrial, but only because as he explained, "Mr. Johnson would like me to move for a mistrial." When the court denied the motion, Johnson stated for the record that a gunshot was not in his interest,

that Hauser did not represent Johnson's interest, and that Johnson wanted to discharge Hauser. (9RT 2118-2124.) The clear inference is that Johnson felt betrayed by Hauser's limp effort on behalf of Johnson, while blaming Johnson for bringing the motion, particularly because the motion was obviously reasonable – jurors might have heard the gunshot and screaming, become frightened, and used the incident against Johnson, even possibly by thinking the shot was connected to Johnson. (*Entsminger v. Iowa* (1967) 386 U.S. 748, 751 [constitutionally adequate representation can be vitiated where counsel ceases to "function in the active role of an advocate"].)

Later Hauser requested that the court ask the jurors whether they heard the shot. Again, Hauser prefaced his request with "Mr. Johnson asked me to ask you," breaching another attorney-client communication while signaling to the court and to Johnson that he disagreed with his client's request. (9RT 2131.) The inquiries revealed that many jurors heard the shot or screaming. (9RT 2139, 2142, 2148, 2149, 2151, 2152, 2155.)

Several other times Hauser violated his client's confidences, often to deflect responsibility for his own actions. (1RT 372-373 [Hauser repeatedly tells the court that he advised Johnson not to be present during the beginning of jury selection, advice the court agrees with, but Johnson wishes to attend anyway]; 4RT 935 [in response to the court's request for a stipulation to excuse a prospective juror, Hauser blames Johnson for refusing the stipulation, even though the decision to stipulate to the excusal of a prospective juror is counsel's to make, not the client's (*In re Horton* (1991) 54 Cal.3d 82, 94-95)]; 6RT 1362 [Hauser faults Johnson for Hauser's examination of a prospective juror]; 8RT 1926, 1932 [Hauser waives Johnson's presence, and then without Johnson's consent, tells the

court the substance of Johnson's possible testimony, which would include criticizing Hauser in front of the jury]; 8RT 2023 [Hauser tells the court and prosecution of Johnson's desire not to stipulate to the removal of a juror and Hauser's disagreement with Johnson]; 12RT 2765 [at sidebar where Johnson cannot hear him, Hauser tells the court that his examination of Detective Vena was conducted "pretty much" at the direction of his client]; 13RT 2889, 2921 [after conferring with Johnson, Hauser informs the court that he agrees with Johnson's desire to have Johnson's wife testify, but then blames Johnson for causing Hauser's difficulty in finding her because, according to Hauser, Johnson told her not to cooperate].)

A client's statements to counsel are presumptively confidential. (Evid. Code, § 917, subd. (a).) Moreover, counsel has a duty to claim the attorney-client privilege whenever disclosure of a communication between client and counsel is sought. (Evid. Code, § 955.) And every attorney – without exception – must "maintain inviolate the confidence, and at *every peril to himself* . . . preserve the secrets, of his or her client" (Bus. & Prof. Code, § 6068, subd. (e)(1), italics added), even if it means a lost opportunity to ingratiate oneself with a judge. Instead of honoring this duty, Hauser routinely breached the attorney-client privilege in favor of his self-interest.

While one may be sympathetic to a trial lawyer who has to deal with a demanding client, the solution is not to breach that client's confidences. The lawyer is "captain of the ship," and except for decisions involving certain fundamental rights, has "complete control of defense strategies and tactics." (*In re Horton*, *supra*, 54 Cal.3d at pp. 94-95, internal quotation marks and citations omitted.) Thus, which stipulations to enter into, which motions to make, which objections to raise, and how to examine a witness are the hard decisions counsel must make, while not blaming the client for

them. Moreover, when a lawyer tells a judge that a motion is made solely because the client has requested it, the lawyer is not only breaching a confidence, counsel is telegraphing to the court that the motion lacks merit, at least in the view of the lawyer. But lawyers are prohibited by statute and ethical rules from making frivolous motions, including those demanded by the client. (*Lebbos v. State Bar* (1991) 53 Cal.3d 37, 43; *People v. Makabali* (1993) 14 Cal.App.4th 847, 851; *Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 127; *People v. McLeod* (1989) 210 Cal.App.3d 585, 589-591; see *People v. Brown* (1986) 179 Cal.App.3d 207, 215-216, citing *Nix v. Whiteside* (1986) 475 U.S. 157].) Thus, the lawyer has an ethical obligation to the court *not* to raise the frivolous motion, and if a client demands that counsel do so, counsel must decline, while perhaps reminding the client of counsel's ethical duties. Moreover, even if the lawyer believes that the motion has some scant merit, the lawyer completely undermines any chance of success – and fails as an advocate for the criminal defendant (*Wheat v. United States*, *supra*, 486 U.S. 153, 159]) – by blaming the client for the motion, while breaching the client's confidence in the process. Accordingly, Hauser breached his ethical obligation to the court by raising any motion in which he did not have a good faith belief in its merits, he breached his duty as Johnson's advocate by signaling to the court that the motion had little or no merit, and he breached his duty of loyalty to Johnson by revealing confidences.

c. Hauser utterly failed to support any of Johnson's meritorious requests to remove his physical restraints, thereby sabotaging those requests, breaching Hauser's duty of loyalty, and exacerbating the conflict with Johnson.

Throughout this case, Johnson complained bitterly about the physical restraints arbitrarily imposed on him. But not once did his appointed counsel object to Johnson's physical restraints. Hauser's complete lack of advocacy on an issue mightily important to a defendant's physical and psychological health virtually eliminated any chance that this defendant could ever trust Hauser. (*Strickland v. Washington*, *supra*, 466 U.S. 668, 688 [counsel has "the overarching duty to advocate the defendant's cause"].)

Since 1872, Penal Code section 688 has essentially provided as follows: "No person charged with a public offense may be subjected, before conviction, to *any more restraint than is necessary* for his detention to answer the charge." (Italics added.) Thus, a trial court may not impose a physical restraint on a criminal defendant at trial absent a showing of a manifest need for the restraint. (*People v. Mar* (2002) 28 Cal.4th 1201, 1216.) The limitations on restraints apply not only to trial, but also to preliminary hearings and other pretrial proceedings. (*People v. Duran* (1976) 16 Cal.3d 282, 288 [noting that limitations on use of physical restraints on criminal defendants at trial originate from early common law]; *People v. Fierro* (1991) 1 Cal.4th 173, 220 [restrictions on use of shackling apply at preliminary hearings]; *Small v. Superior Court* (2000) 79 Cal.App.4th 1000, 1017 [assuming that shackling restrictions apply to pretrial evidentiary hearings].)

At the October 27, 1997 preliminary hearing, Johnson requested self-representation and stated that he did not trust Hauser. Although Johnson also asked that his handcuffs be removed, Johnson's appointed counsel, Hauser, said nothing about the restraints, despite this Court's holding six years earlier that shackling a defendant at a preliminary hearing requires a

showing of a manifest need for the restraints. (*People v. Fierro*, *supra*, 1 Cal.4th at p. 220.) Although the trial court allowed Johnson one free hand to write with, it abused its discretion by keeping the other hand cuffed without any showing of need. (1CT 49, 51, 56, 63.)[40]

At a hearing on November 14, 1997, the date set for arraignment before Superior Court Judge George Wu, Johnson requested that his handcuffs be removed. Hauser said nothing about the handcuffs. Judge Wu denied the request, stating "if the bailiff deems that for purposes of security you should be handcuffed to the other defendant, I'm not going to question his judgment on that." Johnson replied that the bailiff told him that there was no security problem; moreover, Johnson asserted that the court was abusing its power in declining to remove the handcuffs while Johnson was present in court. Still Hauser said nothing. (1RT 9-11.)

This Court has made clear that a trial court is obligated to make its own determination of the manifest need for restraints and may not rely solely on the judgment of a bailiff in approving the use of restraints. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1218; see also *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1825 [abuse of discretion to delegate shackling decision to bailiff]; *People v. Jacla* (1978) 77 Cal.App.3d 878, 885 [same].) Judge Wu relied solely on the judgment of his bailiff, he abused his discretion in doing so, and yet Hauser said nothing.

At a December 16, 1997 hearing, Johnson again complained about being handcuffed, while noting that no defendants other than he and his co-

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[40] The trial court then granted Johnson co-counsel status with Hauser. (1CT 64.) At the end of the preliminary hearing, Johnson moved to dismiss Hauser, but the municipal court did not rule and told Johnson to raise the motion in superior court. (1CT 178.)

defendant were cuffed. Hauser once more said nothing. (1RT 47.) Later during the same hearing, Judge Wu removed Hauser as Johnson's co-counsel at Johnson's request. (1RT 56.)

On January 8, 1998, Johnson – cuffed with his hands behind his back – appeared for arraignment before Judge Morgan and objected to being handcuffed while in the courtroom. Hauser, who had a pending request to be appointed standby counsel over Johnson's objection, said nothing. (1RT 72, 85-86, 88.) Judge Morgan summarily overruled Johnson's objection and therefore abused his discretion. (*People v. Duran*, *supra*, 16 Cal.3d at p. 293 [summary denial of motion to remove shackles is abuse of discretion].)

At a January 22, 1998 hearing before Judge Rose Hom, Johnson protested about being handcuffed behind his back and having chains on his hands, waist, and feet while in court. (1RT 95-96.) Reflecting growing mistrust of Hauser on the issue of restraints, Johnson charged that Hauser, who was not present, was involved in his being handcuffed and chained – not a far-fetched conclusion by a client feeling betrayed by an attorney who never objected to the restraints. (1RT 96-97.)

d. Hauser failed to object to the imposition of the notorious REACT stun belt on Johnson at trial – even while Johnson testified – thereby committing a contemptible breach of loyalty.

On May 19, 1998, at the start of the jury selection process for the first trial, Hauser reported to Judge Morgan that Johnson would appear in court that day. Judge Morgan responded that Johnson would be subject to a stun belt. Hauser, now sole counsel for Johnson, did not object. (2RT 357-

358.)[41]

Hauser represented to the court that Johnson did not care that the court would not allow him in the courtroom without a stun belt. (2RT 361.) Johnson's later plea that the court had no grounds to impose a stun belt belied Hauser's representation. (2RT 369.)

In response to the court's inquiry whether Johnson should wear a belt, the bailiff opined that Johnson "may have a plan to do something. He is shackled right now, and he does have cuffs on." The court then ordered that Johnson be brought in shackled. (2RT 362.) Hauser did not object.

Johnson entered the courtroom shackled and requested a *Marsden* hearing because of the "obvious conflict" between Johnson and Hauser. The court denied Johnson's request, stating that the *Marsden* motion "fully and completely was heard and determined," though no such hearing had ever taken place, as Johnson reminded the court. Hauser, however, did not disabuse Judge Morgan of his mistaken notion that a *Marsden* hearing had occurred. (2RT 365-366.)

When Johnson said that he would be participating in the trial, the court stated, "You will not participate, and let me tell you this: I want you to be here any time you like. However, I will make a determination pursuant to People versus Anthony Garcia, that, in fact, this is the appropriate circumstance in which a belt should be placed upon you at all times. The reason I'm doing that is because I want to control your conduct. The court has specifically and does specifically find good cause requiring you to wear

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[41] Judge Cheroske revoked Johnson's pro per status on March 5, 1998, and appointed Hauser sole attorney of record. (1RT 234-238.)

a belt."[42]

> Johnson asked, "based on what?" The court answered:
>
> First of all, you're charged with committing murder. You have a violent use of a handgun. You also have displayed throughout these court proceedings, including in this court, the present unruly behavior, undignified conduct, and conduct that seeks to demean this court. I am not going to put up with that. I put you on notice of that right now. I will place a belt on you and instruct the sheriff's department, if you become unruly, at that point, to use it. They will explain to you exactly what will happen if, in fact, it is used. So it is up to you, sir, now, not anybody else, not your attorney or anyone else, if you conduct yourself in a gentlemanly matter, you'll be treated like a gentleman. If not, you will not. [¶] Is that clear?

(2RT 367-368.) Johnson replied:

> I have never acted out in this court. I have only asserted myself to protect myself against these charges. You have no grounds to this. I have a right to speak up in this court when it is obvious there is a conflict. That is my right. I have never demonstrated violent tendencies in this court. You misrepresented that. And the record should recognize that. There is no cause for the belt. If I wanted to bust this man with the chair with the belt and bust him in the head – that is

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[42] This Court abrogated *Garcia* in *People v. Mar*, *supra*, 28 Cal.4th at p. 1205.

> not my intention. I know [Hauser is] intentionally trying to dump me. And the belt is not called for. I want to protect my interests. And the record should reflect that.

The court then ruled that a belt would be used. (2RT 369.)

Later, outside Johnson's presence, the court stated:

> Now, I have already informed defendant Johnson that I want a belt placed on him. He has been disruptive. And I stated for the record the reasons why I feel, as I understand the sheriff's department feels, it is appropriate to place a belt on him for security purposes. I am satisfied through my own witnessing of his conduct and attitude and statements today and prior proceedings that I conducted, as well as in a proceeding that he has conducted himself in regard to other judges, that this man is disruptive, is a threat, and can become violent. He is charged with a violent crime, and it is appropriate for him to be belted.

(2RT 379.)

On the fourth day of trial testimony, June 1, 1998, Johnson expressed his intention to testify before the jury. Although Hauser knew that Johnson was wearing a stun belt, Hauser did not object to the belt, but merely requested that Johnson be seated in the witness chair before the jury entered the courtroom. (12RT 2773, 2777.) Johnson took the witness stand before the jury was present and testified in front of the jury while wearing the stun belt. (12RT 2782, 2784.)

At no time did Hauser object to the court's ordering Johnson to wear a stun belt during trial, even though the belt delivers a 50,000-volt shock lasting eights seconds, generally knocks the defendant – shaking

uncontrollably – to the ground, causes incapacitation and severe pain, may lead to uncontrolled defecation and urination, may leave welts on the defendant's skin requiring as long as six months to heal, and may cause muscular weakness for approximately 30-45 minutes, heartbeat irregularities, and seizures. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1215; *Hawkins v. Comparet-Cassani* (9th Cir. 2001) 251 F.3d 1230 1234.) Moreover, as this Court observed in *Mar*, "the presence of the stun belt may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury – *especially while on the witness stand*." (28 Cal.4th at p. 1219, italics added.) Yet, not one word of concern from Hauser for Johnson's physical or psychological well-being, let alone an objection to the potential life-threatening stun belt.

Furthermore, as Johnson pointed out, but Hauser failed to support, Johnson had exhibited no violent physical behavior in the courtroom. And nothing in the record suggests otherwise.

Under *Mar* and *Duran*, a trial court abuses its discretion in imposing a stun belt on a defendant without "'a record showing of violence or a threat of violence or other nonconforming conduct . . . .'" (*People v. Mar*, *supra*, 28 Cal.4th at p. 1217, quoting *Duran*, 16 Cal.3d at p. 291.) Quoting *Duran* at pp. 290-291, *Mar* offered examples of nonconforming conduct: defendant expressed intent to escape, threatened to kill witnesses, and secreted a lead pipe in the courtroom; defendant wrote letters stating his intention to procure a weapon and escape from the courtroom; defendant resisted being brought to courtroom, refused to dress for court, and had to be taken bodily from prison to courtroom; there was evidence of an escape attempt; defendant attempted to escape from county jail while awaiting trial

on other escape charges; and defendant repeatedly shouted obscenities in the courtroom, kicked at the counsel table, fought with the officers, and threw himself on the floor. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1216-1217, citations omitted.)

Before Judge Morgan imposed the stun belt, Johnson was not violent in or before coming to court, he did not threaten violence, and his behavior did not approach the kind of nonconforming conduct sufficient to justify a stun belt. Judge Morgan's ruling did not even mention any particular incident of nonconforming conduct (2RT 367-369), though "specific facts or details of the incident" are required. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1222.) At worst Johnson's choice of language was inappropriate. (1RT 238 [Johnson, an African-American, calling Judge Cheroske a racist for Judge Cheroske's constant mistreatment of Johnson].) But as this Court stated in *Mar*, "under *Duran*, a stun belt may not properly be used, over a defendant's objection, to deter a defendant from making verbal outbursts that may be detrimental to the defendant's own case." (*Id.* at p. 1223, fn. 6; see *Hawkins v. Comparet-Cassani*, *supra*, 251 F.3d at pp. 1234, 1239-1240 [concluding that Sixth Amendment permits use of stun belt where necessary to protect courtroom security, but not where criminal defendant poses risk of only verbal disruption of court proceedings, noting that "[i]n analyzing the belt's Sixth Amendment implications, there is an important difference between verbal disruption and conduct that threatens courtroom security"].)

And contrary to Judge Morgan's reasoning, the fact that in this case the prosecution charged Johnson with a violent crime did not justify the stun belt. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1218, quoting *Duran* at p. 293 ["'The fact that defendant was a state prison inmate who had been convicted of robbery and was charged with a violent crime did not, without

more, justify the use of physical restraints'"].) Hence, Judge Morgan clearly abused his discretion in subjecting Johnson to a stun belt.

"[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant . . . ." (*Wheat v. United States*, *supra*, 486 U.S. 153, 159.) Hauser plainly should have advocated on behalf of his client and tried to protect Johnson's physical health, psychological well-being, ability to testify and personal dignity by objecting to the stun belt. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1216 [physical restraint on defendant affronts human dignity and inevitably tends to confuse and embarrass defendant's mental faculties, thereby materially abridging and prejudicially affecting constitutional rights of defense].) Moreover, after Johnson implored the court at the outset of the trial not to impose the stun belt, Hauser's abject failure to object to the belt, especially while Johnson testified, constituted an inexcusable breach of loyalty.

e. Hauser repeatedly deceived the court, undermined Johnson's credibility, and breached his duty of loyalty, further eroding Johnson's trust.

Business & Professions Code section 6068, subdivision (d) requires a lawyer to employ only means consistent with the truth and prohibits misleading a judge. "It is settled that concealment of material facts is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline." (*Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, 163.) Time and again Hauser concealed material facts from the court and committed misconduct, proving himself untrustworthy and not entitled to Johnson's confidence. Moreover, by not joining Johnson's accurate factual assertions, Hauser undermined Johnson's credibility with the court and breached his duty of loyalty.

On December 16, 1997, while acting in pro per, Johnson moved to disqualify Hauser as co-counsel on several grounds including that Hauser had committed moral turpitude in lying to Johnson on numerous occasions, failed to share discovery with him, and misrepresented the law to Johnson. (1RT 52; 1CT 210-212, 215, 218.) Consistent with his earlier assurance that Johnson could remove Hauser as co-counsel whenever Johnson wished (1RT 14), Judge Wu did not address the merits of Johnson's misconduct claims against Hauser, but removed him as Johnson's co-counsel because of Johnson's sincere beliefs concerning Hauser and Johnson's refusal to work with Hauser. (1RT 56.) Hauser requested that he be appointed standby counsel. After Johnson objected, Judge Wu stated that he would consider Hauser's request and decide on January 8, 1998. (1RT 72.)

On January 8, 1998, Johnson stated his intention to file a motion to disqualify Judge Wu. Proceedings were therefore suspended, without a ruling on Hauser's request for appointment as Johnson's standby counsel. (1RT 76-84.) The disqualification motion was eventually denied. (1CT 234.)

Later that day, Johnson appeared for arraignment before Judge Morgan. (1RT 85-86.) When Judge Morgan expressed his understanding that Hauser was standby counsel, Johnson declared that Hauser was not standby counsel. Hauser did not respond except to state his appearance for the record without even mentioning "standby counsel." Therefore, Hauser did not correct the judge's error; nor did Hauser explain that previously he had been removed as Johnson's co-counsel, had not been appointed standby counsel, and was no longer on the case in any capacity. Moreover, despite Johnson's attempt to correct the record that Hauser was not standby counsel, Hauser did not join in his prior client's assertion, thereby

subverting Johnson's credibility. (1RT 86-87, 102-103, 128-129; 1CT 200.)

Hauser's deception did not end there.

As stated previously, on May 19, 1998, Johnson asked Judge Morgan for a *Marsden* hearing because of the "obvious conflict" between Johnson and Hauser. The court denied Johnson's request, stating that the *Marsden* motion "fully and completely was heard and determined," though no such hearing had ever taken place, as Johnson reminded the court. Hauser, however, did not disabuse Judge Morgan of his mistaken notion and concealed that a *Marsden* hearing had not occurred. (2RT 365-366.)

Thus, twice Hauser deceived the court, twice he committed misconduct, and twice he breached his duty of loyalty by not supporting Johnson's correct statement of the facts. After Johnson witnessed Hauser deceive the court, it is not surprising that, as Hauser informed the court, Johnson "doesn't trust me." (3RT 617.)

f. Hauser pretended to be standby counsel, repeatedly deceived the court, and disparaged Johnson in order to advance his own pecuniary interests, over Johnson's objections.

At a hearing on February 9, 1998, with both Johnson and Hauser present, Judge Wu confirmed that he had previously removed Hauser as Johnson's lawyer and did not appoint Hauser as standby counsel. (1RT 100-103.)

On February 10, 1998, Johnson and Hauser appeared before Judge Cheroske. (1RT 120.) In response to Johnson's request that Hauser's capacity be clarified, Judge Cheroske agreed with Johnson that Hauser was no longer on the case, and that as far as Judge Cheroske could tell, Hauser just happened to be in the courtroom. Hauser did not contest Judge

Cheroske's description of his non-status. (1RT 128-129.)

Minutes after that hearing, Hauser and the prosecutor appeared *without Johnson* before Presiding Judge Hom. Although Judge Wu told Hauser the day before that he had *not* been appointed standby counsel and Judge Cheroske had just clarified to Hauser that he was no longer on the case *in any capacity*, Hauser flatly misrepresented to Judge Hom: "I just wanted to inform you of my particular status in this case. [¶] Judge Cheroske, I just indicated to him why I was on the case. *I am standby counsel presently*." (1RT 142-A, italics added.)

Worse than failing to correct Judge Morgan's misunderstanding that Hauser was standby counsel, this time Hauser blatantly lied to Judge Hom that he was still on the case and acting as standby counsel. Moreover, he did so in a hearing where Johnson was not included so that Johnson was unable to expose Hauser's misrepresentation.

Then – after speaking for two pages' worth of transcript – Hauser apparently had a change of heart about openly deceiving the court and told Judge Hom that Judge Cheroske had just indicated that he was not going to appoint standby counsel, but Hauser wanted the appointment nonetheless. (1RT 144.)

With Johnson absent and unable to defend himself, Hauser also complained to Judge Hom that Johnson made clear to him from the first day that part of Johnson's "modus operandi is to try to see how many defense attorneys he can go through and discourage to get off the case." Hauser further claimed that he had met four or five times with Johnson to establish a rapport, but was unsuccessful. (1RT 143.) Hauser explained that because he accepted the original appointment to represent Johnson, he lost his priority position to receive another appointment to represent a capital

defendant. (1RT 144.) Hauser further insisted that although Judge Cheroske indicated that he was not going to appoint standby counsel, "a reasonable judge" would appoint Hauser in this case. Hauser then added: "And my request is to be standby counsel because that's the belief that I was under when I took the case originally, otherwise I could have declined and went on to another case. [¶] And according to the contract, that status, as far as payment, is the same as if I were lead counsel." Hauser then claimed that he had continued to investigate the case as if he were representing Johnson. (1RT 144.)

Hauser again breached his duty of loyalty to Johnson and put his own interests first by not including Johnson in the hearing before Judge Hom, and by disparaging Johnson in front of the court and deputy district attorney.

A capital defendant is entitled to be present at all court proceedings, unless the defendant executes a written waiver in open court. (§§ 977, subd. (b)(1)), 1043, subds. (a), (b); *People v. Avila* (2006) 38 Cal.4th 491, 598 [defendant's absence from readback of testimony violated section 977, subd. (b)(1) because defendant did not execute in open court written waiver of his right to be personally present]; see *Kentucky v. Stincer* (1987) 482 U.S. 730, 745 ["a defendant is guaranteed the [constitutional] right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure"]; *Rushen v. Spain* (1983) 464 U.S. 114, 117 [right to personal presence at all critical stages of trial is fundamental right of criminal defendant].) Hauser deprived Johnson of his right to presence when he failed to include Johnson in the important hearing before Judge Hom, where Johnson could have rebutted Hauser's misrepresentations, omissions, and mischaracterizations.

And in alleging that Johnson tried to see how many lawyers he could get off the case, thereby implying that Johnson was manipulating the process and causing undue delay, Hauser impugned his then former client and – again – violated Business & Professions Code section 6068, subdivision (e)(1). (*In the Matter of Johnson*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 189.)

Furthermore, although Hauser alleged that he "had absolutely no cooperation from [Johnson] at all" (1RT 145), Hauser concealed the material fact from Judge Hom that Johnson had earlier filed a motion to remove Hauser as his counsel on the grounds that Hauser had engaged in misconduct, lied to Johnson, failed to share discovery with him, and misrepresented the law to Johnson. (1CT 210-217; 1RT 42, 52-53.)

Finally, Hauser asserted to Judge Hom that Judge Cheroske had "just said he wasn't appointing standby counsel and that we were to come back on February 18th to decide at that time . . . as to my status on the case." (1RT 145.) Judge Cheroske had said no such thing. Indeed, he had just clarified that Hauser was no longer on the case in any capacity (1RT 128-129), and nowhere in the record did Judge Cheroske suggest that Hauser's status would be decided on February 18 or any other date. In fact the relevant Minute Order states that the matter was continued to February 18 "for hearing on discovery issues, nonstatutory motion for dismissal, motion regarding prosecutorial misconduct, motion pursuant to Penal Code section 995, motion to disclose confidential informant and in camera hearing pursuant to Penal Code section 1054," with no mention of any intention to decide Hauser's standby counsel request. (1CT 238.)

After hearing Hauser's claim that Judge Cheroske would decide the standby counsel question on February 18, Judge Hom stated that she would

discuss the matter with Judge Cheroske before that date. Hauser replied: "I hope he doesn't think that I'm going behind his back . . . ." (1RT 146.) But Hauser not only went behind Judge Cheroske's back – and Johnson's, too – he deceived Judge Hom in the process and breached his duty of loyalty to Johnson.

Although Judge Cheroske had completely relieved him, Hauser appeared at the February 18, 1998 hearing. Johnson was present. Judge Cheroske asked Hauser if he had attended "each of the proceedings" in this case, and Hauser represented that he had. (1RT 148.) On the contrary, Hauser was not present at hearings before Judge Hom on January 22, 1998 (1CT 231; 1RT 95-99), and February 9, 1998 (1CT 235; 1RT 107-113). Relying on Hauser's misrepresentation that he had been present at all hearings, Judge Cheroske appointed Hauser as standby counsel. (1RT 148.) Johnson objected to the appointment because Johnson believed that Hauser had lied to Johnson. Johnson also requested that if standby counsel were appointed, it not be Hauser. The court noted Johnson objections for the record and summarily overruled them. (1RT 149.)

According to Judge Cheroske, Hauser's appointment as standby counsel meant that Hauser no longer represented Johnson "at all," but was there "to represent the court." (1RT 148.) Moreover, the court prohibited Johnson from seeking advice from his former lawyer so long as Hauser was standby counsel. (1RT 149 [Judge Cheroske: "You should be advised that you have no right to any consultations with Mr. Hauser during the trial.")

From Johnson's perspective, Hauser's acceptance of the standby counsel appointment must have seemed disloyal, particularly since as Hauser's former client, he objected to Hauser's assuming that role. One moment Hauser owed Johnson a duty of loyalty as Johnson's counsel. The

next moment, Hauser is not only paid by the court, he represents the court, owes it a duty of loyalty, and is barred from giving any advice to his former client.

Under these circumstances Hauser should not have accepted his appointment as standby counsel. Hauser obtained the appointment after asserting to Judge Hom that he was "standby counsel presently," though Hauser knew he was not; by not including Johnson in the hearing before Judge Hom; by disparaging his former client at that hearing; by concealing from Judge Hom that Johnson had filed a motion to remove Hauser; by misleading Judge Hom that Judge Cheroske "just said" to come back on February 18 to decide Hauser's status; and by misrepresenting to Judge Cheroske that Hauser had been present at every proceeding, though he was absent from two.

Hauser's deceptions and breaches of his duty of loyalty finally garnered what he sought, an appointment as standby counsel where he would receive the same pay – $125,000 – that he requested to receive as counsel of record. (1RT 144; 1CT 44-47.)

Hauser's deceit and breaches demonstrate a desperation to make money off this case in whatever capacity. He maneuvered to go from counsel for Johnson, to standby counsel for the court, and as shown below, back to counsel for Johnson. No defendant would be able to effectively communicate with or have confidence in a lawyer who engaged in such devious manipulation.

g. Hauser violated his duty of candor, exploited Judge Cheroske's misstatement of the law, and breached his duty of loyalty by accepting appointment as Johnson's counsel.

On February 18, 1998, Johnson, acting in pro per with Hauser as standby counsel for the court, asked Judge Cheroske to consider his motion for ancillary funds ex parte. Judge Cheroske declined to hear it ex parte and proceeded to discuss and rule on Johnson's motion in the presence of all counsel, including the deputy district attorney. (1RT 160-161.)

On February 23, 1998, Judge Cheroske denied Johnson's second motion for ancillary funds to hire an investigator and experts, including a ballistics expert, on the ground that the motion lacked specificity. (1RT 219.) Johnson then asked Judge Cheroske if his procedure towards all attorneys was to require them to provide the specific names of their proposed experts, and Judge Cheroske said that it was. (1RT 220.)

At a pretrial conference on March 5, 1998, Johnson informed Judge Cheroske that he had misrepresented the law when he required Johnson to provide the specific names of his proposed experts. Judge Cheroske revoked Johnson's pro per status in response and appointed Hauser attorney of record. (1RT 234-238.) Hauser obtained the appointment by breaching his duties of candor and loyalty.

Penal Code section 987.9 governs a capital defendant's request for ancillary funds. Subdivision (a) provides that the defendant's motion is confidential and the court's ruling "shall be made at an in camera hearing." Thus, Judge Cheroske was clearly wrong in hearing Johnson's motions for ancillary funds in open court. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1133.)

Furthermore, section 987.9 did not require that Johnson provide the names of his proposed experts. Rather, Johnson merely "had the burden of showing that the investigative services were reasonably necessary by reference to the *general lines of inquiry* he wished to pursue, being as

specific as possible." (*People v. Beardslee* (1991) 53 Cal.3d 68, 100, italics added; *People v. Blair* (2005) 36 Cal.4th 686, 733 ["As section 987.9 makes clear, the right to ancillary services arises only when a defendant demonstrates such funds are 'reasonably necessary' for his or her defense by reference to the general lines of inquiry that he or she wishes to pursue."].) Judge Cheroske, in turn, was compelled to view Johnson's motion for funds "with considerable liberality." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1085.) Thus, although Johnson had the burden of being as specific as possible regarding the general lines of inquiry, e.g., by indicating (as he did) ballistics as a general line of inquiry, he was not required to specify the names of any experts.

"Ordinarily, in granting a [section 987.9] motion for funds to pay an expert, the court will appoint an expert from the county's expert list who has the requisite knowledge and expertise." (3 Millman et al., Cal. Criminal Defense Practice (2007) Trial Preparation, § 70.22[2][b], p. 70-132.) In fact, this has been the practice in Los Angeles County Superior Court, the site of this case. (*Doe v. Superior Court* (1995) 39 Cal.App.4th 538, 542 [section 987.9 appointments must be from Los Angeles County Superior Court approved expert lists; trial court approved funds for expert, but not specific expert defendant requested].) Thus, once a court has granted the defendant's motion for ancillary funds, the court is free to choose an expert from the list of approved experts. This is common sense. Section 987.9 does not demand that a defendant line up an expert before the defendant has even shown the court the reasonable necessity for one, particularly since a defendant has no right to choose an expert of the defendant's personal liking. (*Id.* at p. 545, citing *Ake v. Oklahoma* (1985) 470 U.S. 68, 83.)

Judge Cheroske revoked Johnson's pro per status though Johnson

correctly apprised the judge that he had misstated the law. Judge Cheroske then appointed Hauser as sole counsel. But, as demonstrated below, Hauser must have known that Johnson's view of the law was correct so that Hauser had the obligation to so inform the court, instead of exploiting the court's mistake for his own benefit to the detriment of his former client.

To provide a constitutionally adequate defense, counsel for an indigent capital defendant must apply for ancillary funds under section 987.9. In *In re Jones* (1996) 13 Cal.4th 552 – issued *two years* before Johnson's trial – this Court set aside the entire judgment in a capital case due in part to defense counsel's failure to apply for section 987.9 funds. (*Id.* at pp. 565-566, 588.)

According to Hauser, he had represented three capital defendants at trial before Johnson. (3RT 615-616.) As an experienced criminal defense lawyer with three capital trials under his belt, Hauser was undoubtedly aware that section 987.9 applications are confidential and do not require the specific names of experts, particularly in Los Angeles County. Yet he did not so apprise Judge Cheroske. In failing to remind Judge Cheroske of the requirements of section 987.9, Hauser violated his duty of candor to the court. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315 [Bus. & Prof. Code, § 6068, subd. (d) "obligates an attorney to 'employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth'" [and] "requires an attorney to refrain from misleading and deceptive acts without qualification"].)

At the same time, Hauser violated his duty of loyalty to Johnson. Hauser accepted his appointment as Johnson's counsel knowing that Johnson had correctly stated the law and Judge Cheroske had misstated it. A lawyer owes a duty of loyalty even to former clients and is forbidden

from committing "any act which will injure the former client in matters involving such former representation." (*Yorn v. Superior Court* (1979) 90 Cal.App.3d 669, 675.) And as stated, a lawyer must "'protect his client in every possible way, and [may not] assume a position adverse or antagonistic to his client without the latter's free and intelligent consent.'" (*Santa Clara County Counsel Attys. Ass'n v. Woodside*, *supra*, 7 Cal.4th at p. 548.) Hauser injured Johnson's constitutional right to self-representation when Hauser stood idly by without supporting Johnson's accurate statement of the law and then capitalized on Judge Cheroske's mistake by accepting his appointment as Johnson's counsel over Johnson's objection.

Having again witnessed Hauser's lack of candor and loyalty, especially while it harmed Johnson and benefitted Hauser, Johnson had more reason not to have trust or confidence in Hauser.

h. Johnson and Hauser continued to be embroiled in an irreconcilable conflict – Hauser again breached his duty of loyalty and deceived Johnson.

After Hauser accepted appointment as Johnson's counsel on March 5, 1998, Johnson refused to appear at several subsequent hearings, each time objecting to Hauser as his attorney. (1RT 249A, 252, 257, 264; 2RT 299.)

On May 19, 1998, at the start of the jury selection process, Johnson complained to Judge Morgan that Hauser had lied to Johnson about legal issues numerous times so that Johnson had no reason to believe Hauser. Johnson asked the court for guidance. (2RT 400.) The court advised Johnson to discuss his case with Hauser including Hauser's defense strategy. Johnson responded that because Hauser had lied to him, Hauser's ethics were now in question and that "was an appropriate ground for

removal and dismissal." (2RT 401.) Instead of holding a *Marsden* hearing on Johnson's charges of ethical misconduct, the court stated,

> knowing these circumstances and knowing Mr. Hauser, there's nothing whatsoever in my mind to support any such allegations. And if you want to start communicating with Mr. Hauser, if you have specific things that occurred that are a problem in regard to your communication with the attorney, for example, he won't communicate – I don't think this to be the case – but if he refuses to communicate with you, refuses to answer your questions, refuses to discuss strategy, anything like that you want to talk to him about, and he refuses to do so, you let the court know at that time. And we will have a hearing outside the presence of the jury. And we will make a determination as to whether your statement or allegation is true or untrue.

(2RT 401-402.)

Johnson then explained that he had just inquired whether Hauser had a strategy to defend Johnson, and Hauser said that he did not have one. Johnson pleaded to the court that, given the obvious conflict between Hauser and Johnson, how could the court force Hauser on Johnson. Although Johnson stated that the court would have to address the issue of Hauser's representation in a hearing, the court did not respond and moved on to other business. (2RT 402-403.)

Awhile later Johnson complained to the court that he had just asked Hauser what his strategy was, and Hauser said it was to win. When Johnson suggested to the court that winning was not a strategy, the court faulted Johnson for Hauser's lack of a strategy because Johnson had

previously refused to talk to Hauser. (2RT 415-416.)

Johnson also stated that he asked Hauser how many peremptory challenges the defense would be entitled to, and Hauser said 20. Johnson replied that because his was a capital case, and co-defendant Betton's case was not, 20 peremptory challenges were not sufficient, and asked the court for more challenges for himself. Hauser did not support Johnson's request with any advocacy. Nor did Hauser mention to the court that under Code of Civil Procedure section 231, the defense was entitled to 20 joint challenges and each defendant was entitled to five additional separate challenges. The court denied Johnson's request for more peremptory challenges. (2RT 416-417.)

Next Johnson stated that Judge Wu had removed Hauser from acting as a lawyer in the case in any capacity, but that Judge Cheroske had reinstated Hauser as standby counsel. Johnson wondered aloud how this could have occurred and speculated whether there was some communication of which he was unaware. (2RT 418-419.) Though present when Johnson expressed concern that some communication had occurred outside Johnson's presence, Hauser did not disclose to Johnson that (1) he and the prosecutor had gone behind Judge Cheroske's back and appeared before Judge Hom without Johnson on February 10, 1998, (2) Hauser had pleaded with Judge Hom to be reinstated as standby counsel, and (3) Judge Hom responded that she would discuss the issue with Judge Cheroske – all of which ultimately led to Hauser's reappointment. (See 1RT 142A-146.)

Given the obvious lack of candor towards him, Johnson stated his concern that the court and counsel were in complicity against him. (2RT 418-420.) He also stated that Hauser was providing him ineffective assistance of counsel. Without holding a *Marsden* hearing, the court

nonetheless concluded that Hauser was "extremely effective." (2RT 421; *United States v. Adelzo-Gonzalez, supra*, 268 F.3d at p. 778 [a court may not deny a substitution motion simply because it thinks current counsel's representation is adequate].)

Later that day, Johnson advised the court that the charging Information in his possession was dated January 9, 1998, and was entirely different from the one that the court had just read to prospective jurors. (2RT 444.) The court responded that it read an amended information dated February 19, 1998. Johnson asked whether the information had been "amended during court proceeding or outside the regular proceeding of the courtroom?" (2RT 445.) The court replied that "it was amended in accordance with the law." Johnson informed the court that there was "no record of this amendment" and that its coming to light then "show[ed] some type of subversion and hidden agenda." (2RT 446.) Hauser admitted that he did not have a copy of the amended information, but then blamed Johnson, who was in pro per on that date, even though Hauser was standby counsel at the time and had been acting as Johnson's sole counsel since March 5, 1998, leaving him over two months to obtain a copy. The prosecutor stated his belief that the amended information had been handed to Johnson "on the record" before Judge Cheroske on February 19, 1998. Johnson said the prosecutor was "straight lying." (2RT 449.)

There is no record in this case that the prosecutor served Johnson a copy of the amended information on or about February 19, 1998, or that Johnson was arraigned on the amended information. Moreover, six months later, when Hauser was reviewing the information with the court at the retrial in this matter, Hauser still did not have a copy of the February 19, 1998 amended information, but was operating off of the original

information filed November 10, 1997. (17RT 2-81.)

In short, Johnson justifiably objected to Hauser's strategy of "winning," when winning is not a strategy. Hauser failed to support Johnson's request for additional peremptory challenges and misstated the actual number of challenges to which Johnson was entitled. When Johnson questioned how Hauser could have been appointed standby counsel and wondered aloud whether a hearing had occurred outside Johnson's presence, Hauser failed to inform Johnson that Hauser and the prosecutor had gone behind Johnson's and Judge Cheroske's backs and appeared before Judge Hom in an effort to obtain Hauser's appointment as standby counsel. Hauser failed to acquire a copy of the amended information, and blamed Johnson for this failure, though the fault was Hauser's. The foregoing reflects a further deterioration in the attorney-client relationship.

i. Demonstrating deepening distrust in Hauser, Johnson objected to Hauser's obtaining Johnson's personal psychiatric records.

On May 19, 1998, outside Johnson's presence and without receiving a written waiver from Johnson of his presence in violation of section 977, subdivision (b)(1), the court held a hearing with the prosecutor and Hauser concerning Johnson's psychiatric medical records, which Hauser had subpoenaed. (2RT 571.) Although the court acknowledged that Johnson had not signed a consent form allowing anyone to review the records, the court ruled that it would review them and determine whether to turn them over to Hauser. (2RT 575.) The next day the court concluded that the records should be provided to Hauser. (3RT 582.)

On May 20, 1998, the court held an in camera hearing on Johnson's request for a copy of the medical records subpoenaed by Hauser. (3RT

739-745.) Johnson stated that he was "totally against the records even being in this court," "had no input against them," and wanted to know how Hauser could get them without his consent. (*Id.* at p. 741.) The court explained that it was aware that Johnson had refused to consent to Hauser's obtaining the records, but that Hauser had subpoenaed the records without Johnson's consent to see if there was anything helpful in the records for any penalty phase. Johnson remained adamant in his opposition to Hauser's having the records. (3RT 742.) Johnson pleaded with the court: "Your honor, . . . I don't even want Mr. Hauser with that type of information against me. [¶] I don't have that much confidence in him. You already know my position. I'm trying to work with him. I do not have confidence with Mr. Hauser. I don't even want him with that type of information against me, if there is anything in there that is even helpful or harmful." (3RT 743.) The court nonetheless allowed Hauser access to the records and advised Johnson to discuss the records with Hauser. (3RT 744.)

The issue of Johnson's medical records arose again on May 26, 1998, in connection with jail medical records subpoenaed by Hauser. Again out of Johnson's presence and in violation of section 977, the court examined the records and released them to Hauser, while acknowledging that Johnson did not consent to any release. (5RT 1049.) Johnson later insisted that Hauser did not have Johnson's interest at heart, asserted that his medical records were privileged, again noted that he had not consented to their release to Hauser, and requested that they be returned to Johnson. Johnson was so concerned about keeping his medical records private and out of Hauser's hands that he had asked Hauser to give him the address of every medical facility from which Hauser was seeking records so that Johnson could request each facility's policy regarding release of the

records, but Hauser had not responded to his request. (5RT 1058-1059.) The court declined Johnson's request to recover his medical records from Hauser. (5RT 1067.)

Whether Johnson's appointed counsel had the right to obtain Johnson's medical records without his consent is not the issue. (See Cal. Const., art. I, § 1 [inalienable right to privacy]; *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 16 [California Constitutional right to privacy applies to nongovernmental parties]; *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 440 [no doubt that patient had as a matter of law a legally cognizable interest in maintaining privacy of medical information].) The issue is whether Johnson's distrust of Hauser was genuine, and the facts clearly show that it was. Johnson could not have been any more distressed over Hauser's invasion – justified or not – of Johnson's privacy, even if ultimately that invasion proved helpful to Johnson. He simply did not want Hauser – whom Johnson did not trust and in whom he had no confidence – having access to any of the highly personal and sensitive information likely contained in his psychiatric records.

j. Despite Johnson's best efforts to work with Hauser, the relationship deteriorated further towards a complete breakdown in communication.

On May 20, 1998, the court asked Hauser whether Johnson had communicated any thoughts or strategies to Hauser to assist him in defending Johnson. Hauser said no. The court in turn encouraged Johnson to communicate with Hauser. (3RT 586-587.) Johnson reminded the court that the day before he told the court that Hauser had no strategy to defend Johnson; now the court was advising Johnson to assist Hauser in developing

a strategy. (3RT 589.) Johnson insisted that when Hauser announced that he was ready for trial, Hauser should have had a strategy to defend Johnson at that point. As Johnson aptly put it, "You don't announce ready for something unless you are prepared for it . . . ." Johnson also informed the court that he had indeed conveyed to Hauser his thoughts on strategy, but Hauser had no response. (3RT 588-589.) Notwithstanding Johnson's assertion that he tried talking to Hauser about strategy, which Hauser did not deny (3RT 590), the court concluded: "[F]or you to come to court refusing to talk to him and then take a position that he doesn't have a strategy that you approve of is an absurdity, and we're not going to allow you to play games with this assist, sir." (3RT 593.)

Johnson further stated that Hauser had lied to him about the law and facts of this case. (3RT 590-592.) Johnson explained that Hauser told him that it was permissible for the district attorney to knowingly present false and perjurious evidence at the preliminary hearing, that the autopsy report was not important in a murder case, and that the district attorney had a right to withhold material witnesses' names until the witnesses were ready to testify at trial. (3RT 596-597.) Hauser also advised Johnson that witness Robert Huggins should *not* be called as a witness at the preliminary hearing because Huggins had made some statements about which Hauser had not previously informed Johnson. (3RT 597.) Although Hauser told Johnson that the prosecution had a very strong case, Hauser stated to Johnson's mother and sister that the case was very, very weak. (3RT 598.) Johnson had asked Hauser about his capital defense experience, and Hauser said that he had handled two prior cases, lost one, and obtained an acquittal in the other. When Johnson asked Hauser off the record during the hearing whether he had obtained an acquittal, Hauser said that he had not. (3RT

599.) Only at that point did Hauser request an in camera hearing to respond to Johnson's statements. (3RT 600.)

At the in camera hearing, Hauser did not directly respond to Johnson's statement that a district attorney cannot knowingly present false evidence at a preliminary hearing (*People v. Harrison* (2005) 35 Cal.4th 208, 242 [under principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents]). Nor did Hauser address Johnson's statements that Hauser told Johnson one thing, and Johnson's family the opposite. (2RT 612-613.)

Hauser admitted that he had not obtained the autopsy report for the preliminary hearing, and that he told Johnson that the report was not important for the hearing. (3RT 613.) Whether Hauser would have used the autopsy report at the preliminary hearing or not, it is reasonable for Johnson to have believed that Hauser's failure to even obtain it – and then make an informed choice whether to use it – indicated Hauser's lack of dedication to Johnson's cause.

According to Hauser, he told Johnson that the district attorney did not have to provide the names of material witnesses that the district attorney intended to call because a "recent case" had come down where the names of the witnesses were not provided until shortly before the witnesses testified. Hauser did not identify the name of the case. Nor did the court request the case name. (3RT 613; cf. § 1054.1 ["The prosecuting attorney shall disclose to the defendant . . . (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial"].)

Hauser explained to the court that he and Johnson disagreed on whether to call Huggins as a witness at the preliminary hearing, where

Hauser was Johnson's co-counsel. Hauser supposedly had learned from his investigator that Huggins might incriminate Johnson, but as Hauser acknowledged, "Huggins actually proved to be a favorable witness for Mr. Johnson" at the preliminary hearing. (3RT 615.)

Hauser recounted that he had obtained an acquittal in a death penalty case, though he did not name the case. (3RT 616.) Even though Hauser could not "recall exactly" what he told Johnson, he told the court that he had been "absolutely" accurate with Johnson. (*Ibid.*)

Although Hauser offered that he had done everything that he knew to win Johnson's trust, he conceded that Johnson "doesn't trust me." (3RT 617; *Daniels v. Woodward*, *supra*, 428 F.3d at p. 1198 ["Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel"]; *United States v. Adelzo-Gonzalez*, *supra*, 268 F.3d at p. 780 [finding irreconcilable conflict between defendant and appointed counsel where relationship was antagonistic, lacking in trust, and quarrelsome].) The in camera hearing ended without a ruling by the court. (3RT 619.)

On May 26, 1998, the court held a *Marsden* hearing. Johnson complained about Hauser's failure to file a motion to sever Johnson's trial from Betton's trial. Hauser had explained to Johnson that the relevant severance issue had already been decided by this Court, which, according to Hauser, had concluded that a proper ground for severance did not exist where one defendant faced the death penalty and the other defendant was subject to life without the possibility of parole. Hauser further explained that under those circumstances, the defendant not facing the death penalty (here, Betton) must bring the motion to sever and argue that he would be

prejudiced by a death-qualified jury; therefore, Hauser believed that severance would be unavailable to Johnson as Johnson was the one facing the death penalty in this case. (5RT 1063.)

Johnson insisted that the ultimate authority on the issue of severance under the United States Constitution was the United States Supreme Court, not the California Supreme Court. Johnson thus seemed to be suggesting that even if this Court had decided the issue as Hauser represented, because the United States Supreme Court had not yet ruled on the question, Hauser should have filed the severance motion at least for the sake of preserving the issue. (5RT 1065-1066.)

The court denied Johnson's request to remove Hauser. (5RT 1070.)

The jury was selected on May, 27, 1998, and counsel gave opening statements the following day. (18CT 5232, 5235.)

On the fourth day of trial, June 1, 1998, Johnson symbolically protested Hauser's continued representation by wearing jail clothes. Johnson also objected to the presence of numerous deputy sheriffs and security personnel in the courtroom. Johnson argued that their presence, which suggested to the jury that the defendants were dangerous, created a more prejudicial atmosphere for his case than his wearing jail blues. (9RT 2056.)

Hauser did nothing to support Johnson's objection to the numerous law enforcement personnel, and the court did not rule on Johnson's objection. Hauser's failure to advocate on behalf of his client constituted another breach of loyalty to Johnson. (*Holbrook v. Flynn* (1986) 475 U.S. 560, 569 ["To be sure, it is possible that the sight of a security force within the courtroom might under certain conditions 'create the impression in the minds of the jury that the defendant is dangerous or untrustworthy'"].)

Nevertheless, Johnson continued to make sincere efforts to work with Hauser, as shown by Judge Morgan's statement, "I personally observed he's been communicating with his attorney regularly and I commend you for doing that, Mr. Johnson." (11RT 2575.)

k. Hauser breached his duty of loyalty by improperly waiving nine times Johnson's right to be present at trial – without Johnson's consent.

Johnson had the right to be present at all trial proceedings and did not personally waive the right in writing. (§§ 977, subd. (b)(1), 1043, subds. (a), (b); *People v. Avila*, *supra*, 38 Cal.4th at p. 598; *People v. Davis* (2005) 36 Cal.4th 510, 531 [statutes permit capital defendant to be absent from courtroom only if defendant is removed for disruptive behavior or executes written waiver]; see also *Kentucky v. Stincer*, *supra*, 482 U.S. at p. 745.) Moreover, given the level of distrust that Johnson had for Hauser, it should be obvious that Johnson wanted to attend every hearing in this case. But, in addition to not including Johnson in the hearing before Judge Hom where Hauser pleaded to be standby counsel (1RT 142-A) and the two hearings on Johnson's medical records (2RT 571; 5RT 1049), Hauser purported to waive Johnson's presence in court nine times during trial, often at critical points. (4RT 746 [scheduling]; 7RT 1606 [substantive discussion regarding critical witness statement]; 1680 [substantive discussion regarding inconsistent statement issue]; 8RT 1926 [discussion regarding Johnson's possible testimony and Hauser's representation of Johnson]; 9RT 2111 [sidebar discussion regarding shooting in courtroom next door]; 12RT 2577 [jury instruction discussion]; 14RT 3020 [same]; 3044 [critical witness Newton addresses court]; 3089 [discussion regarding Newton testimony].) Hauser's failure to obtain Johnson's consent to these waivers

was a breach of loyalty nine times over.

l. The breakdown was cemented when Hauser did not hide or deny his disappointment that Johnson was not convicted.

On June 19, 1998, after the jury deliberated guilt for over six days and was unable to reach any verdicts, Judge Morgan declared a mistrial. (18CT 5333; 15RT 3486.) Johnson noted that Hauser was upset because Hauser expected a guilty verdict. Hauser did not deny Johnson's charge. (15RT 3497; 16RT 3500-3503.)

Johnson did not communicate again with Hauser. (17RT 2-69.)

m. The complete breakdown in the attorney-client relationship was manifested at the second trial by Hauser's appalling betrayal of Johnson when Hauser failed to object to Johnson's expulsion from the entire trial, deceived Johnson into believing the jury was present to hear Johnson's testimony, and failed to object to Judge Cheroske's finding that Johnson waived his right to testify.

After Johnson's altercation with Hauser just before the second trial, Judge Cheroske gave Hauser the option of continuing to represent Johnson. (17RT 2-25 [Judge Cheroske: "It's your call.") Hauser replied that he could "represent Mr. Johnson with equal vigor as if this had never happened." Judge Cheroske then permanently excluded Johnson from the courtroom for his entire retrial. (*Ibid.*; 18CT 5342.)

When Judge Cheroske later ruled that Johnson could testify from his jail cell over closed-circuit television, Hauser colluded with Judge Cheroske and the prosecutor to deceive Johnson into believing the jury was present in

the courtroom to see and hear Johnson's testimony, even though the jury was nowhere in sight. (See Argument 1 at pp. 45-53, incorporated here.)

And finally, when Judge Cheroske decreed that Johnson had waived his right to testify, Hauser failed to raise any sort of protest. (23RT 2-1367.)

By Hauser's failure to object to Johnson's permanent exclusion from the courtroom, his deceit towards Johnson, and his failure to object to Judge Cheroske's finding that Johnson waived the right to testify, Hauser committed rank disloyalty, which reflected an irreconcilable breakdown in the attorney-client relationship. And the second trial, during which Hauser represented Johnson but did not communicate with him, resulted in Johnson's conviction on all charges and death sentence. (39CT 11543, 11611-11612; 40CT 11644.)

n. The conflict between Johnson and Hauser was extensive and deep.

In sum, Hauser began representing Johnson by disparaging him in a public document, disclosing Johnson's alleged embarrassing history, gratuitously stating Johnson had been charged with heinous crimes, and asserting as accepted fact that Johnson was violent – all so Hauser could make more money.

Hauser regularly violated Johnson's trust by revealing confidential communications.

Hauser failed to support Johnson by arguing against Johnson's physical restraints.

Hauser even failed to object to the 50,000-volt, potentially life-threatening stun belt imposed on Johnson while he testified.

Hauser concealed from Judge Morgan that he was not standby

counsel, and Johnson witnessed this deception.

Hauser concealed from Judge Morgan that a *Marsden* hearing had not occurred, and Johnson witnessed this deception.

Hauser did not include Johnson at a hearing where Hauser flatly lied to Judge Hom that he was standby counsel.

Hauser concealed from Judge Hom that Johnson had filed a motion to remove Hauser.

Hauser misled Judge Cheroske into appointing Hauser as standby counsel over Johnson's objection.

Hauser breached his duty of loyalty and harmed Johnson's constitutional right to self-representation by accepting his appointment as Johnson's counsel, based on Judge Cheroske's misstatement of the law.

Despite Johnson's inquiry in open court, Hauser concealed that he had failed to have Johnson present during the hearing before Judge Hom where Hauser pleaded to be appointed standby counsel and Hauser belittled Johnson.

Hauser breached his duty of loyalty by blaming Johnson for Hauser's failure to obtain a copy of the amended information.

Hauser failed to obtain Johnson's consent to Hauser's subpoenaing Johnson's confidential psychiatric records, causing Johnson great distress because Johnson did not want a man he did not trust having access to such highly personal and sensitive information.

Hauser failed to support Johnson's objection to the numerous law enforcement personnel in the courtroom.

Hauser breached his duty of loyalty by failing to obtain Johnson's waiver of the right to presence at trial – nine times.

Hauser did not hide or deny his disappointment that Johnson was not

convicted, triggering a complete breakdown in communication between attorney and client.

The complete breakdown was manifested at the retrial by Hauser's treachery when he did not object to Johnson's expulsion from the courtroom for the entire trial, deceived Johnson into believing the jury was present to hear Johnson's testimony, and did not object to Judge Cheroske's finding that Johnson waived his right to testify.

As Hauser informed the court, and as the above legitimate reasons amply justify, Johnson did not trust Hauser.

4. Conclusion

The Sixth Amendment entitles a defendant to counsel who "function[s] in the active role of an advocate." (*Entsminger v. Iowa*, *supra*, 386 U.S. at p. 751.) Indeed, counsel must be willing "to advocate fearlessly and effectively" on behalf of the client (*Smith v. Lockhart* (8th Cir. 1991) 923 F.2d 1314, 1320, quoting *United States v. Hurt* (D.C. Cir. 1976) 543 F.2d 162, 167-168) – clearly not the kind of advocacy Johnson received. But Hauser was not just a potted plant in his passive failure to advocate for Johnson, he actively breached his duty of loyalty over and over. Ultimately Hauser's breaches led to a complete breakdown in communication with Johnson.

"The Supreme Court has repeatedly held that a defendant's Sixth Amendment right to counsel is violated if the defendant is unable to communicate with his or her counsel during key trial preparation times." (*Daniels v. Woodward*, *supra*, 428 F.3d at p. 1197, citing *Riggins v. Nevada* (1992) 504 U.S. 127, 144, *United States v. Cronic* (1984) 466 U.S. 648, 659, fn. 25, *& Geders v. United States* (1976) 425 U.S. 80, 91.)

Because (1) Johnson's motions to discharge Hauser were timely, (2)

the judges below did not respond with the appropriate inquiry, and (3) Johnson was unable to communicate with Hauser during the second trial due to Hauser's breaches of loyalty, Johnson was constructively denied counsel so that the errors in failing to remove Hauser were structural and reversible per se. (*Daniels v. Woodward*, *supra*, 428 F.3d at pp. 1198-1201 [where defendant has legitimately lost complete trust in counsel, and trial court refuses to remove attorney, defendant is constructively denied counsel and prejudice is presumed]; *United States v. Moore*, *supra*, 159 F.3d at p. 1158 [defendant need not show prejudice where there was a breakdown of attorney-client relationship due to irreconcilable differences amounting to complete denial of counsel]; see *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150 [erroneous deprivation of right to retained counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error]; *Bell v. Cone* (2002) 535 U.S. 685, 696, fn. 3 [no showing of prejudice required where criminal defendant constructively denied counsel by government action]; *Roe v. Flores Ortega* (2000) 528 U.S. 470, 483, ["the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice"]; *Arizona v. Fulminante* (1991) 499 U.S. 279, 294 [violating defendant's right to counsel at trial can never be harmless error]; *French v. Jones* (6th Cir. 2003) 332 F.3d 430, 438 ["the [Supreme] Court has often held, both before and after *Cronic*, that absence of counsel during a critical stage of a trial is per se reversible error"].) The judgment must be reversed in its entirety.

6.

JUDGE CHEROSKE ERRED IN FAILING TO REMOVE HAUSER AS JOHNSON'S COUNSEL.

A. Introduction

Judge John J. Cheroske erred in retaining attorney Steven Hauser as defendant Cedric Johnson's counsel because Johnson was constructively denied counsel at the critical conferences where the conflict issue between Johnson and Hauser was decided by the court, Judge Cheroske improperly excluded Johnson from the conferences, Judge Cheroske should have disqualified Hauser as Johnson's counsel in any event, and Hauser labored under three actual conflicts of interest that adversely affected his performance as Johnson's counsel.

B. Facts

On August 25, 1998, Johnson informed Judge Cheroske that he had lost all confidence in Hauser and that he was attempting to retain private counsel. (17RT 2-2.)

On September 17, 1998, the parties and the court, with Judge Cheroske presiding, appeared in the jury assembly room to distribute hardship questionnaires to the approximately 400 prospective jurors present. (17RT 2-12, 18, 64.) Before the prospective jurors were sworn, Johnson and Hauser engaged in an altercation and Hauser fell off his chair. Johnson expressed that he did not want Hauser as his counsel because Hauser did not represent his interests. (17RT 2-18-29, 53, 69.)

Without hearing Johnson's side of the conflict, Judge Cheroske summarily expelled Johnson from the courtroom for his entire trial. (17RT 2-25; 18CT 5342.) Hauser did not object to the court's ruling or argue that Johnson should be present at his own trial.

Also without hearing from Johnson, Judge Cheroske ruled that Johnson's injection of the conflict into the proceedings was intentional and for the purpose of delaying the trial. Hauser did not object to or argue against the court's finding. Finally, on the question of whether Hauser would continue to represent Johnson in light of the attack, Judge Cheroske deferred to Hauser's choice to continue as Johnson's attorney. (17RT 2-25.)

On September 21, 1998, the prosecutor indicated his intention to use the altercation in any penalty phase, but not call Hauser as a witness. The court advised Hauser that he might want to take a quick look at whether that would create a conflict of interest for him. (17RT 2-49.) Hauser agreed to investigate his own potential conflict, while conceding "there might be an appearance of conflict." (17RT 2-49-50.) Hauser thought he would not testify, but added, "I would certainly want to argue." Judge Cheroske responded: "It would be your decision as to how you would want to do this, but it would seem that it would certainly cloud up some issues." (17RT 2-50.)

At a conference before Judge Cheroske on October 2, 1998, with Johnson now permanently barred from the courtroom, Hauser said he would not testify about the incident or any purported threat by Johnson to kill Hauser, which the prosecutor also expected to use at any penalty phase. Hauser requested that he remain on the case and said that the incident was merely a tool to either delay the trial or for Johnson to eventually wind up defending himself. (17RT 2-57-58.) In return for Judge Cheroske's allowing Hauser to remain as Johnson's counsel, Hauser agreed not to testify at all during the penalty phase. Hauser also agreed to the following statement by Judge Cheroske:

> In the event we do get to the penalty phase and the People are allowed to introduce evidence of the attack and/or the threats, the court's indicating [sic] ruling, so that you're aware of it at this point in time, would be that because *by agreement Mr. Hauser will not be testifying, Mr. Hauser* [¶] *would not be allowed to argue* in the form of testimony or any other manner regarding, one, your lack of fear of Mr. Johnson; two, the fact that you have elected to continue to represent Mr. Johnson despite the prior incidents; or, three, to refer to the attack in any way in argument such as the defendant must have just been overcome by emotion, having sat before the 400 people and realizing his jury trial was about to start, or it was his attempt to delay the proceedings and/or get another lawyer, *or anything like that.* Because I think that that's the same as testifying basically.

(17RT 2-59, italics added.) Although on September 21, 1998, Hauser had said that he "certainly" wanted to make an argument concerning the altercation to any penalty phase jury, he was now agreeing not to argue any mitigating aspects of the altercation in return for continuing to represent Johnson in this case.

On October 19, 1998, Judge Cheroske issued an order confirming Johnson's permanent exclusion from his trial and found that "Johnson will continue to do any and everything possible to prevent the trial from proceeding." (17RT 2-64.) Judge Cheroske also stated that Johnson had threatened to kill Hauser and his family. (17RT 2-65.)

During the penalty phase, two deputy sheriffs testified about the altercation between Johnson and Hauser. (25RT 2-1703-1711.) One,

Sergeant McLin, testified that during the incident, Johnson wore a REACT belt, a remotely activated electronic restraint device used to control Johnson. (25RT 2-1706.) According to McLin, when Johnson struck Hauser in the head, McLin "activated the REACT belt on Johnson [but it] did not appear that the REACT belt was working on Johnson for whatever reason." (25RT 2-1706-1707.) McLin activated the belt a second time, it worked, and Johnson was restrained. (25RT 2-1707.)

Hauser did not cross-examine the bailiffs, except to correct the date of the altercation, and called no witnesses regarding the incident. (25RT 2-1708, 2-1712.)

As Hauser promised, in return for continuing to represent Johnson, he did not testify, and he did not argue to the jury that he was not afraid of Johnson, or that he elected to continue to represent Johnson despite the incident, or that Johnson must have been overcome by emotion (realizing that his jury trial was about to start), or any other mitigating aspect of the incident. (25RT 2-1793-1807.)

Although Hauser argued that "socking" him was not a serious factor in aggravation, that it merely illustrated Johnson's frustration with his situation, and that it demonstrated Johnson's psychosis (25RT 2-1801), Hauser also argued that the incident simply indicated Johnson did not like his lawyer, thousands of individuals in our society cannot follow the rules, Johnson had a "screw loose," and a "cold and callous heart" fits an awful lot of people in our society, but the death penalty is not appropriate for *all* of them. (25RT 2-1796, 2-1798-1799, 2-1801.)

C. Johnson Was Constructively Denied Counsel at the Critical Conflict Conferences.

A criminal defendant is entitled under the Sixth Amendment to

representation of counsel at critical stages that hold "significant consequences" to the defendant. (*Bell v. Cone* (2002) 535 U.S. 685, 696.) But "[t]he Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." (*United States v. Cronic* (1984) 466 U.S. 648, 654-655, internal quotation marks and citation omitted.) Because it is unlikely that a criminal defendant will be able to adequately test the government's case without representation (*Penson v. Ohio* (1988) 488 U.S. 75, 84), the adversarial process requires that a defendant "have 'counsel acting in the role of an advocate.'" (*United States v. Cronic*, *supra*, 466 U.S. at p. 656, quoting *Anders v. California* (1967) 386 U.S. 738, 743.) Thus, although defense counsel may be present, the defendant is constructively denied counsel and the Sixth Amendment is violated where counsel fails utterly to act as an advocate for the client at a critical stage. (*Bell v. Cone*, *supra*, 535 U.S. at pp. 695-696 & fn. 3.)

The conflict conferences held significant consequences to Johnson because they determined whether Hauser would continue to act as Johnson's counsel. (*People v. Perry* (2006) 38 Cal.4th 302, 313 [recognizing that whether to remove defendant's counsel for conflict of interest or any other reason is a "crucial matter" because the removal of counsel will affect defendant's representation at trial].) Hence, Johnson was entitled to representation of counsel at each critical conference. But, as shown below, because Hauser completely failed to act as Johnson's advocate at the conferences on the issue of whether he should remain as Johnson's counsel, Johnson was constructively denied counsel and his Sixth Amendment right to counsel was violated.

In *King v. Superior Court* (2003) 107 Cal.App.4th 929, the trial court held a hearing on whether the defendant had forfeited his right to

counsel as a result of his attacks on counsel. While nominally representing the defendant at the hearing, counsel did not argue on behalf of his client, but instead breached his duty of loyalty by offering evidence and arguing against his client. Thus, because it was as though defendant had no counsel at the hearing, the defendant was constructively denied counsel and the forfeiture finding was erroneous. (*Id.* at pp. 949-950.)

Similarly, while nominally representing Johnson, Hauser breached his duty of loyalty, first, by failing to object to Judge Cheroske's finding that Johnson's attack on Hauser was for the purpose of delaying the trial (17RT 2-25), and second, by claiming himself at the October 2 conference that the altercation with Johnson was merely a tool to either delay the trial or for Johnson to eventually wind up defending himself. (17RT 2-58.) Judge Cheroske later agreed with Hauser, again without objection by Hauser. (17RT 2-64.)

As this Court recognized in *People v. Roldan* (2005) 35 Cal.4th 646, while a defendant's threats against his counsel's life may reflect a conflict between the attorney and client, the threats may simply be for the purpose of delaying the trial. Thus, the Court instructed that before disqualifying counsel in that instance, a trial court must be satisfied that the circumstances demonstrated an actual conflict of interest. (*Id.* at p. 675.)

Here, Hauser argued against Johnson and in favor of Judge Cheroske's finding that Johnson punched Hauser to delay the trial. Thus, if Judge Cheroske had any thought of investigating whether an actual conflict existed between Johnson and Hauser – an inquiry he was required to make (*Wood v. Georgia* (1981) 450 U.S. 261, 272) – the thought would have been dispelled by Hauser's argument against his own client.

Furthermore, once Johnson expressed at the first conflict conference

that he did not want Hauser as his counsel because Hauser did not represent his interests (17RT 2-5), Hauser had a duty to advocate for an inquiry by the court into the possible conflict. Moreover, Hauser had a duty to request different counsel to represent Johnson at the conferences. (*King v. Superior Court*, *supra*, 107 Cal.App.4th at p. 949 [defendant entitled to appointment of different attorney for hearing to determine whether defendant forfeited right to counsel after attacking trial counsel].)

But instead of advocating for his client, Hauser represented his own pecuniary interest at the conflict conferences and breached his duty of loyalty again when he agreed not to testify or argue about any mitigating aspects of the altercation with Johnson. (17RT 2-59.) Hence, it was as though Johnson had no counsel at all at the conflict conferences, so that Johnson was constructively denied counsel at these critical stages, and Judge Cheroske's decision to retain Hauser was erroneous.

Prejudice is presumed where, as here, the defendant was completely denied counsel at a critical conference. (*Mickens v. Taylor* (2002) 535 U.S. 162, 166 ["We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary."]; *Roe v. Flores Ortega* (2000) 528 U.S. 470, 483 ["the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice"].) Accordingly, Judge Cheroske's retention of Hauser was structural error and reversible per se. (*United States v. Cronic* (1984) 466 U.S. 648, 659, fn. 25; *French v. Jones* (6th Cir. 2003) 332 F.3d 430, 438 ["the [Supreme] Court has often held, both before and after *Cronic*, that

absence of counsel during a critical stage of a trial is per se reversible error"].)

D. Johnson Was Denied His Presence at the Critical Conflict Conferences.

Johnson had a right to be present at every critical stage of his criminal proceedings if his presence would have contributed to the fairness of the procedure. (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745 ["due process clearly requires that a defendant be allowed to be present 'to the extent that a fair and just hearing would be thwarted by his absence,'" quoting *Snyder v. Massachusetts* (1934) 291 U.S. 97, 108]; see also *People v. Davis* (2005) 36 Cal.4th 510, 530 [defendant's presence is required if it bears a reasonable and substantial relation to a full opportunity to defend]; *People v. Lucero* (2000) 23 Cal.4th 692, 717; §§ 977(b)(1), 1043.) In *Stincer*, the high court held that the defendant's rights under the Due Process Clause were not violated by his exclusion from a hearing because the defendant provided no indication that his presence "would have been useful in ensuring a more reliable determination . . . ." (482 U.S. at p. 747; *United States v. Gagnon* (1985) 470 U.S. 522, 527 [defendants' absence did not violate due process because their presence was not needed to "ensure fundamental fairness" and they "could have done nothing had they been at the conference, nor would they have gained anything by attending"].)

In *People v. Perry*, *supra*, 38 Cal.4th 302, this Court acknowledged "that a defendant may be entitled to be present at a conference called to consider whether to remove his counsel for conflict of interest or any other reason, because the removal of counsel will affect defendant's representation at trial, and is a matter on which defendant's views should be heard." (*Id.* at p. 313, citing *State v. Lopez* (2004) 271 Conn. 724.)

In *State v. Lopez*, *supra*, 271 Conn. 724, the prosecutor informed the trial judge in chambers and outside the defendant's presence that defendant's counsel might testify. The judge asked counsel if he intended to testify and whether a new attorney should be obtained to represent the defendant. After counsel considered the issue, he informed the court that he did not intend to testify on behalf of the defendant. The judge inquired no further. (*State v. Lopez*, *supra*, 271 Conn. at p. 729.)

On appeal, the Connecticut Supreme Court held that the in-chambers inquiry regarding the potential conflict of interest was a critical stage of the defendant's prosecution at which the defendant had a constitutional right to be present. (*Id.* at p. 731; see also *Bradley v. Henry* (9th Cir. 2007) 510 F.3d 1093, 1097-1098 (en banc) (plur. opn. of Noonan, J.), 1106 (dis. opn. of Silverman, J.) [Seven of eleven judges concluding exclusion of defendant from in-chambers discussion of attorney's conflict of interest – a critical stage of prosecution – denied defendant due process]; *People v. Grigsby* (Ill.App.Ct. 1977) 47 Ill.App.3d 812, 816 ["the hearing in chambers to determine whether [the] defendant's attorneys had a conflict of interest was a critical stage of the proceedings for the defendant"].)

Here, too, the three conferences on whether Hauser had a conflict of interest and whether he would continue to represent Johnson or testify and argue were critical stages of Johnson's prosecution so that Johnson had a constitutional right to be present at them. That Judge Cheroske had permanently expelled Johnson from the courtroom is of no moment because Johnson could have appeared at the conferences while physically restrained, or appeared by way of closed-circuit television or telephone. Moreover, any attempt by Hauser to waive Johnson's appearances would have been invalid. (*People v. Davis*, *supra*, 36 Cal.4th at p. 532.) (See discussion at

Argument 2 at pp. 62-66, incorporated here by this reference.)

On September 17, 1998, just after Johnson reportedly punched Hauser, Judge Cheroske held the first conference to discuss whether Hauser would continue to represent Johnson, Johnson said he did not want Hauser as his attorney because Hauser was not representing Johnson's interests, and Judge Cheroske expelled Johnson from the courtroom. (17RT 2-23-25.) It should have been apparent to Judge Cheroske at this point that Johnson and Hauser had a conflict and that Johnson wanted a new lawyer. Thus, Judge Cheroske was required to inquire into the conflict. (*Wood v. Georgia*, *supra*, 450 U.S. at p. 272.) Moreover, because Johnson declared that he did not want Hauser as his counsel, Judge Cheroske was required to hold a *Marsden* hearing and inquire into the reasons for Johnson's dissatisfaction with Hauser. (*People v. Valdez* (2004) 32 Cal.4th 73, 97, citing *People v. Marsden* (1970) 2 Cal.3d 118.) Instead of making any inquiry of Johnson, and thus without hearing from Johnson on the issues, Judge Cheroske ruled that Johnson's injection of conflict into the proceedings was intentional and for the purpose of delaying the trial. Hauser did not object to the court's finding. Judge Cheroske then deferred to Hauser's decision to continue as Johnson's attorney. (17RT 2-23-25.)

Johnson should have been present at the first conference to explain his dissatisfaction with Hauser, to rebut Judge Cheroske's finding that he manufactured the conflict with Hauser in order to delay the trial, and to offer any mitigating circumstances surrounding the conflict, such as whether Hauser provoked Johnson in any way into the altercation. (See *Bradley v. Henry*, *supra*, 510 F.3d at p. 1098 ["Due process does not permit a judge to decide such a question without hearing the affected party. *Audi alteram partem* – hear the other side – is what makes the legal process work

in an adversary system."].)

The next conference on whether Hauser had a conflict and whether he would continue to act as Johnson's counsel was on September 21, 1998, when the prosecutor indicated his intention to use the Johnson/Hauser altercation in any penalty phase, though not call Hauser as a witness. At Judge Cheroske's suggestion, Hauser agreed to investigate his own potential conflict, while conceding "there might be an appearance of conflict." Judge Cheroske noted that it was Hauser's decision whether to testify, "but it would seem that it would certainly cloud up some issues." (17RT 2-49-50.)

Johnson should have been present at the second conference to offer his position on whether Hauser should testify and withdraw as counsel. (*People v. Dunkle* (2005) 36 Cal.4th 861, 915 ["An attorney must withdraw from representation, absent the client's informed written consent, whenever he or she knows or should know he or she ought to be a material witness in the client's cause."].)

Johnson knew his attorney, Steven Hauser, very well. Johnson had even filed a motion to remove Hauser as his counsel because Hauser lied to Johnson. (1RT 52; 1CT 210-212, 215, 218.) As set forth in detail in Argument 5 at pages 166-177, and incorporated by this reference, Johnson witnessed Hauser's lack of candor to the court so that Johnson had good reason to believe that Hauser was deceitful and conniving. Johnson had witnessed Hauser conceal from Judge Morgan that he was not standby counsel, when Judge Morgan stated on the record in Hauser's presence that that was the judge's understanding. (1RT 86-87, 102-103, 128-129; 1CT 200.) Johnson was present when Hauser concealed from Judge Morgan that a *Marsden* hearing had not occurred, though Judge Morgan believed it had

occurred. (2RT 365-366.)

In addition, on reviewing the transcripts of the prior proceedings, Johnson would have discovered that Hauser flatly lied to Judge Hom that he was standby counsel, though minutes before Hauser lied, Judge Cheroske clarified to Hauser that he was no longer on the case *in any capacity*, and the day before, Judge Wu told Hauser that he had *not* been appointed standby counsel. (1RT 100-103, 128-129, 142-A.) Hauser misled Judge Hom about Judge Cheroske's purported stated intention to decide the standby counsel question, though Judge Cheroske made no such statement. (1RT 128-129, 145; 1CT 238.) Hauser also misled Judge Cheroske into appointing him as standby counsel by representing that he had been present at all hearings in this case, though he had not. (1RT 95-99, 107-113, 148; 1CT 231, 235.) Despite Johnson's inquiry to Hauser in open court, Hauser concealed that he had failed to have Johnson present during the hearing before Judge Hom where Hauser pleaded to be appointed standby counsel. (2RT 418-419.)

In light of Hauser's record of deceit, Johnson might have wanted Hauser to testify before the jury because he trusted the jury would see Hauser for the dishonest attorney that Johnson believed he was. Had Johnson been present at the conference and offered his position on Hauser's continued retention, Johnson could have convinced Judge Cheroske that it would be important for the jury to see and hear Hauser testify to put the altercation with Johnson in context. One should not dismiss the possibility that after hearing and seeing Hauser testify, the jury might have felt some sympathy for Johnson.

At the third conference on October 2, 1998, Hauser requested that he remain on the case. In return for Judge Cheroske's allowing Hauser to

remain as Johnson's counsel, Hauser agreed not to testify at all during the penalty phase or make mitigating arguments on Johnson's behalf. Hauser also said that the altercation was merely a tool to either delay the trial or for Johnson to eventually wind up defending himself. (17RT 2-58-59.)

Johnson should have been present at this conference as well because he could have objected to Hauser's remaining on the case and set forth the bases for his objection. Further, Johnson could have objected to Hauser's agreement with Judge Cheroske not to testify and not to make arguments that could have helped Johnson. And finally, Johnson could have pleaded to the court that it was not a delay in trial that he sought, but only a loyal advocate who would be honest with him and the court.

The three conferences held without Johnson's involvement were not situations in which Johnson could have contributed nothing had he attended each; nor can this Court state with any degree of confidence that Johnson would have gained nothing by attending. (See *Snyder v. Massachusetts*, *supra*, 291 U.S. at p. 108.) Accordingly, each of the three conferences regarding Hauser's potential conflict of interest was a critical stage of Johnson's prosecution at which Johnson had a constitutional right to be present.

Judge Cheroske's errors in excluding Johnson from the conferences were structural. (See *State v. Lopez*, *supra*, 271 Conn. at p. 737; *Rushen v. Spain* (1983) 464 U.S. 114, 119, fn. 2 [right to be present during critical stages of proceedings is subject to harmless error analysis, "unless the deprivation, by its very nature, cannot be harmless"]; *State v. Brown* (2003) 362 N.J.Super. 180, 189 [defendant's absence during readback of testimony to jury, unsupervised by judge, was structural error]; *State v. Bird* (2002) 308 Mont. 75, 83 [defendant's exclusion from in-chambers

individual voir dire proceedings was structural error]; *State v. Padilla* (N.M.App. 2000) 129 N.M. 625, 630 [defendant's absence at beginning of trial was structural error]; *State v. Calderon* (2000) 270 Kan. 241, 253 [absence of defendant's interpreter during closing arguments violated defendant's fundamental right to be present at trial and was structural error]; *State v. Garcia-Contreras* (1998) 191 Ariz. 144, 149 [defendant's involuntary absence from entire jury selection was structural error]; see also *Hegler v. Borg* (9th Cir. 1995) 50 F.3d 1472, 1476 ["a defendant's absence from certain stages of a criminal proceeding may so undermine the integrity of the trial process that the error will necessarily fall within that category of cases requiring automatic reversal"]; but see *People v. Davis*, *supra*, 36 Cal.4th at p. 532 ["Under the federal Constitution, error pertaining to a defendant's presence is evaluated under the harmless beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 23"]; *Campbell v. Rice* (9th Cir. 2005) 408 F.3d 1166, 1172 (en banc) ["The Supreme Court has never held that the exclusion of a defendant from a critical stage of his criminal proceedings constitutes a structural error," citing *Rushen v. Spain*, *supra*, 464 U.S. at p. 117].)

In *State v. Sam* (2006) 98 Conn.App. 13, the Connecticut Appellate Court discussed the Connecticut Supreme Court's holding in *State v. Lopez* that the defendant's exclusion from an in-chambers conference to inquire into defense counsel's conflict of interest was structural error. *Sam* concluded that the high court's decision in *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140 lent support to the *State v. Lopez* holding. (*State v. Sam*, *supra*, 98 Conn.App. at p. 31.)

In *Gonzalez-Lopez*, the Court held that the trial court's erroneous deprivation of the defendant's Sixth Amendment right to choice of counsel

qualified as a structural error, which defied analysis by harmless-error standards because it affected the framework within which the trial proceeded and was not simply an error in the trial process itself. (*United States v. Gonzalez-Lopez*, *supra*, 548 U.S. at p. 150.) Moreover, the deprivation had consequences that were "'necessarily unquantifiable and indeterminate, thereby unquestionably qualifying as "structural error."'" (*Ibid.*, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 282.) The high court reasoned:

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," (citation) – or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

(*Gonzalez-Lopez*, at p. 150.)

Here, because Hauser would have been removed if Johnson had been present at the conferences, *Gonzalez-Lopez's* structural error rule governs.

In *People v. Bonin* (1989) 47 Cal.3d 808, this Court recognized that when the trial court knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to make inquiry into the matter and act in response to what it discovers. In discharging its duty, the court may appoint conflict-free counsel – or not, if it finds that the risk of conflict was too remote; regardless, it "must act with a caution increasing in degree as the offenses dealt with increase in gravity." (*Id.* at pp. 836-837, internal quotation marks and citations omitted.)

After the trial court has investigated the matter and acted in response, "the defendant may choose the course he wishes to take. *If the court has found that a conflict of interest is at least possible, the defendant may, of course, decline or discharge conflicted counsel.* But he may also choose not to do so: 'a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests.'" (*People v. Bonin*, *supra*, 47 Cal.3d at p. 837, quoting *Holloway v. Arkansas* (1978) 435 U.S. 475, 483, fn. 5, italics added; see *People v. Jones* (2004) 33 Cal.4th 234, 245 (conc. opn. of Werdegar, J.) ["California . . . recognizes that, when represented by a lawyer who has a potential conflict of interest, 'a defendant is master of his own fate,'" quoting *Alcocer v. Superior Court* (1988) 206 Cal.App.3d 951, 957].)

As a result of the prosecutor's decision to inject Johnson's altercation with Hauser into the proceedings, Judge Cheroske found that a conflict of interest was at least possible in light of Hauser's role as a potential witness. (17RT 2-49-50.) Given Johnson's repeated efforts to

remove Hauser as his counsel – the most recent effort occurring just before the first conflict conference (17RT 2-23) – had Johnson been present at the conflict conferences, undoubtedly he would not have consented to Hauser's continued representation. Under *Bonin*, Judge Cheroske would have been required to discharge Hauser. Accordingly, new counsel would have been appointed, who, as *Gonzalez-Lopez* recognized, would have pursued different strategies, though it is impossible to know what different avenues new counsel would have chosen, making any harmless-error analysis speculative. (*United States v. Gonzalez-Lopez*, *supra*, 548 U.S. at p. 150.) Judge Cheroske's errors in excluding Johnson from the conferences were therefore structural and reversible per se.

E. Because of Hauser's Conflict of Interest, Judge Cheroske Should Have Disqualified Hauser.

Johnson did not have to be present at the conflict conferences for Judge Cheroske to be informed of Johnson's position on Hauser's continued representation. Judge Cheroske already knew Johnson's view because Johnson stated unequivocally to Judge Cheroske on August 25, 1998, that he had lost all confidence in Hauser and was attempting to retain private counsel. (17RT 2-2.) Moreover, just before the first conflict conference from which Johnson was excluded, he told Judge Cheroske that he did not want Hauser, that Hauser did not represent his interests, and that Hauser intentionally "dumped" Johnson in his first trial. (17RT 2-23.) Aware that Johnson did not waive his right to the assistance of unconflicted counsel, Judge Cheroske should have discharged Hauser and appointed new counsel. (*People v. Bonin*, *supra*, 47 Cal.3d at p. 837.)

Furthermore, Hauser should have withdrawn as Johnson's counsel, and Judge Cheroske should have disqualified Hauser for that reason.

(*Asbestos Claims Facility v. Berry & Berry* (1990) 219 Cal.App.3d 9, 27, fn. 6 ["trial court has the power to disqualify an attorney on its own motion"].) "An attorney who attempts to be both advocate and witness impairs his credibility as witness and diminishes his effectiveness as advocate." (*Comden v. Superior Court* (1978) 20 Cal.3d 906, 912.) "Such disadvantage enures to the detriment of the party being represented by the lawyer serving such a dual function." (*Smith, Smith & Kring v. Superior Court (Oliver)* (1997) 60 Cal.App.4th 573, 578.)

Thus, "[a]n attorney must withdraw from representation, absent the client's informed written consent, whenever he or she knows or should know he or she ought to be a material witness in the client's cause." (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 915, citing Rules Prof. Conduct, rule 5-210 and *Comden v. Superior Court*, *supra*, 20 Cal.3d at p. 911, fn. 1.) "The determination whether an attorney ought to testify ordinarily is based on an evaluation of all pertinent factors, including the significance of the matters to which the attorney might testify, the weight the testimony might have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters may be independently established." (*Ibid.*)

"An attorney should 'resolve any doubt in favor of preserving the integrity of his testimony and against his continued participation as trial counsel.'" (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 915, quoting *Comden* at p. 915.)

As the prosecutor's closing argument to the jury demonstrates, the subject matter that Hauser might have testified about was highly significant. The prosecutor's argument covered 10 transcript pages. But over that short stretch, he referred to the Hauser "attack" three separate times, primarily to

show that other inmates would not be safe if Johnson was given life imprisonment without parole, and therefore the jury should vote to kill Johnson. (17RT 2-1787, 2-1791, 2-1792.) Clearly, the prosecutor thought that the subject matter of Hauser's possible testimony was very important to his plea for death.

Judge Cheroske thought Hauser's testimony was significant as well. In fact, as evidenced by the deal that he struck with Hauser in return for Hauser's not testifying, Judge Cheroske thought that Hauser might testify to matters that would serve to mitigate the gravity of the attack on Hauser. Judge Cheroske extracted a promise from Hauser whereby he would not testify that he did not fear Johnson, that he elected to continue to represent Johnson despite the prior incidents, and that Johnson must have just been overcome by emotion, having sat before 400 people and realizing his jury trial was about to start, or anything like that. (17RT 2-59.)

Judge Cheroske recognized that as the victim of the attack, Hauser could have been a strong witness for Johnson at any penalty phase, particularly as the sole witness who could have provided mitigating testimony favorable to Johnson concerning the altercation. Hauser's prior statements support this conclusion. Just after the incident occurred, Hauser stated that he could "represent Mr. Johnson with equal vigor as if this had never happened." (17RT 2-25.) Hauser said later that he did not believe that Johnson actually meant any of his threats. (17RT 2-49.) He further offered that during the defense case at the first trial, Johnson cooperated with Hauser and the two got along well and had a good relationship from that point on until the end of the trial. (17RT 2-69.) Hauser could have told the jury that Johnson stopped talking to him only after Johnson said that Hauser was upset because Hauser expected a guilty verdict at the end of the

first trial, an allegation that Hauser did not deny. (15RT 3497; 17RT 2-69.) Thus, Hauser could have been a material witness to blunt the force of the expected damaging testimony by other witnesses to the altercation or to impeach any exaggerated or fabricated testimony concerning the incident.

Furthermore, whether Hauser should have been called as a witness at the penalty phase should have been decided by a lawyer other than Hauser. Another lawyer might have called Hauser as a witness because, as stated earlier, given Hauser's history of deceit in this case, the jury might have had sympathy for Johnson after Hauser finished testifying. In any event Hauser should have resolved any doubt in favor of preserving the integrity of his testimony and against his continued participation as trial counsel. (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 915.) Instead, Hauser violated his own integrity by agreeing not to testify to and argue any mitigating circumstances surrounding the altercation – in return for his continuing to receive a paycheck for representing a defendant who wanted nothing to do with him.

Accordingly, Hauser should have withdrawn, and Judge Cheroske should have disqualified him from representing Johnson because Hauser knew or should have known that he ought to be a material witness in Johnson's cause. (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 915; *Asbestos Claims Facility v. Berry & Berry*, *supra*, 219 Cal.App.3d at p. 27, fn. 6.)

Because it is impossible to know what choices Hauser's replacement would have made, even whether to go to trial or plea bargain, Judge Cheroske's error in failing to substitute new counsel for Hauser had consequences that were necessarily unquantifiable and indeterminate, thereby unquestionably qualifying as structural error. (*United States v. Gonzalez-Lopez*, *supra*, 548 U.S. at p. 150.) The judgment must be

reversed.

F. Hauser Labored Under Three Conflicts of Interest That Adversely Affected His Performance as Johnson's Counsel.

Under the Sixth and Fourteenth Amendments, the right to effective assistance of counsel includes the right to representation free from conflicts of interest. (*Wood v. Georgia, supra*, 450 U.S. 261, 271.) The same right exists under article I, section 15 of the California Constitution. (*People v. Roldan* (2005) 35 Cal.4th 646, 673.)

A conflict of interest may arise where an attorney's loyalty to, or efforts on behalf of a client are threatened by the attorney's own interests. (*People v. Roldan, supra*, 35 Cal.4th at p. 673; *Wood v. Georgia, supra*, 450 U.S. at pp. 270-273; *Plumlee v. Masto* (9th Cir. 2008) 512 F.3d 1204, 1210 ["as the Supreme Court cases make clear, we are talking about legal conflicts of interest – an incompatibility between the interests of two of a lawyer's clients, or *between the lawyer's own private interest and those of the client*," italics added].)

When the possibility of a conflict is "sufficiently apparent" to a trial court, there arises "a duty to inquire further." (*Wood v. Georgia, supra*, 450 U.S. at p. 272; *People v. Roldan, supra*, 35 Cal.4th at p. 677 ["a trial court has the duty to inquire when it knows or reasonably should know a conflict of interest exists between client and lawyer"].) The trial court must either appoint separate counsel or take adequate steps to ascertain whether the risk of a conflict of interest is too remote to warrant separate counsel. (*Campbell v. Rice, supra*, 408 F.3d at p. 1170, citing *Holloway v. Arkansas, supra*, 435 U.S. at p. 484.) The trial court's failure to appoint separate counsel or to take the appropriate steps violates the defendant's Sixth

Amendment rights. (*Ibid.*)[43]

As noted, this Court recognized in *People v. Roldan*, *supra*, 35 Cal.4th 646, that a defendant's threats against his counsel's life evidenced an apparent conflict between the attorney and client. Although the Court emphasized that no rigid rule exists to preclude relief whenever a claimed conflict of interest with counsel originates in a defendant's own actions, the Court directed that before disqualifying counsel in that instance, a trial court must be satisfied that the circumstances demonstrated an actual conflict of interest because the threats against counsel could have been simply for the purpose of delaying the trial. (*Id.* at p. 675.)

An actual conflict of interest violating the federal Constitution means a conflict that adversely affects counsel's performance. This requires an inquiry into whether counsel "pulled his punches." The Court "must therefore examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission." (*People v. Roldan*, *supra*, 35 Cal.4th at pp. 673-674, citations and internal quotation marks omitted.)

Three conflicts of interest arose in this case. The first manifested itself when Johnson punched Hauser and threatened to kill him. According to Judge Cheroske, Johnson also threatened to kill Hauser's family and

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[43] "To obtain reversal for *Wood* error, the defendant need not demonstrate specific, outcome-determinative prejudice. But he must show that an actual conflict of interest existed and that that conflict adversely affected counsel's performance." (*People v. Bonin*, *supra*, 47 Cal.3d at p. 837, citation omitted)

repeatedly spat on Hauser. (17RT 2-64-65.) Assuming that Hauser is generally not an incompetent lawyer (*Strickland v. Washington* (1984) 466 U.S. 668, 689), his reaction to these events may account for much of Hauser's failure to advocate on Johnson's behalf. Although Hauser suggested that these episodes did not affect him – in fact, just after receiving Johnson's punch and falling off his chair, Hauser quite remarkably stated that he could "represent Mr. Johnson with equal vigor as if this had never happened" (17RT 2-25) – Hauser was likely very angry with Johnson, particularly when Johnson reportedly threatened Hauser's family. Moreover, no proud person reacts well to being spat upon. (17RT 2-64-65.) Hauser took his anger out on Johnson by providing him with a disloyal defense; while perhaps understandable as a purely emotional reaction, it nonetheless violated Johnson's constitutional right to conflicts-free and effective counsel.

The second conflict evolved when the prosecutor decided to introduce the altercation into evidence during the penalty phase, thereby making Hauser a material witness. Thus, Johnson did not create the conflict, the prosecutor did. The prosecutor initially decided to seek the death penalty against Johnson long before the incident with Hauser, in fact, eight months before. (1CT 237; 17RT 2-57.) The prosecutor should have been satisfied with whatever evidence he had at that point to seek death, but he wanted more. In seeking more, the prosecutor took the risk of creating a conflict with Hauser as lawyer and witness.

The third conflict was caused by Judge Cheroske and developed when Hauser entered into an agreement with the judge, thereby creating divided loyalties between Judge Cheroske and Johnson. On the one hand, Hauser was obligated to Judge Cheroske to honor his agreement not to

testify or argue mitigating circumstances surrounding the altercation, while on the other hand, Hauser had a duty of advocacy to Johnson to present Johnson in the best light before the jury, including testifying to provide a basis for making the same mitigating arguments that Hauser had abandoned in favor of his self-interest.

Almost immediately after the conflicts unfolded, Hauser pulled his punches.

The first opportunities for Hauser to omit action came on the day of the altercation when Judge Cheroske excluded Johnson permanently from his own trial, without any objection or argument from Hauser. At the same conference, Judge Cheroske ruled that Johnson's injection of the conflict into the proceedings was intentional and for the purpose of delaying the trial. Hauser did not object to or argue against the court's finding. (17RT 2-25; 18CT 5342.)

No reasonable defense lawyer would choose to subject the client to a trial in absentia, which in all probability would eliminate any presumption of innocence that a defendant present in the courtroom would have. That Johnson was present during the first trial, which ended with a hung jury, illustrates the importance of the defendant's presence. It must be much easier for a jury to find a defendant guilty and especially send that defendant to death, without ever seeing the defendant's face. (18CT 5237; 15RT 3484, 3489.)

The next omission was on October 19, 1998, when Judge Cheroske ruled that by his conduct, Johnson had voluntarily absented himself from all further proceedings in the case. Hauser did not argue that Johnson's "mere absence," Judge Cheroske's words, was a violation of Johnson's fundamental right to be present at his own trial. (17RT 2-64-66.)

Nor did Hauser argue that Johnson should be given the choice between being excluded from his trial and being physically restrained. Hauser, moreover, failed to suggest any alternative to trying his capital client in absentia, for example, appointing a second capital defense counsel under *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 434 ("If it appears that a second attorney may lend important assistance in . . . presenting the case, the court should rule favorably on the request. [I]n general, under a showing of genuine need, . . . a presumption arises that a second attorney is required") to act as a buffer between Hauser and Johnson; separating Johnson and Hauser at counsel's table, perhaps by having a plain-clothed bailiff sit between them; having Johnson participate in the trial by way of two-way closed circuit television; or beginning the trial with Johnson present, while only initially swearing in a few prospective jurors to confirm Johnson's commitment to conforming his behavior, without chancing a mistrial.

Moreover, Hauser did not correct Judge Cheroske's assertion that Johnson did not want "*any* equipment allowing him to monitor the court proceedings." (Italics added.) Johnson had merely declined for the time being to listen to the trial from his holding cell through a *speaker*, or so said Hauser at an earlier hearing. (17RT 2-47-48.) In fact Hauser said nothing about Judge Cheroske's ruling permanently excluding Johnson not only from his trial, but from all court proceedings, a pulled punch devastating to the defense and demonstrating a complete lack of loyalty on Hauser's part.

Hauser's next omission occurred on the date set for retrial, November 5, 1998, when the deputy district attorney suggested a video feed from the courtroom to Johnson's location, which Judge Cheroske rejected.

Hauser did not join in the request or even participate in the discussion. (17RT 23.) No attorney, except perhaps one feeling victimized by his client, would fail to join in the prosecutor's request for a video feed to keep the client informed of the trial's progress.

On November 10, 1998, Judge Cheroske received a note from Johnson asking for copies of reporter's transcripts from certain dates. Judge Cheroske responded: "We'll not provide him with any transcripts at this point in time." Again demonstrating a lack of interest in protecting or advocating for his client, Hauser did not balk; in fact he said nothing. (19RT 2-487.)

Before and after the trial, Hauser provided ineffective assistance of counsel. Nevertheless, because that claim is separate from his failure to provide conflicts-free representation, it will not be asserted here, but will be raised in any habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267 [ineffective assistance claims are often more appropriately litigated in a habeas proceeding].)

Hauser capped off his torpid performance as Johnson's counsel during the guilt phase with a stunning turnabout. He traded his passive lawyering for actively betraying Johnson. As set forth in Argument 5 at pages 188-189, incorporated here, Hauser conspired with Judge Cheroske and the prosecutor to deceive Johnson into testifying to a phantom jury, but then returned to passive form by sitting back while Judge Cheroske used Johnson's "testimony" to deny Johnson his right to testify entirely, over no objection from Hauser. (23RT 2-1367.)

Hauser continued to pull his punches during the penalty phase, not for any tactical reason, but because he agreed to omit arguments and actions in his deal with Judge Cheroske. In return for Judge Cheroske's retention

of Hauser as Johnson's conflicted counsel, Hauser delivered on his promise not to testify, as well as his promises not to argue that he did not fear Johnson, that he elected to continue to represent Johnson despite the altercation, and that Johnson must have been overcome by emotion after realizing that his jury trial was about to start and it could result in his painful execution, "or anything like that." (17RT 2-59.) In an extraordinary act of self-interest and disloyalty, Hauser sold Johnson's right to argue any mitigating circumstances relating to the altercation in exchange for the lucrative opportunity to continue to represent Johnson.

Accordingly, Hauser's conflicts of interest adversely affected his performance as Johnson's counsel. And whether prejudice is presumed or not, the judgment must be reversed.

"The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." (*Holloway v. Arkansas*, *supra*, 435 U.S. at p. 490.) As shown, because Hauser repeatedly kept his mouth shut at the wrong times to Johnson's disadvantage, Hauser's conflicts of interest adversely affected his performance in both the guilt and penalty phases. Accordingly, prejudice is presumed and the judgment must be reversed in its entirety. (*Mickens v. Taylor*, *supra*, 535 U.S. at p. 173; *People v. Rundle* (2008) 43 Cal.4th 76, 173 ["Only when the court concludes that the possibility of prejudice and the corresponding difficulty in demonstrating such prejudice are sufficiently great compared to other more customary assessments of the detrimental effects of deficient performance by defense counsel, must the presumption be applied in order to safeguard the defendant's fundamental right to the effective assistance of counsel under the Sixth Amendment," citing *Mickens*, at p. 175].)

Even assuming for the sake of argument that Johnson must show prejudice under *Strickland v. Washington*, *supra*, 466 U.S. 668, there is a reasonable probability that, but for Hauser's unprofessional errors – namely his pulled punches – the result of the trial would have been different. (*Id.* at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid.*)

First, Hauser's failure to object to Johnson's expulsion from the courtroom for the duration of the trial must have resulted in considerable, if unquantifiable, prejudice to Johnson. Depriving a defendant of the constitutional right to presence by removing the defendant from the courtroom, even for a short time, is a "deplorable" act. (*Illinois v. Allen* (1970) 397 U.S. 337, 347.) As shown in Argument 2, Judge Cheroske erred in committing that act. But had Hauser advocated on behalf of his client, he would have objected to expulsion and offered the options set forth above. And because, as an advocate, Hauser would have also informed Judge Cheroske that the court "must indulge every reasonable presumption against the loss of constitutional rights" (*Illinois v. Allen*, *supra*, 397 U.S. at p. 343), Judge Cheroske, presumably a reasonable jurist committed to following the law, would have rejected permanent expulsion as his chosen course.

Johnson's presence in the courtroom for the trial would have had a strong impact on the jury.

> It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify

and rights under the Confrontation Clause. [Citation.] At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a *powerful influence* on the outcome of the trial.

(*Riggins v. Nevada* (1992) 504 U.S. 127, 142 (conc. opn. of Kennedy, J., italics added).) That powerful influence is magnified in a capital sentencing proceeding, where "assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies." (*Id.* at p. 144 (conc. opn. of Kennedy, J.).)

Furthermore, studies show that a capital defendant's demeanor during trial, particularly if it shows remorse, may have a compelling effect on the jury's penalty verdict. (Blume, et al., *Competent Capital Representation: the Necessity of Knowing and Heeding What Jurors Tell Us about Mitigation* (2008) 36 Hofstra L. Rev. 1035, 1037 [empirical studies reveal that one of the three primary considerations that drive juror decision-making at the penalty phase of a capital trial is the defendant's remorse or lack thereof]; Eisenberg, et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing* (1998) 83 Cornell L. Rev. 1599, 1617 ["jurors tended to believe in a defendant's remorse if he appeared 'uncomfortable or ill at ease'" and "jurors were more likely to believe in a defendant's remorse if they detected a change in his 'mood or attitude' after the guilty verdict"]; *id.* at p. 1633 ["if jurors believed that the defendant was sorry for what he had done, they tended to sentence him to life imprisonment, not death"]; *id.* at p. 1637 ["confirm[ing] the widespread conviction that remorse makes a difference to the sentence a defendant receives"]; Garvey, *Aggravation and Mitigation in Capital Cases: What Do*

Jurors Think? (1998) 98 Colum. L. Rev. 1538, 1560 ["Lack of remorse is highly aggravating"]; *id.* at p. 1567 [defendant should show jury some remorse for what he has done]; Geimer & Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases* (1988) 15 Am. J. Crim. L. 1, 51 [32 percent of the jurors interviewed mentioned the defendant's demeanor as a contributing factor in the sentence recommendation].)

Thus, when Judge Cheroske expelled Johnson permanently from the courtroom – due in part to Hauser's failure to object and propose reasonable options to expulsion – and thereby denied Johnson the opportunity to have a powerful influence on the jury regarding the outcome of his trial, confidence in that outcome was necessarily undermined, sufficient to satisfy *Strickland's* prejudice prong.

Moreover, when Johnson was present in the courtroom during the first trial, Johnson confronted every witness, and six jurors voted to acquit him on the Hightower first degree murder charge. (18CT 5237; 15RT 3484, 3489.) It is reasonably probable that had Hauser objected to Johnson's exclusion, Johnson would have been present to confront the witnesses at the second trial and the result of the trial would have been different.

Second, if Hauser had objected to the prosecutor's proposal to deceive Johnson and explained to Judge Cheroske that their proposed actions would violate the prohibition against an attorney colluding with another to deceive the client (Bus. & Prof. Code, § 6128, subd. (a)), Judge Cheroske probably would have not embarked on a path of deception towards Johnson, which ultimately led to Judge Cheroske's finding that Johnson waived his right to testify.

But even if Judge Cheroske insisted on carrying out the prosecutor's proposal to deceive Johnson into believing that the jury was present in the courtroom when he testified from his jail cell, Hauser, acting as a loyal advocate and not one with a conflict of interest, would have informed Johnson that the jury was not present in the courtroom and advised him not to speak until the jury was present. Furthermore, Hauser would have explained very clearly to Johnson that if Johnson did not follow a question-and-answer format when testifying, Judge Cheroske would find that Johnson had waived the right to testify.

With these proper warnings and a show of loyalty from Hauser, Johnson would have testified as he did at his first trial, that he was asleep during the shootings. (12RT 2792.) Therefore, it is reasonably possible that had the jury in the second trial heard the same testimony from Johnson as the jury in the first trial, which failed to reach a verdict, Johnson would have received a more favorable outcome, an acquittal or a second hung jury.

Third, had Hauser objected to Judge Cheroske's finding that Johnson waived his right to testify and proposed, for example, that Johnson's testimony from the first trial be read to the jury (Evid. Code, § 1291(a)(2)), Judge Cheroske likely would have accepted the proposal so that the jury would have heard Johnson's alibi testimony. It is reasonably possible that the jury, having heard Johnson's testimony, would have returned a more favorable verdict (both at guilt and penalty) or failed to reach any verdict at all.

Finally, Hauser pulled his punches during the penalty phase, as he promised Judge Cheroske that he would, by not testifying and not arguing any mitigating aspects of his altercation with Johnson. Hauser therefore did not explain to the jury that Johnson acted impulsively out of fear of his

impending trial, that Johnson reacted to his powerlessness and inability to remove a lawyer who had consistently failed to advocate for his client, that Hauser chose to continue to represent Johnson because the altercation with Johnson was not serious, and that Johnson had already suffered greatly from the activation of the stun belt so that the jury should not take the altercation into account in assessing penalty. That Hauser pulled those punches undermines any confidence in the jury's death verdict.

Accordingly, Johnson was harmed at guilt and penalty by Hauser's conflicts of interest so that the judgment must be reversed in its entirety.

INTRODUCTION TO GUILT-PHASE EVIDENTIARY AND INSTRUCTIONAL ARGUMENTS

By the time the jury was sworn, Johnson had been deprived of the very fundamentals of a criminal trial: an impartial judge, a meaningful advocate, and the opportunity to attend. One remaining right was to have his guilt assessed by a jury that had considered evidence both fairly presented and properly evaluated. But a series of evidentiary and instructional errors deprived him of even that.

The state's star "eyewitness," Robert Huggins, knew how to game the system. Although his own brother, Gregory Hightower, was a victim in this case, Huggins did not tell the police what he claimed to know about his brother's death until arrested for spousal abuse. But Huggins needed an excuse for not informing earlier. So he told the police that he was afraid because Johnson was still out on the streets, though Johnson had been arrested three weeks before. By the time of trial, Huggins discovered that his explanation for fearing Johnson needed some support. So he told the jury that Johnson had already beaten two murder raps. Though Huggins inflamed the jury mightily, the court denied Johnson's well-taken mistrial motion. On top of that, the court failed to let the jury know that it could use Huggins's spousal abuse conviction to assess his dubious credibility.

The prosecutor's first witness, Rochelle Johnson, repeatedly denied seeing the shootings, which happened before she arrived at the scene. Yet Leonard Greer testified that Rochelle told him just after the shootings that Johnson had killed "him." Though the prosecutor offered no evidence that Rochelle had seen the shootings, the court admitted Rochelle's hearsay. To illustrate the absurdity of the ruling, the court would have acted consistently by admitting the hearsay of one who had not seen the shootings, but had

asserted as fact that a person other than Johnson had been the shooter.

The prosecution's third major witness, Tyrone Newton, testified that he had lied about seeing the shootings in return for dropping cocaine possession charges against him. The court incorrectly refused to allow the police to corroborate that Newton had a history of snitching in return for favors in his own criminal cases. Moreover, though required by well-established law, the court failed to tell the jury that it should view with caution Newton's prior statement to the police inculpating Johnson.

Finally, the court expelled Johnson, who desperately wanted to be in the courtroom for his trial rather than in a holding cell. But the court misled the jury that Johnson chose to be absent from his trial, thereby suggesting that Johnson had fled prosecution. Moreover, the court wrongly instructed that the jury could use Johnson's apocryphal escape as evidence of his guilt.

By permitting unreliable evidence, excluding relevant evidence, and slanting the jury instructions, the errors together unfairly bolstered the prosecution theory of the evidence and undercut the defense theory. The errors induced the jury to cherry-pick those witness statements endorsed by the prosecution and reject those backed by the defense. Worse, the errors contributed to the prosecution's portrait of Johnson as a repeat murderer, outside societal norms and beyond reach of the criminal justice system. This portrait was further enhanced by the fact that Johnson was absent from his own trial and prevented from testifying – which both made it harder for the jury to see him as a human being and suggested that he had so little respect for the proceedings that he did not even attend.

7.

JOHNSON WAS INCURABLY HARMED AND DENIED A FAIR TRIAL WHEN THE MAIN PROSECUTION WITNESS VOLUNTEERED THAT HE WAS AFRAID OF JOHNSON BECAUSE JOHNSON HAD ALREADY BEATEN TWO MURDER CASES.

A. Introduction

The only person to testify that he saw Cedric Johnson and Terry Betton shoot the victims, Robert Huggins was the prosecution's key witness. But Huggins had previously denied under oath that he had seen Johnson shoot either victim. Huggins had also delayed telling the police about his brother's shooting for three months – even while his stepfather, Hightower's father, whom Huggins claimed to have told about seeing Johnson shoot the victims, talked to police about offering a reward for information. Indeed, Huggins incriminated Johnson only when Huggins found himself locked up on his own criminal case. Thus, the prosecution had to explain away Huggins's delay and his exculpating Johnson under oath. At trial, Huggins claimed that he delayed talking to the police because Johnson was "still running around on the streets" – though Johnson had been in jail for three weeks by the time Huggins spoke up. Huggins then testified that he was worried about Johnson being on the streets because Johnson "had already beat two cases like this already."

The clear inference from Huggins's statement was that even before this case Johnson had twice murdered but escaped conviction. Once the jury heard this, Johnson's chances of receiving a fair trial were irreparably damaged and his timely motion for a mistrial should have been granted. (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) Although the court eventually struck the answer and generally admonished the jury that

stricken evidence may not be considered, the harm was done and could not be cured. Huggins had painted Johnson as a multiple murderer who killed with impunity, and nothing could remove that picture from the jurors' minds. Moreover, the picture remained in the background, adding depth and color to the prosecution's theme that Johnson killed snitches and undermined the criminal justice system. Refusing to grant Johnson a mistrial – and denying his later motion for a new trial, based on the same error – deprived Johnson of his state and federal rights to due process. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.) Accordingly, this Court should reverse his convictions. Further, because the harm was exacerbated at the penalty phase, Johnson's Eighth Amendment rights were violated and his sentence should be reversed. (U.S. Const., 8th & 14th Amends.)

B. Proceedings Below

During the prosecutor's "final series of questions," Huggins admitted that although he had told his family what he saw the night of the shootings, he did not tell the police. Huggins explained that he failed to do so because Johnson "was still running around on the streets." The prosecutor then asked, "why were you worried about that?" and Huggins answered that Johnson "had already beat two cases like this already." (21RT 2-860.)

Johnson's counsel immediately objected and at side bar moved to strike the testimony and for a mistrial. (21RT 2-860-861.) He argued that the prosecutor should have instructed Huggins not to refer to any prior case, and that Johnson had been irreparably prejudiced. The prosecutor did not argue that the evidence was admissible; instead, he argued that Huggins had not referred to any earlier cases at the first trial in response to the same question and that the error could be cured by instruction. (21RT 2-861.)

Before ruling, the court took the noon recess. (21RT 2-862.) After

the break, trial counsel argued that Huggins's inadmissible statement would prejudice Johnson at a penalty phase as well. (21RT 2-863.)

The court denied Johnson's motion for a mistrial and indicated that it would instead strike the testimony and admonish the jury. (21RT 2-865-866.) But, rather than immediately strike the evidence before the jury, the trial court permitted the prosecutor to interrupt Huggins's testimony and present four witnesses out of order – two medical examiners, a firearms examiner, and Mr. Adame, a Housing Authority detective. (21RT 2-867-930.) When Huggins eventually retook the stand, the court gave the following admonition:

> [R]emember when we started off earlier in this trial, that prior to taking of any testimony, I gave you some instructions on your duties and functions as jurors. And one of those instructions that I gave you dealt with what just happened then, which is whenever I order anything stricken by way of testimony, it's not in evidence; and you're not to consider it for any purpose. As a matter of fact, you're to treat it as though you never even heard it. Remember that instruction?

(21RT 2-931.) The jury answered affirmatively. The court then asked:

> Now, is there anybody here who feels they can't follow that kind of an instruction? [¶] In other words, even though I've told you, as I just did with Mr. Adame, to disregard – or that I struck the testimony, are there any of you who feel that you would have any difficulty following that kind of an instruction? [¶] Everybody indicates no, that they would have no problem.

(21RT 2-931.)

Only then did the court remind the jury that "there had just been an objection to a question asked of [Huggins] and a motion to strike that testimony that he had given." The court sustained trial counsel's much-earlier objection and motion to strike, and admonished the jury to disregard "that answer." The court did not identify specifically the stricken testimony. It directed the jury that "the last question and answer that remained was why hadn't he – something to the effect of why hadn't he contacted the police, and he said because C.J. was still on the street." (21RT 2-932.)

Huggins then testified that sometime after the shootings he was arrested and the police questioned him about the case. (21RT 2-933-934.) Although he did not initially talk to the officers, he eventually spoke to them about the shootings, while he was still in custody. (21RT 2-934.) Before he testified at the preliminary hearing, Huggins was in a lockup cell with 20 to 25 other people, including Johnson and Betton. (21RT 2-935-936.) There, Johnson "asked me would I say all the stuff I said about him." (21RT 2-295.) Huggins did not respond and Johnson did not say anything else. (21RT 2-935-936.) Huggins then claimed that he testified falsely at the preliminary hearing because he was concerned about his safety. (21RT 2-936, 2-938.) He was seeing Johnson and Betton regularly and was concerned about being labeled a snitch. (21RT 2-938-939.)

After Johnson was convicted, he moved for a new trial, in part based on Huggins's prejudicial testimony. (40CT 11649-11655.) That motion was denied, the court stating that it had made the correct ruling earlier. (25RT 2-1830.)

C. The Court Erred and Denied Johnson Due Process When It Failed to Declare a Mistrial Because Incurable Prejudice Flowed from Huggins's Testimony that Johnson Was an Unpunished Multiple Murderer.

Though subject to a trial court's discretion, a mistrial should be granted where the harm to the defendant is incurable. (*People v. Cox* (2003) 30 Cal.4th 916, 953.) Such incurable prejudice can result from a witness's volunteered statement. (*People v. Wharton* (1991) 53 Cal.3d 522, 565.) References to a defendant's prior criminal history are especially prejudicial because a jury will tend to see it as proof of guilt on the present charge or as justification for condemning the defendant irrespective of his guilt on the present charge. (See *People v. Guerrero* (1976) 16 Cal.3d 719, 724 ["The natural 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"].) Such references cannot always be cured by admonition. (See *People v. Allen* (1978) 77 Cal.App.3d 924, 935 ["In a wide variety of decisions there has been a finding of such exceptional circumstances in holding that the court's admonition to the jury was not sufficient to overcome the substantial danger of undue prejudice and of misleading the jury"]; *People v. Roof* (1963) 216 Cal.App.2d 222, 225-226 [court's admonition will not "obliterat[e] from the minds of the jurors" fact that accused has been previously charged with crime].) The harm here – informing the jurors that Johnson had murdered twice before and escaped conviction – was so great that Johnson's chances of receiving a fair trial were irreparably damaged; the trial court therefore abused its discretion when it denied Johnson's mistrial motion. (*People v. Ayala, supra,* 23 Cal.4th at p. 282.)

Moreover, the court's ruling permitted trial to continue with a jury contaminated by this highly prejudicial and resonant information, thus violating Johnson's right to a fair trial by an impartial jury. (U.S. Const., 14th Amend.; cf. *People v. Lyons* (1956) 47 Cal.2d 311, 319, 324 [prosecutor's improper allusions to defendant's prior conviction denied him due process].) Whether the trial court's refusal to grant a mistrial denied Johnson due process should be analyzed in the context of the entire trial. (See, e.g., *People v. Bolden* (2002) 29 Cal.4th 515, 555 [mistrial was not warranted and defendant was not denied due process where witness blurted out fleeting reference to parole office in relation to defendant; incident was not significant in context of entire guilt trial].) It is clear from the context of this trial that the harm to Johnson's case was extreme and went uncured.

1. Alleging that Johnson had already killed twice encouraged the jury to decide the case based on Johnson's alleged prior misconduct rather than on the evidence.

Evidence of a defendant's prior criminal history can prejudice him in two separate ways. First, evidence of criminal history suggests that because the defendant committed a crime in the past he is more likely to have committed the instant offense. This prejudice is greatest where, as here, the past crime is similar to the present crime, because of the "inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.'" (*People v. Beagle* (1971) 6 Cal.3d 441, 453, overruled on other grounds in *People v. Castro* (1985) 38 Cal.3d 301.) Second, such evidence distracts the jury from its task – to determine whether the defendant committed the instant offense – and encourages it instead to convict him for his past crimes. In other words, because the defendant committed the prior crime, he is a bad person and deserves to be convicted in this case, without

respect to the evidence. (See Law Rev. Com. Comment to Evid. Code, § 1101 [character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man because of their respective characters].) That prejudice is greatest where, as here, the prior criminal history is serious.

2. The testimony was especially inflammatory because it told the jury that Johnson had never been convicted or punished for those past crimes.

What distinguishes this case from others is Huggins's statement that Johnson had "*beat*" two prior murder cases. The term "beat" signifies that Johnson had committed the crimes but escaped conviction for a reason unrelated to guilt. (See, e.g., *People v. Jablonski* (2006) 37 Cal.4th 774, 791 [defendant's statement that he pled not guilty by reason of insanity because he hoped to "beat the case" with psychiatric defense supported conclusion that he was malingering]; *People v. Williams* (1997) 16 Cal.4th 153, 201 [defendant stated that he "going to get some witnesses shot" in order to "beat this case"]; *People v. Vallarta* (1965) 236 Cal.App.2d 128, 131 [after admitting that he was transporting 90 bindles of heroin, arrestee told officers he "was going to beat this case" because officers had searched him illegally]; see also http://www.beatmyspeedingticket.com [promising "5 Easy Steps To Win . . . Even If You *Were* Speeding"].)

Worse than learning of a defendant's past convictions, here the jury was told that Johnson had never been punished for the earlier killings. Admission of uncharged offenses "breeds a tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses." (*People v. Thompson* (1980) 27

Cal.3d 303, 317 [citations and quotations omitted] [discussing reasoning behind basic rule of exclusion of Evid. Code, § 1101, subd. (a)].) Huggins did not testify that Johnson was "exonerated" or "acquitted" or "found not guilty." One cannot expect a juror to put aside her natural tendency to want to punish a defendant for his past, unpunished crimes.

3. The statement supported the prosecution theme throughout trial that witnesses were intimidated to testify against Johnson.

The theme that Johnson escaped prosecution because witnesses were intimidated to testify underpinned the entire prosecution case. When a witness failed to incriminate Johnson, the prosecutor argued that it was due to fear of retaliation. (24RT 2-1443-1444, 2-1448, 2-1453.) In particular, the prosecutor tried to explain away Huggins's credibility problems by arguing that he feared harm from Johnson. (20RT 2-658-659; 24RT 2-1448.) And, from the outset, the prosecution's theory of premeditation was that Johnson sought to kill Faggins and Hightower because they might one day be snitches in some unidentified, hypothetical future criminal case. (20RT 2-654; 24RT 2-1453.) Huggins's testimony that Johnson "beat" the earlier cases added to this theme by suggesting that Johnson had successfully intimidated – or even killed – the witnesses in those two cases, making concrete an otherwise speculative prosecution theory.

The prosecutor set forth this theory – that Johnson was a snitch-killer who escaped conviction because witnesses were intimidated – in his opening statement, in which he specifically directed the jury's attention to Huggins's explanation for his reluctance to implicate Johnson. (20RT 2-654, 2-658-659.) In contrast, both defense attorneys emphasized that Huggins delayed for months reporting his account of the shootings and

accused Johnson only once Huggins was in custody on his own case. (20RT 2-661-662, 2-671.) In short, all three opening statements made clear that Huggins's credibility was critical to the prosecution case and that the central dispute was whether Huggins suppressed the truth because he feared Johnson or whether Huggins falsely implicated Johnson to curry favor in his own case. Thus, while in the typical case, whether a particular incident is incurably prejudicial is "by its nature a speculative matter," here it was clear from the trial's start that Huggins's explanation for his inconsistent statements was the key to the case. (*People v. Haskett* (1982) 30 Cal.3d 841, 854.)

Moreover, this central, recurring theme was a constant reminder of the stricken evidence; it explained why not only Huggins but all the lay witnesses would be afraid of Johnson. Thus, striking the evidence did not likely eliminate it from the jurors' minds. (See *People v. Estrada* (1998) 63 Cal.App.4th 1090, 1099 [even if stricken, once improper suggestion was made that appellant avoided conviction for prior similar crime with similar defense, any question or remark related to that earlier incident would raise offensive suggestion again].)

Each lay witness knew Johnson and lived in or had family in the Jordan Downs housing development. (20RT 2-676; 21RT 2-800, 2-820, 2-822; 22RT 2-1043, 2-1112-1113.) Thus each witness was presumably aware of Johnson's alleged past. And this theme persisted through the end of trial. In discussing Huggins's testimony, the prosecutor argued:

> He didn't come forward. I understand that. That was his brother. You have to decide whether or not you understand that. [¶] He told you that C.J. was still running around outside. That's why he didn't come forward. [¶] To make matters worse, he was placed in the same cell by mistake with

> C.J. . . . [¶] My argument to you is that any type of situation like that is threatening and intimidating, and you're liable to say anything.

(24RT 2-1448.) What made the situation "threatening and intimidating" was Johnson's history of successfully beating cases so that he would be free to retaliate against the snitches who implicated him.

4. No evidence countered Huggins's testimony.

Whether the harm flowing from a witness's volunteered statement is incurable can turn on whether later evidence counters the prejudice. In *People v. Wharton*, *supra*, 53 Cal.3d at p. 566, the Court found that a witness's suggestion that the defendant had assaulted the witness was not incurable in large part because that same witness later unequivocally blamed someone else for the beating. Here, in contrast, no evidence or instruction suggested to the jury that Huggins's allegations were untrue. Huggins's blurted-out testimony that Johnson had "beat" two prior murder cases was not countered by any other evidence.

5. The admonition failed to cure the harm.

A reviewing court generally presumes that the jury has followed instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) But some prejudice is so great that no limiting instruction "however thoughtfully phrased or often repeated," can erase a prejudicial image from the jurors' minds. (*People v. Guerrero, supra*, 16 Cal.3d at p. 730.) Indeed, "[t]he limited value of the admonition is implicitly recognized by the tendency of the courts to give it weight when the evidence of guilt is convincing [citation] and to disregard it when the case is a close one [citation]." (*People v. Duran* (1969) 269 Cal.App.2d 112, 118.)

The prejudice in this case was much greater than the prejudice in

People v. Ozuna (1963) 213 Cal.App.2d 338, 339, where a police officer improperly testified that – in describing his version of the shootings at issue – the defendant had stated he was an ex-convict. The trial court struck the testimony and admonished the jury to disregard it altogether. (*Id.* at p. 340.) The "crucial question" on appeal was whether the admonition cured the prejudice. (*Id.* at p. 342.) The Court of Appeal found that it did not, reasoning that it was "self-deceptive to assume that the jurors could put out of their minds" the stricken testimony. (*Ibid*; see also *People v. Bentley* (1955) 131 Cal.App.2d 687, 689-690, overruled on other grounds in *People v. White* (1958) 50 Cal.2d 428 [in prosecution for child sex abuse, officer's statement that defendant was suspect in earlier case was prejudicial error notwithstanding court's direction that volunteered testimony should be disregarded]; *People v. Morgan* (1978) 87 Cal.App.3d 59, 68, overruled on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480 [admonition would not have cured the harm resulting from erroneously admitting evidence that defendant had committed prior unidentified offense for which he was on parole].) The prejudice here was simply too great to cure by admonition.

That the jury represented to the trial court that it was generally able to disregard stricken testimony does not alter the analysis. First, as described in detail below, the jury responded to the court's generic question after the court directed the jury's attention to unrelated stricken testimony of a different witness. Second, this Court need not accept without question the jury's assurance. In *Marshall v. United States* (1959) 360 U.S. 310, 311-312, during the defendant's trial for unlicensed dispensing of drugs, some of the jurors were exposed to news articles that mentioned that the defendant had previously been convicted of a similar crime. Although each exposed juror individually assured the trial court that he would not be

influenced by the news account and would decide the case on the evidence alone, the United States Supreme Court, in its supervisory capacity, ordered a new trial. (*Id.* at p. 313.) To be sure, *Marshall* involves a different context – media exposure – and does not control here. (See *Murphy v. Florida* (1975) 421 U.S. 794, 798 [*Marshall* has no application beyond federal courts].) But it demonstrates that a reviewing court need not always accept at face value jurors' representations that they will not be influenced by specific inadmissible information they have learned, let alone, as here, representations regarding non-specific information or information unrelated to Huggins's claim that Johnson had escaped punishment for two other murders – even where the trial court has accepted them.

Indeed, the presiding judge of the Compton Superior Court presumably recognized the inherent limitations of judicial admonition when she ordered Judge Cheroske to dismiss the entire jury panel that witnessed Johnson's altercation with Hauser. (17RT 2-39.) No matter how vehemently a prospective juror assured the court that she could disregard the encounter, no matter how thoroughly the court admonished the eventually seated jury to disregard it, Johnson could not receive a fair trial if the jury was selected from a pool of people exposed to that event. In contrast to Judge Cheroske, who was willing to accept individual jurors' representations that they would not be affected by what they had seen, Presiding Judge Hom implicitly concluded that Johnson's chances of receiving a fair trial were irreparably harmed. (17RT 2-39.) Similarly, once Huggins had alerted the jury that Johnson was a multiple murderer who would roam the streets freely if not convicted here, no instruction could remove that information from the jurors' minds.

In fact, the admonition here cured nothing. First, the admonition

came well after the improper testimony. During that time, the jury took its noon recess and the prosecution presented four other witnesses. (21RT 2-862-930.) Second, the court did not make clear what testimony was stricken. In fact, its admonition appeared to be directed toward the testimony of another witness, Clement Adame, a Housing Authority detective, who testified to being flagged down by a woman transporting the fatally wounded Hightower in her car. (21RT 2-925-930.) At one point, the prosecutor asked him what happened when the woman flagged him down and Adame answered with hearsay: "She, uh, said that her friend was in the back seat and that he was shot." (21RT 2-927.) Betton's counsel objected; the court sustained the objection and struck the innocuous answer.[44] (21RT 2-927.) Shortly after, Adame was excused and Huggins returned to the stand. (21RT 2-930.) The court admonished the jury as follows:

> Before we get started, folks, the last witness that just testified, Mr. Adame, you recall there was an objection to a question; and he had already answered the question; and I sustained the objection, and then I struck the answer.
>
> Remember that?
>
> And remember when we started off earlier in this trial, that prior to taking of any testimony, I gave you some instructions on your duties and functions as jurors. And one of those instructions that I gave you dealt with what just happened then, which is whenever I order anything stricken by way of testimony, it's not in evidence; and you're not to consider it for any purpose. As a matter of fact, you're to treat it as though you never even heard it. Remember that instruction?

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[44] There was no dispute about whether the woman was carrying Hightower's body or whether he had been shot.

(21RT 2-931.) The jury answered affirmatively. The court then asked:

> Now, is there anybody here who feels they can't follow that kind of an instruction? [¶] In other words, even though I've told you, as I just did with Mr. Adame, to disregard – or that I struck the testimony, are there any of you who feel that you would have any difficulty following that kind of an instruction? [¶] Everybody indicates no, that they would have no problem. [¶] All right. Thank you.

(21RT 2-931.) Thus, the court asked the jurors whether they could disregard Adame's garden-variety, nonprejudicial hearsay statement that Hightower had been shot and was being carried in the back of a woman's car – *not* Huggins's dynamite testimony that Johnson had murdered twice before. And the jurors assured the court that they could disregard Adame's statement – not Huggins's.

In contrast, in *People v. Wharton, supra,* 53 Cal.3d at p. 566, this Court found curative the trial court's pointed instruction specifically dispelling any suggestion that the defendant had committed the misdeed suggested by the witness's volunteered statement. There, the court told the jury:

> [The witness] blurted out a statement about the defendant, Mr. Wharton. If you heard the statement, you're instructed to disregard it. Mr. Wharton had nothing to do with any injuries that were sustained by [the witness]. You shall take it as a fact that Mr. Wharton had nothing to do with the injuries of [the witness]. You shall not draw any adverse inferences against Mr. Wharton from the fact that any witness was injured while in or out of the jail.

(*Id.* at p. 565.) The generic admonition here – "whenever I order anything stricken by way of testimony, it's not in evidence; and you're not to consider it for any purpose" (21RT 2-931) – did not approach the "direct

and pointed" admonition that reduced the prejudice in *Wharton*. (*Wharton,* at p. 566.)

Finally, the very nature of the volunteered information undermined the tardy admonition. As explained above, "beating" cases connotes avoiding conviction not because one is innocent but because of some legal technicality. That connotation was especially pernicious here. The jury was informed of what it would consider highly relevant evidence, and the judge then struck it. While that sequence seems logical to a lawyer, a lay juror would likely view it as not only illogical but wrong: she should be allowed to consider the criminal defendant's past crimes when deciding whether he is guilty.[45] Huggins's statement and the court's response thereto suggested that highly relevant and incriminating evidence existed – but that legal technicalities prevented the jury from hearing and considering it. This of course played into the larger prosecution theme that Johnson believed that he was beyond the reach of the criminal justice system and therefore killed with impunity.

6. The evidence against Johnson was weak.

Whether the harm flowing from improper testimony is incurable – and whether a defendant has therefore been denied due process – depends in large part on how strong the case against him is. (See *People v. Bolden, supra*, 29 Cal.4th at p. 555 [mistrial not warranted and defendant not denied

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[45] The public has long deplored the perceived number of guilty defendants who get off on technicalities. (See, e.g., Richard A. Rosen, *Reflections on Innocence*, 2006 Wis. L. Rev. 237, 237 ["As late as the first half of the 1990s, most people within and outside of the American criminal justice system believed that allowing too many guilty people to get off on 'technicalities' was the major deficiency in the system."].)

due process where improper reference was insignificant in context of entire trial].) As detailed above, the specter of Johnson's two prior murder cases was implicitly raised each time the prosecution returned to its theme that witnesses failed to incriminate Johnson only because they were intimidated. Further, this theme implied that the paucity of prosecution evidence was due to Johnson's criminal misconduct, rather than the inherent weakness of the prosecution case.

And the prosecution case was weak indeed – so weak that it failed to convince the first jury that Johnson was guilty of any crime, and kept the second jury deliberating for four days after less than five days of evidence. (18CT 5333; 39CT 11515-11543; 24RT 2-1581-1612; *People v. Cooper* (1991) 53 Cal.3d 771, 837 ["We have sometimes inferred from unduly lengthy deliberations that the question of guilt was close."]; *People v. Taylor* (1986) 180 Cal.App.3d 622, 634 [finding error prejudicial in light of entire record, including first jury's not reaching a verdict].) No physical evidence connected Johnson to the shootings. Huggins, the sole testifying eyewitness, suffered from multiple credibility problems. As one victim's brother, he was biased. (21RT 2-816.) His identification of Johnson was impeached by his earlier testimony and by his three-month-long silence after the shootings. (21RT 2-967; 22RT 2-982-983.) And he got his facts wrong. He claimed that Johnson shot Faggins with an Uzi (21RT 2-954-955), but no Uzi was used (22RT 2-1074, 2-1076-1077; 23RT 2-1204). He claimed that Faggins was shot while facing the shooter (21RT 2-951), but Faggins was not (21RT 2-917). He claimed that Johnson shot Hightower from up close (21RT 2-956), but no soot or stippling was found on Hightower's body – indicating that he was shot from farther away (21RT 2-888). Huggins claimed that when he first approached Hightower, who had been shot in the head, he did

not see any blood (21RT 2-960) – which is inconceivable given that head wounds bleed profusely. (21RT 2-885, 2-888.) And Huggins claimed that he left the shootings and drove to his baby's mother's house (21RT 2-966), but he had previously told Detective Vena that he had gone to his sister's house. (23RT 2-1198-1199.)

Even the prosecutor did not believe Huggins. The deputy district attorney conceded to the jury that, based on the evidence, there was no way to determine whether Terry Betton or Johnson shot Faggins. (24RT 2-1466.) Even the prosecutor so lacked trust in Huggins's credibility that he told the jurors that it would be "ridiculous" to base their decision on Huggins alone because Huggins had given the jury "an inconsistent statement previously." (24RT 2-1559.)

The only other alleged eyewitness was Tyrone Newton, who explicitly denied hearing Johnson talk about killing the victims or seeing Johnson shoot them and whose single inculpatory statement was given while he was in custody in exchange for leniency on his own criminal case. (20RT 2-779-780; 21RT 2-793, 2-795, 2-799-801.) And even with that incentive to incriminate Johnson, in his taped statement to Sergeant Waters, Newton could not accurately describe the shootings – because he did not see them. (See 2SCT II 326, 346 [Newton stating that shootings took place on 97th Street, though they occurred on 99th Street (22RT 2-1024-1026, 1177)], 330, 347-348 [Newton stating that Faggins was shot in arm, head, face and shoulder, but he was shot only in the back (21RT 2-917)], 348 [Newton agreeing that Johnson reached into Hightower's car and shot him, though Hightower was shot from farther away (21RT 2-888)].) As Newton explained, he based his incriminating statement not on his own observations, but on what the police told him about the shootings (21RT 2-

800) and – like Leonard Greer – on rumors he had heard. (21RT 2-795.)

The final supposed eyewitness was Rochelle Johnson, who from the beginning denied having seen the shootings. (23RT 2-1195-1196.) But the prosecution took the position that Rochelle knew more about the shootings than anybody – that, despite the testimony of every witness to the contrary, she was at the scene. (24RT 2-1566.) To support this theory, and to counter the testimony of Charles Lewis, Huggins, and Rochelle herself that she was not there, the prosecutor could offer only Greer's claim – made months after the shootings and highly disputed[46] – that Rochelle had told him "CJ didn't have to kill him" – an ambiguous statement that does not establish that Rochelle herself saw anything at all. (20RT 2-684, 714-715; 22RT 2-1006, 1045, 1116.)

In defense, Johnson called his wife, Jocelyn Smith, who testified that Johnson was sleeping in her apartment at the time of the shootings. (23RT 2-1326, 1344, 1346.) In addition, Joyce Tolliver, Johnson's reluctant[47] mother-in-law, testified that she heard shots and then saw two men who were not Johnson and Betton in the area of the shootings, one of whom carried a gun that looked like an Uzi. (23RT 2-1319, 1324-1326.) Maureen Wallace testified that, after hearing shots, she saw two men running with a gun and a dog. (23RT 2-1376.) The men were not Johnson and Betton. (23RT 2-1377.) Wallace knew both defendants, as well as Hightower, but

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[46] Rochelle denied making the statement. (20RT 2-714-715.) Greer insisted that he reported Rochelle Johnson's statement to Officer Mrakich. (22RT 2-1159, 1171.) But Officer Mrakich testified that Greer had never told him about his sister's alleged statement. (23RT 2-1259.)

[47] Tolliver testified that she was not happy about her daughter marrying Johnson. (23RT 2-1327.)

there is no indication that she had a particularly close relationship with any party. (23RT 2-1377, 1380-1383.)

Moreover, the inflammatory reference supported the weakest aspect of the prosecution case: the alleged eyewitnesses' credibility. To find Johnson guilty, the jury had to believe that Huggins had lied at the preliminary hearing, then told the truth at trial. As to Newton, the jury had to believe just the opposite: that he had told the truth in his prior statement to police, and then lied at trial. To explain these dramatically inconsistent statements – and to explain why Huggins, Rochelle Johnson, and others failed to come forward and incriminate the defendants – the prosecutor repeatedly posited that the witnesses were afraid. This theory was advanced at the first trial as well, but that jury did not learn that Johnson had beaten two prior murder cases. That jury was apparently not convinced by the prosecution's explanation of its witnesses' credibility problems, because it did not convict Johnson of any crime. Similarly, in *People v. Ozuna, supra*, a first jury could not reach a verdict; a second jury heard the same evidence, but also learned that the defendant was an ex-convict, and convicted. The appellate court found that the prejudice generated in the jurors' minds from the single reference to the defendant's criminal history caused irremediable harm, such that the court's admonition to disregard the testimony entirely was insufficient and the conviction had to be reversed. (213 Cal.App.2d at p. 342.)

In short, this was an extremely close case in which the volunteered information was the most inflammatory imaginable and served to boost the prosecution witnesses' highly damaged credibility.

7. The inflammatory statement functioned as uncontested factor (b) evidence and further prejudiced Johnson at the penalty phase.

Ineffectively stricken as it was, Huggins's testimony essentially put before the jury uncontested factor (b) evidence demonstrating Johnson's other criminal conduct. (§ 190.3, subd. (b).) Impossible to forget or ignore, Huggins's statement told the jury that Johnson – a multiple murderer – had prior multiple murders. In other words, as far as the jury knew, Johnson was eligible for death twice over.

At the same time, because it was not admitted evidence, Johnson could not confront Huggins or otherwise contest this allegation. (See U.S. Const., 6th Amend.) In fact, since Huggins's use of the word "beat" implies that Johnson was acquitted of the alleged charges, such evidence was explicitly barred. (§ 190.3 ["in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted"].) Yet the testimony essentially allowed the state to use crimes for which Johnson was found not guilty as a reason to put Johnson to death.

True, the jury was instructed not to consider other criminal acts besides the battery on Hauser as aggravators. (40CT 11634.) But for the same reasons that a juror could not ignore such inflammatory information at the guilt phase, she would also consider Johnson's having killed twice before when deciding penalty. Indeed, a defendant's unpunished multiple murders are precisely the kind of information jurors would find highly relevant to the moral decision of whether a person deserves to die. Under these extreme circumstances, the usual presumption that jurors follow instructions to disregard testimony breaks down.

Moreover, Huggins's reference to Johnson's prior murders fit perfectly within the prosecutor's argument for death. While he explicitly mentioned only the battery on Hauser as factor (b) evidence, to support his

position that Johnson deserved to die, the prosecutor argued that Johnson "was essentially violent his whole life." (25RT 2-1793.) To a juror, Huggins's testimony about the two prior murders would support this characterization and be convincing – if unsanctioned – factor (b) evidence.

But even more importantly, Huggins's statement supported the central prosecution theme that Johnson undermined the criminal justice system and committed crimes with impunity. Indeed, the prosecutor argued in his guilt-phase closing that Johnson and Betton gunned down the victims in public view, confident that no witness would identify them. (24RT 2-1562-1563.) Implicit in this theme was the inference that Johnson lacked all respect for the criminal justice system.

At the penalty phase, this theme became explicit and the prosecutor, in discussing factor (b), argued that Johnson had "[c]omplete disrespect for authority, complete disrespect for other human beings, complete disrespect for rules and regulations." (25RT 2-1791.) He killed snitches. He caused witnesses to perjure themselves. He refused to attend his own trial.[48] He even attacked his own lawyer. Again and again, Johnson was painted as a criminal with no regard for the legal system and whom the legal system could not reach. These jurors had the rare opportunity to hold Johnson accountable and – by sentencing him to death – ensure that he would not further sabotage the criminal justice system in which they had become participants.

Moreover, the prior unpunished murders served to explain why Johnson but not Betton was death-eligible. At the guilt phase, the

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[48] While the prosecutor did not argue this specifically, the jurors were inaccurately instructed that Johnson had voluntarily absented himself from trial. See Argument 11.

prosecution pressed an aiding and abetting theory, arguing that each defendant was equally culpable for each victim's murder. (See 24RT 2-1465 ["Mr. Betton is equally guilty of the crimes as well. . . . Each principal, regardless of the extent or manner of participation, is equally guilty."], 2-1468 ["[E]very sub-element of aiding and abetting is met by Mr. Betton, and it's also met by Mr. Johnson as well, if you want to consider Mr. Johnson an aider and abettor of Mr. Betton."], 2-1469 ["You have to remember, as an aider and abettor, they are equally guilty of the crime committed."].) The instructions confirmed that – if the jury accepted the prosecution's version of the shootings – Johnson and Betton were equally liable. (See 40CT 11573-11574 [CALJIC Nos. 3.00, 3.01].) Apart from a single personal-use allegation, both defendants were charged identically as to the shootings. (19CT 5365-5367.) Both were charged with a special circumstance. (19CT 5366.) By Johnson's penalty phase, the jury had itself found that Betton had previously been convicted of manslaughter and sodomy– much more serious crimes than Johnson's single drug felony conviction. (19CT 5367; 25RT 2-1682.) Yet, as the jury knew from the beginning of trial, the prosecution sought death against only Johnson. (17RT 2-161.) His two prior unpunished murders explained to the jury why the government believed only Johnson deserved to die.

Lastly, at the penalty phase, the jury had an even greater incentive to disregard the trial court's admonition and consider the allegation that Johnson had murdered twice before and escaped conviction. The guilt phase of the trial asked the jury to decide what concrete facts had been proven with respect to a particular event. At penalty, the jurors were asked to make a moral judgment whether Johnson deserved to live or die, to assess his entire history – a history that they had originally been told

included two unpunished murders. Disregarding that information, while making an explicitly moral, all-encompassing judgment, was impossible.

In sum, the harm was greater at the penalty phase. Even if Johnson was not prejudiced at the guilt phase of trial, he was prejudiced at the penalty. His sentence should therefore be reversed.

D. Conclusion

Once Huggins told the jury that Johnson was an unpunished multiple murderer, Johnson had no chance of receiving a fair trial. "The mere direction that the testimony should be disregarded was no antidote for the poison that had been injected into the minds of the jurors." (*People v. Bentley*, *supra*, 131 Cal.App.2d at p. 690.) The harm was incurable, and the trial court abused its discretion and denied Johnson a fair trial when it refused to grant his motion for a mistrial. This Court should reverse Johnson's convictions.

8.

THE COURT ERRED IN ADMITTING ROCHELLE JOHNSON'S HEARSAY STATEMENT THAT "CJ DIDN'T HAVE TO KILL HIM."

A. Introduction

The prosecution failed to call a single reliable eyewitness in this case. Their biases and inconsistent statements rendered both Robert Huggins and Tyrone Newton incredible. So, to secure a conviction, the prosecution created a third eyewitness, Rochelle Johnson. Leonard Greer, Rochelle's estranged brother who had already lied to police once about the case to anger her, testified that he met Rochelle on her way home from the shooting scene and that she told him "CJ didn't have to kill him." (22RT 2-1116.) Rochelle denied making the statement and denied having seen the shooting. No witness testified that Rochelle was at the shooting scene. Nonetheless, the prosecutor argued from that unreliable hearsay statement that Rochelle had in fact witnessed the shootings and knew more about the crimes than anyone else. Because the statement fits within no exception to the hearsay rule, admitting it was error. And because the improper evidence invited the jury to base its guilty verdict on an unreliable out-of-court statement that played into the central prosecution theme that anyone who failed to inculpate defendant Cedric Johnson did so because she feared him, the error violated Johnson's rights to a fair trial and a reliable verdict. (U.S. Const., 6th, 8th & 14th Amends.)

B. Proceedings Below

Rochelle Johnson testified that she and Terry Betton were in her apartment when she heard a commotion and someone came to her door and told her there had been an accident. (20RT 2-684-686.) She went to the scene where she found Gregory Hightower, alive and bleeding in his car.

(20RT 2-688.) Since she had some medical training, she gave Hightower CPR until others took him to the hospital. (20RT 688-691.) She stayed at the scene for 10 minutes, crying, then returned to her home. (20RT 2-690-691.) There, she called her mother, who arrived with Leonard Greer, Rochelle's brother. (20RT 2-693-694.)

Rochelle specifically denied seeing Greer on her way to or from the scene or talking to Greer about anything she had observed with respect to the shootings. (20RT 2-714-715, 2-723.) The prosecution later called Greer, who testified that he met his sister on the sidewalk as she was coming from the shooting scene. (22RT 2-1115.) Over Betton's counsel's hearsay objection, Greer testified that Rochelle told him, "They didn't have to kill him." (22RT 2-1116.) Then, over Johnson's counsel's hearsay objection to the question, "Did she say anything about CJ?" Greer testified that Rochelle said, "CJ didn't have to kill him." (22RT 2-1116.) Neither the prosecutor nor the trial court offered a theory of admissibility for these out-of-court statements.

In his rebuttal argument to the jury, the prosecutor offered :

> [O]ne thing [Greer] did say, which was the truth[, in his] statement to the police officer – was that, "Hey, *Rochelle knows more than possibly anybody else. Rochelle knows more than possibly anybody else.*" Now Rochelle didn't say much here. . . . [Y]ou decide whether or not what she said on the stand is completely credible. Consider Mr. Greer's statement that she said, "Hey, look," when she was coming back from the crime scene, "I don't know why they did it. C.J. shouldn't have shot him." Consider that when you are reaching a verdict in this case. . . . What *she saw* out there

absolutely was a tragedy[.]

(24RT 2-1566, italics added.)

C. Rochelle Johnson's Alleged Statement Was Inadmissible Hearsay.

Offered to prove the truth of the matter asserted – that Johnson had killed "him," though the prosecutor did not posit who "him" was – Rochelle Johnson's out-of-court statement was inadmissible hearsay. (Evid. Code, § 1200.) By overruling the hearsay objection, the trial court implicitly found either that the statement was non-hearsay or that a hearsay exception applied. Because it was undisputably offered to prove that Johnson had in fact killed somebody, the statement was hearsay. Thus, to find that it was non-hearsay was an abuse of discretion. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 203.) And, as detailed below, because the statement was not based on Rochelle Johnson's personal knowledge, there was no reasonable basis to conclude that the alleged statement was either a spontaneous statement or a prior inconsistent statement. Admitting it was therefore error. (*People v. Phillips* (2000) 22 Cal.4th 226, 234; *People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.)

1. Because she did not personally witness the shooting, Rochelle's alleged remark was not an admissible spontaneous statement.

To be admitted as an exception to the hearsay rule under Evidence Code section 1240, a statement must not only be spontaneous, but also purport to describe or explain an act or condition *perceived by the declarant*. (*People v. Morrison* (2004) 34 Cal.4th 698, 718.) As the statement's proponent, the prosecution bore the burden of proving by a preponderance of the evidence that Rochelle had personally perceived the

shootings. (*People v. Anthony O.* (1992) 5 Cal.App.4th 428, 433, citing *People v. Tewksbury* (1976) 15 Cal.3d 953, 966; see also *People v. Phillips*, *supra*, 22 Cal.4th at pp. 235-236 [where proponent of hearsay statement did not suggest that an exception applied to additional level of hearsay, statement was admissible spontaneous declaration only if declarant was relating events he saw himself].) Specifically, the proponent must provide either direct evidence or at least a "persuasive inference" that the declarant personally observed the exciting event; that she did so should not be purely a matter of speculation or conjecture. (*Phillips*, at p. 236; cf. *Miller v. Keating* (3d Cir. 1985) 754 F.2d 507, 511 [under equivalent federal rule, "[d]irect proof of perception, or proof that forecloses all speculation is not required. On the other hand, circumstantial evidence of the declarant's personal perception must not be so scanty as to forfeit the 'guarantees of trustworthiness' which form the hallmark of all exceptions to the hearsay rule."].) Here, the prosecutor did not meet his burden of proving that Rochelle had personally witnessed the shootings; the court therefore erred in admitting the hearsay as a spontaneous statement. (*Ungefug v. D'Ambrosia* (1967) 250 Cal.App.2d 61, 68.)

In *People v. Phillips*, *supra*, 22 Cal.4th at p. 236, this Court upheld the exclusion of a proposed spontaneous statement because "virtually no evidence" supported an inference that declarant personally perceived the event. The statement itself – "[Defendant] was shooting at everything in sight" – did not indicate the declarant had personally observed the events. (*Id.* at pp. 235-236.) And although one could infer from his conduct before and after the homicide that the declarant had been at the scene, there was other direct testimony that he had not been. (*Id.* at pp. 236-237.) Further, the declarant's excited demeanor did not necessarily demonstrate that he

had witnessed the incident; simply hearing about the events could have affected him greatly. (*Id.* at p. 237.)

And in *Ungefug v. D'Ambrosia, supra,* 250 Cal.App.2d at p. 68, cited with approval in *People v. Phillips*, *supra*, 22 Cal.4th at p. 236, the Court of Appeal found error where an alleged spontaneous statement was admitted with neither direct proof nor a persuasive inference that the declarant personally perceived the event. As in *Phillips*, the declarant in *Ungefug* simply recited the alleged event without identifying a source of the information. (*Ungefug*, at p. 66 ["[the victim] had been hit twice, by another car that did not stop"].) No evidence demonstrated that the *Ungefug* declarant had witnessed the accident; as the court noted, he may have merely repeated what others had told him. (*Id.* at p. 68.) As in *Phillips* and *Ungefug*, here Rochelle's alleged statement itself did not meet the prosecutor's burden of demonstrating that she had personally observed the shootings.

In fact, this Court has found that the statement, "*I know* he shot her. *I know* she is hurt bad." did not "unquestionably" demonstrate that the declarant personally perceived the event. (*People v. Brown* (2003) 31 Cal.4th 518, 542, italics added.) There, in finding that the comments qualified as spontaneous statements, the Court relied on other evidence indicating that the declarant had personally seen the events – namely that he was indisputably in the car directly behind the victim's truck and had a clear view when the defendant jumped out of the declarant's car, pulled the victim from her truck, and shot her. (*Id.* at pp. 541-542.)

Despite the prosecutor's best efforts, he produced no evidence at all that Rochelle had seen the shootings. First, Rochelle adamantly denied that she had seen the shootings. Indeed, she did so from the very beginning; she

told Detective Vena within hours of the shootings that she did not know who had shot the victims. (23RT 2-1195-1196.) Huggins – whose credibility the prosecution endorsed – testified that Rochelle was not at the shootings.[49] (22RT 2-1005-1006.) Charles Lewis, in Hightower's car just before Hightower was shot, also denied that Rochelle was in the car or at the shooting scene. (22RT 2-1039, 1045.)

According to Huggins, Lewis did tell him that there was a woman in the back of the car who crawled out when Johnson approached, but Huggins – who knew Rochelle well – did not testify that the woman was Rochelle. (20RT 2-719; 22RT 2-1083, 1086.) Moreover, the car belonged to Hightower's girlfriend, Monica, who was seen attending to Hightower after he was shot, suggesting that any woman in the back of the car might have been Monica. (22RT 2-1036; 23RT 2-1380-1381.)

Annette Johnson – who, according to Greer's account, saw her daughter moments after the alleged statement to Greer – supported Rochelle's account that she never claimed to have seen the shootings. Annette testified that Greer drove her and his girlfriend to Rochelle's apartment, contradicting her son's account that he saw Rochelle alone outside. (20RT 2-743.) Despite repeated questioning, Annette denied that Rochelle had ever told her that she saw Hightower killed. (20RT 2-755-756, 2-761.) Nor did Greer ever tell Annette that he knew about Rochelle's involvement in the shootings. (20RT 2-760.)

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[49] By Huggins's testimony, he had plenty of opportunities to see Rochelle at the scene. He testified that he had seen Rochelle at the party. (21RT 2-820.) He left with Hightower. (21RT 2-822.) Hightower got into his car, then Huggins walked to his car while Hightower drove, following him. (21RT 2-822.) Huggins saw Charles Lewis in the car, but mentioned nothing about Rochelle's being there. (21RT 2-822.)

In sum, because not even "the remotest inference, conjecture or speculation" supported the trial court's implied finding that the statement was a spontaneous statement by Rochelle after she personally perceived the shooting, admitting it was error. (*Ungefug v. D'Ambrosia*, *supra*, 250 Cal.App.2d at p. 68; cf. *Miller v. Keating*, *supra*, 754 F.2d at pp. 511-512 [reversing where record was "empty of any circumstances from which the trial court could have inferred" that declarant personally perceived event].)

2. The statement was not inconsistent with Rochelle's testimony.

Nor was Rochelle's alleged comment to Greer a prior inconsistent statement admissible for its truth under Evidence Code section 1235. That section's "fundamental requirement" is that the prior statement in fact be inconsistent. (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1219.) Where a witness's prior statement is not materially inconsistent with her testimony, it is error to admit the prior statement for its truth. (*People v. Arias* (1996) 13 Cal.4th 92, 153; *Johnson*, at p. 1220.)

On its face, Rochelle's alleged prior statement was not inconsistent with her testimony. She testified, in essence, "I did not see the shooting." At most, the import of her alleged statement to Greer was "CJ killed him" – not "I saw CJ kill" Hightower or Faggins. Had Rochelle testified that someone else had killed Hightower or Faggins, the prior statement might have been inconsistent. But she did not so testify. Rather, she testified that she *did not see* who shot either victim. Thus, the two statements are not inconsistent on their face.

Moreover, the prior statement was inconsistent and therefore admissible only if it was based on Rochelle's personal knowledge. But, as detailed above, no evidence demonstrated that Rochelle had witnessed the

shootings.

Thus, just as Rochelle lacked the personal knowledge to testify directly that Johnson had shot Hightower or Faggins, her alleged prior statement should not have been admitted. (Evid. Code, § 702.) As the Court of Appeal has held, the personal-knowledge requirement applies no less to a hearsay declarant than to a witness. (*People v. Valencia* (2006) 146 Cal.App.4th 92, 104; see also *People v. Williams* (1996) 46 Cal.App.4th 1767, 1779 [letter from city attorney indicating that he had received reports that witness had given false testimony under oath and suborned perjury in another matter was inadmissible hearsay; conduct attributed to witness was not based on attorney's personal knowledge, but reflected what he had been told by others].) Indeed, if a trial court is permitted to infer personal knowledge from any ambiguous hearsay statement, then, had Rochelle told Greer (for example) "*Charles Lewis* didn't have to kill him," the defense would have been entitled to present that statement as third-party culpability evidence.

Moreover, as the proponent of the hearsay statement, it was the prosecutor's burden to demonstrate Rochelle's personal knowledge before eliciting her hearsay statement. (Evid. Code, § 403.[50]) He did not. Indeed, as shown, the evidence established that Rochelle did not witness the

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[50] Evidence Code, section 403 provides in relevant part: The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: . . . [t]he preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony[.]

shootings.

D. Admitting Rochelle Johnson's Alleged Hearsay Statement Violated Johnson's Constitutional Rights.

Putting before the jury a wholly unreliable piece of evidence denied Johnson his rights to due process, to jury trial, and to a reliable conviction – as guaranteed by the federal Constitution. (U.S. Const., 6th, 8th & 14th Amends.) Here, the jury was asked to consider as proof of Johnson's guilt a prior statement the declarant testified she never made, and which was testified to only by an unreliable multiple felon, whose account of the statement was undercut by all the other evidence, and who admitted inculpating the defendants in order to involve and anger the supposed declarant, with whom he was feuding. (22RT 2-1111-1112, 1132, 1143-1144, 1153, 1170.) No one corroborated that Greer and Rochelle even saw each other on the street after the shootings; Annette Johnson contradicted Greer's account. (20RT 2-743.) Finally, Greer was "positive" that he had reported Rochelle's statement to Officer Mrakich – a claim the officer flatly denied. (22RT 2-1158-1159; 23RT 2-1259.)

Indeed, even Greer's limited account of the shooting incident was inherently incredible. For example, he testified that he heard 10 or more shots in a bunch, all together, which is inconsistent with there being two separate shootings. (22RT 2-1136-1137, 1166; compare 21RT 2-854, 955 [Huggins testifying that two to three minutes passed between shootings and that Johnson had enough time to converse with Hightower before shooting him].) On the one hand, Greer said he ran toward the scene because he was nosy and wanted to see the shootings. (22RT 2-1114, 1138, 1142.) On the other, he claimed he was not interested enough to actually reach the scene. (22RT 2-1146-1147). Confronted with this contradiction, Greer could only

offer that hearing 10-plus gunshots nearby "was interesting, but it wasn't that interesting." (22RT 2-1147.) Greer's claim that he saw the defendants flee together was uncorroborated and reported only after he admitted lying about seeing the actual shootings; he never told Detective Vena he had seen them running away. (22RT 2-1143.) And, of course, no witness corroborated Greer's claim that he was there at any point. Huggins, the prosecution's star witness, explicitly denied seeing Greer anywhere in the area. (22RT 2-997.) Similarly, Greer did not see Huggins. (22RT 2-1167.) In sum, Greer's account was wholly unreliable.

Further, assuming that the statement was made, its meaning is unclear. By Greer's own account, when he saw Rochelle, he repeatedly asked what had happened, but Rochelle's only response was her ambiguous statements, "They didn't have to kill him," and "CJ didn't have to kill him." (22RT 2-1116, 1148.) According to Greer, she told him nothing else beyond those two sentences; she was too "shook up" to explain anything. (22RT 2-1117.) And back at her apartment, Rochelle did not repeat the statement that Greer alleged she made to him outside. (22RT 2-1160.)

Moreover, according to the prosecutor's theory of the case and all the evidence, only one person shot at Hightower. (24RT 2-1468.) Thus, if in Rochelle's purported statement, "They didn't have to kill him," "him" referred to Hightower, then Rochelle's statement made no sense because *they* did not shoot Hightower. Furthermore, Rochelle's other alleged statement, that CJ did not have to "kill" him, also made no sense because Hightower was alive when he left the scene, as Rochelle knew because she had just given him CPR before others transported Hightower to a hospital. (20RT 2-688-691.)

In sum, no evidence supported Greer's claim that he saw Rochelle

returning from the scene; no evidence supported his claim that the statement was ever made; and no evidence supported an inference that – if made – the ambiguous statement was anything more than "rank hearsay." (*People v. Valencia, supra,* 146 Cal.App.4th at p. 104.)

Nonetheless, the prosecutor made the demonstrably unreliable evidence a centerpiece of his argument. (24RT 2-1566.) Johnson had a constitutional right to a trial free from such wholly unreliable evidence. Its admission rendered the trial much more than imperfect; it rendered the trial unfair. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.)

E. Johnson Was Prejudiced.

Reversal is required because Johnson's constitutional rights were violated and the state cannot prove the errors harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) But even applying the state-law standard, Johnson was prejudiced because there is a reasonable probability that in this weak case, had the prosecutor *not* been permitted to transform Rochelle Johnson into a much-needed incriminating third eyewitness, Johnson would have obtained a more favorable result. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Each key prosecution witness in this case had dramatically changed his story over time, and a guilty verdict turned on whether the prosecution could convince the jury to cherry-pick those statements that inculpated Johnson and reject those that did not. For this reason, at every turn and *without any evidence* to support his theory, the prosecutor pandered to the jurors' hoped-for fear of "the Projects" and explained away *his* failure to provide direct evidence that Johnson had shot the victims as a function of witness fear. (24RT 2-1443-1444 [in arguing that Rochelle Johnson lied, the prosecutor stated, "I absolutely have no problem with someone coming

to this stand and telling you statements that are inconsistent with what they had said before because *they may be concerned about what possibly may happen to them after they testify*" (italics added)], 1453 ["[Newton] did not want to say that his statement was true on the tape because he also frequents Jordan Downs and he's also known [Johnson and Betton]"], 1562-1563 ["Who did [Johnson] think was going to tell on him? And after all, folks, it's undisputed that there were a number of people out there at the time of the shooting. And where are they? Not a soul came forward right away to say that they saw who actually did the shooting. Now, we don't live in Jordan Downs. And I'm sure Mr. Hightower and Mr. Faggins and all the witnesses that testified have seen *the shadier side of Jordan Downs. But perhaps that was the reason why others did not show up.* And perhaps that was the reason why Mr. Johnson and Mr. Betton felt completely okay with doing something like that in front of a number of people." (Italics added.)].)

The Deputy District Attorney's use of Rochelle Johnson epitomized this approach. As to Cedric Johnson, the two main factual disputes at trial were (1) identity and (2) whether the murders were premeditated. Rochelle's testimony, consistent with all her many prior recorded statements, did nothing to advance the prosecution case on either of these issues. She categorically and consistently denied seeing the shootings. Into her mouth Greer put the key words, "CJ didn't have to kill him." This statement permitted the prosecutor to transform Rochelle Johnson into an eyewitness and then argue that she knew more than anyone else – but was apparently so afraid of being harmed that she repeatedly perjured herself. Indeed, the prosecutor even improperly vouched for the statement, arguing that Greer's claim that Rochelle had told him that Johnson should not have killed him "was the truth . . . ." (24RT 1566; *People v. Turner* (2004) 34

Cal.4th 406, 432 [misconduct for prosecutor to vouch for credibility of witness].)

Even more importantly, the statement and the prosecutor's subsequent argument bolstered the prosecution theory that its failure to produce eyewitnesses was itself evidence of Johnson's guilt. Thus, according to the prosecutor's unsubstantiated argument, Rochelle failed to incriminate Johnson, not because she did not see the shootings, but because she was afraid of him. In other words, on the question of who killed the victims, Rochelle's own testimony was entirely neutral, yet the prosecutor urged the jury to interpret that testimony as proof of Johnson's guilt. In sum, under any standard, Johnson was prejudiced and his convictions should be reversed.

F. Conclusion

Desperate for eyewitnesses, through Rochelle's alleged hearsay statement, the prosecutor posited that – notwithstanding all the evidence to the contrary – Rochelle had seen Johnson shoot the victims. He did so by playing fast and loose with the rules of evidence, but the payoff was substantial. Not only did he gain a much-needed eyewitness, but he further drove home his theme that any absence of incriminating evidence was due to witnesses' – including Rochelle's – fearing Johnson. But no hearsay exception applied, and the court should not have admitted Greer's wholly unreliable account of Rochelle's alleged statement. The prejudice was extreme, and Johnson's convictions should accordingly be reversed.

9.

THE COURT ERRED WHEN IT EXCLUDED POLICE CORROBORATION OF NEWTON'S TESTIMONY THAT HE INCULPATED JOHNSON TO OBTAIN A PROSECUTORIAL FAVOR IN HIS OWN CRIMINAL CASE.

A. Introduction

If believed, Tyrone Newton's taped statement provided powerful evidence that defendant Cedric Johnson had planned and committed the murders of Gregory Hightower and Lawrence Faggins. At trial, Newton himself disavowed the statement, testifying that he lied in order to gain a favor on his own drug case for which he had been taken into custody. To bolster its theory that Newton was truthful during his police interview and untruthful at trial, the prosecutor called his interviewer, Sgt. Waters, to testify that she promised him no benefits in exchange for his incriminating the defendants.

The defense then sought to elicit from Waters the more salient point that – whether or not Newton ultimately received a benefit – Newton asked for and expected a favor in return for his statement. Specifically, as Newton had earlier testified, during the interview he told Waters that in the past he had obtained significant benefits for information he gave to a Detective Barber. When the defense tried to cross-examine Waters about this reference, Judge Cheroske excluded the testimony both as improper character evidence and under Evidence Code section 352. Because the brief proffered testimony would have corroborated Newton's explanation of his then-existing motive to falsely inculpate Johnson, Judge Cheroske abused his discretion in excluding it. Moreover, by curtailing the cross-examination of Sgt. Waters, the ruling left the jury with only the

prosecutor's theory that Newton should be believed because he gained nothing from accusing Johnson, while the defense was prevented from eliciting the more relevant fact that Newton sought and expected a benefit in return. Thus, Johnson was denied his constitutional right to confrontation and his right to present a defense. (U.S. Const., 6th and 14th Amends.) Without the error, Waters would have corroborated Newton's claim that he had a contemporaneous motive to lie to the police about Johnson. Because nothing else corroborated this critical, all-encompassing aspect of Newton's trial testimony, the error prejudiced Johnson and his convictions must be reversed.

B. Proceedings Below

The prosecution theory – particularly its theory of premeditation – rested in large part on Newton's videotaped interview, in which he described Johnson and Terry Betton planning and then committing the murders. The prosecutor's goal was to convince the jury that that statement was true and Newton's trial testimony was false. In contrast, the defense theory was that Newton lied to get himself out of jail on his cocaine possession case and then admitted he had lied once he was under oath and faced with the defendants he had falsely accused – an eventuality he had sought to avoid by telling Waters that he could not testify because he was afraid of Johnson. Critical to this defense was explaining to the jury why Newton would have lied to the police and falsely incriminated an acquaintance.

The prosecution called Newton to authenticate his taped statement and to lay a foundation so that the videotape and accompanying transcript could be admitted as his prior inconsistent statement. (20RT 2-776-783; 21RT 2-792-793.) The prosecutor elicited that, at the time he testified,

Newton was serving a 16-month sentence for marijuana possession, but that he had no deal with the prosecutor as to that sentence. (20RT 2-779.) The prosecutor then played portions of the tape and provided transcripts to the jury. (21RT 2-791-792.) Still on direct, Newton testified that he had lied on the tape about the shooting and about the pre-shooting conversation, but did not explain why he lied to Sgt. Waters. (21RT 2-793.)

On cross-examination, both defense counsel attempted to explain to the jury that Newton's videotaped statement, in which he claimed Johnson and Betton had planned and carried out the murders of both victims, was the product of repeated police pressure to provide the story they wanted to hear. Newton testified that he was not at Jordan Downs on the day of the shootings; he was with his family in Hawthorne. (21RT 2-799-800.) The next day he learned that Hightower and Faggins had been shot. (21RT 2-795, 799-800.)

On October 11, 1996, Newton was arrested for cocaine possession in Jordan Downs. (21RT 2-794, 2-801.) When first questioned by the arresting officer, Newton denied knowing anything about the shootings; only when the officer assured him that his case would be dropped if he provided information about the shooting did Newton make up his story about Johnson. (21RT 2-801.) The officer "said some words" and Newton "followed along with it." (21RT 2-800.) Then, at the station, before he was officially interviewed by Waters, several other officers gave Newton the date and details of the shooting. (21RT 2-805.) Believing that doing so would benefit him in his case, Newton repeated the officers' account on videotape to Sgt. Waters. (21RT 2-807.) Indeed, although he was arrested immediately after Waters interviewed him, Newton was released shortly after that arrest. (21RT 2-807; 23RT 2-1266.) He was never prosecuted for

the cocaine possession. (21RT 2-807.)

To support the theory that Newton was willing to lie to obtain leniency in his own case, the defense elicited from him that he told Waters that in the past he had exchanged information for favors on his own cases. (21RT 2-807.) He was released each time he provided information. (21RT 2-807.) At trial, Newton did not remember the name of the detective he most often worked with. (21RT 2-807.)

The prosecution then called Sergeant Waters, who had investigated the homicide; she explained that she took Newton's taped statement but did not have any other contact with him. (22RT 2-1094-1096.) The prosecutor elicited that Waters did not promise Newton anything in exchange for his statements. (22RT 2-1096.) Thus, since the tape had already been authenticated and played during Newton's testimony, Waters's direct testimony served only to support the prosecution theory that her interview was entirely neutral and Newton's statements were not the product of any police promises.

On cross, Betton's counsel attempted to counter this theory in two ways. First, he elicited that, as Newton had testified, other police officers had spoken to Newton before Waters even arrived at the station to interview him. (22RT 2-1097-1098.) Thus, Newton was primed before Waters ever spoke to him and the fact that she never coached him herself was insignificant. Further, counsel sought to demonstrate to the jurors why Newton would have believed that incriminating Johnson and Betton would lead to his own case being dropped. Waters confirmed that Newton had told her that he had been an informant for a Detective Barber. (22RT 2-1098.) Counsel then tried to corroborate Newton's earlier testimony that he had told Waters he had successfully exchanged information for leniency in

the past with that detective. But the prosecution objected on relevance and section 352 grounds. (22RT 2-1098.)

At a side bar on the issue, defense counsel took the position that Waters should be permitted to testify that Newton told Waters that he gave Barber information whenever he wanted to, and that in return Barber would help him. Specifically, one time Newton got caught with a lot of drugs, and Barber helped him. The statement went to Newton's credibility because it showed that Newton was hoping to get a deal on the case for which he was in custody. That hope caused Newton to lie to police. (22RT 2-1099.)

Judge Cheroske excluded the statement, first positing that it was inadmissible character evidence and then that it would confuse the jury to refer to a statement not contained in the jurors' copies of the tape and transcript. (22RT 2-1099-1100.) He permitted Waters to corroborate only Newton's generic statement to Waters, "But y'all know the more y'all get me off y'all line, the happier I will be[.]" (22RT 2-1100, 2-1107.) Judge Cheroske excluded Newton's statement to Waters that in the past he had repeatedly exchanged information for favors. Both defense counsel objected to the exclusion on state and federal due process grounds. (22RT 2-1101.)

Whether Newton's trial testimony or his videotaped statement should be believed was central to both sides' arguments. But without the excluded evidence, Johnson's counsel was limited to arguing generally that Newton's taped statement should not be believed because he was in custody for drug possession and "was ready to say anything to try to get out of that case. . . . [H]e was not prosecuted on the case. So his plan worked." (24RT 2-1485.) Though Betton's counsel argued Newton was "savvy" (24RT 2-1541), he could not invoke Waters's testimony to argue that, at the time he made the

taped statement, Newton and Waters were both aware that he very reasonably expected a favor in return.

In his rebuttal, the prosecutor argued that Newton's taped statement should be believed in part because he received no benefit on his cocaine case: "Newton – I'll grant you, he probably was expecting something, but you heard Mr. Newton tell you on the stand – you heard him tell you that he was arrested that night. Now, if he was expecting something, it didn't come." (24RT 2-1559.)[51]

C. Sergeant Waters's Testimony Should Have Been Admitted to Show that, at the Time He Incriminated Johnson, Newton Fully and Reasonably Expected a Favor in Return.

1. The excluded evidence was relevant.

Evidence that goes to a witness's credibility is relevant, and the presence or absence of a motive to lie affects a witness's credibility. (Evid. Code, §§ 210, 780, subd. (f).) Thus, a witness's bias is always relevant.

Had Newton *testified* that the defendants had planned and committed the shootings, Johnson would have been entitled to expose any favors Newton had received or expected in return for his testimony. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) But Newton did not incriminate Johnson during his testimony. Instead, the prosecution offered Newton's out-of-court statement as substantive and central evidence of Johnson's guilt. (See Evid. Code, § 1235.) Johnson was therefore entitled to try to discredit that earlier statement by exposing Newton's motive to lie at the time he made it.

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[51] In fact, Newton had testified that he was released shortly after his arrest and that he was never prosecuted –undisputed facts that suggest his expectation of leniency was met.

The prosecutor called Waters to demonstrate that Newton was promised and received no favors in return for his statement inculpating Johnson. In other words, because he had no motive to falsely incriminate Johnson, Newton's taped statement should be believed. The prosecution thus put the context of the interview and its impact on Newton's state of mind squarely at issue. The defense was therefore entitled to cross-examine Waters on that same conversation and context to prove that Newton's state of mind was not what the prosecution had suggested – that at the time he inculpated the defendants he had a motive to lie. (*Davis v. Alaska* (1974) 415 U.S. 308, 316 [witness's partiality is always relevant as discrediting him].) Whether true or not, Newton's claim that he had previously received significant benefits in return for information reflected that he wanted a benefit again this time. And Waters's apparent silence when Newton signaled that he expected a favor suggested that those expectations were reasonable and would be acted on. Had the jury known about it, Waters's silence would also have undermined her testimony that she promised him nothing, since it suggests that she acquiesced to Newton's expectation of ultimately receiving some benefit.

Newton himself testified that he expected leniency in exchange for his inculpatory account, based on his successful history with another detective in past cases where he received favors each time he inculpated someone in a criminal case. The key was the jury's understanding that – at the time he made the statement to police – he had every reason to believe that incriminating the person the police had already decided had committed the crime would garner him a favor in his own case. In fact, he told Sgt. Waters – with whom he apparently had no history – that he and another detective had a history of quid-pro-quo favors. Notifying Waters of this

history signaled to her that he expected leniency in his pending cocaine case in return for going along with the story provided by other officers. Even if ultimately he did not receive a benefit, that would have been beside the point. (See *People v Allen* (1978) 77 Cal App 3d 924, 932 [error to prevent defendant from cross-examining witness on his expectation of leniency, whether or not expectation was reasonable].)

2. The evidence was not character evidence.

Judge Cheroske initially suggested that the testimony was inadmissible character evidence. (22RT 2-1099.) Although he did not elaborate, Judge Cheroske presumably meant that the defense should not be permitted to elicit Newton's past instances of exchanging information for prosecutorial favors in order to demonstrate that on this occasion he was exchanging information for favors. (See Evid. Code, § 1101, subd. (a).) But, as Betton's counsel explained, he instead sought to demonstrate Newton's incentive to lie and give context and meaning to the comment "y'all know the more y'all get me off y'all line, the happier I will be." (22RT 2-1099-1100.) He did not seek to prove some character trait of Newton's through specific instances and then ask the jury to infer that Newton acted in accordance therewith. Rather, whether they had occurred or not, Newton's referencing his quid pro quo exchanges with Detective Barber signaled that Newton wanted a deal in exchange for incriminating the defendants. The admissible evidence went to Newton's then-existing incentive to lie, not to his character. (Evid. Code, §§ 1101, subd. (b) [wrongful act admissible to prove motive]; 1101, subd. (c) ["Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness"]; *In re Freeman* (2006) 38 Cal.4th 630, 640, fn. 5.)

3. Excluding the testimony under Evidence Code section 352 was an abuse of discretion.

As explained above, the evidence was probative. It demonstrated that at the time he was interviewed, Newton had an incentive to falsely incriminate Johnson and Betton – whom he knew the police had already identified as suspects. Waters was the only person who could corroborate Newton's in-custody statements about Detective Barber; they were not on the redacted videotape or transcript. And the prosecutor had asked the jury to disbelieve Newton's in-court testimony; Waters, a prosecution witness, would have corroborated the statement, and the jury would have been free to infer from it that Newton had lied to police to get a deal – even if the jury rejected Newton's own testimony.

The excluded evidence demonstrated not only that Newton made the statement, but also that Waters heard and understood it. There was no evidence presented that the police affirmatively told Newton that he would receive no benefit from implicating Johnson. Thus, it was also probative that, when Newton signaled his expectation of leniency, Waters heard, understood, and did not correct that expectation. Had Waters communicated to Newton during the interview that he should not expect any favors – his experiences with Detective Barber notwithstanding – the excluded evidence would have meant much less. But Waters apparently did nothing to check Newton's expectations, thus conveying to him (and ultimately the jury) that they were reasonable and might well be rewarded.

Neither the court nor the prosecutor suggested that the evidence was unduly prejudicial to the state's case, and it was not. It put Newton's taped statement in context; it revealed, through the prosecution's own witness, that he had a motive to lie to police.

Nor would Waters's brief testimony that Newton told her he had successfully exchanged information for favors with Barber in the past have consumed much time. The only concern, then, is whether it would have unduly confused the jury. Judge Cheroske claimed that eliciting testimony that Newton had made a statement not contained in the jurors' redacted videotape and transcript would confuse them. (22RT 2-1100.) Under the circumstances, this concern was unfounded.

Two separate segments of Newton's videotaped statement were played for the jury, one by the prosecution, one by the defense. (21RT 2-792, 23RT 2-1263.) Correspondingly, the jury was provided with two separate, redacted transcripts of Newton's videotape; one included those portions offered by the prosecution, the other those portions offered by the defense. (2SCT II 322-338 [People's Exhibit 5], 342-348 [Defense Exhibit F].) Even within the admitted portions of the tape and transcript, the jury could hear and see that questions and answers were omitted. For example, on page 19 of the transcript introduced by the prosecution, 22 of 28 lines are blacked out. (2SCT II 328.) Thus, the jury was well aware that it was not receiving the entire taped statement. Referring to a few sentences not contained in the tape or transcript would not have confused anybody.

Further, Newton had already testified that he had told Waters about his history with another detective. That testimony was not reflected in the tape or transcript. Thus, the defense sought only to corroborate Newton's reference to his statements about Barber through Waters rather than through the videotape.

Moreover, police often testify to an interviewee's statement not contained on an admitted tape. Jurors can understand that not every statement by an interview is audibly memorialized on tape. Under those

circumstances, to flesh out the statement and explain the context, witnesses may testify to the unrecorded portion of the statement. Indeed, Waters had already done so when she testified that she never promised Newton anything. In sum, the jury would not have been confused by Waters's testifying that at some point, not contained in the redacted tape and transcript, Newton told her he had exchanged information for favors with Detective Barber.

D. This Court Should Not Adopt a Rule that Rewards Law Enforcement for Keeping Quid-Pro-Quo Agreements with Snitches Implicit Rather than Explicit.

Working with in-custody snitches may be a necessary and effective method of police investigation. And in some cases, a snitch who has accused a suspect solely to benefit himself may end up testifying at trial. But when he does so, the jury is entitled to know and understand his motives. A snitch is not like other witnesses; he has an incentive to lie nonexistent for most witnesses: implicating the suspect may keep him out of prison. Trial courts should not curtail cross-examination that seeks to flush out these motives.

Had Newton and Waters made an explicit arrangement to exchange information for leniency, that arrangement would have been admissible on the theory that it demonstrated Newton's motive to incriminate Johnson. Any implicit arrangement is just as relevant; whether or not it materialized, Newton expected a benefit and therefore had reason to lie. Indeed, this Court's finding that the defense was not entitled to elicit this key evidence would encourage police and prosecutors to keep any quid pro quo arrangements with snitches implicit and unspoken. Rather than following transparent procedures when seeking information from a snitch, law enforcement would have an incentive to conduct business with snitches

with a wink and a nod. The in-custody snitch would inculpate the desired suspect and, in return, might escape prosecution entirely. But, so long as the transaction was conducted under the table, the jury would not learn about it. While perhaps leading to more convictions, this approach would not contribute to fairer trials.

E. Johnson Was Denied His Rights to Cross-Examine the Witnesses Against Him and to Present a Defense.

Improperly preventing a defendant from exposing a prosecution witness's motive to lie violates his confrontation rights. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 15.) A defendant is entitled to cross-examine a witness on his motives to falsely accuse the defendant, and to present extrinsic evidence of the same. (*Olden v. Kentucky* (1988) 488 U.S. 277, 230 [trial court's refusal to permit cross-examination of the victim regarding her motive to lie, and its exclusion of evidence proffered by the defendant on the same issue, violated the Sixth Amendment right of confrontation]; *Davis v. Alaska*, *supra*, 415 U.S. at pp. 316-317.) Thus, the defense was constitutionally entitled to impeach Newton's videotaped statement. Further, the defense was entitled to impeach Waters's credibility when she cast the interview as neutral and free of any promises.

Specifically, a defendant's constitutional rights to confrontation and cross-examination include the right to fully expose a witness's motive to lie in order to benefit from an explicit or implicit agreement with the state. For example, in *United States v. Schonenberg* (9th Cir. 2004) 396 F.3d 1036, the lead prosecution witness was a co-conspirator who, although already sentenced, had a plea agreement that permitted the prosecutor to seek a sentence reduction after the defendant's trial based on the witness's testifying "truthfully." (*Id.* at p. 1040.) The trial court permitted defense

counsel to enter the plea agreement into evidence and to elicit that the witness had an incentive to please the government to obtain his sentence reduction, but the court prevented him from eliciting that the prosecutor alone determined whether his testimony had been truthful. (*Id.* at pp. 1040-1041.) The Ninth Circuit held that so limiting cross-examination was reversible constitutional error. (*Id.* at p. 1044.)

While the *Schoneberg* facts are not those here, the case demonstrates that a defendant has a right to fully explore a prosecution witness's motive to lie. Moreover, while recognizing a trial court's authority to limit cross-examination, such limitation "cannot preclude a defendant from asking not only whether the witness is biased, but also to make a record from which to argue why the witness might have been biased." (*United States v. Schonenberg*, *supra*, 396 F.3d at p. 1042.) Thus, although Johnson bore no constitutional right to limitless exploration of Newton's motive(s) to lie, he did have the right to put before the jury reliable evidence that at the time Newton incriminated Johnson, he expected a significant favor.

As explained above, Waters's testimony that Newton referred to Barber in an attempt to obtain a favor from her was proper cross-examination not only to demonstrate Newton's expectation of a favor, but also to demonstrate that Waters herself did not – as suggested by her direct examination – rule out the possibility that Newton's incriminating the defendants would earn him a favor. Betton's counsel explained that Newton referenced his track record with Barber in an effort to get himself a deal; as noted above, Waters did nothing to alter this expectation. Thus, had the proposed cross-examination been permitted, the jury could have inferred that at the time of the taped statement, both Newton and Waters expected that the information would earn Newton leniency. This would

have undercut the prosecutor's suggestion that because Newton never received the favor, he would not have changed his story to earn one. Thus, limiting cross-examination of Waters left the jury with the misleading impression that Newton had no motive to lie when he made his statement.

The ruling further infringed on Johnson's right to present a defense. Under the Sixth Amendment a defendant is entitled not only to cross-examine a witness on her motive to lie, but also to present extrinsic evidence of such motive. (See *Justice v. Hoke* (2nd Cir. 1996) 90 F.3d 43, 50 [where excluded testimony about sole prosecution witness's motivation to fabricate allegations against defendant could have raised a reasonable doubt about the truth of those allegations, exclusion violated right to present a defense].)

F. Johnson Was Prejudiced.

The constitutionally improper denial of a defendant's opportunity to impeach a witness for bias is subject to *Chapman* analysis. (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 684.) The question is whether, assuming the damaging potential of the impeachment were fully realized, this Court can nonetheless say that the error was harmless beyond a reasonable doubt. (*Ibid.*) The Court should look to the following factors. First, the importance of Newton's testimony to the prosecution case. (*Ibid.*) As explained elsewhere, Newton was not only one of merely two testifying alleged eyewitnesses, but his unsworn out-of-court statement comprised the only suggestion of motive and almost the entire evidence of premeditation. In short, without Newton's videotaped statement, the prosecution had no capital case. Second, whether the testimony was cumulative. (*Ibid.*) While Newton himself had testified to his reference to his successful snitching track record, had Detective Waters corroborated him, the statement would

have been an undisputed fact from which a reasonable juror would infer that Newton was looking for a favor. Thus, even if the jury did not believe Newton's trial testimony, had it heard the excluded evidence, it might well have doubted that the taped statement was truthful. Third, whether evidence corroborated or contradicted the testimony of the witness on material points. (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 684.) Newton's account of the pre-shooting conversation was entirely uncorroborated. And Newton's account of the shooting itself was inaccurate as to where and how it happened. Fourth, the extent of cross-examination otherwise permitted. Here, Newton himself disavowed the contested statement and, on cross-examination, he himself claimed he had lied for a favor. But evidence of a contemporaneous statement reflecting his state of mind would have been much more powerful impeachment, because it was made at the time the prosecution posited that he was telling the truth. Fifth and finally, the overall strength of the prosecution case. (*Ibid.*) Here, the state's case relied on three witnesses, each of whom had some incentive to incriminate Johnson and all of whom had provided prior wildly inconsistent statements. And the prosecution's case was not strong enough to convince the first jury. Thus, the state cannot prove that the improper exclusion was harmless beyond a reasonable doubt.

G. Conclusion

In determining whether Johnson had committed premeditated murder, the jury had to decide whether to reject Newton's taped statement, his trial testimony, or both. Even if the jury rejected his testimony, knowing definitively that Newton expected leniency in return for incriminating Johnson would have raised a reasonable doubt that Newton's taped allegations were true. Like the failure to give CALJIC No. 2.71.7 (see

Argument 10), excluding police corroboration that, the one time Newton incriminated Johnson, he did so because he reasonably expected a favor in his own criminal case, prevented Johnson from presenting key impeachment evidence and prevented the jury from accurately assessing Newton's credibility. Johnson's convictions should therefore be reversed.

10.

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT SHOULD VIEW WITH CAUTION NEWTON'S REPUDIATED OUT-OF-COURT ACCOUNT OF JOHNSON'S PRE-OFFENSE STATEMENTS.

A. Introduction

Nothing is easier to lie about than another's alleged oral statement. And often no evidence of motive, premeditation, and intent is more powerful than that same statement. Recognizing these two facts, the law requires a jury to examine skeptically evidence of a defendant's oral statement before accepting it as proof of guilt. Here, while in custody and hoping for a favor, Tyrone Newton told the police that shortly before the shootings, defendant Cedric Johnson singled out the victims from the dozens of other partygoers and told Newton that he planned to kill those two men because they might sometime in the future become snitches. At trial, Newton repudiated this statement and explained that he had lied to police to gain a favor on his own case. Nonetheless, the prosecution rested its theory of motive, premeditation, and intent on this one uncorroborated, disavowed statement. By failing to direct the jury to view this critical statement with caution, the trial court erred. And because the error lowered the prosecution's burden of proof and reduced the death verdict's reliability, admission of this evidence without an appropriate instruction violated the federal Constitution. (U.S. Const., 6th, 8th, & 14th Amends.)

B. Newton's Account of Johnson's Oral Admissions

Two weeks after the shootings, Tyrone Newton was arrested for cocaine possession. (21RT 2-794.) After being primed by as many as four officers, and looking for a favor, Newton provided a videotaped statement

that inculpated Johnson and Terry Betton. (20RT 2-783; 21RT 2-793, 800, 805, 807.)

As reflected in People's Exhibit 5, Newton told his interviewer, Sgt. Waters, the following. Johnson "was talking about killing him." (2SCT II 323.) Johnson said "we gettin' rid of all the snitches. . . . [I]t ain't the point that he did something to you, it's the point that he will 'cause he a snitch." (2SCT II 324.) At the time, Newton, Johnson, Betton, and "Mongoloid" were in an apartment with a view of the ongoing party. (2SCT II 325-326.) Looking out the window, Johnson noted that Hightower and Faggins were outside and commented, "we can do them right here and right now." (2SCT II 326.) Johnson asked Newton to kill Hightower, but Newton refused because Hightower had done nothing to him. (2SCT II 326-327.) Johnson assured Newton, "It ain't the fact that [Hightower] did something to you, we're getting rid of all the snitches." (2SCT II 327.) Newton did not explain how or why Johnson had identified Hightower as a snitch.

At trial, Newton testified that the videotaped account was a lie; the above statements were never made. (20RT 2-779-780.) He explained that he falsely claimed Johnson made the statements and shot the victims because the arresting officer had assured him that the drug charges would be dropped if he gave information about the shooting. (21RT 2-801.) In fact, Newton had been in Hawthorne the night of the shooting, but he had family in Jordan Downs and had heard talk of the shooting. (21RT 2-799-800.)

C. Failing to Instruct the Jury to View Johnson's Supposed Oral Statements with Caution Was Error.

A trial court has a sua sponte duty to instruct the jury to view a defendant's oral statements with caution. (*People v. Wilson* (2008) 43

Cal.4th 1, 19.) At the time of Johnson's trial, CALJIC No. 2.71.7 provided as follows:

> Evidence has been received from which you may find that an oral statement of intent, plan, and motive was made by the defendant before the offense with which he is charged was committed. [¶] It is for you to decide whether the statement was made by the defendant. [¶] Evidence of an oral statement ought to be viewed with caution.

(CALJIC No. 2.71.7 (1996 ed.).)

The purpose of CALJIC No. 2.71.7 is to assist the jury in determining whether the putative statement was made. (*People v. Beagle* (1972) 6 Cal.3d 441, 456.) Unlike other types of evidence, a defendant's oral statements require this cautionary instruction because they are so easily fabricated. "[N]o class of evidence is more subject to error or abuse. . . . No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself." (*People v. Ford* (1964) 60 Cal.2d 772, 800 [citations and quotations omitted].) Failing to provide CALJIC No. 2.71.7 (or similar) was error.

Moreover, in this case, where motive and planning could not be proved without the statement, the error violated the federal constitution. (U.S. Const., 6th, 8th, & 14th Amends.; see also Cal. Const., art. I, §§ 15, 16, & 17.) Johnson acknowledges that this Court has not yet found failure to give sua sponte instructions on how to view evidence to be constitutional error. (See, e.g., *People v. Dickey* (2005) 35 Cal.4th 884, 905.) He nevertheless argues that under these unique circumstances the error went to such a key issue that his due process rights to a fair jury trial were denied.

By requiring the instruction sua sponte, the law recognizes that the instruction is a critical legal principle necessary to the correct jury determination of the facts. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Failing to caution the jury that the key and sole statement of motive, planning and intent should be viewed with caution therefore reduced the state's burden of proof as to the elements of intent and premeditation and denied Johnson his right to a jury trial. (U.S. Const., 6th & 14th Amends.) Further, the Eighth Amendment requires reliability not only in the ultimate determination whether a defendant convicted of murder should live or die, but also in the determination of whether he is guilty or not guilty in the first instance. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.) And there is widespread judicial recognition that the unrestrained consideration by the factfinder of an accused's putative admissions is often dangerous and unreliable. (*People v. Bemis* (1949) 33 Cal.2d 395, 398-399.) The cautionary admonition ensures that the jury gives the proper weight to the putative admission. Failing to give the admonition here diminished the reliability of the verdict in this capital case and therefore violated the Eighth Amendment.

D. Because There Was Conflicting Evidence as to Whether the Statements Were Made, and Because the Putative Statements Were the Primary Evidence of Motive, Planning and Intent, the Error Prejudiced Johnson.

In contrast to cases where this Court found that omitting CALJIC No. 2.71.7 was harmless, the statement at issue here was not attested to at trial. Indeed, Newton expressly denied that Johnson had made the statement. Under these circumstances, the jury sorely needed guidance on how to view Johnson's alleged statement – a statement on which the prosecution's theory of first degree murder depended. (See *People v. Ford*,

supra, 60 Cal.2d at p. 800.) No other instruction directed the jurors to view the statement with caution; instead they were encouraged to consider and accept the statement just as they would any other evidence. The error thus prejudiced Johnson by bolstering the only evidence of motive and planning and by steering the jury away from a finding of second degree murder and toward a finding of premeditation.

Because a defendant's oral statement that proves an element of the crime is particularly persuasive, yet easily misreported, it demands a higher level of scrutiny than does other evidence. "[I]t is precisely because the confession, if a fact, is so weighty and produces such a close approach to complete persuasion, that we are inclined to hesitate and demand the most satisfactory testimony before we accept that as a fact which, if believed, will practically render other evidence superfluous." (3 Wigmore, Evidence (Chadbourn ed. 1970) § 820b, p. 304.) Here, the failure to require that scrutiny went to the precise portion of Newton's statement that was least credible yet most important to the state's case. Johnson was therefore prejudiced.

As argued above, because the error violated Johnson's federal constitutional rights, the *Chapman* standard of prejudice applies. (*Chapman v. California* (1967) 386 U.S. 18, 24.) But even as state-law error, Johnson was prejudiced because there is a reasonable probability that with the proper guidance the jury would have reached a different conclusion about Johnson's guilt, the degree of the crime committed, and/or whether he should be sentenced to death. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

1. There was a sharp conflict in the evidence as to whether the statement was made, with the bulk of evidence suggesting that it was not made.

The purpose of CALJIC No. 2.71.7 is to guide the jury in determining whether the statement at issue was in fact made, and courts have therefore looked to the following factors in evaluating prejudice: (1) whether there is conflicting evidence about whether the admission was actually made (*People v. Ford*, *supra*, 60 Cal.2d at p. 800); (2) whether the statement was reported by a witness who may be biased (*Ford*, at p. 800; *People v. Lopez* (1975) 47 Cal.App.3d 8, 14); and (3) whether the alleged statement was corroborated by other witnesses (*People v. Henry* (1972) 22 Cal.App.3d 951, 958). Each factor weighs in favor of finding prejudice here.

To begin with, the only evidence the statement was made was the uncorroborated hearsay account of a single witness who then repudiated his account at trial. To Johnson's knowledge, no court has ever held harmless the failure to give the cautionary instruction on similar facts.

Further, at the time he inculpated Johnson, Newton was biased. He testified that he was looking for a favor in his own criminal case. (21RT 2-801.) He spoke to up to four officers before Waters interviewed him, one of whom explicitly offered him leniency in exchange for providing the account he offered on tape. (21RT 2-801, 805.) Moreover, one can infer that as a long-time informant, Newton was well aware not only that he would benefit from inculpating Johnson as the shooter, but also that a defendant's statements of intent are particularly valuable to law enforcement. Newton's compelling motive to lie supports a finding of prejudice. (Compare *People v. Beagle, supra*, 6 Cal.3d at p. 456 [no prejudice where statement was reported by defendant's friend] with *People v. Lopez, supra*, 47 Cal.App.3d at p. 14 [prejudice found where pre-offense statements were attested to by witnesses who were not disinterested].)

Viewed objectively, Newton's taped account smacks of advocacy. At the time he was interviewed, he knew Faggins and Hightower had been killed (21RT 2-795), so he set out to provide his custodians with a story that accounted for that result. Thus, he claimed Faggins and Hightower left the party together.[52] (2SCT II 328.) He claimed that Johnson named them and only them in advance as victims. (2SCT II 326.) He offered a motive for what was otherwise an inexplicable selection of victims – Johnson and Hightower were very good friends. (2SCT II 327; 20RT 2-718.) Significantly, even Leonard Greer – a Jordan Downs familiar desperate to fire up the police investigation – had offered an entirely different motive. (22RT 2-1155.) In short, a correctly instructed juror would reasonably conclude that Newton had made up his dubious story about motive and plan out of whole cloth.

Finally, Newton's report of Johnson's statement was entirely uncorroborated. According to Newton's statement, someone named Mongoloid was present when Johnson stated his intent. (2SCT II 326.) But Mongoloid neither testified nor otherwise corroborated Newton's claim. Detective Vena testified that he knew Mongoloid's real name but for some reason never interviewed him. (23RT 2-1225.) Had the jury been correctly instructed, it might well have questioned why Mongoloid did not corroborate this essential statement and then questioned whether the statement had in fact ever been made. (See *People v. Henry, supra*, 22 Cal.App.3d at p. 958.)

In sum, the unique factual posture here demanded that the relevant

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[52] Robert Huggins testified that he and Hightower left together. (21RT 2-822; 22RT 2-997.) He did not mention Faggins accompanying them. And Newton did not mention seeing Huggins.

instructions be accurate and complete. Instead, the jury was invited to make a finding of first degree murder and death-eligibility based entirely on a single disavowed hearsay statement. It is reasonably probable that, had it been appropriately cautioned as the law requires, the jury would not have found that the statement had been made. And without the statement the prosecution could not prove that either murder was premeditated and deliberate.

2. The statements were the cornerstone of the prosecution theory of premeditation.

"Where a defendant's admissions are vitally important evidence in the case, it is likewise vitally important that the jury be guided as to the manner in which it is to view and evaluate that evidence." (*People v. Deloney* (1953) 41 Cal.2d 832, 840; see also *People v. Ford, supra*, 60 Cal.2d at p. 800.) Vitally important the statement was. Without Johnson's "we're getting rid of all the snitches" comment, the prosecution could at most prove two second degree murders. It is not surprising, therefore, that the prosecutor leaned heavily on the statement in his opening, closing, and rebuttal. (20RT 2-653; 24RT 2-1453, 1463, 1471, 1473, 1559, 1562-1563, 1566-1567.) According to the prosecutor, the only other proof that Johnson premeditated the killings was the number of rapidly fired shots to each victim – meager proof indeed. (See, e.g., *People v. Rogers* (2006) 39 Cal.4th 826, 874, fn. 19 [six shots at close range support second degree murder finding]; *People v. Alcala* (1984) 36 Cal.3d 604, 626 [that a slaying involved multiple wounds cannot alone support a determination of premeditation; absent other evidence, a brutal manner of killing is as consistent with a sudden, random explosion of violence as with calculated murder].) It is thus reasonably probable that, if the jury did not believe the

statement, it would not have found that the prosecution had met its burden of proving beyond a reasonable doubt that the killings were the result of premeditation and deliberation, and that they therefore constituted first, rather than second, degree murder. (See *People v. Holt* (1944) 25 Cal.2d 59, 91.)

In *People v. Ford, supra*, 60 Cal.2d 772, the defendant was charged with the first degree murder of a police officer. Several witnesses testified to the defendant's pre-offense statements, including his repeated remark that the police had better not give him trouble or they would "lose." (*Id.* at pp. 799-800.) The statements constituted "a substantial part of the evidence offered to establish the prosecution's theory that the shooting of [the victim] was deliberate and premeditated because the defendant had formed an intent to kill any police officer who might interfere with his plans." (*Id.* at p. 800.) The trial court did not give the cautionary instruction omitted here and, accordingly, the Court reversed. (*Ibid.*)

Here, Newton's highly contested account provided the only direct evidence of planning and motive. There was no other evidence of Johnson's alleged desire to eliminate snitches. Indeed, Greer provided a wholly different motive – to avenge Betton's mistreatment in a prior drug deal. (22RT 2-1155.)

Nor did any other evidence support the prosecution theory of premeditation. This Court has identified three categories of evidence that support a premeditation and deliberation finding: (1) planning activity; (2) facts about the prior relationship between defendant and victim that provide a motive; and (3) the nature of the killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) Without the statements at issue here, there is no planning activity at all. And the undisputedly friendly relationship between

Johnson and Hightower cuts against a finding of motive and pre-existing reflection. Apart from the inherently suspect statement, there was simply no evidence that either victim had ever snitched or planned to snitch on Johnson or Betton.[53] Finally, nothing about the manner of killing – a quickly and poorly executed public shooting – was "so particular and exacting" that one can infer that Johnson "must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way[.]" (*Id.* at p. 27.)

Indeed, the bulk of the evidence suggested there was no pre-conceived plan at all. There was evidence that Faggins had a gun at the time and that Johnson shot Hightower only after the two exchanged words by Hightower's car. (21RT 2-955; 22RT 2-1087; 23RT 2-1198-1199.) Even the prosecutor could not help but admit to the jury that "that Mr. Hightower was shot in his car *quite unexpectedly*, blown away." (24RT 2-1456, italics added.) So much for any plan to kill Hightower because he was a snitch.

That the Hightower shooting was rash and unplanned is further demonstrated by the fact that – under the prosecution's theory – Betton's girlfriend, Rochelle Johnson, was either in or very near Hightower's car at the time. (22RT 2-1045-1048; 23RT 2-1200; 24RT 2-1566.) Indeed, according to the prosecution theory, the highly ill-conceived plan was for the two defendants to shoot two men separately in front of dozens of

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[53] Newton testified that he had never heard of either victim snitching on anybody. (21RT 2-801.) The prosecutor then elicited that Newton had told Sgt. Waters that Faggins had snitched on someone named Mo-C. (21RT 2-814.) Mo-C did not testify. There was no evidence that Mo-C was in any way connected to either defendant or that either defendant knew about Faggins allegedly having snitched on him.

witnesses who could identify them, and while one defendant's girlfriend was inches away from one of the victims.

Johnson's alleged oral statement was the least-corroborated and most easily fabricated aspect of Newton's account. Thus, under correct instructions, a reasonable juror might well have disbelieved that Johnson had said beforehand that he wanted to kill the snitches. And without the statement, the prosecutor could not prove beyond a reasonable doubt that Johnson exercised the "cold, calculated judgment" required for first degree murder. (40CT 11583 [CALJIC No. 8.20].)

3. No other instructions conveyed the concept of CALJIC No. 2.71.7.

The principal effect of CALJIC No. 2.71.7 is to emphasize, on a defendant's behalf, that his inculpatory extrajudicial statements, if any, should be viewed with caution. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1157-1158.) And the only other instruction that conveys this concept, CALJIC No. 2.71, instructing that a defendant's oral admissions should be viewed with caution, was not given here. (*People v. Lang* (1989) 49 Cal.3d 991, 1021 [no prejudice in failing to give CALJIC No. 2.71.7 where CALJIC No. 2.71 was given].) Because the jury was never appropriately cautioned, omitting CALJIC No. 2.71.7 prejudiced Johnson.

This Court has found the omission of the cautionary instruction harmless where the jury was "unquestionably aware" through other instructions that the defendant's oral statement should be viewed with caution. (*People v. Wilson*, *supra*, 43 Cal.4th at pp. 19-20 [jury was unquestionably aware to view defendant's oral statements with caution in part because of instruction to view "with distrust" (CALJIC No. 3.18) accomplice's testimony regarding defendant's statements]; *People v.*

Dickey, *supra*, 35 Cal.4th at pp. 905-907 [jury was unquestionably aware to view witnesses' testimony with caution given instructions on witness credibility and extensive impeachment of the witnesses]; see also *People v. Bunyard* (1988) 45 Cal.3d 1189, 1224-1225 [other instructions adequately alerted the jury to view with caution witnesses' testimony that defendant solicited them to kill his wife]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 93-94 [failure to give CALJIC No. 2.71 harmless, in part because admissions were reported by accomplices, whose testimony jury had been instructed to view with caution].)

Here, the jury was not unquestionably aware through other instructions to view with caution Johnson's purported statements to Newton. The credibility instructions given the jury pertained to assessing Newton's *in-court testimony*, which Johnson argued was true because Newton testified that his taped statement was a lie. No instruction directly permitted the jury to determine the credibility of Newton's taped statement ostensibly repeating Johnson's statements. On the contrary, the only credibility instructions relating to Newton's taped statement, CALJIC Nos. 2.13 (prior inconsistent statements as evidence) and 2.20 (believability of witness), merely allowed the jury to believe Newton's taped statement about Johnson's alleged assertions and disbelieve Newton's in-court testimony that he had lied to the police about Johnson's purported statements of motive, plan, and intent. (40CT 11555-11556.) Thus, no instruction advised the jury to view Newton's taped statement with caution or distrust.

On the other hand, because the jurors were instructed with CALJIC No. 2.51 (Motive), they could use Newton's taped statement of Johnson's motive "to establish" that Johnson was guilty. (40CT 11562.) But had

CALJIC No. 2.71.7 been given, as fairness and the law required, the deck would not have been so stacked against Johnson as the instruction would have guided the jury to view with caution Newton's taped statement alleging Johnson's oral statements.

4. Johnson's purported statement supported the broad prosecution theme that Johnson beat cases and subverted the entire criminal justice system.

As detailed in Argument 7, throughout trial, the prosecutor advanced the theme that Johnson was not only a double murderer, but that he undermined the entire legal system by threatening and retaliating against snitches. The alleged statement at issue here supported that theory and turned a tragic double murder into something much more threatening. Relatedly, the statement bolstered the testimony of Greer and Huggins, by suggesting that testifying against Johnson put them at risk of retaliation from him.[54]

5. Johnson was further prejudiced at the penalty phase.

The prejudice extended to the penalty phase as well. There, the prosecutor argued that Johnson deserved to die because he premeditated the murders of people he believed were snitches. (25RT 2-1792.) Thus, Newton's single disavowed claim that Johnson planned to kill the victims because they were snitches was not only critical to the guilt-phase theory of premeditation, but also, the prosecutor argued, merited a death verdict. The highly suspect oral admission became an aggravating circumstance. Yet, because it was never told to view the statement with caution, the jury was

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[54] In fact there was no evidence of such retaliation. The witnesses who had testified against Johnson at the first trial were not retaliated against at the time of the second.

never properly guided in its determination whether the explicitly relied-on aggravating circumstance actually existed here. Therefore, although there was no separate error in failing to provide CALJIC No. 2.71.7 at the penalty trial, *People v. Livaditis* (1992) 2 Cal.4th 759, 784, the prejudice from the original, guilt-phase error spilled over to the penalty phase. (Cf. *People v. Pensinger* (1991) 52 Cal.3d 1210, 1268-1269 [where jury was correctly instructed at guilt phase to view with caution witness's testimony about defendant's admissions, it did not need additional help in evaluating same witness's credibility as to admissions at penalty phase].) Johnson's death sentence should therefore be reversed.

E. Conclusion

By failing to give the sua sponte instruction CALJIC No. 2.71.7, the trial court deprived the jury of much-needed guidance on how to assess Newton's disavowed, hearsay claim that Johnson had voiced the intent on which the prosecution theory depended. It thus violated Johnson's constitutional rights and, accordingly, his convictions should be reversed.

11.

THE COURT DENIED JOHNSON A FAIR TRIAL BY INSTRUCTING THE JURY THAT IT COULD INFER GUILT FROM JOHNSON'S "VOLUNTARY ABSENCE" WHEN THAT ABSENCE WAS CAUSED BY THE COURT'S DECISION TO EXCLUDE HIM FROM THE COURTROOM.

A. Introduction

Because Judge Cheroske permanently excluded him from the courtroom even before trial began, the jurors never saw or heard defendant Cedric Johnson. They did not know that, during the entire trial, Johnson was locked up in the courthouse and had been in custody since his arrest months before. After acknowledging to counsel that it was untrue, Judge Cheroske nonetheless told the jury that Johnson's absence was voluntary, thereby effectively instructing the jury that Johnson had fled. Separately, and without any evidence to support the inference, Judge Cheroske also told the jury that a defendant's flight after being accused of a crime can be used as evidence of guilt. Taken together, these erroneous instructions suggested that Johnson was absent because he had fled and that he had fled because he was guilty.

B. Facts

Seven weeks before trial began, Judge Cheroske permanently excluded Johnson from the courtroom. (17RT 2-25, 66, 76; 18CT 5342-5343; 39CT 11500.)

Judge Cheroske initially planned to instruct the venire that Johnson had voluntarily absented himself. (17RT 2-67-68; 19RT 2-565.) Johnson's counsel objected to the word "voluntarily," arguing that Johnson wanted to attend the trial. (19RT 2-565-566.) Judge Cheroske overruled the

objection, said he would leave the word in, but nonetheless – and without explanation – eventually omitted "voluntarily" from the *pre-trial* instruction. (19RT 2-566, 576.) Judge Cheroske instructed the potential jurors as follows. "[T]he defendant Johnson will not be present for these proceedings. The court is instructing you that are not to speculate as to the reasons for his absence, nor is this a matter which in any way can affect you or your verdict in this case." (19RT 2-576.)

Because Judge Cheroske permanently removed him and prevented Johnson from testifying, the jury never saw or heard Johnson. The jury was never told that Johnson was in custody on site. He was identified through a photograph only. (20RT 2-778; Exh 1.)

At the end of the trial, Judge Cheroske told the lawyers that he intended to instruct the jury on Johnson's voluntary absence. Counsel Steven Hauser objected to the word, "voluntarily," noting again that Johnson had wanted to attend trial, but had been excluded. The prosecutor opposed Hauser's objection and argued that "voluntarily" was the appropriate word to use. Although Judge Cheroske proposed in his draft instruction to require the jury to disregard Johnson's absence, the prosecutor believed that "the jury may speculate if we don't put 'voluntarily' in, speculate beyond all bounds." (23RT 2-1402.)

Judge Cheroske responded to Hauser's objection by insisting that Johnson had voluntarily chosen not to attend his trial: "I think it's clear that it's been his choice on a daily basis to never even listen to this case, let alone come into court." (23RT 2-1402.) This, despite that Judge Cheroske said on September 17, 1998, that he would not allow Johnson back in the courtroom (17RT 2-25); said on September 21, 1998, that he had already ordered that Johnson would not be brought back into the courtroom (17RT

2-47); said on October 19, 1998, "I'm not going to have him in this courtroom no matter what he promises" (17RT 2-67); said on the first day of trial, November 5, 1998, "That man will never be in this courtroom under any conditions that I can foresee" (17RT 2-94); said on November 10, 1998, "I won't let him in here" (19RT 2-566); and essentially declared in 10 minute orders issued from September 17, 1998 through November, 18, 1998, that Johnson remained excluded from the courtroom pursuant to the court's order (18CT 5342, 5351; 39CT 11500-11534). Moreover, *after* Judge Cheroske had permanently expelled Johnson from the courtroom, Johnson had merely declined at the time to listen to the proceedings from his holding cell through a speaker, or so said Hauser at an earlier hearing. (17RT 2-48.) As Hauser told Judge Cheroske, Johnson had communicated that he did not want to listen to the trial through a speaker; he never communicated that he wanted to be absent from the courtroom. (19RT 2-566.)

Judge Cheroske acknowledged that were he to ask Johnson whether he wanted to be present in the courtroom for his trial, Johnson would have said yes. (17RT 2-95 [Judge Cheroske: "I'm not going to ask if he wants to be physically present, because I'm convinced that he would say he does"].) And as Hauser explained to Judge Cheroske, Johnson wanted to be present in the courtroom for his trial, just as he was for the first trial. Judge Cheroske, however, ruled that under Penal Code section 1043, subdivision (b)(1), Johnson had voluntarily absented himself by his disruptive behavior. (23RT 2-1403.)[55]

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[55] Section 1043, subdivision (b)(1) provides: "The absence of the defendant in a felony case after the trial has commenced in his presence
(continued...)

Judge Cheroske also shared the prosecutor's fear that the jurors would speculate as to why Johnson was absent even if Judge Cheroske instructed them not to speculate; Judge Cheroske was especially concerned that the jurors might "speculate" that he did not allow Johnson to be present. (23RT 2-1403.) Judge Cheroske had previously expressed that he did not want the jurors thinking that he had done something to prevent Johnson "absolutely from being here, *although I have*." (19RT 2-566, italics added.)

Hauser, on the other hand, did not want the jury to think that Johnson had escaped or otherwise left the jurisdiction – as the voluntary absence instruction suggested. (23RT 2-1403.) Nonetheless, on overruling Hauser's objection, Judge Cheroske instructed the jury as follows:

> Defendant Cedric Johnson has voluntarily absented himself from these proceedings. This is a matter which must not in any way affect you in this case. In your deliberations do not discuss or consider this subject. It must not, in any way, affect your verdicts or any findings you may be asked to make in connection with your verdicts.

(40CT 11572 ["Court's A"].) The court also gave CALJIC No. 2.52:

> The flight of a person immediately after the commission of a

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[55](...continued)
shall not prevent continuing the trial to, and including, the return of the verdict in any . . . case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom."

> crime or *after he's accused of a crime* is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(23RT 2-1417-1418, italics added.) This instruction was presumably included because Leonard Greer had testified that he had seen the defendants leaving the shooting scene. (22RT 2-1115.) No witness testified to either defendant's flight after being accused of a crime.

C. Johnson Was Denied Due Process When the Trial Court Misled the Jurors About the Reason for Johnson's Absence and Permitted Them to Use His Court-Imposed Absence as a Circumstance Indicating His Guilt.

Each of the two above instructions was independently improper. Court's A – that Johnson's absence was voluntary – improperly told the jury a "fact" that was untrue. The version of CALJIC No. 2.52 given to the jury erroneously referred to flight after being charged as evidence of guilt where no evidence supported that inference.

Preliminarily, and as repeatedly argued in this brief, Judge Cheroske violated Johnson's constitutional and statutory rights to be present at critical stages of the trial where Johnson would have contributed to the fairness of the proceedings. (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745; *People v. Rundle* (2008) 43 Cal.4th 76, 133-134, 177-179.) While Judge Cheroske acknowledged that if he had asked Johnson whether he wanted to be present during his trial, Johnson would have said yes (17RT 2-95), Judge Cheroske also quite remarkably suggested that Johnson did not want to be present at

his trial. (23RT 2-1402.) For his part, Hauser repeatedly said that Johnson wanted to be present. (19RT 2-565-566; 23RT 2-1402.)

1. It was error to tell the jury a fact that was untrue.

The instruction that Johnson had voluntarily absented himself was improper because it was untrue. Johnson's absence was not "undertaken of [his] own free will[.]" (American Heritage Dict. (4th ed. 2006) p. 1929.) Rather, Johnson was excluded from the entire trial against his will. Indeed, Judge Cheroske acknowledged that his instruction was factually untrue, remarking that he would include "voluntarily" because, "I don't want the jury to be misled and think that I've done something that's prevented [Johnson] absolutely from being here, although I have." (19RT 2-566.)

Courts have approved a voluntary-absence instruction where the defendant made a conscious and explicit choice not to attend his trial. (E.g., *People v. Sully* (1991) 53 Cal.3d 1195, 1241 [instruction proper where defendant expressed intention to disrupt trial unless permitted to remain outside courtroom and then declined several invitations to return]; *People v. Vargas* (1975) 53 Cal.App.3d 516, 530 [instruction proper where defendant attended first day of trial, then left courthouse on second day and never returned].) But, to appellant's knowledge, no appellate court has approved instructing a jury that a defendant's absence is voluntary where it is not. Moreover, as a general principle, a judge should not affirmatively misinform a jury about any fact. (See *People v. Kipp* (1998) 18 Cal.4th 349, 378 [factually inaccurate instruction is erroneous instruction].) And a trial court may give an instruction only if it applies to the facts of the case and is supported by substantial evidence. (Pen. Code, § 1127; *People v. Marshall* (1997) 15 Cal.4th 1, 39.) Because no evidence even hinted at Johnson's having voluntarily absented himself from his trial, the instruction

was erroneous.

Moreover, the only legitimate goal in instructing the jury on Johnson's absence at all was to ensure that the jury did not consider that fact in its deliberations. That goal was achieved by the court's initial, neutral instruction. (19RT 2-576.) Slanting that neutral instruction by adding an untrue fact was wholly unnecessary.

Indeed, including "voluntary" was not only unnecessary, it was also unfair. Rather than eliminating or equally limiting improper speculation, Judge Cheroske precluded only one area of speculation: that Johnson had been prevented from attending. His instruction left open any speculation flowing from the fact that Johnson's absence was voluntary. As a result, jurors may have speculated that Johnson had such contempt for the legal system that he did not even bother attending his own trial – a theme the prosecution hammered throughout trial. Or they may have believed he refused to attend because he knew he was guilty. More damaging still, as described below, combined with the erroneous flight instruction, telling the jury that Johnson was voluntarily absent suggested that he had fled prosecution – a circumstance the jury could then use to find him guilty.

That Judge Cheroske told the jurors not to consider Johnson's voluntary absence does not negate the error. To begin with, Judge Cheroske himself determined that telling the jurors not to speculate about Johnson's absence would not prevent them from speculating. Only by telling the jury outright that Johnson was voluntarily absent could he foreclose speculation about whether and why Johnson's absence was involuntary. But speculation about why Johnson was voluntarily absent was just as improper; and that more limited, more detrimental speculation Judge Cheroske did not preclude.

Further, courts have recognized that telling a jury not to consider an erroneous, prejudicial fact will not cure the harm. In *Coleman v. Calderon* (9th Cir. 1998) 150 F.3d 1105, a California trial court's instruction inaccurately described the governor's power to commute the defendant's death sentence, but also directed the jury not to consider commutation in its deliberations. (*Id.* at p. 1118.) Nonetheless, the Ninth Circuit found that because the inaccurate instruction invited speculation about whether the defendant's sentence would be commuted, it was constitutionally infirm and warranted penalty relief.[56] (*Id.* at p. 1119.) Here, too, the erroneous instruction invited just the speculation it was supposed to preclude.

2. The flight instruction was erroneous because there was no flight after Johnson was accused.

It was error to include in the flight instruction that the jurors could infer guilt from any flight by Johnson after he was accused of a crime, because there was no such flight. (23RT 2-1417-1418.) Before a jury can be instructed that it may draw a particular inference, there must be evidence to support that inference. (*People v. Carmen* (1951) 36 Cal.2d 768, 773.) Indeed, a trial judge has a duty to refrain from giving an instruction that is irrelevant to the case and confusing to the jury. (*People v. Saddler* (1979) 24 Cal.3d 671, 681.)

Judge Cheroske instructed the jurors that they could use any flight by Johnson after he was accused of a crime to draw an inference of guilt. (23RT 2-1417-1418.) But there was no evidence that Johnson fled after he

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[56] The U.S. Supreme Court did not address the Ninth Circuit's finding of constitutional error, but reversed because that court had not properly analyzed harmlessness. (*Calderon v. Coleman* (1998) 525 U.S. 141, 145.)

was accused of a crime. In *People v. Farley* (1996) 45 Cal.App.4th 1697, the Court of Appeal found error where the trial court did not delete from CALJIC No. 2.52 the reference to flight immediately after the crime, where the only flight was that after the defendant had been accused. (*Id.* at pp. 1712-1713; see also *People v. Carrera* (1989) 49 Cal.3d 291, 314 [trial court should have deleted reference to immediate flight where only flight was after accusation].) The converse is also error: because there was only evidence of immediate flight, it was error not to delete the inapplicable reference to flight after being accused.

3. Together, the two instructions suggested that Johnson was absent because he had fled and that he had fled because he was guilty.

Judge Cheroske instructed the jury that flight after being accused could be considered as a circumstance of guilt. He also falsely told the jury that Johnson's absence from trial was voluntary. Because there was no other evidence of flight after accusation, a reasonable juror would conclude that the Johnson's voluntary absence was due to his having fled pre-trial.

No California court has addressed this precise scenario. But a Massachusetts appellate court found reversible error on similar facts. In *Commonwealth v. Muckle* (Mass. App. Ct. 2003) 797 N.E.2d 456, defendant Kirby failed to appear on the second day of trial. Although the circumstances of Kirby's disappearance were unclear, the judge determined after a hearing that his absence was voluntary such that trial should continue. He first properly explained to the jury that Kirby was absent and that trial would continue without him. (*Id.* at p. 460.) The next day, however, the judge instructed the jury that Kirby's absence was voluntary. (*Id.* at p. 461.) The appellate court found this latter instruction to be improper both because it was not neutral and because, without any evidence

being presented to the jury, the judge simply conveyed his own conclusion that Kirby's absence was voluntary. (*Id.* at pp. 461-462.)

As in this case, the error in *Muckle* was compounded by a factually inapplicable consciousness-of-guilt instruction. Like the jury here, the *Muckle* jury was told that it could infer guilt from the defendant's flight[57] – but the only evidence of such flight was the trial court's erroneous instruction that the defendant was voluntarily absent from trial. (*Commonwealth v. Muckle, supra,* 797 N.E.2d at p. 462.) It was error, the court found, to let the consciousness-of-guilt instruction rest exclusively on the erroneous instruction – unsupported by evidence presented to the jury – that Kirby was voluntarily absent. (*Ibid.*) Similarly, it was error here to instruct the jury that flight after accusation supported a finding of guilt, where the only evidence of such flight was the court's own erroneous instruction that Johnson had chosen not to attend trial.

In sum, combined, the two instructions permitted the jury to infer guilt from an undisputed fact, announced by the highest authority in the courtroom, that was simply not true.

4. The instructional errors denied Johnson due process.

Providing the jury with a false piece of information from which it could infer guilt violated Johnson's state and federal due process rights. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.) A prosecutor's knowing use of false evidence or argument at trial deprives the defendant of due

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[57] In *Muckle*, there was no evidence of any flight, so no flight instruction should have been given at all. (*Commonwealth v. Muckle, supra,* 797 N.E.2d at p. 462.) As explained above, here there was no evidence of flight after being accused, so the court should have deleted that phrase from its version of CALJIC No. 2.52.

process. (*Pyle v. Kansas* (1942) 317 U.S. 213, 216; *People v. Sakarias* (2000) 22 Cal.4th 596, 633.) No less does a trial judge's putting before the jury a false fact violate due process and our notions of fair play. Further, replacing a neutral instruction, designed to curb *all* speculation, with an instruction that precludes only that speculation which might benefit the defendant, while permitting speculation to his detriment, gives the prosecution an unfair and undeserved advantage and thus also violates a defendant's due process and equal protection rights. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7; see *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection].) Moreover, slanting this instruction to benefit the prosecution also violated due process by lessening the prosecution's burden of proof. (*In re Winship* (1970) 397 U.S. 358, 364.)

A disruptive defendant may suffer the consequences of her misbehavior including absence from trial.[58] But she should not suffer the additional unnecessary sanction of having the jury infer from her absence that she has fled or escaped because she is guilty. In *United States v. Sanchez* (2d Cir. 1986) 790 F.2d 245, the defendant failed to appear for trial. Trial nonetheless went forward, and the judge eventually instructed the jury that a defendant's flight or nonappearance could be considered on

[58] As argued above, Johnson's complete removal from trial was improper. (See Argument 2.) In order to discuss the instructional error here, Johnson assumes for the purposes of this argument only that he waived his constitutional right to attend his trial.

the question of his guilt. (*Id.* at p. 248.) The Second Circuit found that, because there was no evidence that the defendant had intentionally fled, the instruction was improper. The Court of Appeals noted that allowing a jury to infer guilt from a defendant's unexplained nonappearance "would impose a heavy sanction on what may constitute the mere waiver of a constitutional right to attend trial." (*Id.* at pp. 252-253.) Although the facts here are not precisely those in *Sanchez*, here too the jury was instructed – via Court's A and CALJIC No. 2.52 – that it could infer from Johnson's unexplained absence that he was guilty. And here too the court sanctioned Johnson for waiving his constitutional right to be present. Having permanently excluded Johnson from his own trial, Judge Cheroske should not have further and unnecessarily penalized him by advising the jury that his absence could be taken as a sign of guilt.

D. Together the Two Instructions Prejudiced Johnson.

A federal due process violation is subject to harmless error review under *Chapman v. California* (1967) 386 U.S. 18, 24. Because there is a reasonable possibility that Judge Cheroske's two improper instructions contributed to the verdict, reversal is required. (*People v. Lewis* (2006) 139 Cal.App.4th 874, 887.) Even under a state-law standard, reversal is required because, given the weak state of the evidence, there is a reasonable probability that absent the errors Johnson would have enjoyed a more favorable outcome. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

As set forth in detail in Argument 7 at pages 243-247, incorporated here, the evidence against Johnson was very weak, making the erroneous instructions that much more prejudicial. Only two individuals – Tyrone Newton and Robert Huggins – of the dozens who purportedly witnessed the shootings identified Johnson as a shooter and both witnesses were highly

unreliable, biased, and admitted liars, forcing the prosecutor to concede that it would be "ridiculous" for the jury to make its decision based on either of them because each repeatedly made inconsistent statements regarding the shootings. (20RT 2-688; 24RT 2-1559-1560.)

First, Newton admitted under oath at trial that he had lied to the police about having witnessed the shootings because he wanted the officers to drop cocaine possession charges against him, which they did. (21RT 2-779-780, 795, 799, 800-801, 807.)

And second, Huggins was impeached at trial many times with prior inconsistent statements, was repeatedly contradicted by other witnesses, and admitted lying under oath about the shootings. (20RT 2-681, 688, 718; 21RT 2-816-817, 820, 822, 833, 840-842, 844-845, 849, 851, 854, 856, 870-871, 875, 879, 885, 887-888, 901-903, 908, 934-936, 938, 941-943, 946-947, 955-956, 967-968; 22RT 2-979, 981, 985-986, 987-989, 991, 994, 998-999, 1013-1014, 1017, 1047, 1064-1065, 1074, 1087, 1167; 23RT 2-1198, 1201, 1211, 1230, 1291, 1328.) Most important, Huggins testified at the preliminary hearing that he did not see the shootings. (21RT 2-849, 967; 22RT 991.) Moreover, Huggins testified at trial that Johnson shot Faggins in the front, while the medical examiner ruled that Faggins was only shot in the back. (21RT 2-917, 951-955.) Lastly, although one victim, Gregory Hightower, was Huggins's brother, Huggins did not talk to the police about the shooting until over three months later, when he was arrested and incarcerated for spousal abuse. (21RT 2-933-934, 946; 22RT 2-982-983, 1092-1093; 23RT 2-1217.)

Newton and Huggins's testimony were so lacking in credibility that only an admission of guilt by Johnson, by way of Judge Cheroske's fabricated voluntary absence and grossly unfair flight instructions, could

save the prosecution's flimsy case.

Consciousness-of-guilt evidence may "utterly emasculate whatever doubt the defense has been able to establish on the question of guilt." (*People v. Hannon* (1977) 19 Cal.3d 588, 603.) It is only natural a juror would believe that – irrespective of the state of the evidence – the defendant who flees his own trial must be guilty. Here, the fact that Johnson was voluntarily absent came from a reliable source – the judge – and went unrefuted. As in *Muckle*, where the Massachusetts appellate court reversed the defendant's convictions based on the two errors present here, Judge Cheroske's erroneous voluntary-absence instruction was "very powerful in effect because it was given by the independent figure in the courtroom, who [bore] the markings of authority." (*Commonwealth v. Muckle, supra,* 797 N.E.2d at p. 463.) The instruction "perforce would have resonated with the jury, especially in light of the final consciousness of guilt instruction and the overarching charge that the jury 'must take the law' as the judge gives it." (*Ibid.*; see also *Bollenbach v. United States* (1946) 326 U.S. 607, 612 ["'The influence of the trial judge on the jury is necessarily and properly of great weight,' [citations], and jurors are ever watchful of the words that fall from him"].)

Moreover, as detailed in Argument 7, the prosecution painted Johnson as a repeat criminal with contempt for the legal system – just the sort of person who would flee or escape rather than face trial. At a minimum, telling the jury that Johnson had chosen not to attend trial indicated that he disrespected the very proceedings and system the jurors were actively engaged in. The error thus played into, and was heightened by, the ongoing prosecutorial theme that Johnson routinely flouted rightful prosecutions and undermined the entire criminal justice system.

The jury must have been surprised by and extremely curious about Johnson's absence – a trial in absentia of a defendant accused of two murders, not exactly the American way. A defendant's absence from trial, moreover, "is highly prejudicial under any circumstances." (*State v. Horne* (N.J. Super. Ct. App. Div. 2005) 869 A.2d 955, 963 [a jury instruction "that permits an inference of guilt based on [the defendant's] absence is highly prejudicial"].) A defendant facing a possible death sentence would have to be guilty – without any hope of prevailing – to choose not to be present at his own trial. That, or the defendant escaped, thereby extinguishing any doubt about the defendant's guilt.

Finally, Judge Cheroske and the prosecutor provided the strongest argument why the admonition did not remedy the erroneous voluntary-absence instruction. Both Judge Cheroske and the prosecutor had the opportunity to observe the jurors as they listened to the evidence, and both independently concluded that Johnson's jury would not follow the court's instructions, despite this Court's presumption to the contrary. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1014.) Specifically, both Judge Cheroske and the prosecutor believed that it was necessary to instruct the jury that Johnson "voluntarily" absented himself, as distinguished from instructing that Johnson was simply absent, because even though the court intended to instruct the jury to disregard Johnson's absence for all purposes, neither Judge Cheroske nor the prosecutor believed that this would suffice to prevent the jury from speculating about the reason for Johnson's absence. (23RT 2-1402.) If, as Judge Cheroske and the prosecutor insisted, the jury would not follow the court's instruction not to speculate about Johnson's absence, then there is no reason to believe that the jury abided by Judge Cheroske's admonition that, in determining Johnson's guilt, the jury should

disregard the court's instruction that Johnson was voluntarily absent.

Thus, as Hauser feared and expressed to Judge Cheroske, the jury likely relied on the voluntary-absence and flight instructions, faulted Johnson for his absence, and inferred that Johnson had escaped to avoid a trial where he would be found guilty because he was guilty, as Johnson proved by his flight from justice.

Here, Judge Cheroske deceived the jury about why Johnson was absent. The deception was harmful by itself because it suggested that Johnson voluntarily absented himself because he was guilty. The flight instruction then allowed the jury a legal basis for reconfirming Johnson's guilt. In sum, the two instructional errors caused Johnson great damage, contributed to the jury's guilty verdicts because the evidence of guilt was provided by witnesses on whom the prosecutor said it would be ridiculous to independently rely, and require reversal.

12.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO DIRECT THE JURY'S ATTENTION TO THE STAR PROSECUTION WITNESS'S PRIOR MISDEMEANOR CONDUCT AND ITS IMPACT ON HIS ALREADY WEAKENED CREDIBILITY.

A. Introduction

As explained throughout this brief, Cedric Johnson's guilt turned largely on Robert Huggins's credibility. Thus, the jury needed as many tools as possible to accurately assess the star prosecution witness's credibility. One relevant factor was Huggins's having committed spousal abuse, a crime of moral turpitude that reflects his readiness to do evil and therefore his willingness to lie. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296; *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402.) The law required the trial court to instruct the jury that it could consider Huggins's misdemeanor criminal conduct in determining whether to believe him. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884.) But the trial court did not. Because this failure prevented the jury from properly assessing the single most important component of the prosecution's case, Johnson's constitutional rights were violated, his case was prejudiced, and the verdicts are unreliable. (U.S. Const. 6th and 14th Amends.; Cal. Const., art. I, §§7, 16.) His convictions should therefore be reversed.

B. The Trial Court Failed to Instruct *Sua Sponte* That Huggins's Misdemeanor Criminal Conduct Was Relevant to His Credibility.

The undisputed evidence was that Huggins had committed misdemeanor "spousal abuse," for which he was in custody at the time of Johnson's preliminary hearing. (22RT 2-1092-1093.) CALJIC No. 2.20 instructs in part: "In determining the believability of a witness you may

consider anything that has a tendency to . . . disprove the truthfulness of the testimony of the witness, including . . . [p]ast criminal conduct of a witness amounting to a misdemeanor." (CALJIC No. 2.20.) Here, the trial court gave CALJIC No. 2.20, but omitted the misdemeanor-conduct factor. (23RT 2-1414; 40CT 11556.) It also did not give CALJIC No. 2.23.1 (Believability of a Witness – Commission of Misdemeanor). Failing to instruct the jury that it could consider Huggins's misdemeanor conduct was error.

Trial courts are required to instruct *sua sponte* on those CALJIC No. 2.20 factors that apply to the evidence. (*People v. Rincon-Pineda, supra,* 14 Cal.3d at pp. 883-884.) Misdemeanor conduct that reflects moral turpitude is admissible to impeach a witness. (*People v. Wheeler*, *supra*, 4 Cal.4th at pp. 295-296.) And spousal abuse is a crime of moral turpitude, because abusers, like Huggins, who are aware of their special relationship with the victim and then violate that relationship wilfully and with an intent to injure, manifest the general readiness to do evil that defines moral turpitude. (*People v. Rodriguez, supra,* 5 Cal.App.4th at p. 1402.) Thus, the misdemeanor-conduct factor applied and the court erred in omitting it. (*Rincon-Pineda*, at pp. 883-884; *People v. Galloway* (1979) 100 Cal.App.3d 551, 567 [when any one of CALJIC No. 2.20's factors finds support in the evidence, the trial court errs by excising that factor from its instructions]; *People v. Martinez* (1978) 82 Cal.App.3d 1, 19-20.)

That Huggins admitted a spousal abuse conviction rather than the underlying conduct makes no difference. Although evidence of a misdemeanor conviction is inadmissible hearsay when offered to impeach a witness's credibility (*People v. Wheeler*, *supra*, 4 Cal.4th at p. 300), here the conviction was admitted without any hearsay objection, so it was

undisputed evidence of Huggins's domestic violence and useable to impeach his credibility. (*Ibid.* & fn. 15 [because defendant waived any hearsay claim by making no trial objection on that specific ground, admission of witness's misdemeanor theft conviction – with its "undoubted probative force" to impeach her credibility – cannot serve as grounds for reversal of the judgment against defendant]; *People v. Lomeli* (1993) 19 Cal.App.4th 649, 655, disapproved on other grounds in *People v. Hernandez* (2004) 33 Cal.4th 1040 [misdemeanor convictions properly admitted to impeach testifying defendant in absence of hearsay objection].) Indeed, the prosecutor asked about the conviction himself. (22RT 2-1093.)

C. Johnson's Federal Constitutional Rights Were Violated.

Because the instructional error prevented the jury from properly assessing the star prosecution witness's credibility, it deprived Johnson of his constitutional rights to due process, jury trial, and a reliable verdict. (U.S. Const., Amends. 6, 8, 14; Cal. Const., art. I, §§ 7, 16, 17.) The question for the jury was: taking all relevant credibility factors into account, should Huggins's testimony about the shooting be believed? Johnson was entitled to have the jury accurately and comprehensively assess Huggins's testimony; that assessment was part of Johnson's "basic right to have the prosecutor's case encounter and survive the crucible of meaningful testing." (*United States v. Cronic* (1984) 466 U.S. 648, 656; see *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1273, overruled on other grounds by *Payton v. Woodford* (9th Cir. 2002) 299 F.3d 815 [reversing for erroneous exclusion of defense evidence].) Omitting the instruction discouraged the jury from testing the evidence, diluted the prosecution's burden of proof, and violated Johnson's rights.

D. Johnson Was Prejudiced Because the Omitted Factor Was the Straw That Would Have Broken the Camel's Back of Huggins's Already Weak Credibility.

Significantly, to find Johnson guilty, the jury not only had to believe Huggins told the truth about the shooting at trial, but it also had to buy his explanation of why he did not initially report his brother's murder to police and why he gave a diametrically opposite account under oath at the preliminary hearing. Therefore, for the error to have been prejudicial, the jury need not have adopted as true Huggins's preliminary hearing testimony that he saw nothing and rejected wholesale his trial testimony. Johnson was prejudiced if a correctly instructed juror would have rejected *all* of Huggins's statements as unreliable rather than cherry-picking those statements endorsed by the prosecution.

Here, had the jury considered his recent prior abusive criminal conduct, it would have seen that Huggins was generally ready to do evil, including lie under oath to ensure that someone was convicted for his brother's murder. Thus, the court's instructional error made a concrete difference in this weak case. And to find that the error did not prejudice *this case* would essentially be to hold that failing to instruct on this factor is harmless per se.

1. Huggins's credibility already sagged under the weight of his bias, his prior inconsistent statements, and physical and testimonial evidence that contradicted his story.

Huggins was no ordinary eyewitness. As the brother of victim Gregory Hightower, he was biased. (21RT 2-816.) Though one would expect him to want to see his brother's killer prosecuted, Huggins failed to tell the police about the shooting for three months – even while his stepfather, Hightower's father, talked to police about offering a reward for

information. (21RT 2-933-934, 982-983; 23RT 1210.) Indeed, Huggins incriminated Johnson only when Huggins found himself locked up on his own criminal case. (21RT 2-934.) He claimed he described the shooting to his stepfather only days after it happened. (21RT 2-860, 944; 22RT 2-1001.) Yet when Detective Vena talked to the stepfather, the latter had no knowledge of who had killed Hightower. (23RT 2-1210.) And, of course, Huggins denied under oath that he had seen Johnson shoot either victim. (21RT 2-967; 22RT 2-991.) In short, no independent evidence whatsoever verifies that Huggins even witnessed the shooting.

Moreover, Huggins got his facts wrong. He claimed that Johnson shot Hightower from up close (21RT 2-956), but no soot or stippling was found on Hightower's body – indicating that he was shot from further away (21RT 2-888). And Huggins claimed that when he first got to Hightower, who had been shot in the head, he did not see any blood – which is inconceivable given that head wounds bleed profusely. (21RT 2-885-886, 888, 960.)

Further – even apart from his failing to incriminate the defendants at the preliminary examination – Huggins's story about what happened before, during, and after the shooting changed from one telling to the next. He first told Detective Vena that he did not see Johnson and Betton at the party before the shooting. (21RT 2-946.) He then testified that they were both there. (21RT 2-820, 946.) At the first trial, he testified that he did not see Hightower at the party. (22RT 2-987.) He changed this, too, and testified at the second trial that Hightower attended and left with him. (21RT 2-818, 822.) At the second trial, Huggins also claimed that he got out of his car and stood observing the shooting with "bullets flying around." (21RT 2-949.) But Huggins told Detective Vena that he remained seated in his car

during the shooting. (23RT 2-1198.)

Nor could Huggins keep straight his story of what he did after the shooting. He told Detective Vena that after he checked Hightower, he drove west on 99th Street, parked, and ran to his sister's house. (23RT 2-1198.) Then, at the first trial, he said he went home without his car. (21RT 2-994.) Finally, at the second trial, he claimed he drove to his girlfriend's house. (21RT 2-966.) One wonders how he could have got this wrong if he actually witnessed the shooting as he said. And no one corroborated this claim: neither the sister, who appears to have attended the trial, nor the girlfriend, Sharon Hilt, testified. (21RT 2-816.) And no evidence corroborated his claim that his girlfriend or sister ever called 911. In fact, the record suggests no such call was made: Betton's counsel attempted to elicit from Vena that he listened to the relevant 911 tape and Hilt never called, but the court prevented him. (23RT 2-1219.)

Huggins repeatedly testified at the second trial that Johnson was the one who shot Faggins. Huggins told the jury that Johnson shot Faggins at close range (21RT 2-951 ["That close, you can't miss"]) with something like a 9 mm Beretta, while Faggins was facing Johnson (21RT 2-953). The medical examiner, however, testified that Faggins was shot only in the back. (21RT 2-917.) Huggins also said that Johnson shot Faggins with an Uzi, spraying him with bullets and causing Faggins to collapse. (21RT 2-843, 954-955.) But no Uzi was used. (22RT 2-1074.)

Even the prosecutor did not believe Huggins. The deputy district attorney conceded to the jury that, based on the evidence, there was no way to determine whether Terry Betton or Johnson shot Faggins. (24RT 2-1466.)

The prosecutor, moreover, disbelieved Huggins's statements to

Vena, that Faggins had a gun at the party and later dropped it, which, according to Huggins, Johnson picked up and fired at Faggins. (23RT 2-1198-1199; 24RT 2-1562.) In fact, the prosecutor flatly contradicted Huggins in arguing to the jury that Faggins "didn't have a gun." (24RT 2-1562.)[59]

Finally, the prosecutor so lacked trust in Huggins's credibility that he told the jurors that it would be "ridiculous" to base their decision on Huggins alone because Huggins had given the jury "an inconsistent statement previously." (24RT 2-1559.)

While Huggins claimed that 40-50 other people were present at the shooting, including many he identified by name, not one was presented to corroborate his story. (21RT 2-817, 829, 845, 853, 856, 857, 944-945, 947-949.) According to Huggins, Toby and Toby's brother-in-law left at the same time as Huggins, and got into his car with him. (21RT 2-947.) Thus, Toby and his brother-in-law were in about the same position to observe the shooting as Huggins. Yet neither testified.[60]

Huggins said Faggins left the party with Donald Ray Gordon. (21RT 2-822-823.) Gordon did not testify. Indeed, the only other prosecution witnesses who implicated Johnson and claimed to have been at the scene,

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[59] Huggins first testified at trial that he told Vena that he *saw* Faggins's gun fall out, but then changed his testimony to say that he did not tell Vena that he saw the gun. Huggins claimed that Toby told him about the gun falling and that Huggins just told Vena that Faggins had a gun and it fell. (21RT 2-948-949.) Huggins did not deny that he told Vena that Faggins had a gun at the party. (22RT 2-1006-1007.)

[60] Vena testified that Huggins told him the name of Toby's brother-in-law, but Vena never interviewed him. (23RT 2-1230.) Nor did he interview Toby. (23RT 2-1217.)

Newton and Greer, did not see Huggins there. Nor did Huggins see either of them. (21RT 2-945, 946.) And while Huggins described Charles Lewis and his actions at the scene, Lewis denied seeing Huggins at all that evening. (21RT 2-822, 850-851, 947; 22RT 2-1064.)

No one even corroborated that Huggins attended the party. Rochelle Johnson and Shetema White testified that Huggins, whom Rochelle called a very good friend, was not at the party. (20RT 2-681, 719; 23RT 2-1291.)

In sum, Huggins – the sole testifying eyewitness – gave an account of the shooting that was significantly contradicted by the physical evidence, his prior statements, other witness testimony, and even the prosecutor. These factors distinguish this case from *People v. Horning* (2004) 34 Cal.4th 871, where the omission of CALJIC No. 2.20's felony-conviction factor was found harmless. (*Id.* at p. 911.) There the witness, Biaruta, was not part of the central prosecution case; the prosecutor mentioned him only in passing in his opening statement. (*Ibid.*) Biaruta, an informant, testified that the defendant had briefly confessed to the crimes while they were locked up together. (*Id.* at p. 885.) Thus, the real question there was whether he should be believed as an informant – a status that by definition encompasses the concept that he has a criminal history. Moreover, *Horning* turned on whether the jury believed that the substantial circumstantial evidence linking the defendant to the murder – including his fingerprints on the victim's documents, his later possession of the victim's gun, and his abrupt departure from the state after the killing – as well as the defendant's self-incriminating statements proved his guilt. (*Id.* at pp. 880-886, 901-902.) The confession to Biaruta was an isolated and minor piece of evidence.

But where a case turns on the credibility of one prosecution witness,

evidence that discredits that testimony may raise a reasonable doubt in the jurors' minds. (*Lewis v. Mayle* (9th Cir. 2004) 391 F.3d 989, 999.) This was such a case. Huggins was the star witness, and Johnson's guilt depended on the jury believing his trial testimony beyond a reasonable doubt.

2. The omitted concept – that Huggins's spousal abuse undermined his credibility – was not covered elsewhere.

No other instruction directed the jury to consider Huggins's misdemeanor conduct. CALJIC No. 2.23.1 was not given. Correctly given in this case, that instruction would have told the jury:

> Evidence has been introduced for the purpose of showing that a witness, Robert Huggins, engaged in past criminal conduct amounting to a misdemeanor. This evidence may be considered by you only for the purpose of determining the believability of that witness. The fact that the witness engaged in past criminal conduct amounting to a misdemeanor, if it is established, does not necessarily destroy or impair a witness's believability. It is one of the circumstances that you may take into consideration in weighing the testimony of that witness.

(CALJIC No. 2.23.1 (6th ed. 1996.) The court would also have instructed the jury that the elements of misdemeanor spousal abuse are (1) a person willfully inflicted bodily injury upon a spouse or cohabitant or mother of his child and (2) the bodily injury resulted in a traumatic condition. (CALJIC No. 9.35 [Spouse or Cohabitant Beating]; Use Note, CALJIC No. 2.23.1 [requiring trial court to instruct on elements of misdemeanor crime].)

To be sure, the court instructed the jury that it could "consider anything that has a tendency reasonably to prove or disprove the

truthfulness of the testimony of the witness" and that the list of examples given was not exhaustive. (CALJIC No. 2.20; 40CT 11556; 23RT 1414.) But nowhere did the court instruct the jury that past misdemeanor conduct counted against credibility, and a juror would not necessarily infer from the generic reference to "anything" that she could and should consider such misconduct relevant to truthfulness.

Moreover, unlike in *Horning*, where the jury knew that the witness/informant had multiple criminal convictions and had served a 12-year prison sentence, and defense counsel highlighted the informant's criminal record by arguing to the jurors that they "should not 'believe the word of a convicted felon who was in the Arizona prison'" (*People v. Horning*, *supra*, 34 Cal.4th at p. 911), here the jurors had no reason to consider Huggins's misdemeanor conduct in assessing his credibility because neither defense counsel mentioned it to them (see *People v. Hardy* (1992) 2 Cal.4th 86, 190-191 [closing arguments can make failure to give a particular instruction harmless].)

Furthermore, the above introductory language from CALJIC No. 2.20 simply tells the jury that it is not precluded from considering anything that may affect credibility; this is very different from focusing the jury's attention on a particular factor that it might not independently realize bears on credibility. *Rincon-Pineda* and its progeny demand that the jury be instructed that it may consider each individual applicable factor – not that the jury be abstractly instructed that it is free to consider any and all self-defined credibility-related factors it may think up.

In particular, here the jury was instructed with CALJIC No. 2.23, which singled out felony convictions as bearing on credibility. Without CALJIC No. 2.23.1, the instructions thus suggested that misdemeanor

convictions and conduct were not to be considered. A literate and logical juror would understand that *felony* conduct alone bore on credibility.

3. Under any standard, Johnson was prejudiced.

Because Johnson's federal constitutional rights were violated, the *Chapman* prejudice standard applies. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The state cannot show the error to be harmless beyond a reasonable doubt, because it cannot show that Huggins's credibility was anything but central to the prosecution case or prove that if the jury had taken into account Huggins's recent criminal conduct, it would nonetheless have believed him. Johnson was therefore prejudiced.

Even as a matter of state law, Johnson was prejudiced because it is reasonably probable that he would have obtained a more favorable result absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) As detailed above, there is a "reasonable chance, more than an abstract possibility," that a properly instructed jury would *not* have believed Huggins and what paltry prosecution evidence supported his story at trial beyond a reasonable doubt. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

As evidenced by the jurors' request to have all of Huggins's testimony read back to them (24RT 2-1585) and the fact that the prior jury hung (18CT 5333), there is "at least such an equal balance of reasonable probabilities" that this Court should find the error prejudicial. (*People v. Watson*, *supra*, 46 Cal.2d at p. 837; *People v. Taylor* (1986) 180 Cal.App.3d 622, 633-634 [finding *Watson* prejudice where "primary task facing the jury was assessing credibility," jury asked for readback of witnesses' testimony, and prior jury hung].) Moreover, the jury deliberated for *four days* (24RT 2-1581-1610; 39CT 11537-11543) after hearing less

than *five days* of testimony (39CT 11515-11537), suggesting that their task was a difficult one. (*People v. Cooper* (1991) 53 Cal.3d 771, 837 ["We have sometimes inferred from unduly lengthy deliberations that the question of guilt was close."].) Because the case was close, Huggins's credibility was vital to the prosecution case, and no argument or instruction conveyed the omitted concept, Johnson was prejudiced at the guilt phase.

Furthermore, reversal of the penalty verdict is required because a reasonable possibility exists that had the jury understood that Huggins's moral depravity in committing spousal abuse had a tendency in reason "to shake one's confidence in his honesty" (*People v. Wheeler*, *supra*, 4 Cal.4th at p. 295, internal quotation marks and citation omitted), the jury would have had lingering doubt about Johnson's guilt and returned a life sentence. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448 [state law error at the penalty phase must be assessed on appeal by asking whether it is reasonably possible the error affected the verdict]; see also *People v. Abilez* (2007) 41 Cal.4th 472, 525 [the *Chapman* and *Brown* standards are the same in substance and effect].)

13.

INSTRUCTING THE JURY WITH CALJIC NO. 17.41.1 VIOLATED JOHNSON'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, REQUIRING REVERSAL.

The jury in this case was instructed in the guilt phase with CALJIC No. 17.41.1 as follows:

> The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the court of the situation.

(40CT 11601, bracketed language in original; 24RT 2-1571.)

In *People v. Engelman* (2002) 28 Cal.4th 436, 441, 449 ("*Engelman*"), a noncapital case, this Court disapproved CALJIC No. 17.41.1, holding that it should not be given. This Court also concluded, however, that it did not violate the defendant's rights under the federal constitution to a jury trial and to due process of law; nor did it violate the state constitutional right to a unanimous verdict. (*Id.* at pp. 442-445.) Johnson respectfully submits that in this case, the instruction did violate his rights under the Sixth and Fourteenth Amendments; he therefore raises the issue here in order to ask this Court to reconsider its decision in *Engelman* and to preserve the error for review in federal court if necessary. In addition, the instruction violated Johnson's rights under the Eight Amendment to reliable and uncoerced guilt and penalty verdicts, an issue not presented in *Engelman*.

A. This Court Should Reconsider Its Decision in *Engelman* That Giving CALJIC No. 17.41.1 Does Not Violate the Sixth and Fourteenth Amendments.

The Sixth Amendment to the United States Constitution, which protects the right to a jury trial in criminal cases, applies to the states through the Fourteenth Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 156.) Whether a particular feature of the common-law jury trial right is constitutionally compelled in state courts depends on "the function the particular feature performs and its relation to the purposes of the jury trial." (*Williams v. Florida* (1970) 399 U.S. 78, 99-100.) The secrecy and sanctity of jury deliberations, and the free exchange of ideas this feature is designed to protect, are a cornerstone of the Anglo-American jury system. (*Engelman,* at p. 443; *People v. Cleveland* (2001) 25 Cal.4th 466, 475.) The confidentiality, secrecy, and privileged nature of deliberations is an essential prerequisite for the free exchange of ideas in the jury room. "Juror privacy is a prerequisite of free debate, without which the decisionmaking process would be crippled." (*United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1086, citing Note, *Public Disclosures of Jury Deliberations* (1983) 96 Harv. L. Rev. 886, 889; see also *Tanner v. United States* (1987) 483 U.S. 107, 127 [historical and substantial concerns support the protection of jury deliberations from intrusive inquiry].) The free and candid exchange of ideas allows the jury to fulfill its purpose of fostering community participation, in the form of the "common sense judgment" of laypeople with varying viewpoints, to determinations of guilt or innocence. (*Duncan,* at pp. 155-156.)

Thus, the Sixth Amendment requires privacy and confidentiality for deliberations, which similarly promote effective group deliberations that

include minority viewpoints. (See also *People v. Oliver* (1987) 196 Cal.App.3d 423, 429 ["[P]rivate, confidential deliberations outside the presence of all nonjurors are an essential feature of the right to an impartial jury trial guaranteed by the Sixth Amendment. An infringement of that essential right therefore constitutes an error of constitutional dimension"].)

CALJIC No. 17.41.1 can curtail and/or distort jury deliberations. As this Court recognized in *Engelman*, CALJIC No. 17.41.1

> has the potential to intrude unnecessarily on the deliberative process and affect it adversely – both with respect to the freedom of jurors to express their differing views during deliberations, and the proper receptivity they should accord the views of their fellow jurors. Directing the jury immediately before deliberations begin that jurors are expected to police the reasoning and arguments of their fellow jurors during deliberations, and immediately advise the court if it appears that a fellow juror is deciding the case upon an "improper basis," may curtail or distort deliberations. [I]t is not conducive to the proper functioning of the deliberative process for the trial court to declare – before deliberations begin and before any problem develops – that jurors should oversee the reasoning and decisionmaking process of their fellow jurors and report perceived improprieties to the court.

(*Id.* at p. 440.)

The Court concluded, however, that because secrecy is not absolute, and may give way to reasonable inquiry into juror misconduct, CALJIC No. 17.41.1's potential to induce a juror to unnecessarily reveal the content of deliberations, or threaten to do so, does not render it unconstitutional. (*Engelman,* at p. 444.) Johnson respectfully contends that the principle that jury secrecy is not absolute does not warrant the conclusion that this instruction complies with Sixth and Fourteenth Amendment guarantees.

To be sure, as *Engelman* states, refusal to deliberate may constitute grounds for a juror's discharge, and intrusion into the content of jury deliberations is necessarily attendant to the process of discharging a sitting juror. (*Engelman,* at p. 444.) The vice of CALJIC No. 17.41.1, however, lies not only in its provision for intrusion into jury deliberations in some cases, but more fundamentally, in every case, in the change it risks effecting on the deliberative process itself. In other words, the instruction does not merely provide that the sanctity of jury deliberations may be intruded upon when necessary to address an allegation of misconduct; it hampers deliberations in *every* case by instructing jurors as they go into the juror room that their fellow jurors will be policing the thoughts they express and are duty-bound to report any perceived improprieties to the judge. More, it provides a tool jurors may use to "browbeat[] other jurors," and risks squelching minority views. (*Engelman,* at p. 445.) All of these vices strike squarely at the very core of the deliberative process – the free and open exchange of ideas among members of a representative cross-section of the community who have come together to attempt to reach a judgment based on lay common sense. (See, e.g., *Ballew v. Georgia* (1978) 435 U.S. 223, 229-230.)

As the Supreme Court has put it:

> The basic purpose of a trial is the determination of truth, and it is the jury to whom we have entrusted the responsibility for making this determination in serious criminal cases. Any practice that threatens the jury's ability properly to perform that function poses a similar threat to the truth-determining process itself.

(*Brown v. Louisiana* (1980) 447 U.S. 323, 334, citation and quotation omitted.)

Thus, the relevant constitutional question, Johnson respectfully maintains, is not whether intrusions into deliberations are sometimes allowed; it is well-established that they are. The question, rather, is whether this state practice "creat[es] a substantial threat to Sixth and Fourteenth Amendment guarantees," and if so, whether any state interest justifies it. (*Ballew v. Georgia, supra,* 435 U.S. at p. 243 [finding reducing criminal jury from six to five poses substantial threat unjustified by any significant state interest]; see *id.* at p. 231; see also *Burch v. Louisiana* (1979) 441 U.S. 130, 139 [though state has a substantial interest in reducing time and expense associated with administration of criminal justice, that interest cannot justify nonunanimous verdicts by six-person juries].) As explained above, the instruction does threaten the constitutional guarantee of unconstrained jury deliberations. And *Engelman*'s holding that the instruction should not be given effectively establishes that there is no state interest in instructing juries with CALJIC No. 17.41.1 that justifies the acknowledged risk. The only state interest is in guarding against jury misconduct, and that interest is adequately protected by other instructions. (*Id.* at pp. 448-448.) Thus, the instruction violates the Sixth and Fourteenth Amendments to the United States Constitution and its state constitutional counterparts. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 16.)

The instruction also violates due process in that it infringes a right "deeply rooted in this Nation's history and tradition" – the sanctity of jury deliberations. (*Moore v. City of East Cleveland* (1977) 431 U.S. 494, 503; see *In re Winship* (1970) 397 U.S. 358, 361-362 [finding reasonable doubt requirement protected by due process because firmly entrenched in history and tradition of Anglo-American trial]; *Engelman,* at p. 443, quoting

People v. Cleveland, supra, 25 Cal.4th at pp. 481-482.)

Finally, the instruction violates the state constitutional right to trial by jury, not only for the reasons stated above, to the extent the state constitutional right is coextensive with the federal constitutional right, but also because it infringes the state constitutional right, in felony cases, to a jury of 12 persons and to a unanimous verdict. (See Cal. Const., art. I, §§ 7, 13, 15, 16; *People v. Peters* (1982) 128 Cal.App.3d 75, 89-90.) The instruction's potential for use as a tool for coercing fellow jurors infringes the right to a unanimous verdict reflecting the individual judgment of each juror. (See *Engelman,* at pp. 445, 447; see also *People v. Gainer* (1977) 19 Cal.3d 835, 848-849.) This state right to a unanimous verdict in turn is protected from arbitrary infringement by the due process clause of the Fourteenth Amendment to the federal Constitution; its violation thus constitutes a due process violation as well. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

For all the reasons stated above, this Court should reconsider *Engelman* and hold that CALJIC No. 17.41.1 violates the state and federal constitutions.

B. Giving CALJIC No. 17.41.1 at the Guilt and Penalty Phases in this Capital Case Violated the Eighth and Fourteenth Amendments and Their State Counterparts.

Even if this Court should decline to revisit *Engelman*, this case presents an additional issue not present in that case – how CALJIC No. 17.41.1 impacts the guilt and penalty phases of a capital trial. In a capital case, CALJIC No. 17.41.1 violates the Eighth and Fourteenth Amendment rights to reliable determinations of guilt and penalty, and the state constitutional counterparts. (See U.S. Const., 8th & 14th Amends.; Cal.

Const., art. I, §§ 7, 15, & 17.)

In *People v. Brown* (2004) 33 Cal.4th 382, 392-393, a capital case, this Court addressed a claim that CALJIC No. 17.41.1 violated the rights to jury trial, to due process, and a unanimous verdict, and declined to revisit *Engelman*, because the defendant had made no argument warranting reconsideration. *Brown* also addressed the incorporation of CALJIC No. 17.41.1 by reference at the penalty phase of a capital case, as was done here. It rejected without significant analysis the defendant's single argument that the instruction would have pressured jurors disinclined to impose death "to go along with the majority . . . or risk being reported to the court." (*Id.* at p. 400.) Johnson respectfully asks this Court to reconsider that conclusion. Moreover, as set forth below, Johnson makes a broader, and different, argument than that made in *Brown* – one which has not yet been explicitly addressed by this Court.

1. Instructing Guilt-Phase Jurors in a Capital Trial with CALJIC No. 17.41.1 Violates the Eighth and Fourteenth Amendments.

The Eighth Amendment requires reliability not only in the ultimate determination whether a defendant convicted of murder should live or die, but also in the determination of whether he is guilty or not guilty in the first instance. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.) The risk to the integrity of deliberations recognized in *Engelman*, at pp. 440, 445-448, even if tolerable in noncapital cases, cannot be countenanced where life is at stake. As the Supreme Court has repeatedly recognized, death is different. (*Beck,* at p. 637.)

The risks to the deliberative process recognized by this Court in *Engelman* are even graver here. First, because CALJIC No. 17.41.1 fails to

specify what an "improper basis" is, jurors may define without guidance what is improper and impose it on others. (*Engelman*, at p. 447.) Jurors otherwise "confident of their own good faith and understanding of the evidence and the court's instructions on the law, mistakenly may believe that those individuals who steadfastly disagree with them are refusing to deliberate or are intentionally disregarding the law." (*Id.* at p. 446.) Second, the instruction "could cause jurors to become hypervigilant during deliberations about *perceived* refusals to deliberate or other ill-defined 'improprieties," threatening the "free exchange of ideas that lies at the center of the deliberative process." (*Id.* at p. 447.) "[A] juror endowed with confidence in his or her own views . . . might rely on CALJIC No. 17.41.1 as a license to scrutinize other jurors for some ill-defined misconduct rather than to remain receptive to the views of others." (*Id.* at p. 447.) Third, the instruction may be used by a juror to browbeat other jurors; a juror, without ever communicating with the court, might "place undue pressure on another juror by threatening to accuse that juror in open court of reasoning improperly or not following the court's instructions[;]" or the instruction might be used to "short-circuit discussions by threatening to call upon the court to arbitrate normal disagreements." (*Id.* at pp. 445-447). Fourth, jurors who cannot deliberate well or skillfully may censor themselves, unwilling to articulate ideas or opinions that might be deemed "improper," thus crippling deliberations and robbing them of the free exchange of ideas from differing viewpoints. (*Id.* at pp. 443, 446.)

As this Court recognized in *Engelman*, at p. 447, "[j]ury deliberation is a sensitive mechanism that most often simply must – and will – accommodate itself to the resolution of strong differences of opinion." This Court has found that CALJIC No. 17.41.1's tinkering with this

"sensitive mechanism" is unwarranted in criminal cases in general. In a capital case, the risks are more than unwarranted; they are unconstitutional.

2. Instructing Penalty-Phase Jurors with CALJIC No. 17.41.1 Violates the Eighth and Fourteenth Amendments.

The court incorporated CALJIC No. 17.14.1 by reference at the penalty phase. The court did not reread applicable guilt-phase instructions at the penalty phase; nor did it instruct the jury to disregard any inapplicable guilt-phase instructions. Rather, it told the jury: "You are to be guided by the instructions I read to you in the first phase of the trial that are applicable and pertinent to the determination of the penalty." (40CT 11629; 25RT 2-1808.) Thus, each juror was free to follow CALJIC No. 17.41.1's directive to police her fellow jurors during penalty deliberations.

Effectively giving CALJIC No. 17.41.1 at the penalty phase poses an even more serious threat to a defendant's constitutional rights. The instruction is incompatible with the unique role of capital jurors, who "express the conscience of the community on the ultimate question of life or death." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 519.) The jurors' task at the penalty phase is "inherently moral and normative, not factual . . . ." (*People v. Prieto* (2003) 30 Cal.4th 226, 264.) Faced with this weighty moral task, however, capital jurors "are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 333.) A juror must be "free to reject death if [he or she] decides on the basis of *any* constitutionally relevant evidence or observation that it is not the appropriate penalty." (*People v. Brown* (1985) 40 Cal.3d 512, 540.)

In this context, all the risks posed by CALJIC No. 17.41.1, set forth

above, are particularly acute. Given only partial guidance, and vested with significant discretion, jurors are even more free to decide for themselves what might constitute "any . . . improper basis" for decision. (See *Engelman,* at p. 447 [language referring to "'any other improper basis' permits members of the jury to provide their own interpretation of what is improper"].) In weighing aggravating and mitigating circumstances – and thus deciding whether Johnson was to live or die – the jurors were told to "assign whatever moral or sympathetic value *you deem appropriate* to each and all of the various factors you are *permitted* to consider." (CALJIC No. 8.88, emphasis added; 40CT 11637; 25RT 2-1813.) This language, granting broad discretion to the jurors, nonetheless includes the concept that choosing life cannot be based on an improper, inappropriate, or impermissible basis. Johnson therefore respectfully disagrees with this Court's finding that CALJIC No. 17.41.1 does no constitutional harm because "[t]hese instructions plainly inform the jurors of the nature of their task and the basis on which they are to determine the appropriate penalty." (*People v. Brown, supra,* 33 Cal.4th at p. 400.) Permissible exercises of the constitutionally mandated discretion jurors are granted at the penalty phase may *appear* improper, particularly to jurors more familiar with the less discretionary determinations of guilt or innocence. The risk that a juror may deem another juror's constitutionally relevant evidence or observation improper, and attempt to cut off discussion or threaten to report the matter to the judge – or the risk that jurors may censor themselves, fearful that their ideas will be deemed improper or reported to the court – are all the more threatening to a defendant's constitutional rights at the penalty phase.

For example, although not enumerated in the standard instructions,

mercy can and should play a role in the jury's determination of the appropriate penalty. (See Argument 14.) Thus, a juror inclined to consider mercy may properly do so. But some other juror might easily think that mercy *cannot* be considered, since it is not specifically enumerated in CALJIC No. 8.85 or elsewhere. CALJIC No. 17.41.1 permits that second juror, who is incorrectly convinced that mercy is an improper consideration, to browbeat the first juror into foregoing her merciful inclinations.

To be sure, this example rests on speculation, in that Johnson cannot show that any such browbeating occurred. But *Engelman* itself recognizes that the harm of CALJIC No. 17.41.1 lies not in the outcomes it assures but in the risks it poses – risks unjustified by any state interest, see *supra*; and risks are by definition speculative.

CALJIC No. 17.41.1's many risks are inconsistent with the Eighth Amendment's heightened need for reliability; the risks that led this Court to decide that CALJIC No. 17.41.1 should not be given in a noncapital case cannot be accepted at all in cases where life is at stake. The instruction "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty" (*Lockett v. Ohio* (1978) 438 U.S. 586, 605) – because the free exchange of ideas has been chilled, deliberations have been curtailed by the implicit or explicit threat of a report to the judge of alleged impropriety, or an argument for life has been improperly dismissed. "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Ibid.*)

C. Reversal is Required.

Giving CALJIC No. 17.41.1 at the guilt phase and then effectively

giving it again at the penalty phase requires reversal of the judgment. The errors are structural, because the harm is "necessarily unquantifiable and indeterminate[.]" (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150.) The effects of CALJIC No. 17.41.1 are unquantifiable because the instruction is, as this Court has recognized, likely to chill the free exchange of ideas in the jury room – a harm that is by its nature hard to assess as it relates to things unsaid. There is simply no way of knowing what arguments for life might have been left unstated in the fear that they were "improper."

Even should this Court apply harmless-error analysis, the prosecution cannot sustain its burden of proving beyond a reasonable doubt that the errors in delivering CALJIC No. 17.41.1 at the guilt and penalty phases did not contribute to the verdicts obtained. The question is not whether "in a trial that occurred without the error, . . .[the] guilty verdict[s] [and death sentences] surely would have been rendered" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279) – though in this case the prosecution could not even meet that standard. Rather, the question is whether the verdicts "actually rendered in this trial [were] surely unattributable to the error." (*Ibid.*) The prosecution cannot prove that beyond a reasonable doubt.

This instruction poses a myriad of risks, all acknowledged by this Court, and all significant enough that this Court has concluded the instruction should not be given. Given the many acknowledged risks this instruction poses – each entirely reasonable, describing an entirely possible scenario – the prosecution cannot sustain its burden of showing beyond a reasonable doubt that the errors did not contribute to the verdicts. As set forth at length elsewhere, the evidence supporting the convictions was at

best weak. The prosecution can offer no basis from which to conclude that this instruction did not contribute to the guilty verdicts. Likewise, there is nothing in this record to support the conclusion that the erroneous delivery of CALJIC No. 17.41.1 at the penalty phase, where the broader discretion granted to the jury only heightened the risks that CALJIC No. 17.41.1 would distort deliberations, did not contribute to the death sentences.

For the foregoing reasons, the entire judgment against Johnson must be reversed. At a minimum, because the improper instruction's harm was aggravated at penalty, Johnson's death sentence must be reversed.

14.

A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) The reasonable doubt standard is the bedrock principle at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *In re Winship, supra*, 397 U.S. at p. 363.) Jury instructions violate these constitutional requirements if there is a reasonable likelihood that the jury understood them to allow conviction based on proof insufficient to meet the standard of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court instructed the jury with CALJIC Nos. 2.01, 2.02, 2.21.2, 2.22, 2.27, 2.51, 8.20, and 8.83.1. (40CT 11552-11553, 11558-11559, 11561-11562, 11583-11584, 11594.) These instructions violated the above principles and thereby deprived defendant Cedric Johnson of his constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) and trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16). (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265.) They also violated the fundamental requirement for reliability in a capital case by allowing Johnson to be convicted without the prosecution having to present the full measure of proof. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) Because the

instructions violated the federal Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

Johnson recognizes that this Court has previously rejected many of these claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.) Nevertheless, he raises them here for this Court to reconsider those decisions and in order to preserve the claims for federal review, if necessary.[61]

A. The Instructions on Circumstantial Evidence – CALJIC Nos. 2.01, 2.02, and 8.83.1 – Undermined the Requirement of Proof Beyond a Reasonable Doubt.

The jury was given three interrelated instructions – CALJIC Nos. 2.01, 2.02, and 8.83.1 – that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. (40CT 11552 [sufficiency of circumstantial evidence – generally]; 40CT 11553[sufficiency of circumstantial evidence to prove specific intent or mental state]; 40CT 11594 [special circumstances – sufficiency of circumstantial evidence to prove required mental state].) These instructions, addressing different evidentiary issues in almost identical terms, advised Johnson's jury that if one interpretation of the evidence

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[61] In *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, this Court ruled that "routine" challenges to the state's capital-sentencing statute will be considered "fully presented" for purposes of federal review by a summary description of the claims. This Court has not indicated that repeatedly-rejected challenges to standard guilt phase instructions similarly will be deemed "fairly presented" by an abbreviated presentation. Accordingly, Johnson more fully presents the claims in this argument.

"appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (40CT 11552-1553, 11594.) These instructions informed the jurors that if Johnson reasonably appeared to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. The instructions undermined the reasonable doubt requirement in two separate but related ways, violating Johnson's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana, supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama, supra*, 447 U.S. at p. 638.)[62]

First, the instructions compelled the jury to find Johnson guilty and the special circumstance true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship, supra*, 397 U.S. at p. 364.) The instructions directed the jury to convict Johnson based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (40CT 11553.) An interpretation that appears reasonable, however, is not the same as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana, supra*, 508 U.S. at p. 278 ["It would not satisfy the

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[62] Although defense counsel did not object to the giving of CALJIC No. 2.02, the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (§ 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally-mandated one.

Second, the circumstantial evidence instructions required the jury to draw an incriminatory inference when such an inference appeared "reasonable." In this way, the instructions created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless Johnson rebutted it by producing a reasonable exculpatory interpretation. Mandatory presumptions, even ones that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, the instructions plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you must accept the reasonable interpretation and reject the unreasonable." (40CT 11552-1553, 11594.) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. Accordingly, this Court should invalidate the instructions given in this case, which required the jury to presume all elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The instructions had the effect of reversing, or at least significantly lightening, the burden of proof, since it required the jury to find Johnson guilty of first degree murder and the special circumstance true unless he

came forward with evidence reasonably explaining the incriminatory evidence put forward by the prosecution. The jury may have found Johnson's defense unreasonable but still have harbored serious questions about the sufficiency of the prosecution's case. Nevertheless, under the erroneous instructions, the jury was required to convict Johnson if he "reasonably appeared" guilty of murder, even if the jurors still entertained a reasonable doubt of his guilt. The instructions thus impermissibly suggested that Johnson was required to present, at the very least, a "reasonable" defense to the prosecution's case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find Johnson guilty and the special circumstance true on a standard less than the federal Constitution requires.

B. CALJIC Nos. 2.21.2, 2.22, 2.27, 2.51, and 8.20 Also Vitiated the Reasonable Doubt Standard.

The trial court gave five other standard instructions that magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diluted the constitutionally mandated reasonable doubt standard – CALJIC Nos. 2.21.2 (witness wilfully false), 2.22 (weighing conflicting testimony), 2.27 (sufficiency of testimony of one witness), 2.51 (motive), and 8.20 (deliberate and premeditated murder). (40CT 11558-11559, 11561-11562, 11583-11584.) Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence.

Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, and violated the constitutional prohibition against convicting a capital defendant on any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Cage v. Louisiana*, *supra*, 498 U.S. at pp. 39-40; *In re Winship*, *supra*, 397 U.S. at p. 364.)[63]

The jury was instructed with CALJIC No. 2.51 as follows:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(40CT 11562.) This instruction allowed the jury to determine guilt based on the presence of alleged motive alone and shifted the burden of proof to Johnson to show absence of motive to establish that he was not guilty, thereby lessening the prosecution's burden of proof. As a matter of law, however, it is beyond question that motive alone, which is speculative, is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient]; see *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

Jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say

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[63] Although defense counsel failed to object to these instructions, Johnson's claims are still reviewable on appeal. (See fn. 2, above, incorporated here by reference.)

so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase inclusio unius est exclusio alterius could mislead a reasonable juror as to the scope of an instruction]; *People v. Dewberry* (1959) 51 Cal.2d 548, 557 [failure to instruct on effect of a reasonable doubt as between any of the included offenses resulted in erroneous implication that rule requiring finding of guilt of lesser offense applied only as between first and second degree murder]; *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].) Here, the prosecution's heavy reliance on Tyrone Newton's "snitch" testimony increased the likelihood that the jury would have understood that motive alone could establish guilt. (24RT 2-1453, 1463, 1559, 1562, 1566.)

CALJIC No. 2.21.2 also lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." (40CT 11558.) That instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].) The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the

jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(40CT 11559.) The instruction specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing. Thus, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence standard." As with CALJIC No. 2.21.2, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (40CT 11561), was likewise flawed. The

instruction erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case, and cannot be required to establish or prove any "fact." (*People v. Serrato* (1973) 9 Cal.3d 753, 766.)

Finally, CALJIC No. 8.20, which defines premeditation and deliberation, misled the jury regarding the prosecution's burden of proof. The instruction told the jury that the necessary deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation. . . ." (40CT 11583.) In that context, the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, as opposed to raising a reasonable doubt. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean absolutely prevent].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." In the face of so many instructions permitting conviction on a lesser showing, no reasonable juror could have been expected to understand that he or she could not find Johnson guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated Johnson's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const.,

art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

C. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions.

Although each challenged instruction violated Johnson's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.02, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [circumstantial evidence instructions].) While recognizing the shortcomings of some of the instructions, this Court has consistently concluded that the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt, and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the federal Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged

instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions are "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden, supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin* (1985) 471 U.S. 307, 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as they were given in this case, explicitly told the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to reasonable doubt.

D. Reversal Is Required.

Because the erroneous circumstantial evidence instruction required conviction on a standard of proof less than proof beyond a reasonable

doubt, its delivery was a structural error, which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) At the very least, because all of the instructions violated Johnson's federal constitutional rights, reversal is required unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

The prosecution cannot make that showing here, because its proof of Johnson's guilt was weak for all of the reasons previously discussed. Because these instructions distorted the jury's consideration and use of circumstantial evidence and diluted the reasonable doubt requirement, the reliability of the jury's findings is undermined.

The dilution of the reasonable-doubt requirement by the guilt phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, Johnson's judgment must be reversed in its entirety.

15.

THE TRIAL COURT ERRED IN REJECTING PROPOSED INSTRUCTIONS THAT WOULD HAVE PROPERLY GUIDED THE JURY IN ITS PENALTY DETERMINATION.

A. The Court Erroneously Rejected an Instruction That the Jury Could Consider a Constitutionally Valid Factor: Mercy.

Defendant Cedric Johnson's counsel requested that the trial court instruct the jury that at the penalty phase the jury was "permitted to consider pity, sympathy or mercy for the defendant in deciding whether to give life without parole or death." (40CT 11643 (Special Instruction D).) The court rejected the instruction, noting that CALJIC No. 8.85 referred to any sympathetic or other aspect of the defendant's character or record as a basis for imposing a sentence less than death. (25RT 2-1768-1769.) The court's refusal to instruct the jurors that they were empowered to exercise sympathy, pity, or mercy when determining the appropriate sentence denied Johnson his constitutional rights to have the jury consider mitigating evidence and to receive instructions delineating the defense theory of the case. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17.)

1. Jurors may consider mercy in deciding penalty.

The role of mercy has long been acknowledged to be an important consideration in any capital sentencing decision. The United States Supreme Court struck down sentencing schemes that mandated a sentence of death for particular crimes in part because they excluded consideration of compassion or mercy. (See *Roberts v. Louisiana* (1976) 428 U.S. 325, 331 [Louisiana statute provided no role for mercy].) Moreover, it has acknowledged that even though jurors must be guided in their discretion to determine the appropriate sentence, mercy may still play an independent

role in the sentencing decision. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 203 [isolated decision to extend mercy does not render statutes unconstitutional].)

This Court has also acknowledged the role of mercy in the consideration of all mitigating evidence relevant to the jurors' determination of the appropriate sentence. Trial courts "should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." (*People v. Haskett* (1982) 30 Cal.3d. 841, 864.) This statement implicitly recognizes that mercy is not a factor in mitigation itself, nor an aspect of the defendant's character. Rather, the capacity to show mercy is personal to the jurors; it is their "reasoned moral response" (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328) to mitigating evidence, through the imposition of a penalty that is less than what is perceived to be deserved in light of the balance between statutory factors in aggravation and mitigation.

In this sense, mercy is an evidence-based consideration which jurors superimpose over the balance of statutory factors in aggravation versus those in mitigation in order to determine whether death is an appropriate penalty notwithstanding the defendant's culpability in the commission of the murder. (See *People v. Lanphear* (1984) 36 Cal.3d 164, 169.) However, without instructional guidance there is a substantial likelihood the jury may have excluded any consideration of mercy. The absence of instructions defining the role of mercy in the jurors' determination of the appropriate sentence conflicts with the importance of informing capital juries of their "obligation to consider all of the mitigating evidence introduced by the defendant." (See *California v. Brown* (1987) 479 U.S.

538, 542-543, 546 (conc. opn. of O'Connor, J.).)[64]

Even in the absence of mitigating evidence, a mercy instruction should be required when requested. "[D]iscretion to grant mercy – perhaps capriciously – is not curtailed." (*Moore v. Balkcom* (11th Cir. 1983) 716 F.2d 1511, 1521.) Indeed, this Court has consistently recognized that a jury may determine that the evidence is insufficient to warrant death even if there is no mitigating circumstance. (See *People v. Duncan* (1991) 53 Cal. 3d 955, 979 [jury may decide that aggravating evidence not comparatively substantial enough to warrant death].) Mercy offers a vehicle for the jury to deliver a just verdict even if they fail to find any mitigating factors as defined by the legislature and presented by the defendant.

Thus, the jury must be provided with a vehicle for dispensing mercy after their consideration of all the evidence, so they may express their "reasoned moral response" in a sentencing decision. If the jury is not told that it has the power to consider mercy, in the same way that it must consider all the statutory mitigation offered by the defendant, it may falsely believe that the sentencing process involves merely a calculated weighing of factors, leaving them no means of effecting a moral response to evidence falling outside the enumerated factors. Accordingly, the trial court should have granted Johnson's request that the jury be instructed on mercy.

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[64] Justice Blackmun's dissent in *Brown*, expresses concern about the imposition of the death penalty without juries having considered mercy for the defendant. "In my view, we adhere so strongly to our belief that sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual because . . . we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value." (479 U.S. at pp. 562-563.)

2. CALJIC No. 8.85 did not convey that mercy – as distinct from sympathy – is a valid factor to consider in determining penalty.

This Court has repeatedly held that language contained in CALJIC No. 8.85 sufficiently alerts jurors to their "obligation to take into account mercy" in deciding penalty. (E.g., *People v. Hughes* (2002) 27 Cal.4th 287, 403.) In this case, CALJIC No. 8.85 stated in relevant part:
"You shall consider, take into account and be guided by . . . . 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[.]" (40CT 11631-11632; 25RT 1810-1811; see also Pen. Code, § 190.3, subd. (k).) Under this instruction, a reasonable juror would not necessarily understand that she could consider mercy – a concept distinct from sympathy. In this context, sympathy connotes a similarity or affinity between juror and defendant. (See Webster's 3d New International Dict. (2002) at p. 1413 [defining sympathy as "correspondence in qualities, properties, or disposition . . . an affinity, association"].) Johnson's mitigation evidence may not have inspired any sense of affinity for Johnson among the jurors. But it could have inspired mercy, a response that connotes sheer compassion for its object, regardless of difference. (See *id.* at p. 2317 [defining mercy as "compassion or forbearance shown to an offender"].) Mercy may be invoked even if the evidence has no sympathetic value. As Justice Mosk stated, mercy "is the power to choose life over death – whether or not the defendant deserves sympathy – simply because life is desirable and death is not." (*People v. Andrews* (1989) 49 Cal.3d 200, 236 (dis. opn. of Mosk, J.).)

A merciful jury was Johnson's only hope. The jurors neither saw nor heard from the man they were asked to sentence to death. Little was

offered at penalty to invoke a sympathetic response among the jurors. But Johnson was entitled to have the jury consider whether – simply as a human being – he deserved mercy.

B. The Court Erred in Refusing to Instruct the Jury That Death Is Worse Than Life Without Parole.

In answer to Question 107 on the jury questionnaire, four sitting jurors stated that they believed that life without possibility of parole was a more severe sentence than death.[65] (20CT 5814, 5946; 21CT 5979.) To correct this fundamental misunderstanding of the applicable law, Hauser requested the following instruction:

> Some of you may have expressed on your questionnaires that you felt that life in prison without possibility of parole is worse than death. In this case, you are instructed that the sentence of death is to be considered a worse sentence than that of life without possibility of parole, even though you personally may disagree.

(40CT 11642.) Finding no case authority requiring that the jury be instructed which penalty is more severe or worse, the court rejected the proposed instruction. (25RT 2-1767.) No other instruction made clear that

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[65] Juror No. 2 elaborated on the questionnaire: "No freedom to live by choice and desired style for as long as you live for as long as you live will hurt every day[.]" (20CT 5814.) Juror No. 6 said that LWOP was worse "because he or she has the rest of their lives [sic] to think about it[.]" (21CT 5946.) Juror No. 7 explained: "Both are bad[.] Death is faster over now, life in prison slower death." (21CT 5979.) Juror No. 5 indicated that LWOP was worse, stating, "Living without hope, I think, would be devast[at]ing to anyone." (21CT 5913.) Although Juror No. 5 was eventually replaced by an alternate just before penalty deliberations, she was still serving at the time Judge Cheroske rejected the proposed instruction. (25RT 2-1775.)

– as a matter of constitutional law – the jury had to consider death as the most severe punishment. As a result, three jurors rendered a death judgment based on a fundamental and uncorrected misunderstanding of the central moral framework. Rejecting the proposed, legally correct, instruction and permitting the jury to deliberate under this legal misconception violated Johnson's state and federal constitutional rights to a fair penalty trial and a reliable and non-arbitrary determination of penalty, and requires reversal of his death sentence. (Cal. Const., art. I, §§ 15, 17; U.S. Const., 8th & 14th Amends.)

1. Failing to inform the jury that death is the more severe penalty was constitutional error.

The United States Supreme Court has long considered death to be qualitatively different in its severity from all other punishments. In *Woodson v. North Carolina* (1976) 428 U.S. 280, 305, the Court stated: "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Id.* at p. 305.) Much of the high court's capital jurisprudence is based on this fundamental premise: "There is no question that death as a punishment is unique in its severity and irrevocability." (*Gregg v. Georgia* (1976) 428 U.S. 153, 187; accord, *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Coker v. Georgia* (1977) 433 U.S. 584, 598.) Life imprisonment – even without the possibility of parole – is not as severe as death. (See *California v. Ramos* (1983) 463 U.S. 992, 1024 [permanent imprisonment is less severe than a death sentence].) The Court has been absolutely clear on this point: "Because the death penalty is the most severe punishment, the Eighth

Amendment applies to it with special force." (*Roper v. Simmons* (2005) 543 U.S. 551, 568, citing *Thompson v. Oklahoma* (1987) 487 U.S. 815, 856 (conc. opn. of O'Connor, J.).)

When the state seeks death, courts must ensure that every safeguard designed to guarantee "fairness and accuracy" in the "process requisite to the taking of a human life" is painstakingly observed. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414; see also *Gardner v. Florida*, *supra*, 430 U.S. at pp. 357-358.) As a result, the Eighth Amendment requires a "greater degree of accuracy" and reliability. (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342; see also *Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 ["[T]he severity of the death sentence mandates heightened scrutiny in the review of any colorable claim or error."].) Allowing the decision between life or death to turn on a misunderstood legal concept is inconsistent with the degree of reliability required by the Eighth Amendment. As the high court has stated:

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case.

(*Mills v. Maryland* (1988) 486 U.S. 367, 383-384.) The trial court here disregarded this basic constitutional requirement. Its failure to instruct the jury that death is the more severe penalty, especially given that the sitting jurors obviously were ignorant of the law, denied Johnson a fair penalty trial and a reliable and non-arbitrary sentencing determination in violation of the Eighth and Fourteenth Amendments.

Significantly, the court did not correct the jurors' critical misunderstanding elsewhere. Indeed, time and again the court indicated that the belief that death was a less severe sentence than LWOP need not be corrected. To begin with, it never identified the "wrong" written answer to Question 107 as a reason to question a juror. Further, when directly confronted with such an answer during jury selection, it failed to correct that misunderstanding. (18RT 2-193, 2-324.) In contrast, when a potential juror noted that death was worse than LWOP because the latter can result in being paroled, the court thoroughly corrected that misunderstanding, instructing her "You're to assume, for this case and for the answering of these questions, that life without possibility of parole means just that. . . . There's not going to be any parole. . . . You have to assume that." (18RT 2-485.) Thus, at no time did the court explicitly correct the jurors' legal misunderstanding.

2. Johnson's death sentence should be reversed.

As detailed elsewhere, the case for guilt, let alone death, was far from overwhelming. The primary evidence of premeditation – Tyrone Newton's disavowed statement, on which a finding of first degree murder depended, was both unreliable and improperly bolstered by two other errors – the exclusion of evidence showing Newton's contemporaneous motive to lie and the court's failure to properly instruct that the statement should be viewed with caution. (See Arguments 9 and 10.) The sole special circumstance was multiple murder. The aggravating evidence consisted of victim impact evidence as to Hightower and Johnson's other criminal activity. Apart from Robert Huggins's wholly improper allusion to Johnson having gotten away with killing two other people – another significant error – the only prior criminal conduct was Johnson's single marijuana

conviction and his altercation with his defense counsel. As indicated by the first jury's not finding Johnson guilty of any crime at all, it is clear that in this case a death sentence was far from a foregone conclusion.

In this context, refusing to explicitly instruct the jury only what the law holds true – that death is more severe than LWOP – especially when sitting jurors did not understand this constitutional principle, was prejudicial under either the federal reasonable-doubt standard or the state reasonable-possibility standard. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 447-448.) The death judgment must therefore be reversed

16.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT JOHNSON'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, Johnson briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, Johnson requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad.

To meet constitutional muster, 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. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offenses charged against Johnson, Penal Code section 190.2 contained 21 special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme 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 United States Constitution.

B. The Broad Application of Section 190.3(a) Violated Johnson's Constitutional Rights.

Penal Code section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 40CT 11631.) 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. Of equal importance is the use of factor (a) to embrace facts that cover the entire spectrum of circumstances inevitably present in every homicide – facts such as the victim's age, defendant's age, motive for the killing, and method, time, and location of the killing. In this case, the prosecutor argued that the method of killing and Johnson's alleged motive

(25RT 2-1792-1793) were aggravating factors.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death on no basis other than that the particular set of circumstances surrounding the crime were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Johnson is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Johnson urges the court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof.

1. Johnson's death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt.

California law does not require that a reasonable doubt standard be

used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, Johnson's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (40CT 11637-11638.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Ring v. Arizona* (2002) 530 U.S. 584, 604, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Cunningham v. California* (2007) 549 U.S. 270 now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. To impose the death penalty in this case, Johnson's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 40CT 11637-11638.) Because these additional findings were required before the jury could impose the death sentence, *Apprendi, Ring, Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Johnson is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) The Court has rejected the argument that *Apprendi* and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Johnson urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, Johnson contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has previously rejected Johnson's claim that the Due Process Clause and the Eighth Amendment each requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Johnson requests that the Court reconsider this holding.

2. Some burden of proof is required, or the jury should have been instructed that there was no burden of proof.

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution

will be decided and Johnson is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, Johnson's jury should have been instructed that the state had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (40CT 11631, 11637), fail to provide the jury with the guidance required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Johnson is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a

nonexistent burden of proof.

3. Johnson's death verdict was not premised on unanimous jury findings.

a. Aggravating Factors

To impose a death sentence, when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty, violates the Sixth, Eighth, and Fourteenth Amendments. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, 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.) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra.* (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Johnson asserts that *Prieto* was incorrectly decided, and applicaiton of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such

allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Johnson asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Johnson's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 40CT 11634.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in section 190.3, factor (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 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by Johnson (25RT 2-1703-1711) and devoted a considerable portion of its closing argument to the alleged offense (25RT 2-1787, 2-1791-1792).

The United States Supreme Court's recent decisions in *Cunningham v. California*, *supra*, 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 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 unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Johnson is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The instructions caused the penalty determination to turn on an impermissibly vague and ambiguous standard.

Whether to impose the death penalty on Johnson hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (40CT 11638.) The phrase "so

substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The instructions failed to inform the jury that the central determination is whether death is the appropriate punishment.

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Johnson urges this Court to reconsider that ruling.

6. The instructions failed to inform the jurors that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole.

Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of section 190.3, the instruction violated Johnson's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Johnson submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the

Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of Johnson's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The penalty jury should be instructed on the presumption of life.

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated Johnson's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th

Amends.), and his right to the equal protection of the laws. (U.S. Const. 14th Amend.)

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) Nevertheless, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written Findings Violates Johnson's Right to Meaningful Appellate Review.

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), Johnson's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived Johnson of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Johnson urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Johnson's Constitutional Rights.

1. The use of restrictive adjectives in the list of potential mitigating factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see CALJIC No. 8.85; § 190.3, factors (d) and (g); 40RT 11631) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Johnson is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The failure to delete inapplicable sentencing factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to Johnson's case – factors (e) and (f). The trial court failed to omit those factors from the jury instructions (40CT 11631-11632), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Johnson asks the Court to reconsider its decision in *People v. Cook* (2006) 39 Cal.4th 566, 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The failure to instruct that statutory mitigating factors were relevant solely as potential Mitigators.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending on the jury's appraisal of the evidence. (40CT 11631-11632.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – 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. Davenport* (1985) 41 Cal.3d 247, 288-289). Johnson's 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. Consequently, the jury was invited to aggravate Johnson's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, Johnson asks the court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty.

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, Johnson urges the court to reconsider its failure to require inter-case proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause.

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 in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.406.) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any findings to justify the defendant's sentence. Johnson acknowledges that the court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the court to reconsider.

H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms.

This court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook* (2006) 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the

death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), Johnson urges the court to reconsider its previous decisions.

17.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT.

Even if this Court finds that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of both guilt and penalty phase proceedings, compels the conclusion that Johnson was denied a fair trial at both phases, and warrants reversal of the judgment of conviction and sentence of death because the state will not carry its burden of proving that the cumulative effect of the errors was harmless beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 844-848 [reversing entire judgment in capital case due to cumulative error]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 to the totality of the errors when errors of federal constitutional magnitude combined with other errors]; see *People v. Lindberg* (2008) 45 Cal.4th 1, 54; *People v. Riggs* (2008) 44 Cal.4th 248, 330; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 298 ["The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair"]; *Killian v. Poole* (9th Cir.

2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"].)

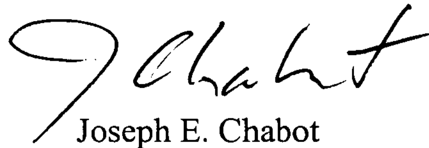
CONCLUSION

For the reasons stated, the judgment must be reversed in its entirety.

Dated: January 14, 2009

Respectfully submitted,

Michael J. Hersek
State Public Defender



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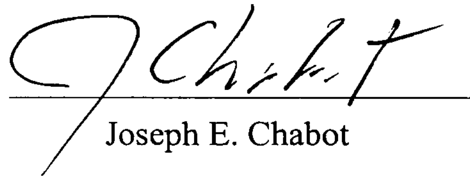
CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Joseph E. Chabot, am the Senior Deputy State Public Defender assigned to represent appellant, Cedric Jerome Johnson, in this automatic appeal. I counted the words in this brief with the computer program used to prepare the brief and certify that it is 103,637 words, excluding the tables and certificates.

Dated: January 14, 2009



Joseph E. Chabot

DECLARATION OF SERVICE

Re: *People v. Cedric Jerome Johnson* No. S075727

I, **Neva Wandersee,** declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in envelopes addressed respectively as follows:

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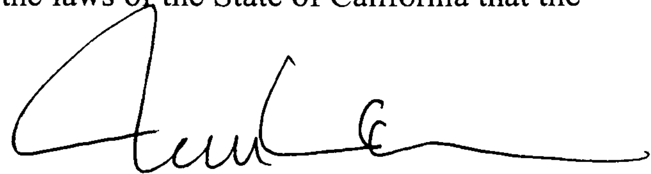
Each envelope was then, on January 14, 2009, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Dated: January 14, 2009



Neva Wandersee