DEATH PENALTY

SUPREME COURT No. S076337

DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

EDWARD CHARLES, III,

Defendant and Appellant.

Orange County Superior Court No. 94NF2611

APPELLANT'S OPENING BRIEF

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

HONORABLE EVERETT W. DICKEY, JUDGE
HONORABLE WILLIAM R. FROEBERG, JUDGE

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STATEMENT OF APPEALABILITY

This appeal is automatic pursuant to the California Constitution, art. VI, section 11 and Penal Code section 1239, subdivision (b). Further, this appeal is from a final judgment following a jury trial and is authorized by Penal Code section 1237, subdivision (a).

STATEMENT OF CASE

By an Information filed on April 10, 1995, appellant Edward Charles,

III was charged with three counts of murder. (1 C.T. 191.) Count I alleged that on or about November 6, 1994 appellant Charles murdered his brother, Danny Charles, in violation of Penal Code section 187(a). Count II alleged that on or about November 6, 1994 appellant Charles murdered his father, Edward Charles, II, in violation of Penal Code section 187(a). Count III alleged that on or about November 6, 1994 appellant Charles murdered his mother, Dolores Charles, in violation of Penal Code section 187(a). All three counts alleged the offenses were serious felonies within the meaning of Penal Code section 1192.7(c)(1). (1 C.T. 191-192.) Finally the Information alleged a multiple murder special circumstance within the meaning of Penal Code section 190.2(a)(3). (1 C.T. 192.)

On April 10, 1995 appellant was arraigned on the Information, pleaded not guilty to each count and denied all the special circumstance allegations. Appellant requested trial by jury. (1 C.T. 201; 1 R.T. 1A.)

On November 17, 1995 Appellant's Motion to Prohibit the Prosecution from Seeking the Death Penalty was denied without prejudice. (2 C.T. 461.) On November 27, 1995, Appellant's Motion to Apply Different Standards to the Challenges for Cause Depending on the Circumstances was denied as was Appellant's Motion to Pre-Instruct the Jury that Life Without Parole Means Life Without the Possibility of Parole. However, the Court ruled it would instruct the jury that it should assume that whatever sentence was imposed would be carried out. (2 C.T. 496.) On December 11, 1995 Appellant's

Motion to Exclude Tony Saavedra's Article of January 3, 1995 in the Orange County Register (People's Exhibit 2) was denied without prejudice. (2 C.T. 627.)

Opening Statements were given on December 11, 1995 (2 C.T. 628) and the presentation of evidence in the guilt phase commenced the following day. (2 C.T. 629; 5 R.T. 1363-1364.) On December 18, 1995 Appellant's Motion to Exclude Exhibits 3-15 was granted with the exception of exhibit number 3 (photograph of the front of a burned vehicle), which was admitted into evidence. (2 C.T. 647-648.)

The jury retired to deliberate on January 3, 1996 and reached its verdict on January 8, 1996. (2 C.T. 669, 680.)

The jury found appellant guilty of murder in the second degree of Danny Charles as charged in Count One; guilty of murder in the first degree of Edward Charles as charged in Count Two and guilty of murder in the second degree of Dolores Charles as charged in Count Three. (3 C.T. 751-753.) The jury found true the special circumstance of multiple murder. (3 C.T. 754.)

The Penalty Phase of this trial commenced on January 11, 1996. (3 C.T. 828.) The presentation of evidence concluded on January 17, 1996 and the jury began deliberations on January 22, 1996. (3 C.T. 852, 856.)

On January 23, 1996, following a conference in chambers, counsel stipulated to excuse juror number 5 for cause. (3 C.T. 860.) An alternate juror was selected, the court read CALJIC 17.51 to the jury, and the jury retired to begin deliberations anew. (3 C.T. 860.)

Following a series of jury notes and *in camera* discussions which indicated a deadlocked jury, the court inquired of the foreperson if he thought it likely further deliberations would result in an unanimous verdict. (3 C.T. 862-872.) Receiving a negative answer from the foreperson and then each individual juror, the court declared a mistrial on January 25, 1996. (3 C.T. 873.)

On February 5 ,1996 appellant filed a *Marsden* motion. (3 C.T. 945.) The motion was heard and denied on February 6, 1996 (3 C.T. 949) and the ruling affirmed on March 4, 1996 following an *in-camera* hearing. (3 C.T. 964.) On March 5, 1996 the court asked if appellant was still considering representing himself as discussed in the *in-camera* hearing on the previous day. Following a discussion between appellant and counsel, appellant agreed to continue with present counsel. (3 C.T. 985.)

On March 19, 1996, witness Jill Brodhagen testified concerning a possible conflict of interest for defense counsel. (3 C.T. 1009.) In open court, out of presence of the jury, defense counsel declared a conflict. (3 C.T. 1011.) The prosecution represented to the Court that it would not present the evidence at trial that may have caused the defense to declare a conflict and the defense informed the Court that it would now be able to proceed with trial without a conflict. (3 C.T. 1011.)

Presentation of evidence in the second penalty phase trial commenced on March 20, 1996. (3 C.T. 1016.) Jury deliberations began on March 28, 1996. (3 C.T. 1033.)

On April 2, 1996 the jury returned its verdict. (4 C.T. 1139.) The jury returned a verdict of death. (4 C.T. 1139.)

On June 21, 1996 the defense filed a motion for a new trial based on juror misconduct[1]. The court granted this motion on August 8, 1996. (4 C.T. 1302.) This same date, the court denied appellant's motion for a new trial on grounds of incompetency of trial defense counsel. (4 C.T. 1302.) When defense counsel declared a conflict, the court relieved the Public Defender's office from the instant case and appointed Thomas Goethals as counsel for appellant.[2] (4 C.T. 1302, 1304.)

Voir dire commenced in the third penalty phase trial on January 5, 1998. (4 C.T. 1330.) Presentation of evidence began on January 13, 1998. (5 C.T. 1635.) On January 27, 1998 the jury began deliberations. (5 C.T. 1809.) On January 29, 1998 the jury informed the court it was deadlocked and the court declared a mistrial. (5 C.T.

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[1] During a recess a juror discussed the death penalty with a non-juror, an elder in his church. An affidavit signed by the juror states that during a weekend recess in jury deliberations, between 3/29/96 and 4/1/96, he discussed with the elder whether it was right for a Christian to make a death decision. The reply he received was that it was alright to make such a decision based on God's instructions to Moses. (1171-1173; 1174-1193.)

[2]The court advised counsel pursuant to Penal Code section 1240.1 that Messrs. Klar and Davis would continue to represent the defendant with respect to the preparation of the record on appeal concerning the guilt phase and the two penalty phases already completed. (4 C.T. 1303.)

1840.)

Over vigorous defense objection, the court decided to hold a fourth penalty phase. Presentation of evidence in the fourth penalty phase trial began on October 15, 1998. (6 C.T. 1864.) Jury deliberations commenced on October 28, 1998. (6 C.T. 1894.) On October 29, 1998 the jury returned a verdict of death. (6 C.T. 1899, 1988.)

Pursuant to Penal Code section 1181(7), the court re-weighed the evidence of aggravating and mitigating factors to determine if the weight of the evidence supported the jury's verdict. (6 C.T. 2079-2082.) Finding that the law and the evidence supported the imposition of the death penalty as determined by the jury, the court denied the Motion for Modification of Verdict. Judge William R. Froeberg signed the Judgment of Death on January 15, 1999. (6 C.T. 2082, 2078.)

As to Counts One and Three, the second degree murders of Danny Charles and Dolores Charles, respectively, the court sentenced appellant to a term of fifteen (15) years to life for each count. The sentences imposed as to Counts One and Three were stayed pending execution of the sentence on Count Two, death. (6 C.T. 2083-2084.)

This appeal is automatic. (6 C.T. 2084.)

STATEMENT OF FACTS

Introduction

On November 7, 1994 Deputy Sheriff Rifilato responded to a call involving a burning car in the parking lot of the El Camino High School in La Mirada. Through the data base from the Department of Motor Vehicles, he determined the car was registered to Dolores and Edward Charles of Fullerton. The car was a 1987 light blue Honda and normally driven by Daniel Charles, one of their two sons. (5 R.T. 1364-1367.)

The burned bodies of Mr. and Mrs. Charles were in the back seat of the car and the burned body of Daniel Charles was in the trunk. (5 R.T. 1368, 1376.) The pathologist who conducted the autopsies of the deceased determined that all three were dead before the car fire started. (5 R.T. 1387-1402.)

Prosecution Evidence

In November 1994 Bernard Severino, appellant's maternal grandfather, lived with his daughter (Dolores) and his son-in-law (Edward Charles, II) at 3101 Terraza Place in Fullerton, California. (5 R.T. 1410.) Dolores and Edward Sr. had two sons, appellant and Danny. (5 R.T. 1409-1410.)

Appellant, the eldest, was employed as a mechanic at the Sunny Hills Chevron station. (5 R.T. 1464; 1488.) Prior to this employment he attended classes at Fullerton and Cypress colleges, but did not complete his studies to attain a degree. (5 R.T. 1464-1465.) Although appellant was not living at the Charles' residence on November 7th, he

was in the process of moving back to the house and Mrs. Charles had recently painted a room for him. (5 R.T. 1431.) Appellant was engaged to Tiffany Bowen. Ms. Bowen had recently begun college in Baltimore, Maryland, and appellant had been staying with the Bowen family during the fall of that year. (6 RT 1715, 1730-1731.)

Danny, the younger son, was in college at U.S.C. and was doing quite well. He usually came home on weekends, returning to the college on Sunday evening. (5 R.T. 1431-1432.) He was quite talented as an opera singer and actor and was pursuing a degree in that field. (5 R.T. 1417, 1433, 1464.)

It appeared to Mr. Severino that during this period, the family was showing more interest in Danny than appellant. Mr. and Mrs. Charles were disappointed in appellant to a certain degree because he never completed college and never seemed to complete what he set out to do. There was also some disappointment in the extracurricular activities in which appellant participated, boxing and karate. (5 R.T. 1464-1465, 1476-1477.) Finally, it was apparent that his parents did not approve of appellant's fiancee, Tiffany Bowen. (5 R.T. 1467-1468.)

By contrast, the family was very pleased with Danny's accomplishments. (5 R.T. 1478.)

There was normal sibling rivalry between the two boys, but nothing substantial. (5 R.T. 1463.) Mr. Severino never saw appellant exhibit physical violence towards Danny or his parents. (5 R.T. 1465-1466, 1479-1480.) It was normal for appellant to hold in his anger

and walk away from an argument in a huff. (5 R.T. 1466.)

Sunday, November 6, 1994

The afternoon of Sunday, November 6, 1994 Danny gave a recital at the house, a recital attended by one of his teachers or a Metropolitan Opera singer. (5 R.T. 1416, 1433.) Mr. Severino could not remember whether or not appellant attended the recital, but he did not think that appellant did so. (5 R.T. 1434.) The family sat down to dinner around 6 p.m. (5 R.T. 1410.) Mr. Severino could not remember if appellant joined the family for dinner, either. Sometimes appellant did so and sometimes he did not. (5 R.T. 1411, 1434.)

Right after dinner, Mr. Severino went to his room at the opposite end of the house from the family rooms and bedrooms. (5 R.T. 1413.) He did not see either of his grandsons leave that night. (5 R.T. 1414, 1435-1437, 1484.)

Before retiring for the evening, Mr. Severino spoke to his daughter where she was watching television on the couch. (5 R.T. 1418.) It was about 11:30 p.m. and Mrs. Charles was concerned. Danny customarily called to inform her of his safe arrival back at college, but had not yet called that evening. (5 R.T. 1418.)

This same evening Susan Poladian and her daughter, Jennifer, were at the home of Gina Simms on Lakeside Drive in Fullerton. Lakeside Drive is right around the corner from Terraza Place where the Charles family lived. (5 R.T. 1518; 1534-1535.) Around 9:30 p.m., Ms. Simms was walking the Poladians to their car. (5 R.T. 1518; 1535.) As the trio walked down the Simms' driveway, Ms. Poladian

and Ms. Simms heard someone call for help in a muffled voice. The call seemed to come from the trunk of a car parked across the street. (5 R.T. 1518-1519, 1525-1526; 1535, 1551.) The women walked a little further, heard the sound again, and returned to the house to call 911. (5 R.T. 1519-1520; 1535, 1554.) The car was gone when the police arrived. (5 R.T. 1520.) Both women thought the car depicted in People's Exhibit 18 [Danny's Honda] (5 R.T. 1409) looked somewhat similar to the car they saw that evening. (5 R.T. 1529-1532; 1539.)

In November 1994 Bryan Poor also worked at the Sunny Hilly Chevron station and knew appellant. Mr. Poor worked at the station on Sunday night, November 6th. At approximately 9:50 p.m. appellant came to the station. He was driving a small sedan, light in color, which Mr. Poor had not seen appellant driving on any previous occasion. (5 R.T. 1498.) In response to Mr. Poor's query about the car, appellant said it belonged to Mrs. Bowen (Tiffany's mother) and he was testing the clutch or brakes or something[3]. (5 R.T. 1499, 1509.) Appellant parked the car in a place that seemed unusual to Mr. Poor; it was on the southwest corner of the station where it was poorly lit. Usually appellant parked in front. (5 R.T. 1499.)

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[3] Mr. Poor did not remember how many times appellant came to the station that night, but it was probably more than five, and once that afternoon. (5 R.T. 1503-1504.) It was not unusual for people who worked at the station to come in and out even when they were not working, and Mr. Poor did not notice anything unusual about appellant's demeanor. (5 R.T. 1503, 1509.)

Monday, November 7, 1994

Monday morning Mr. Severino got up sometime between 5 and 5:30 a.m. and took the family dog for a walk. Mr. Severino noticed a trail of blood on the driveway just in front of the steps. Mrs. Charles' car was in the driveway, but no one was home. (5 R.T. 1423, 1446.) He did not check the bedrooms, but he saw neither his son-in-law nor his daughter that day. (5 R.T. 1424.)

Later that day appellant visited Mr. Severino at the residence. Mr. Severino asked appellant about the family and appellant responded that Danny had a clutch problem with his car and appellant's parents went to pick him up. (5 R.T. 1424.)

When he did not hear from his family by 6 p.m. on Monday, Mr. Severino was very concerned and mentioned to appellant that he was going to call the police[4]. (5 R.T. 1453.) Shortly thereafter appellant left the house. (5 R.T. 1454.)

Monday, November 7, 1994

Dr. Jerry Kuhn testified that he lived across the street from the Charles residence and knew the Charles family, (6 R.T. 1557-1559.) He knew that appellant worked on cars and saw appellant working on cars in the driveway area of the house. (6 R.T. 1582.) At 6:10 a.m. on November 7, 1994 Dr. Kuhn exited his front door to pick up his newspaper. He observed appellant using a towel or rag to rub the cement driveway of the Charles' residence. (6 R.T. 1560-1561, 1573.)

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[4] He was waiting only because it was his belief that one had to wait 24 hours before filing a missing persons report. (5 R.T. 1453.)

Appellant temporarily ceased his rubbing when he saw Mr. Kuhn watching him, but resumed the activity once Mr. Kuhn re-entered his home and looked out the window. (6 R.T. 1562, 1574.) Appellant then threw the towel or rag into the back of the truck parked in the driveway[5]. (6 R.T. 1562, 1578.)

According to Mr. Burchit, owner of the Sunny Hills Chevron station, appellant arrived for work on Monday, November 7th at approximately 8 a.m. (5 R.T. 1488-1489.) Appellant was unshaven and looked as if he had been up all night. (5 R.T. 1489.)

According to Mrs. Bowen, appellant arrived at the Bowen residence around 7 p.m., on Monday evening. (6 R.T. 1716, 1723-1724.) Upon his arrival he watched television until around 8 p.m. when he received a telephone call from Tiffany. Appellant then left for a while and returned around 8:30 or 9 p.m. (6 R.T. 1717, 1725.) He went to his room, then left the house again a little after 10 p.m. (6 R.T. 1718, 1734.)

Around 9 p.m. Monday evening Ty Bowen, Tiffany's brother, was on the roof of the family home putting up Christmas lights. (6 R.T. 1738-1739.) Appellant called up to Ty and asked for a ride to the Sunny Hills Chevron station. (6 R.T. 1741.) Even though at the time appellant was driving Tiffany's truck and the truck was there, Ty did not question the request. (6 R.T. 1742.) Ty drove appellant to the

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[5] Jerry Kuhn never observed appellant physically violent with any of the Charles family members. There were verbal arguments over mowing the grass or other tasks apparently undone, but no more than normal. (6 R.T. 1585.) The last such argument ended when appellant sped away in his car. (6 R.T. 1587.)

station then returned home and returned to his lights. (6 R.T. 1742.)

Sometime after 10 p.m. Mrs. Bowen told Ty he had a telephone call from someone named Rob. (6 R.T. 1719; 1743.) When Ty answered the phone, he found out the caller was actually appellant. (6 R.T. 1743.) Appellant said he was at the softball field and asked if Ty could pick him up; Ty did so. (6 R.T. 1743.) When the two men arrived at the Bowen residence, Ty once again returned to the roof[6]. (6 R.T. 1744.)

It was also Monday, November 7th, around 10 p.m., that Deputy Sheriff James Rifilato received a call concerning a burning car at El Camino school in La Mirada. (5 R.T. 1364-1365.) When Deputy Rifilato arrived at the scene, the car was smoldering, but no longer burning.[7] (5 R.T. 1366.) Through the DMV he determined the car, a 1987 Honda Civic, was registered to Dolores and Edward Charles of Fullerton. The car appeared to be gray. (5 R.T. 1367-1368.)

Deputy Rifilato saw two badly burned bodies (Mr. and Mrs. Charles) in the rear passenger seat of the vehicle. (5 R.T. 1368.) Both were unclothed. (5 R.T. 1368.) In the trunk of the car Deputy Rifilato

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[6] En route from the softball field Ty did not notice any unusual odor on appellant and appellant's demeanor appeared normal. (6 R.T. 1774, 1779.)

[7] Deputies Stevens and Rechtscaffen also responded to the scene. (6 R.T. 1780, 1782.) They concluded that the car fire had been intentionally set and there were three areas of origin: a flammable booster on the ground between the left front door and the left front tire; in the front passenger compartment on the front seats and floorboard; and in the trunk of the car. (6 R.T. 1783-1784.)

Deputy Stevens opined that gasoline was the only accelerant used. (6 R.T. 1791.)

saw an additional victim (Danny Charles). Danny was less burned than his parents and he appeared to be clothed. (5 R.T. 1376-1377.)

Criminalist Phil Teramoto removed People's Exhibit 20 (a knife) from the trunk of the burned Honda. (7 R.T. 1949, 1951.) He was given a blue T-shirt and a purple sweatshirt (People's Exhibit 12), also taken from the trunk, to test for the presence of gasoline. The items all tested positive. (7 R.T. 1952.)

Detective Sergeant Curt Royer, Los Angeles County Sheriff's department, also responded to the El Camino High School parking lot the evening of November 7th as lead investigator to an arson fire. (8 R.T. 2085-2086.)

Tuesday, November 8, 1994

Mr. Severino had not yet contacted the police when Sgt. Royer arrived at the Charles residence on Tuesday, November 8th about 2:00 a.m. He found no evidence of forced entry or of a struggle, and the only family member present was Mr. Severino. (8 R.T. 2128.)

After speaking with Mr. Severino, Sgt. Royer went to the Bowen residence. There he spoke with appellant and with Mrs. Jeanne Bowen, the mother of Tiffany and Richard (Ty) Bowen. (6 R.T. 1714-1716; 8 R.T. 2091, 2140.)

Sgt. Royer spoke to appellant at approximately 6:15 a.m. (8 R.T. 2091.) At that time appellant told Sgt. Royer he last saw his parents and his brother at approximately 8 p.m. on Sunday. Appellant said he had dinner with them. His brother left about 8 p.m. Appellant first stated he walked to the car with Danny then got into his own car

and left. (8 R.T. 2092, 2136.) Appellant then recanted saying he just walked Danny to the door of the residence and left a short time later. (8 R.T. 2092, 2137.) Appellant said he spent the night at the Bowen residence, arriving around 8 p.m. (8 R.T. 2092-2093.)

Subsequently, while speaking with Mrs. Bowen, Sgt. Royer learned that appellant did not spend Sunday night at the Bowen residence. In a second conversation with appellant that morning, appellant stated that when he arrived at the Bowen residence no one was awake. Appellant said he spent the night and left before anyone arose on Monday morning. (8 R.T. 2094.)

When asked how appellant's parents and brother were all found in the same vehicle, appellant answered that Danny was having trouble with the clutch in the car and probably returned to the Charles' residence at which point his parents intended to drive Danny back to school. (8 R.T. 2093.)

During the interview it struck Sgt. Royer that appellant was not at all disturbed by the news of his family. When he challenged appellant in this regard, Sgt. Royer testified that in his opinion, appellant faked an appropriate reaction. (8 R.T. 2130-2134.)

In November 1994 Leann Pollaccia was homeless. (6 R.T. 1671.) During the early morning hours of Tuesday, November 8, 1994, she was looking through dumpsters for recyclable materials. (6 R.T. 1672.) It was drizzling and dark, but she had a flashlight. She saw what she thought to be paint on some towels and clothes, but then began to think the stains were blood. (6 R.T. 1674.) She also saw a

Rubbermaid 30-gallon garbage pail; People's Exhibit 28 appeared to be the same type. Inside the garbage pail she found a pair of dress pants, jeans, shirts, towels and about an inch or two of blood. (6 R.T. 1675.)

Using a poker, Ms. Pollaccia continued to probe the dumpster. When she came across a 16-inch crescent wrench, People's Exhibit 16, with engraving on it, she threw it into the trunk of her car. (6 R.T. 1677.) Initially she intended to give the wrench to a friend, but other friends informed her she might have a murder weapon. (6 R.T. 1677.) Ms. Pollaccia kept the wrench for a week then saw the news articles stating that the police were looking for a blunt object. Subsequently, Ms. Pollaccia took the wrench to the police. (6 R.T. 1677-1678, 1704-1705.)

Among other items she retrieved from the dumpster were a pair of sunglasses and some pieces of jewelry, including a gold woman's necklace. (6 R.T. 1681.) She did not find a choker-type dog chain. (6 R.T. 1690.)

Philip Axelson testified that he instructed appellant in martial arts, karate, and boxing. (6 R.T. 1589, 1646, 1666.) He believed that over a three year period, the relationship between appellant and him became very personal. (6 R.T. 1603.) Axelson testified that appellant confided in him. (6 R.T. 1604, 1657.)

It was Mr. Axelson's impression that appellant did not really have very much regard for any member of his family. (6 R.T. 1604-1605, 1644, 1655.) In Mr. Axelson's opinion, there seemed to be a lot

of animosity between appellant and Danny. However, Mr. Axelson never saw any violence between the two brothers. (6 R.T. 1652-1653.) Mrs. Charles' smoking bothered appellant as did appellant's perceived disparity in his parents' treatment of the two brothers. (6 R.T. 1655, 1656.)

Appellant started instruction with Mr. Axelson in 1991. In Mr. Axelson's view, appellant was very dedicated at times and at other times he seemed distracted. (6 R.T. 1638-1639.) Between March 1994 and November 1994 there was no contact between him and appellant. (6 R.T. 1613-1614.)

Then, on November 8, 1994 at approximately 5:30 p.m., Mr. Axelson received a telephone call from appellant. (6 R.T. 1594.) Axelson testified that appellant told him, "I have done a terrible thing. I killed my family." (6 R.T. 1597, 1669; 8 R.T. 2141.) Mr. Axelson asked, "What?" and after a pause appellant said, "I think I killed my family." (6 R.T. 1597, 1630-1631; 8 R.T. 2146.) Mr. Axelson asked appellant if he had called an attorney then told appellant that he was in a meeting and would call appellant back. (6 R.T. 1601.) Mr. Axelson then called the police department and spoke with Sgt. Royer. (6 R.T. 1601; 8 R.T. 2140-2141.)

Sgt. Royer's police report contains a quote from Axelson that reads, "I think I did something terrible." (6 R.T. 1622.) There was nothing in the report saying 'I did something terrible." (6 R.T. 1622.) Axelson admitted that the quote might be what he actually told Sgt. Royer, but he testified that at the time he erred on the side of

appellant. In his current testimony, however, he wanted to clear up that error. (6 R.T. 1625.) Axelson also testified that appellant never told him, "They [the police] think I killed my family." (6 R.T. 1598.) Nevertheless, he admitted that in the thirteen months or so between his call to Sgt. Royer and his current testimony, he did not disclose his conceded error in what appellant told him to either the prosecution or the defense. (6 R.T. 1626.)

Causes of Death

Lisa Scheinin, deputy medical examiner at the Los Angeles County Coroner's office conducted the autopsies on Mr. and Mrs. Charles as well as Danny Charles. (5 R.T. 1387, 1389-1390.)

Daniel Charles had two stab wounds[8] in the back, lacerations of the scalp and a very large skull fracture in the frontal part of the head. (5 R.T. 1390.) In addition, there was a fracture of the hyoid bone on the right side. (5 R.T. 1391.) Deputy Scheinin testified there are two ways such a fracture can occur: 1) compression of the neck such as by manual strangulation, or 2) a blow to the side of the neck. She found no evidence of strangulation, but opined the charring to that part of the body made examination very difficult. (5 R.T. 1392.)

She determined there were four blows to Danny Charles' head. (5 R.T. 1392-1393.) She was unable to determine if People's Exhibit 16 (the wrench) was the instrument used to deliver those blows. (5 R.T. 1394.) The cause of death to Daniel Charles was craniocerebral

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[8] It was apparent the stab wounds were caused prior to death. (5 R.T. 1390-1391.)

trauma due to blunt force injury. (5 R.T. 1395.)

The body of Edward Charles, Sr. was much more burned than that of Danny, so it was difficult to see external injuries. (5 R.T. 1395.) Internally there was injury to the brain caused by two punched-in skull fractures, fractures to the left cheek bone, the bridge of the nose, the lower side of the jaw and to several ribs on both the left and right sides. (5 R.T. 1396-1397.) There was also a fracture of the lower thoracic spinal column and injury to the neck. (5 R.T. 1397.) The neck injury was similar to that of Danny Charles, but more extensive. The fracture could have been caused by a blow or by strangulation. (5 R.T. 1397.) The cause of death to Edward Charles, Sr. was multiple blunt force injuries to the head and neck. (5 R.T. 1400.) During the examination of Edward Charles, Sr., Ms. Scheinin found evidence of adenocarcinoma, cancer of the prostate. (5 R.T. 1404.)

The body of Dolores Charles was also badly charred. (5 R.T. 1401.) The only injury found on Mrs. Charles was some hemorrhage on the side of the neck. The injury was caused either by a blow or strangulation. The cause of death to Mrs. Charles was asphyxia due to neck compression. (5 R.T. 1402.)

Ms. Scheinin examined the stomach contents of the deceased and determined that, assuming all three ate at the same time, Dolores and Edward Charles died some period of time after Daniel Charles. (5 R.T. 1407-1408.)

Testimony of Kimberly Speare

Kimberly Speare dated appellant for three years from June 1991 through June 1994. (6 R.T. 1799-1800.) During that period they lived together for a year and a half in the home of Ms. Speare's parents. (6 R.T. 1800.) Appellant's move into the Speare family residence was gradual and her family accepted appellant and the living arrangement. Ms. Speare and appellant talked about marriage. (6 R.T. 1825.)

Ms. Speare found appellant a caring person, gentle, not into any kind of drugs or alcohol. (6 R.T. 1826-1827.) When appellant was angry he would yell then take a time-out, walk away from the situation or sometimes kick a door or hit a closet. (6 R.T. 1827.)

During the course of their relationship, Ms. Speare and appellant shared expenses. Appellant worked at a few jobs, but was never desperate for money. (6 R.T 1831-1832.) He also attended junior college at Fullerton and Cypress. (6 R.T. 1821.)

Ms. Speare knew appellant's family well. (6 R.T. 1809-1810, 1831.) Even though Ms. Speare sensed jealousy of Danny's accomplishments in appellant, there were times when appellant expressed pride in those accomplishments, both to herself and others. (6 R.T. 1829-1830.) Appellant did complain about his mother's smoking, in relation to his health and hers. (6 R.T. 1832-1833.)

Ms. Speare never saw appellant threaten to hurt any member of his family (6 R.T. 1812-1814), nor was he ever violent towards her or any of her family. (6 R.T. 1815.) She did witness some family

disagreements which involved yelling, but never any physical blows. (7 R.T. 1846-1847.)

Ms. Speare introduced appellant to karate under the instruction of Philip Axelson. (6 R.T. 1815.) The two attended class together and would practice at home. (6 R.T. 1816, 1817-1818.) Both had a great deal of respect for Mr. Axelson and looked up to him even though he was a bit controlling. (6 R.T. 1816.)

Although Ms. Speare would characterize appellant as a follower rather than a leader, in her opinion appellant would be able to defend himself to the limit if in danger. (6 R.T. 1819.) She never saw appellant lose control in class. (6 R.T. 1818-1819, 1845-1846.)

At one point appellant became interested in boxing. She and appellant both trained with Axelson, with appellant's training much more intense than hers. (6 R.T. 1822.)

The relationship between Ms. Speare and appellant ended gradually. During the last six months of the relationship he no longer lived at the Speare residence, became distant and seldom came around. (6 R.T. 1850–1852.) He was drinking and spending his off-time with other friends. (6 R.T. 1851-1852.)

Ms. Speare recognized the pattern mark, the Yin- Yang symbol, on People's Exhibit 16 (the wrench). (6 R.T. 1800-1801.) Shortly after appellant began working as a mechanic the two of them engraved all of his tools with a similar Yin-Yang symbol. (6 R.T. 1802-1803.)

The Murder Weapon(s) and D.N.A. Evidence

Steven Dowell, criminalist at the Department of Coroner for the

County of Los Angeles, received the skull pieces of Edward Charles, Sr. and fragments from the skull of Danny Charles. (7 R.T. 1957-1958.) He also received People's Exhibit 16, the wrench. (7 R.T. 1959.) Except for one large hole shown in People's Exhibit 38, Mr. Dowell reconstructed the skull of Edward Charles and bound it with wire. (7 R.T. 1960.) Although he could not positively correlate the wrench with the head injury, he could not exclude People's Exhibit 16 as a possible tool that could have produced the defects shown in the reconstructed skull. (7 R.T. 1960, 1970.)

Mr. Dowell also examined the skull fragments of Danny Charles. (7 R.T. 1961.) On one of the fragments (depicted in People's Exhibit 40), Mr. Dowell found an indentation which matched the pattern mark in the oval end of the crescent wrench. (7 R.T. 1962-1964.) Mr. Dowell could not say the wrench was the specific tool which caused the indentation in Danny's skull, but due to this pattern, his conclusion was somewhat more definitive than in the skull of Edward Charles. (7 R.T. 1977.)

On November 10, 1994 criminalist/serologist Heidi Robbins arrived at the Charles residence during the execution of a search warrant. (7 R.T. 1854, 1858.) She located a pair of sparring gloves (People's Exhibit 25) in a corner of the dining room. (7 R.T. 1858.) She found blood in the foyer under a cabinet (1859) and in numerous areas in the master bedroom - on a computer desk, a night stand, the headboard and side of the bed, the wall above the headboard, on the side of the box spring and the mattress, and on the back of the

bedroom door. (7 R.T. 1859-1860, 1877-1879.) There was no blood on the sheets. (7 R.T. 1861.) It was evident an attempt had been made to clean the night stand and the entryway[9]. (7 R.T. 1862, 1880[4].)

Ms. Robbins also found blood, human tissue and hairs on People's Exhibit 16, the wrench (7 R.T. 1863-1864), and on People's Exhibit 20, the knife found in the trunk of the Honda Civic. (7 R.T. 1864-1865.) No blood was detected outside the residence, but there had been a very heavy rainstorm prior to Ms. Robbins' arrival. (7 R.T. 1870-1871.) No blood was detected on two vehicles in the driveway, a black Nissan pick-up truck and a charcoal gray Honda Accord, the Charles' family car. (7 R.T. 1871-1872.)

Ms. Robbins performed D.N.A. testing on the blood and tissue found on the gloves, wrench, knife and night stand and compared the D.N.A. results with those of samples taken from the deceased individuals and appellant. (7 R.T. 1866.) The blood on the sparring gloves excluded all deceased persons and was consistent with appellant (1866); the tissue on the wrench was consistent with Danny Charles and excluded Mr. and Mrs. Charles and appellant (1867, 1892) and the same was true for the blood on the knife (1867); the blood on the night stand was consistent with Edward Charles, Sr and excluded Danny, Mrs. Charles and appellant. (7 R.T. 1867.)

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[9] A family member who was at the residence confided to Ms. Robbins that she had mopped the entryway. (7 R.T. 1874.) No clean-up efforts were made by any family member in the bedroom. (7 R.T. 1882.)

Post-Arrest Behavior

Appeals to Grandfather

At some point, Mr. Severino, appellant's grandfather, became aware that appellant was arrested for the homicides of the family. (5 R.T. 1425.) Mr. Severino received two telephone calls from appellant after appellant was incarcerated. (5 R.T. 1425.) In the first call appellant began by inferring that Mr. Severino should take responsibility for the homicides because he was an old man and had lived his life. (5 R.T. 1426, 1428.) When Mr. Severino hung up on appellant, appellant called again a minute or two later and informed Mr. Severino that Tiffany, appellant's fiancee, was pregnant and appellant was concerned about her. Mr. Severino became very angry and again hung up ending the conversation. (5 R.T. 1426.)

Prosecution Exhibit I

Sgt. Royer obtained Prosecution Exhibit I, a 14 page letter, from Cezar Pincock, an inmate in the Orange County jail on December 7, 1994. Mr. Pincock wanted consideration on his two pending cases. Sgt. Royer promised nothing and confiscated the letter as evidence. (8 R.T. 2090, 2109.)

Prosecution Exhibit I is a letter purportedly written by appellant to Czar [sic] while both men were incarcerated in the Orange County jail. (7 R.T. 2060-2061.) In the letter appellant allegedly related the evidence of which appellant was aware to Czar so Czar could in turn relay it to a man who was going to take the blame for the homicides for money. The letter states that appellant knew who committed the

homicides and that the killer is "still out there and knows all about Tiffany and her family."

The letter explains that appellant returned to the Charles residence around 11:30 p.m. on November 6th and found his parents and brother dead. His parents were on the bed in the master bedroom and his brother in the trunk of the car. His father was wearing pajamas and had been hit in the head several times with a hammer which appellant subsequently disposed of. His father was also beaten in the middle of the back. Appellant's mother was wearing a brown sweater and blouse and had a rusted dog choker chain around her neck.

Appellant's brother, in the trunk of the car, was wearing light colored blue jeans and "Monkey boots," "which I took off and dumped." The letter also states that appellant's wrench was on top of his brother and a knife was on his stomach.

The letter then states that what appellant had to do was clean up. He knows who committed the homicides and they left a typed note in an envelope threatening that if appellant did not do so he would go to jail for murder. Further, if appellant went to the police, the perpetrator would go after Tiffany and her family.

In the letter, appellant then purportedly gives the details of the clean-up: carrying his mother and dragging his father wrapped in the sheets and an egg crate foam pad to the car; stripping the three bodies of their clothes except for the pants and socks on his brother; remaking the bed; and disposing of the clothing, shoes, bloody towels, bedding, wrench and rusted chain in brown trash bags which he put inside a

blue rubber maid trash can which he put into the car with his deceased family members. He left the knife in the trunk of the car.

After cleaning up and making the bed, appellant cleaned the blood from the driveway, showered then drove the 1987 Honda Civic to a parking lot. After a final check, appellant went to work on Monday morning and worked until 5:00 p.m. After work he drove the truck to the car and drove the car to a dumpster where he "started dumping evidence."

The letter continues stating that appellant then went back to the truck, returned to the Charles residence, saw his grandfather then went to the Bowen residence and had Tiffany's brother drive him to the gas station where he [appellant] worked. Appellant then "ran to car got gas can, sucked gas out of tank" and poured gas over the inside and outside of the car and over his brother in the trunk of the car. He then drove the car to school and set it afire before running to a nearby ballfield and calling Ty for a ride back to the Bowen residence.

The next page of the letter states that "I got a hold of my friend," and appellant will tell the friend what to do; he will give half now and half a little later. The letter states that appellant needs to know what to say after the 27,th also, it would look better "if X got caught in the act of something, weather it be M. or steal. ... Some one could call pigs and tell them X is there and is going to finish the job." And, if Czar can't make this work appellant needs to see about another approach.

The letter then lists "Things that are f...ed.", including,

the woman who heard brother screaming from the trunk; the neighbor who observed the driveway cleanup; Brian Poor 's reference to parking in an out of the way spot; and the person on Yucca.

The letter tells Czar not to worry about [my] gramps, that he is senile, has no track of time and can't remember anything. It also asks "where should I say I was Sunday night" then suggests that a good alibi would be that "I was with a girl from 7:30 p.m. on til 7:30 a.m. Monday..."

After another short reference to X "being caught red handed", the letter concludes with two diagrams: a crudely drawn diagram of the Charles residence and its surroundings and a neatly drawn ink diagram of the inside of the residence with handwritten notes in pencil identifying rooms and the location of his deceased parents when appellant found them. (Prosecution Exhibit I.)

Testifying under the protection of the Newsperson's Shield Law, reporter Tony Saavedra of the Orange County Register stated that he received a copy of Prosecution Exhibit I, interviewed appellant at the Orange County jail, and wrote an article for his newspaper on January 3, 1995. (7 R.T. 2059-2061.)

In the article, People's Exhibit 2 for identification, Saavedra referred to the letter and stated that appellant confirmed during the interview that the letter was his handwriting. (7 R.T. 2061-2062.) The interview was conducted through glass in a jail visiting booth. (7 R.T. 2062.) Saavedra held up portions of the letter and asked appellant what appellant meant by certain references or passages. (7

R.T. 2062-2063.)

Asked how appellant could burn the bodies, appellant likened the burning to cremation. (7 R.T. 2064, 2065.) Appellant also told Saavedra that as the flames rose, he ran to a near-by baseball field and called his fiancee's brother for a ride home. (7 R.T. 2065-2066.)

Saavedra admitted that appellant never specifically said that he wrote the letter or that he didn't write the letter. (7 R.T. 2065-2067.) Nevertheless, because appellant discussed so much of the material contained in the letter in answer to Saavedra's questions, Saavedra did not believe it necessary to ask outright if appellant was the author. (7 R.T. 2068-2069.)

Saavedra also admitted that appellant denied killing anyone and denied trying to have his grandfather killed. (7 R.T. 2071.)

Kimberly Speare identified the handwriting on Prosecution Exhibit I as that of appellant. (6 R.T. 1804.) She also recognized People's Exhibit 30 as a portion of appellant's phone book. (6 R.T. 1803.) Ms. Speare opined that People's Exhibits 31 and 32, handwriting exemplars, appeared to be appellant's handwriting. She also believed the writing in People's Exhibit 33, another of appellant's handwriting exemplars appeared to be quite a bit different. (6 R.T. 1805.)

Testimony of Jill Roberson (Brodhagen)

Jill Roberson (Brodhagen) met appellant while they both worked at the Sunny Hills Chevron station. (7 R.T. 1898, 1907.) During that time Ms. Roberson was married and lived with her

husband and daughter. She also had a drinking problem. (7 R.T. 1908.) When appellant was arrested, Ms. Roberson began corresponding with him. (7 R.T. 1898-1899, 1906.) Under oath, Ms. Roberson stated that she and appellant discussed at great lengths her saying she was with him the night of the homicides. (7 R.T. 1918-1920.) He did not, however, want Ms. Roberson to lie for him. (7 R.T. 1919.) Appellant suggested that it would be better for him if someone had been with him the night of the homicides, and Ms. Roberson responded, "What are you talking about? I was with you." (7 .T. 1921.)

Ms. Roberson was still married, but separated, at the time of her testimony. She professed love for appellant. (7 R.T. 1937, 1939, 1947-1948.)

Testimony of Deputy Hyatt

Appellant was booked into Module L of the Orange County jail on the morning of November 10, 1994. (7 R.T. 1979.) Deputy Gene Hyatt had supervisory duties in Module L. (7 R.T. 1978, 1980.) Between November 10th and 23rd, deputy Hyatt had some contact with appellant escorting him to and from the visiting area and in his general duties. (7 R.T. 1981, 2004-2005.)

On November 23rd deputy Hyatt received notification from appellant through the intercom button in his cell that appellant had to talk to him. (7 R.T. 1983-1984.)

Prior to this time, appellant's demeanor had been pleasant, easy-going. (7 R.T. 1985-1986, 2007-2009.) On this occasion appellant

appeared very upset. Appellant told Deputy Hyatt that he [appellant] did not kill anyone, but that his grandfather had done so. (7 R.T. 1985-1986, 2014-2015, 2016-2020.) Appellant then gave Deputy Hyatt a full account of how he removed the bodies from the house, put his blood-covered grandfather in the shower, cleaned the room and removed the bodies from the house to a car in the driveway. (7 R.T. 1986-1988, 2020-2023.) Appellant then went to bed, went to work the next morning, and stopped at his girlfriend's house on the way home that evening. (7 R.T. 1988-1989, 2025.)

Appellant told deputy Hyatt he arrived at the family residence at approximately 5 p.m. and decided to dispose of the bodies; they were still in the car. (7 R.T. 1990.) In the school parking lot, appellant doused the interior of the vehicle with gasoline and model airplane fuel and ignited the car. Then appellant walked home. (7 R.T. 1991, 2029.)

Appellant also told Deputy Hyatt he disposed of a ball peen hammer and a letter opener which he found stuck in his brother's back. (7 R.T. 1991-1992, 2026.)

Testimony of Detective Sgt. Curt Royer

Detective Sergeant Curt Royer confirmed the burned automobile was the Honda which Gina Simms identified as the car from which she heard the muffled cry for help. (8 R.T. 2087.)

On November 18, 1994 Sgt. Royer received notification that the wrench found by Leann Pollaccia had been received. (8 R.T. 2088-2089.) Subsequently, Sgt. Royer interviewed Mr. Burchit at the

chevron station and seized the tool box and tools depicted in People's Exhibits 22 and 21. The tools are People's Exhibit 29.[5] (8 R.T. 2089.)

On cross examination, Sgt. Royer admitted that appellant's name did not appear on Prosecution Exhibit I and it was neither dated nor signed. (8 R.T. 2113-2114.) He also admitted there were several details in the letter which were inconsistent with actual events. (8 R.T. 2148.) The letter indicates Mr. Charles was hit in the back of the head several times with a hammer; no hammer was found. (8 R.T. 2118, 2154-2155.) The letter indicates Mrs. Charles had a rusted dog choker around her neck. (8 R.T. 2118.) No choker was found. (8 R.T. 2118, 2155.) Although mentioned in the letter, no "monkey boots" were found, there was no evidence that the gas tank of the Honda had been siphoned (5 R.T. 1373-1374; 5 R.T. 1386; 8 R.T. 2127-2128)[6], and no typewritten threats telling appellant to clean up were found[7]. (8 R.T. 2119, 2127-2128.) Additionally, the letter indicates that appellant arrived at the Charles' residence at 11:30 p.m. and found his parents deceased, but Mr. Severino indicated he spoke

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[5] Mr. Burchit recognized the tools and tool chest depicted in People's Exhibits 21 and 22 as those belonging to appellant. These were seized by Sgt. Royer following an interview at the station. (5 R.T. 1490; 8 R.T. 2089.)

[6] Deputy Fierro did note several T-shirts that smelled of gasoline under the decedent in the trunk. (5 R.T. 1386.)

[7] Included in the letter was a list of items including the hammer, the choker, and the monkey boots and the statement that all of these items were discarded. (8 R.T. 2157-2158.) Also, although Ms. Pollaccia testified she found a pair of men's blue and white pajamas, (which the letter states Mr. Charles was wearing), she did not mention the pajamas to Sgt. Royer and they were never turned in. (8 R.T. 2159-2164.)

to Mrs. Charles at 11:30 p.m. (8 R.T. 2119.)

Other parts of the letter, however, served to answer some of Sgt. Royer's questions, i.e., the letter states Mr. Charles was wearing pajamas before he was unclothed by appellant. That was why no zipper, belt buckle, car keys, etc. were found in the burned Honda. (8 R.T. 2153.)

Sgt. Royer also testified that the letter and diagrams contained some information that was not contained in the police reports., i.e., information obtained only after the D.N.A. analyses had been completed. (8 R.T. 2096, 2149-2150.)

Defense Evidence

Prosecution Exhibit I

In 1995 William Hatch was self-employed and had previously qualified in several courts as an expert in handwriting comparisons. (8 R.T. 2200, 2203-2204.) Mr. Hatch examined Defense Exhibits A and B, handwriting exemplars written by appellant on September 6, 1995 and September 14, 1995, respectively (8 R.T. 2204-2205), and compared them to Prosecution Exhibit I. (8 R.T. 2205.)

Mr. Hatch determined that the person who printed the exemplars did **NOT** do any of the handwriting on the letter, Prosecution Exhibit I. (8 R.T. 2212, 2224, 2225.) In addition, only one person wrote all of Prosecution Exhibit I. (8 R.T. 2215.)

Mr. Hatch did see some similarities between the exemplars and People's Exhibit 30, appellant's address book. (8 R.T. 2221.) Mr. Hatch found no indication that appellant was attempting to disguise

his writing on the exemplars. (8 R.T. 2239.)

Appellant's Character

Rhonda and Brian Beller knew appellant through appellant's volunteer work as their son's soccer coach in 1989-1990. (8 R.T. 2246-2247; 8 R.T. 2355-2356.) Both of the Bellers got to know appellant quite well and felt that he was a good and caring person. (8 R.T. 2247-2248; 8 R.T. 2358.) Neither ever saw appellant violent in any way towards anyone. (8 R.T. 2249; 8 R.T. 2359.)

After appellant ceased to coach soccer, Mr. Beller kept in touch with appellant and would see him at some of the soccer games. Over a four year period, Mr. Beller probably saw appellant twenty to thirty times. (8 R.T. 2357.) Mr. Beller and his wife tried to support appellant through this ordeal and Mr. Beller visited appellant after appellant was incarcerated. They did not talk about the specific facts of the case. (8 R.T. 2359-2360.)

Rob Aldrich, Brian Bangan and Jason Snyder, friends of appellant, testified in his behalf. (8 R.T. 2323; 8 R.T. 2390; 8 R.T. 2398-2399.) None of the friends ever heard appellant make any threats or derogatory comments towards any member of his family. (8 R.T. 2349; 2392-2393; 2401-2402.)

Mr. Aldrich knew appellant as a co-worker at the Sunny Hills Chevron station. (8 R.T. 2323.) He knew Tiffany Bowen and also knew Jill Roberson. (8 R.T. 2324.) He opined that the majority of time he saw Ms. Roberson she was intoxicated and that she was more

of an untruthful person than a truthful one.[8] (8 R.T. 2324.)

Mr. Aldrich believed that appellant was concerned about his father's prostate cancer (8 R.T. 2347-2348) and remembered an occasion when appellant left work to pick up a prescription for his father. (8 R.T. 2350.)

Mr. Aldrich opined that prior to Ms. Bowen's departure to Baltimore, appellant was a happy-go-lucky type person. (8 R.T. 2352-2353.) After Ms. Bowen left, Mr. Aldrich noticed that appellant was more depressed, less talkative. (8 R.T. 2353.)

Mr. Bangan knew appellant from martial arts class. (8 R.T. 2391.) Mr. Bangan opined that to be effective in martial arts, one has to have a certain intensity; appellant had that intensity. (8 R.T. 2392.) However, there was never a time when appellant became excessively violent, either during class or afterwards. (8 R.T. 2392.) Appellant's etiquette in class was professional and he was easily influenced by the instructor. (8 R.T. 2392.) Mr. Bangan also saw appellant socially. (8 R.T. 2392-2393.)

At some point in August 1993, appellant dropped out of martial arts classes. (8 R.T. 2395.) When appellant returned to classes in 1994 Mr. Bangan felt appellant lacked the maturity Mr. Bangan sought in a friend. Appellant had changed, overstated his achievements; told people he was a black belt when he was not. (8

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[8] Ms. Roberson was also described by Janina Herold, a friend, by her father, Dennis Brodhagen, and by investigator Thomas Gleim as unreliable as regards the truth. (8 R.T. 2281-2282, 2288-2289; 8 R.T. 2301, 2304, 2307, 2310; 8 R.T. 2314, 2316-2318.)

R.T. 2396-2397.)

Jason Snyder met appellant in high school. Over a five year period they became pretty good friends. (8 R.T. 2399-2400.) Mr. Snyder also knew Kim Speare. (8 R.T. 2400.)

A couple of times a month Mr. Snyder would have dinner with the Charles family. Sometimes arguments occurred between appellant and one of the family members. (8 R.T. 2402.) If the argument was between appellant and his father, the argument would end with both walking off in a huff. (8 R.T. 2403.)

Testimony of Friends of Danny Charles

Anthony Sands and Lori Korngiebel were both friends of Danny Charles and Mr. Sands knew appellant. (7 R.T. 2038, 2039; 8 R.T. 2318, 2319.) Mr. Sands knew the Charles family and had dined with them on several occasions and slept in their home a number of times. (7 R.T. 2040.) Some of those times appellant was present. Mr. Sands never saw appellant physically violent with any member of his family and never heard appellant threaten any member of his family in any way. (7 R.T. 2041.)

Mr. Sands, Ms. Korngiebel and Danny Charles were supposed to attend a musical performance the evening of Sunday, November 6, 1994. (7 R.T. 2042; 8 R.T. 2319-2320.) Both Mr. Sands and Ms. Korngiebel spoke to Danny on the telephone between 7 and 8 p.m. that evening. (7 R.T. 2042; 8 R.T. 2320.) Neither heard any yelling or screaming, no arguing or anything unusual in the background. (7 R.T. 2043; 8 R.T. 2320-2321.)

Appellant's Mode of Transportation

In November 1994 Jennifer O'Brien and Kim Pearson worked in a dental office located behind the Sunny Hills Chevron station. (8 R.T. 2252-2253; 8 R.T. 2267-2268.) Tiffany Bowen was a dental patient. (8 R.T. 2254-2255; 8 R.T. 2269.) Ms. O'Brien also knew that Ms. Bowen owned a black truck with a blue body glove design on the side. (8 R.T. 2254-2255.) She did not know appellant, but did know who he was; he sometimes accompanied Ms. Bowen to her appointments. (8 R.T. 2256.)

On Monday night, November 7, 1994, both Ms. Pearson and Ms. O'Brien were working until about 9:30 p.m. (8 R.T. 2258; 8 R.T. 2271.) As the women drove out of the parking lot, appellant arrived at the parking lot in Ms. Bowen's truck.[9] (8 R.T. 2259; 8 R.T. 2271.)

Rebuttal Evidence

In the early morning of November 8, 1994 Sgt. Royer responded to the burning vehicle in the El Camino High School parking lot. (8 R.T. 2415-2416.) From the parking lot Sgt. Royer drove to the Charles residence at 3101 Terraza Place. (8 R.T. 2417.)

Sgt. Royer arrived at the residence at approximately 2:45 a.m. and made contact with Mr. Severino. (8 R.T. 2419.) It appeared to

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[9] Ms. Pearson noted the time was 9:16 p.m. when she entered her car. (8 R.T. 2272.)

Ty Bowen testified that he drove appellant to the Sunny Hills Chevron station that evening even though Tiffany's truck was available to appellant. Mr. Bowen estimated appellant's request was about 9 that evening. (6 R.T. 1738-1739, 32 R.T. 4642-4643.)

Sgt. Royer that Mr. Severino was greatly concerned; he had not seen his daughter, son-in-law and grandson for almost twenty-four hours. (8 R.T. 2420.)

Mr. Severino was having difficulty remembering and was unable to answer some questions. He was also having trouble trying to understand what the officers were telling him about his family. (8 R.T. 2421.) At that time, all they could tell him was that three bodies were found in a burned vehicle and other than the body in the trunk, they could not tell him the gender of the victims. (8 R.T. 2421.)

Mr. Severino did not have trouble answering any questions concerning who lived at the house, their ages, or what had transpired at the house the previous day. (8 R.T. 2421-2422.) He informed that Danny left the house about 8 p.m. after dinner and that he (Mr. Severino) had contact with his daughter over three hours later. He could not understand how she, his son-in-law and his grandson ended up together in the burned car. (8 R.T. 2422.)

Penalty Phase Evidence (4th trial)

Background

Since the jury in the fourth penalty phase trial had not previously heard any of the evidence in this case, much of the presentation was a reprise of the guilt phase evidence. Rather than simply repeat the guilt phase evidence, the defense will present just the additional evidence that was not presented at the guilt phase.

When Jill Roberson (Brodhagen) was called by the prosecution to testify, she testified more or less as she had in the guilt phase.

nevertheless, on cross examination, she testified that she had seen hundreds of appellant's letters written to her over a two year period while he was in jail and she had also seen his writing when he worked with her at the Sunny Hills Chevron Station. (32 R.T. 4789.) Ms. Roberson then testified that had never seen Prosecution Exhibit I before her testimony at the penalty phase. (32 R.T. 4790.) After examining Prosecution Exhibit I on the stand, Ms. Roberson testified the writing did NOT look like the writing in the letters appellant wrote to her. (32 R.T. 4701.)

Deputy Sheriff Frank Tomeo testified that he was working in the Orange County jail as a prowler on January 5, 1995. (33 R.T. 4846-4847.) In the evening hours he was walking by the day room when he observed appellant sneaking up behind inmate Ferranti who was seated at the table. (33 R.T. 4847.) Using his right arm, appellant put a choke hold on Mr. Ferranti and pulled him out of the seat. Appellant then dragged inmate Ferranti backwards into the shower area and dropped him there. (33 R.T. 4848.)

Deputy Tomeo stayed and kept visual contact with inmate Ferranti while notifying the module deputy of the situation. (33 R.T. 4848.) Additional prowlers arrived to escort inmate Ferranti to the dispensary. (33 R.T. 4848-4849.) Inmate Ferranti was knocked unconscious, but was able to walk to the dispensary; he required five stitches. (33 R.T. 4849.)

After appellant dropped inmate Ferranti in the shower, appellant returned to his activity in the day room. (33 R.T. 4849, 4852.)

On October 14, 1997 Deputy sheriff James Gagen, also assigned to the Orange County jail, was conducting random searches of various cells as was the common practice. (33 R.T. 4853.) On that day appellant was housed in Tank Four in Cell Eleven. (33 R.T. 4853-4854.) Appellant had been housed there since April 1996. (33 R.T. 4854.) Deputy Gagen searched cell eleven and found two grinding disks, two hacksaw blades and a nine-inch piece of metal. (33 R.T. 4854.) All the items were in concealed locations within the cell. (33 R.T. 4854.)

People's Exhibit 49 is a Xerox copy of the items found in appellant's cell. (33 R.T. 4855-4856.) Only a Xerox copy was available because when the items were confiscated they were simply copied then destroyed. (33 R.T. 4856.)

On cross examination deputy Gagen testified that the reason he discarded the items was because he did not believe that appellant had committed a crime in possessing the items in his cell. (33 R.T. 4864-4865.)

After the items were thrown away, appellant was internally disciplined for possessing contraband items in his cell; that was the total action taken. (33 R.T. 4865.)

Appellant's status at the time was Total Sep, total separation. That means appellant showered, visited the day room, exercised and ate by himself. When he left the cell, he was escorted to and fro by two deputies. (33 R.T. 4855, 4868-4869.) No other inmate had access to his cell. (33 R.T. 4855.) Deputy Gagen opined that it is possible

for an inmate to pass contraband down the tier from one cell to another; deputy Gagen has seen this happen. (33 R.T. 4873.)

Attorney Ronald Klar of the Orange County Public Defender's Office testified that he represented appellant for a couple of years. (34 R.T. 5014-5015.) Mr. Klar remembered stressing to appellant that it was very important not to talk to anyone about the case, including the press and family. (34 R.T. 5017.) He told appellant that even if statements appellant made were innocuous, they could be misinterpreted. (34 R.T. 5018.)

It is standard procedure at some point in the trial process to give discovery materials such as investigative reports, police reports, transcripts, or other documents related to the case to a client. (34 R.T. 5019-5020.) Mr. Klar provided appellant with a great deal of discovery. (34 R.T. 5020.)

Other Defense Evidence

Appellant's Skills Could be Useful to the Prison

Norman Morein was self-employed as a sentencing consultant and had worked in the California prison system for twenty-five years. (34 R.T. 4934-4935.) He testified that the California prisons were divided into four levels of security. (34 R.T. 4935-4936.) With a sentence of life without the possibility of parole, an inmate would initially be sentenced to a level four institution, highest security. (34 R.T. 4936.)

Mr. Morein was apprised of the fact that appellant was a skilled mechanic with additional skills in the use of computers. (34 R.T.

4937.) Mr. Morein opined this would make appellant sought after as an inmate because inmates perform the bulk of what is done in an institution. Appellant's skills are rare and would be valued by the staff. (34 R.T. 4937-4938.)

Character Evidence

Robert Aldrich, Jason Snyder, and Jeffrey Simeon were all friends of appellant. (34 R.T. 4973-4974; 4990-4992; 5005-5006.)

Mr. Aldrich was a co-worker of appellant's at the Sunny Hills Chevron station. (34 R.T. 4974-4975.) He knew appellant to be a happy-go-lucky guy until Tiffany Bowen, appellant's fiancee, left the area. Then appellant became depressed and was not as talkative. (34 R.T. 4977-4978.)

Jason Snyder and appellant attended high school and some classes at Fullerton Junior College together. They discussed going into business together at one point. (34 R.T. 4990-4992.) For about four years the two men worked on appellant's car several days a week. (34 R.T. 4992.) Occasionally Mr. Severino, appellant's grandfather, joined them. (34 R.T. 4993.) The friendship between the two men continued until appellant was arrested, but during the year prior to the arrest they did not spend as much time together. (34 R.T. 4995.)

Mr. Snyder also knew the other members of the Charles family and appellant's fiancee, Tiffany Bowen. (34 R.T. 4994-4995.) He opined appellant seemed very proud of Ms. Bowen and was happy in their relationship. (34 R.T. 4995.) On occasion appellant also bragged about Danny's talents. (34 R.T. 4996.) Mr. Snyder never

observed anything he would regard as abnormal or an unhealthy jealousy between appellant and Danny. (34 R.T.4997.)

On cross examination Mr. Snyder testified that even though he knew appellant to be a fine young man, Mr. Snyder also knew not to cross him. Appellant held his own and had a temper. (34 R.T. 4999.) Although Mr. Snyder did observe verbal altercations between appellant and his father, he never saw appellant get physical with any member of his family. (34 R.T. 5000.)

Jeffrey Simeon met appellant through Mr. Snyder. (34 R.T. 5005-5006.) At some point prior to 1994 Mr. Simeon and appellant lived together for about three months. (34 R.T. 5006.) Mr. Simeon met Tiffany Bowen, but his opinion of her was more negative than positive. (34 R.T. 5007-5008.) When Mr. Simeon opined to appellant that he thought the relationship was based more on physical attraction than anything else and that appellant could do better, appellant disagreed. (34 R.T. 5008, 5013-5014.) Mr. Simeon was aware that appellant spent money on Ms. Bowen for nose and breast enhancement plastic surgery[10]. (34 R.T. 5009.)

Mr. Simeon visited the Charles family home about a half dozen times and found them to be a typical American family. (34 R.T. 5010.)

John Bowen, father of Richard (Ty) Bowen and Tiffany Bowen has known appellant since appellant was eight years old. (34 R.T.

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[10]He met Ms. Bowen before her plastic surgery and saw her afterwards. She was attractive before the surgery. (34 R.T. 5013.)

4983.) Ty and appellant played soccer on a team that Mr. Bowen coached. (34 R.T. 4984.) In 1993 appellant started going out with Tiffany. Mr. Bowen had no reservations about that. He thought it was a positive thing. (34 R.T. 4985.) Appellant seemed to be a positive influence on Tiffany. (34 R.T. 4986.)

At some point appellant asked Mr. Bowen's permission to marry his daughter. (34 R.T. 4986.)

After that conversation, Ms. Bowen left California to go to school in Baltimore. It was decided that since appellant worked just down the street from the Bowen residence and they had an extra bedroom that appellant could use the room whenever he needed it. (34 R.T. 4987-4988.) Appellant lived with the Bowen family from the time Ms. Bowen left for school until the incident. (34 R.T. 4988.) He was not there every day, but he was there a lot. (34 R.T. 4988-4989.)

Bryan Beller has known appellant since 1989. He met him through the soccer program.[11] (34 R.T. 5037-5038.) When the team needed a coach, appellant volunteered. (34 R.T. 5038-5040.) This position was normally held by an adult volunteer. At the time, appellant was still a teenager. (34 R.T. 5041.)

Mr. Beller got to know appellant fairly well. (34 R.T. 5041-5042.) He observed how appellant related to the boys on the team and to the parents (34 R.T. 5042) and considered appellant a role model

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[11]Mr. Beller's testimony was read from the trial transcript of January 15, 1998. He was unavailable to testify in the fourth penalty phase. (34 R.T. 5037.)

for the boys on the team[12]. (34 R.T. 5045.) Mr. Beller believed appellant handled it very well when a parent was being very derogatory towards him. (34 R.T. 5043.)

Mr. Beller would characterize appellant as a leader, not a follower; he was mature for his age. (34 R.T. 5048.) Although he responded yes when asked two years ago if appellant was a role model for his son, Mr. Beller stated he would be challenged to say so at this time. He has read much more about the case. He still does not know the details, but he knows more than when he testified previously. (34 R.T. 5048, 5049-5050.)

Family Support

Roberta Prindiville, Mr. Severino's one of daughters, stated that she knew appellant had done horrible things, but she still supported him. (34 R.T. 5056, 5060.) Until this tragedy, the Charles extended family was very close. (34 R.T. 5061-0063.) There was a special bond between appellant and his grandfather. (34 R.T. 5064.) Ms. Prindiville testified the rest of the family was behind her one hundred percent in their desire to be able to maintain a relationship with appellant. (34 R.T. 5066-5067.) Joanne Irene, appellant's first cousin once removed, concurred that the family was a tight, close-knit family. (34 R.T. 5068-5070.) She also concurred with Ms. Prindiville as to continued family support for appellant. (34 R.T. 5074-5075.)

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[12]Kathleen Main also met appellant when appellant coached her son's soccer team. (34 R.T. 5029-5031.) She believed appellant's impact on her son was definitely positive. (34 R.T. 5034.)

INTRODUCTION TO THE ISSUES

This was a circumstantial evidence case with a number of significant gaps. For example, there was no particular motive for appellant to commit these homicides. Additionally, the wrench that the prosecution alleged was the murder weapon was not shown to have been in appellant's tool box at the Chevron Station immediately prior to the homicides. Appellant worked on cars at home and he did not always put his tools away. Thus, an assailant could have found the wrench in the home and simply used it as a weapon of opportunity. Another significant evidentiary discrepancy was that although Axelson testified that appellant confessed that he "did something terrible" and that "I think I killed my parents," that testimony is somewhat inconsistent with what Axelson actually told the police. The police report had the quote as "I think I did something terrible." Moreover, although Axelson denied that appellant told him 'They [the police] think I killed my family;" nevertheless, he did not disclose his conceded error in recounting appellant's conversation until he was on the stand - over a year after he talked with the police.

To surmount these difficulties, the prosecution relied heavily on Prosecution Exhibit I, a fourteen page letter purportedly written by appellant. As explained in the Statement of Facts, the letter amounts to a virtual confession to the homicides and involves a plot to cover them up by having his grandfather killed.

That said, the letter was obtained by the prosecution from a notorious jailhouse informant who was concededly seeking favors in

his own case. The possibility, or more accurately, the probability that the document was forged was an issue not only well known to the prosecution, but a telling weakness that it studiously avoided. Indeed, the informant's credibility was so poor that the prosecutor even referred to him as a "slime ball" and admitted that his total lack of credibility was the reason why the prosecution refused to call him to the stand to authenticate the letter.

Instead, the prosecution called newspaper reporter Tony Saavedra to the stand to help authenticate the letter and use it as an adoptive admission. Testifying under the protection of the newsperson's shield law, Saavedra said that he took a copy of the letter with him to the jail, placed the front page of the letter - and perhaps another page or so - up against the glass window of the visiting booth and asked appellant about the homicides. Although Saavedra admitted that he never actually asked appellant if he wrote the letter and appellant emphatically denied any involvement in the homicides or a plot to cover them up, nevertheless, over vigorous defense objection Saavedra was permitted to testify that in his opinion appellant Charles admitted writing the letter.

Unfortunately, defense cross examination on the point at the guilt phase was severely restricted by the trial judge pursuant to his interpretation of the scope of the newsperson's shield law. Nevertheless, at the third penalty phase trial, when there was a new judge and a new set of defense counsel, some of the restrictions on the use of the evidence were changed.

Saavedra was not allowed to testify to his opinion about whether appellant admitted writing the letter because that was the province of the jury. Further, on cross examination Saavedra admitted that appellant talked about the letter and the incident indiscriminately with no apparent delineation between the contents of the letter and his description of what happened on the night of the incident. Thus, there was no true adoptive admission.

Additionally, not only did the prosecution turn a blind eye to the probability that it was using false evidence to bolster its difficult circumstantial evidence case, but it engaged in improper closing argument in an attempt to shore up another large deficit in its case, absence of motive. The prosecution failed to explain why appellant - a young middle class man with no criminal record and demonstrated service to his community would kill three members of his family for no particular reason. To remedy that omission, the prosecution attempted to introduce a family insurance policy naming appellant as one of the beneficiaries. The prosecution did not charge a financial gain special circumstance, however, and could not show that appellant even knew about the policy. Therefore, the trial judge refused to allow the policy into evidence.

Nevertheless, in guilt phase closing argument, the prosecutor told the jury that by killing his family, appellant stood to inherit the family home and all its possessions. Since there wasn't even a shred of evidence to support that claim, the trial court sustained the vigorous defense objection. Unfortunately, the damage was done. Without the

benefit of the slightest evidentiary support, the prosecutor provided the jury with a sinister motive for an otherwise almost inexplicable triple homicide.

As if the foregoing instances of misconduct were not sufficient to prejudice appellant in the eyes of the jury, the prosecutor insulted and demeaned the defense in closing argument in the guilt phase by saying that he "tipped his hat to the defense for making chicken salad out of you know what." Moreover, as explained in detail in issues III, IV and V, these egregious acts of misconduct were exacerbated by flawed or otherwise improper jury instructions on motive, consciousness of guilt and adoptive admissions.

This was a close case, as demonstrated by the extraordinary fact that it required four penalty phase trials to get a jury willing to sentence Mr. Charles to death. After the jury hung at the third penalty phase trial, the defense vigorously objected to a fourth and asked the trial court to impose a sentence of life without parole. The prosecution objected.

The trial court ruled that despite the fact that there would not be any new evidence presented in the fourth penalty phase trial, legally, it could not deny the prosecution a fourth opportunity to seek the death penalty. Although two penalty phase juries hung, because more jurors voted for death than life, the judge considered that voting ratio to be a significant factor. Further, the court noted that there were at least some circumstances supporting a death verdict.

The trial court's ruling evidenced a misunderstanding of the

scope of its discretion and further it improperly judged the factors weighing in the balance. The trial court was not legally required to give the prosecution a fourth penalty phase under any circumstances. Moreover, the fact that more jurors voted for death than life was not a distinguishing feature either. Multiple hung juries, even those with majorities favoring death do not provide a principled method for determining whether additional penalty phase trials are permitted. Thus, it is apparent that rather than make a principled determination, the trial judge improperly relied on his private notion of what would be fair or just.

Finally, the instructional errors and the systemic problems with the death penalty in California prejudiced appellant.

Individually and cumulatively these errors undermined confidence in the homicide convictions and the death penalty verdict. They require that appellant's convictions be reversed and his death sentence be set aside.

GUILT PHASE ISSUES

I.

THE TRIAL COURT ERRED IN ADMITTING PROSECUTION EXHIBIT ONE AS AN ADOPTIVE ADMISSION

Summary of Argument

The trial court erred in admitting the letter obtained from informant Pincock, Prosecution Exhibit I, as an adoptive admission for four reasons. First, appellant never acknowledged writing the letter. Second, the chain of custody was faulty. Third, appellant was never shown the entire letter, and thus there is no showing he knew of or adopted its entire contents. Fourth, although appellant responded to the newspaper reporter's questions about the letter, the evidence shows that the reporter's questions dealt with the offenses and the letter indiscriminately. Thus, appellant's responses are at best ambiguous with regard to the letter. It is not clear that appellant understood that the reporter was asking about the contents of the letter or questions about the offenses.

Moreover, to the extent that the defense was prohibited by the reporter's shield law from exploring whether appellant was responding to questions about the letter or separately to questions about the offenses, appellant was unfairly deprived of his Fifth and Fourteenth Amendment rights to due process and a fair trial as well as his Sixth Amendment rights to confront and cross examine witnesses and present a defense and his Eighth Amendment right to a reliable penalty determination.

The appellant was severely prejudiced by the admission of the letter. As noted above, this case was a circumstantial evidence case. There were no eyewitnesses to the homicides. The letter itself amounted to a virtual confession. Additionally, the letter suggested a plot to kill appellant's grandfather thereby making it appear that appellant was trying to direct suspicion away from himself. While the other circumstantial evidence was ambiguous at best, a confession is virtually the strongest evidence that exists. Thus, a jury allowed to hear such evidence would undoubtedly resolve all its doubts and ambiguities against appellant. More importantly, because the letter implies appellant was plotting to kill his aged grandfather, the letter significantly increased the likelihood that the jury would find one or more of the other killings to be premeditated and deliberate. Additionally, allowing the letter to portray appellant as a vicious, remorseless and calculating killer of his family made the likelihood of imposing the death penalty dramatically more certain.

Factual Background

At the preliminary hearing, Sergeant Royer, the detective who supervised the investigation of the deaths of Mr. and Mrs. Charles and Danny, testified that on December 7, 1994, he received a 14 page handwritten letter [Prosecution Exhibit 1] from jail inmate Cezar Pincock[13]. (I C.T. 138-139.) Pincock wanted consideration in his case in return for this information. (1 C.T. 150.) Sgt. Royer testified that he

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[13] There was some confusion over Pincock's last name. Sgt Royer and other witnesses occasionally referred to the witness as Pinnock rather than Pincock.

refused Pincock's demand noting that the letter was evidence and he would simply take it. Nevertheless, he agreed to inform the District Attorney of Pincock's actions. (1 C.T. 150.) Sgt. Royer also testified that Pincock said he got the letter from appellant, but Sergeant Royer admitted that he had no personal knowledge of that. (1 C.T. 147-148.)

Near the end of the preliminary hearing, the prosecution tried to admit the letter into evidence. The defense objected on two grounds, (1) the letter was hearsay, and (2) there was no authentication that appellant actually wrote it. (1 C.T. 186-187.) The preliminary hearing judge excluded the letter as improper hearsay. (1 C.T. 188.)

Prior to trial, the defense made a written motion to exclude the letter on the grounds that no chain of custody had been established. That is, since Pincock did not testify, the prosecution failed to establish that the letter was authentic. (2 CT 625-626.)

At an Evidence Code section 402 pretrial hearing on the admissibility of the letter, the parties stipulated the original letter was received by Sgt. Royer from inmate Cezar Pincock. The letter itself discussed a plot to kill appellant's grandfather to cover up the homicides. The alleged plot was being investigated by an undercover sting operation. The District Attorney told the court that he requested that a reporter for the Orange County Register newspaper, Mr. Anthony Saavedra, who had apparently learned of the matter, not publish anything about the sting until after the operation concluded. [14]

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[14] The prosecution conceded that the police undercover sting operation in jail was a clear violation of *Massiah v. United States* (1 R.T. 81) and no evidence from those

The prosecutor also told the court that after the undercover operation ended, he gave Saavedra a copy of the letter "basically to give thanks to Mr. Saavedra." (3 R.T. 1215.) The prosecutor took no further action on the matter and did not request that Saavedra or the Orange County Register take any action. (3 R.T. 1215.)

The parties also stipulated that if a defense handwriting expert was called to examine the letter, the expert would say that appellant did not write the letter. (3 R.T. 1217.)

The trial judge then asked if there were any questions the defense would be asking that might cause the newspaper reporter to invoke his immunity under the California reporter's shield law. (3 R.T. 1217.) The defense responded that it wanted to inquire into the circumstances regarding any purported confession by appellant to the reporter. (3 R.T. 1218.)

When reporter Saavedra took the witness stand, he testified that he had an interview with Mr. Charles at the Orange County jail on January 2, 1995. (3 R.T. 1222-1224.) He took numerous quotes from the letter and those appeared in his article in the newspaper (Prosecution Exhibit 2 for identification). (3 R.T. 1219-1222.) He also testified on direct examination that appellant admitted writing the letter and that all of the direct quotes from Mr. Charles that appeared in the article were accurate. (3 R.T. 1223-1224.)

On cross examination, however, Saavedra admitted that he never actually asked appellant if he wrote the letter. (3 R.T. 1236.)

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interviews of the defendant were admitted at trial.

During his visits, he was separated from appellant by a glass partition, and he showed a page or some pages of the 18 page letter to appellant by holding it up to the glass. He did not show appellant the entire letter. (3 R.T. 1232.) Saavedra could not recall exactly how many pages or even which pages of the letter he showed appellant. (3 R.T. 1232.) Nevertheless, Saavedra testified that when he showed appellant the pages, appellant agreed with what was in the letter and in some cases appellant elaborated on what was in the letter. Saavedra testified that he went over some passages because he did not understand them, and appellant would explain them. (3 R.T. 1237.) Saavedra also testified that he said to appellant , "I have a letter that you wrote or" you wrote here". According to Saavedra, appellant never answered "Yes, I did." or "No, I didn't." (3 R.T. 1237) Saavedra affirmed that it was his impression based on the total conversation that appellant wrote the letter. He conceded, however that appellant never actually admitted writing the letter. (3 R.T. 1237.)

When pressed about exactly what caused Saavedra to come to the conclusion that appellant wrote the letter, Saavedra explained how he conducted the interview. He testified that he would put a page up against the glass partition in the visitor's booth so appellant could see it or he would read a section from the letter to appellant. Saavedra assumed appellant was reading the passages of the letter he pressed against the glass but he could not say for sure. (3 R.T. 1239-1240.) There was no way for appellant to turn the pages of the letter and appellant never asked Saavedra to turn any of the pages of the letter.

Further, appellant never responded directly to anything in the letter or directed Saavedra to any specific portion of the letter. (3 R.T. 1237-1241.) Saavedra did not recall everything he showed appellant, although he did recall showing appellant the first page of the letter. (3 R.T. 1239, 1242, 1251.) After that, he "hopscotched around" showing appellant various other pages. (3 R.T. 1243.) During the interview, appellant denied a plot to kill his grandfather and said that the police trumped things up or got them wrong. (3 R.T. 1239.)

Saavedra testified that when he asked whether appellant denied killing anyone but merely found the bodies, appellant responded affirmatively. (1238-1241.) Saavedra admitted however, that he could not say whether appellant was responding directly to particular passages in the letter or simply to the letter in general. (3 R.T. 1241.) Indeed, as to most of the interview, Saavedra testified that he would show appellant portions of the letter or make comments about what the letter said and appellant would then respond in some way. (3 R.T. 1243.) Specifically, appellant commented on such things as finding the bodies, holding his brother and cremating the family. (3 R.T. 1244-1245.) Appellant never pointed out those passages in the letter. Saavedra was merely telling appellant what was in the letter and appellant was responding to his comments. (3 R.T. 1245.) Saavedra agreed with the suggestion of counsel that his conclusion that appellant admitted writing the letters was based largely on the fact that appellant never actually denied writing the letter. (3 R.T. 1247.) In that regard, Saavedra again admitted that he never actually asked appellant

when or where he wrote the letter. (3 R.T. 1249.)

At the conclusion of the Evidence Code section 402 hearing, the trial judge asked if the prosecution was offering the letter as an exhibit based on the implied admission [adoptive admission] rule. That is, appellant failed to deny that he wrote the letter under circumstances where it would be normal to expect him to deny it if it was not his writing. (3 R.T. 1255.)

The prosecutor replied that the adoptive admission rule was the basis for admission and noted that the letter also tracked fairly closely with what appellant told a jail deputy, Deputy Hyatt, in an earlier statement about the homicides, thus making it more likely than not that appellant wrote the letter. Additionally, the last page of the letter contained a diagram of appellant's house. The diagram had a prosecution discovery number on it. (3 R.T. 1255-1256.)

The defense objected to the admission of the letter noting that while some of the statements in it were similar to those which appellant had made to Hyatt, there were also numerous dissimilarities. The letter did not flow: there were odd page breaks and disjointed thoughts as if the author was writing it based on reading a series of police reports. It was not dated or signed. (3 R.T. 1257-1258.) Additionally, it was stipulated that the defense handwriting expert would testify that appellant did not write any portion of this 18 page document. (3 R.T. 1258.)

The district attorney and the trial judge reviewed the letter, and both opined that it looked like the same person wrote all of the

document. The court noted that there was a strong inference that if appellant wrote one part, he wrote it all. (3 R.T 1259.)

Defense counsel objected again noting that even if appellant failed to deny part of the document, that doesn't mean all of the letter would be admissible. Saavedra testified only that appellant admitted to some specific excerpts from the letter, the evidence does not show that appellant admitted to the entire contents of the letter. (3 R.T. 1259.) Further, even though the evidence showed that the police obtained all 18 pages at one time, the fact that it was obtained from an informant, Cezar Pincock, suggests that there was tampering. (3 R.T. 1259)

The court replied that since appellant was shown page 1 of the document and did not deny he was the author, there seemed to be no reason to exclude it. (3 R.T. 1260-1261.)

Defense counsel then argued that the chain of custody was not established since there was no evidence that appellant was the original author or that he gave it to Pincock. (3 R.T. 1260-1261.)

The court found that since appellant was shown page one of the document and failed to deny that he wrote it and since the entire letter appears to be written in the same hand, there was no issue with the chain of custody. The entire 18 page letter was admissible. The defense motion to exclude the letter was denied without prejudice. (3 R.T. 1262.)

Prior to trial, the judge ordered that all limine rulings would be binding at trial unless a party specifically asked for reconsideration. (1

R.T. 37.)

Later, at the guilt phase trial, Saavedra first testified that he confirmed in his jailhouse interview with appellant that the letter (Prosecution Exhibit 1), was actually written by appellant. (7 R.T. 2061-2062.) In fact, one of the primary purposes of the interview was to determine if appellant wrote the letter. (7 R.T. 2066.) Saavedra explained that he made that determination by holding the first page of the letter up against the glass partition in the jail visitor's booth and asking appellant specific questions about its contents. Appellant responded with descriptions of things mentioned in the letter, such as "monkey boots" and a sweatshirt found on Danny Charles' body. (7 R.T. 2064.)

Saavedra volunteered that the reason he showed appellant the letter was because initially, appellant was denying any part in a scheme against his grandfather. The defense objection to commentary on a plot to kill appellant's grandfather was sustained. (7 R.T. 2064.)

During the interview, Saavedra read a portion of the letter that said a person should not get caught doing "M." Saavedra told appellant that it appeared from the letter that he was involved in a plot to kill his grandfather. Appellant denied any intention of hurting his grandfather. (7 R.T. 2064-2065.) In response to Saavedra's further questioning, appellant admitted that he burned the bodies after he found them because it was akin to cremating them. (7 R.T. 2065-2066.)

On cross examination, however, Saavedra admitted that

appellant denied killing anyone. (7 R.GT. 2072.) Further, appellant never actually admitted writing the letter, nor did Saavedra ever actually ask appellant if he wrote any portion of it. (7 R.T. 2066, 2068, 2072.) Saavedra also acknowledged that he did not show appellant every page of the letter and did not recall exactly what portions he did show appellant. He did recall, however, that he showed appellant the first page of the letter. (7 R.T. 2066-2067, 2073.) Saavedra confirmed that he believed appellant wrote the letter because Mr. Charles never actually denied writing it and because he discussed its contents with Saavedra. (7 R.T. 2068.) Nevertheless, Saavedra admitted that appellant never pointed out any specific portion of the letter or directed Saavedra's attention to any portion of the letter. Instead, Saavedra asked appellant about various things contained in the letter and appellant commented on those matters. They never went through the document line-by-line, however. (7 R.T. 2070- 2071.)

Sgt. Royer then testified and explained how he got the letter from the informant Cezar Pincock. (8 R.T. 2090, 2100-2113.) He admitted that much of the detail contained in the letter was also contained in the police reports he gave to the defense team. (8 R.T. 2096.) Sgt. Royer acknowledged that inmates sometimes have copies of their police reports in the jail; indeed, the letter states, "I have to let you read my case and evidence." (8 R.T. 2120-2121.)

Sgt. Royer also admitted that there were numerous statements in the letter that were inconsistent with the facts at the scene. For example, "monkey boots" are listed in the letter although no boots of any kind

were found at the scene. The letter indicated Mr. Charles was hit with a hammer, but no hammer was found. (Indeed, the prosecution's theory, in fact, was that at least one of the decedents was struck with a wrench found in a dumpster after the homicides.) The letter states there was a rusted dog choker chain around Dolores Charles' neck, but no such a chain was found. (8 R.T. 2118.) The letter further indicates that Danny Charles was found in the trunk of the car and appellant's wrench was on top of him. (8 R.T. 2118-2119). However, no wrench was found on top of Danny in the trunk of the vehicle. The letter also indicates that appellant got home at 11:30 p.m., found the bodies and started cleaning up. Nevertheless, Sgt. Royer interviewed Mr. Severino on the sequence of timing. (8 R.T. 2119.) Mr. Severino indicated that he was up around 11:30 p.m. talking to Dolores. (8 R.T. 2119-2120) Additionally, the letter states that appellant "sucked gas out of the tank." (8 R.T. 2127.) However, no paraphernalia was found that could be used to suck gas from a gas tank. (8 R.T. 2127-2128.)

Attached to the letter is a diagram of the Charles residence. (8 R.T. 2095-2096.) That same diagram is also contained in the police reports, although the diagram in the letter contains additional information not in the police report diagram. (8 R.T. 2095-2096.) Additionally, there were a few other items in the letter itself that were not in the police reports. Thus, if the author was only reading police reports, he would not know these things. (8 R.T. 2150. These facts included the color of the blanket of the bed and the fact that the bed was made with only one pillow. (8 R.T. 2150-2151.

Sgt. Royer also told the jury that informant Pincock wanted consideration in his own cases in exchange for the letter. (8 R.T. 2104.) Further, Pincock contacted Royer, not the other way around. (8 R.T. 2106-2108.)

Appellant's former girlfriend, Kimberly Speare, testified that in her opinion the handwriting in Prosecution Exhibit 1 was appellant's. (6 R.T. 1804.)

William Hatch, a handwriting expert called by the defense testified that in his opinion appellant did not write the letter in Prosecution Exhibit 1. (8 R.T. 2211-2215.)

When the letter was offered into evidence at the close of the guilt phase, the defense again objected on the grounds raised in the prior hearing. The judge acknowledged that the defense was not waiving its prior objections and admitted the letter over the defense objection. (8 R.T. 2176.)

Right before deliberations, juror number 2 wrote a note to the court asking how Pincock obtained the letter. After conferring with the court, neither side requested the court to respond to the note. (8 R.T. 2342-2344.)

After the conclusion of the guilt phase and two penalty phase trials, new defense counsel and a new trial judge were appointed. At the third penalty phase trial, the defense again challenged the admissibility of the letter. (4 C.T. 1338.) In its trial memorandum, the defense urged that since Saavedra never asked appellant if he wrote the letter, but simply assumed that he did so based on his

responses to some of Saavedra's questions, there was no oral admission at all. Further, since Saavedra never showed appellant the entire letter and could not identify which portions of the letter he showed appellant, the entire letter did not constitute an adoptive admission. (4 C.T. 1347-1350.)

At the beginning of the Evidence Code section 402 hearing on the penalty phase motion, Saavedra again invoked the reporter's shield law noting that anything that occurred between him and appellant that was not in the published story was protected under the shield law. (24 R.T. 2816.)

The defense asserted that the issue was divided into two parts: First, did appellant actually admit that he wrote the letter? Second was there an adoptive admission because appellant never actually denied writing the letter? The defense took the position that appellant never actually said he wrote the letter, and that under the circumstances, - that he was in jail and his attorney told him not to talk to reporters - there would be no reason to deny any assertion by a reporter. Hence there was no adoptive admission either. (24 R.T. 2816-2817.)

The prosecutor responded by informing the new penalty phase judge that in previous testimony, Saavedra never actually asked appellant if he wrote the letter. Instead, Saavedra held up portions of the letter to the glass window separating the two in the jail visiting area and appellant never denied that he wrote the letter when the reporter would say things like "you wrote that ...." Further, because Kim Speare authenticated the handwriting as belonging to appellant,

the prosecution did not need Saavedra for admission of the letter. (24 R.T. 2819-2820.)

The defense conceded that if Speare would testify that the letter was in appellant's handwriting, there was some foundational basis for the letter. Nevertheless, there was still the problem of whether the letter constituted an adoptive admission. (24 R.T. 2822.)

When Saavedra was called to the stand by the prosecution in the penalty phase Evidence Code section 402 hearing, he admitted that **there was a discussion of the facts of the case that were different from things discussed in the letter**. (24 R.T. 2837 [Emphasis added].) Nevertheless, it was still his opinion that because of the entirety of the conversation, appellant was the author of the letter. (24 R.T. 2838)

After roundly chastising the attorney representing the newspaper about the paper's public opinion poll concerning whether appellant should be executed (24 R.T. 2839), the penalty phase judge allowed the defense to make its presentation at the motion hearing. The defense called appellant's former counsel, Ronald Klar to the stand. Mr. Klar testified that he told appellant not to talk to the press. (24 R.T. 2845-2846.) On cross examination, he admitted that appellant did not always follow his advice. (24 R.T. 2848.)

After argument, the trial judge agreed with the defense that Saavedra should **NOT** be allowed to express his opinion concerning who wrote the letter because that was a jury question. (24 R.T. 2850.) Nevertheless, the Saavedra testimony was otherwise admissible

because non responses or evasive responses to direct questions from the reporter were matters for the jury to consider in deciding whether the letter was an adoptive admission. (24 R.T. 2951.)

At the third penalty phase trial, Saavedra admitted on cross examination that appellant talked about the crimes and the letter indiscriminately – that is, there was no real differentiation between the two. (26 R.T. 3182-3183)

At the fourth penalty phase trial, the parties stipulated that Saavedra would not be allowed to offer an opinion on whether he thought appellant wrote the letter. (30 R.T. 4131.) Saavedra testified in essentially the same manner as he had on the previous occasions. (32 R.T. 4685- 4729.) During closing argument , the district attorney read virtually all of the letter aloud and made descriptive comments concerning appellant's culpability while doing so. (35 R.T. 5153-5164.)

Standard of Review

The standard of review for an adoptive admission is whether the trial court abused its discretion in admitting this evidence. (*People v. Karis* (1988) 46 Cal.3d 612, 637; *(People v. Edwards* (1991) 54 Cal.3d 787, 820.) While that standard calls for deference, it does not require abdication. (*People v. Lang* (1989) 49 Cal.3d 991, 1050 (conc. and dis. opn. of Mosk, J.) Even a defendant's statements in a jailhouse interview with a media reporter – an instance that comes within a well recognized exception to the hearsay rule – may be excluded if the statements pose at least some risk of unreliability.

(*People v. Whitt* (1990) 51 Cal. 3d 620, 643-644.) Here, the risk of unreliability was unacceptably high.

Rules Governing the Use of Adoptive Admissions

The rules governing admissibility and use of adoptive admissions are fairly well defined, but often difficult to apply in practice. Moreover, since adoptive admissions are essentially hearsay, the trier of fact will often have no means of testing the reliability of often ambiguous statements or conduct. More important, what makes the adoptive rule so much more difficult to apply is that an adoptive admission isn't actually an admission at all. Instead, it is merely silence - a silence from which the trier of fact is invited to infer a meaning from its context. That is, the trier of fact has to make multiple inferences, deciding both whether the silence is meaningful and if so, what that meaning is. Moreover, that meaning is often based on disputed versions of the events surrounding the silence and generalized assumptions about human behavior that may or may not be true in the particular instance. For these reasons, before such evidence is presented to a jury, the initial question of reliability is critical to any determination of admissibility.

Adoptive admissions constitute a "well-recognized exception to the hearsay rule." (*People v. Preston* (1973) 9 Cal.3d 308, 313.) Section 1221 of the California Evidence Code provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his

adoption or his belief in its truth."

Two requirements are necessary for the introduction of adoptive admissions. First, "the party must have knowledge of the content of another's hearsay statement." (*People v. Silva* (1988) 45 Cal.3d 604, 623, citing 1 Jefferson, Cal.Evidence Benchbook (2d ed. 1982) § 3.3, p. 175.) Second, "having such knowledge, the party must have used words or conduct indicating his adoption of, or his belief in, the truth of such hearsay statement." (*Ibid.*, emphasis in original; see also *People v. Davis* (2005) 36 Cal.4th 510, 535 .) Although the admissibility of the evidence in the first instance is for the court to determine, whether appellant's conduct actually constitutes an adoptive admission is a jury question. *(People v. Edelbacher* (1989) 47 Cal.3d 983, 1011; *People v. Simmons* (1946) 28 Cal.2d 699, 712-712.)

The test for admitting an accusatory statement against a defendant and the defendant's failure to deny such statement is not whether defendant had an opportunity to deny the accusation but whether the accusation was made under circumstances calling for a reply. (*People v. McKnight* (1948) 87 Cal.App.2d 89, 92.) It is not essential that the accusation be made directly and in so many words. *(People v. Riel* (2000) 22 Cal.4th 1153, 1189.) Moreover, a defendant's "'silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.' [citation]." *(Ibid.)* Nevertheless, if the defendant expressly denies the statement there is no admission. *(People v. Davis* (1957) 48 Cal.2d 241, 249.)

Each case must be determined on its own facts and circumstances. *(Ibid,* see also, *People v. McKnight, supra,* 87 Cal.App.2d at p. 89.)

The burden is always on the proponent of the purported adoptive admission [here, the prosecution] to offer sufficient proof of the preliminary facts to demonstrate that the evidence falls within the purview of Evidence Code section 1221. (*People v. Lebell* (1979) 89 Cal.App.3d 772, 779, citing Evid. Code §§ 400-403; see also *People v. Maki* (1985) 39 Cal.3d 707, 711-713.) Whether the prosecution has established a proper foundation for admission of such an exception to the hearsay rule is a factual matter for the trial court. (*People v. Browning* (1975) 45 Cal.App.3d 125, 143 (overruled on a different ground in *People v. Williams* (1976) 16 Cal.3d 663, 669.) Significantly for the issue here, **the authenticity of a writing is also a preliminary fact to be found by the trial court before submission of the evidence to the jury**. (Evidence Code section 403, subd. (a)(3).)

In addition to the general rules set forth above, two other rules applicable to adoptive admissions are particularly important to the issue in this case. First, if the hearsay statement has been reduced to writing, the entire statement must be shown to appellant before the statement and appellant's response are admissible. *(People v. Davis, supra,* 48 Cal. 2d at p. 250.)

Second, admissions are limited to the actual accusations made and the defendant's actual responses. When a long accusatory statement is read to or by the defendant, it may contain a great deal of

information that is otherwise inadmissible or statements which a defendant might not otherwise be reasonably expected to refute, from lack of time, inattention, or failure of memory, if nothing else. If the entire statement is given to the jury under the guise of an adoptive admission, that otherwise inadmissible evidence or statements come before the jury in such a way that not even a cautionary instruction may overcome the prejudice. (*People v. Davis* (1954) 43 Cal.2d 670, 671.) Indeed, ""[I]t is fundamentally unfair to expect point-by-point denials of long narrative statements, containing several facts as well as theories and inferences - particularly where the statements are not in question form." (*People v. Sanders* (1971) 75 Cal.App.3d 501, 508.) see also, *People v. Simmons, supra,* 28 Cal.2d 699, 716-717 [The practice of obtaining evidence by means of tacit admissions by reading detailed statements of the crime purportedly made by a codefendant or companion in the crime with a view toward eliciting either a complete confession or an admission by silence to be used against the defendant to whom the statement is read, is improper], accord, *People v. Spencer* (1947) 78 Cal.App.2d 652, 657-658 [The practice of confronting a defendant with a codefendant's statement containing a vast amount of hearsay testimony otherwise utterly inadmissible and offering the entire statement in evidence merely because defendant did not flatly deny everything in the statement, is prohibited. The admission of such a statement constitutes an abuse of the trial court's discretion.] The federal courts have adopted a similar rule. (See, e.g., *Williamson v. United States* (1994) 512 U.S. 594, 599-602 [129 L. Ed.

2d 476, 114 S. Ct. 2431].)

Williamson is significant in this regard, because it sets forth the rationale for admitting this type of hearsay evidence. In *Williamson*, the United State Supreme Court concluded that the trial court erred in admitting a lengthy narrative as a statement against penal interest under Federal Rules of Evidence, rule 804(b)(3) on the ground that it was generally self-inculpatory. The High Court instructed that each individual statement within the longer narrative should have been examined to determine whether it was inculpatory or exculpatory. The reason for the narrow construction of the meaning of a "statement" flows from "the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does NOT extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." (*Id.*, at p. 597.)

Prosecution Exhibit 1 Did Not Qualify as an Adoptive Admission

The letter that Sgt. Royer obtained from the informant could not qualify as an adoptive admission for four reasons. First, the chain of custody was inadequate to show that the letter was genuine or authored by appellant. Second, because Saavedra showed appellant only part of the letter - and, aside from the first page Saavedra could not say which parts of the letter he actually discussed with appellant - and since the evidence showed that appellant talked about the crimes

and the letter indiscriminately, any admissions were limited to appellant's actual responses to any of Saavedra's purportedly accusatory questions.

Third, far from admitting the truth of the letter, appellant actively disputed writing it. Further, because appellant denied that he killed anyone and denied any intention of hurting his grandfather, anything in the letter that he did not expressly admit and that could support an inference that he killed his family or intended to have his grandfather hurt should have been excluded.

Fourth, to the extent that the defense was prohibited from mounting a proper defense to the admission of Prosecution Exhibit 1 because of the invocation of the reporter's shield law, appellant has been deprived of his due process right to a fair trial under the Fifth Amendment and Fourteenth Amendments, his Sixth Amendment Rights to cross examine and to present a defense, as well as his Eighth Amendment right to a fair and accurate penalty determination.

Although all of these problems are inextricably linked, for ease of understanding, appellant will discuss each problem separately.

Insufficient Showing of Chain of Custody to Warrant Admission

In *People v. Catlin* (2001) 26 Cal.4th 81, this court set forth the guidelines for admission of evidence when there is a challenge to the chain of custody. In *Catlin* this court concluded that the party offering the evidence must demonstrate with reasonable certainty that under all the circumstances, including the ease with which the evidence could

be altered, that the evidence was not altered. Morever, the reasonable certainty requirement is NOT met when some vital link in the chain is missing. Under those circumstances, it is as likely as not that the evidence was altered. Left only to speculate on whether the evidence was in its original form, the court must exclude it. (*Id.*, at p. 134.) Conversely, when there is only the barest speculation that there was tampering, it is proper to admit the evidence and let any remaining doubt fall to the jury for resolution. While a perfect chain of custody is preferable, gaps are permissible as long as the remaining links do not raise serious questions of tampering. (*Id.*, at p. 134. [Emphasis added.)

The chain of custody in this case did not meet the mandated standard - or anything close to it. Sgt. Royer testified that he received the letter from a conceded jailhouse informant who was seeking favors in his own case. (8 R.T. 2104-2108.) The informant himself never testified about the source of the letter.

It is undisputed that the letter contains statements that contradict the actual facts of the case. As noted above, "monkey boots" are listed in the letter although no boots of any kind were found at the scene. Further, the letter indicates the senior Mr. Charles was hit with a hammer but no hammer was found. More importantly, the prosecution determined that a large crescent wrench was the weapon used to kill Mr. Charles. The letter indicates there was a rusted dog choker chain around Dolores Charles' neck, but no one found a rusted dog's choker-type chain. The letter indicates that Danny Charles was found

in the trunk of the car and defendant's wrench was on top of him. However, no wrench was found on top of Danny in the trunk of the vehicle. The letter also indicates that defendant got home at 11:30 p.m., found the bodies and started cleaning up. Nevertheless, Sgt. Royer interviewed Mr. Severino on the sequence of timing. Mr. Severino indicated that he was up around 11:30 p.m. talking to Dolores -who was obviously very much alive at that time - and appellant was nowhere around. Additionally, the letter states that appellant "sucked gas out of the [vehicle's] tank." However, no paraphernalia was found around the burned vehicle that could be used to suck gas from a gas tank. (8 R.T. 2118-2120, 2127-2128.)

Additionally, the defense handwriting expert testified unequivocally that the letter was NOT that of appellant. (8 R.T. 2211-2215.) The only evidence to the contrary came from appellant's former girlfriend, who obviously was not a handwriting expert. (6 R.T. 1804.)

The undisputed factual discrepancies between the actual evidence and the letter, plus the fact that the letter was obtained from a jailhouse informant seeking favors from the prosecution, plus the expert testimony that the handwriting was NOT that of appellant demonstrates that there were very serious issues involving the reliability of the document. If the letter was written by appellant and appellant was the assailant, why would the letter contain the kind of information that the assailant would obviously know was wrong?

The most plausible explanation is that the informant obtained the police reports provided to appellant by his lawyers and used them, along with information unwittingly supplied him by appellant in apparently innocuous conversations, to construct the letter in a facsimile of appellant's handwriting. (See, e.g., 5 R.T. 1340-1341 1350-1361; 35 R.T. 5222-5224.) Where the letter contains information that only appellant would know, that information easily could be obtained either by an educated guess, information available in the public media, or information obtained by the informant from otherwise innocent and general communications with appellant. Indeed, since appellant returned to his home nearly every day, he would certainly know these little details such as the color of the blankets on the bed. Thus, those minor details that are in the letter but do not appear in the police reports do not support an unequivocal determination that the letter was written by appellant. (*See,* e.g., *People v. Gonzales* (1990) 51 Cal.3d 1179, 1281; *superseded on other grounds by statute.*)[15]

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[15] In *Gonzales*, this court explained how informants like the notorious Leslie White could create a wholly false confession from a defendant that had the ring of authenticity. As the court observed:

> "On October 27, 1988, a newspaper article appeared in which inmate Leslie White described how inmate-informers concocted false but convincing confessions implicating other prisoners, testified falsely against those prisoners, and in return received special benefits. As described in that article and on subsequent occasions, the inmate would arrange to be confined or transported with the suspect, so he could show he had the opportunity to hear a confession. (Sometimes the jail officials would facilitate this by deliberately housing the suspect in the portion of the

While it is true that this court has repeatedly rejected the claim that evidence produced by an informant is inherently unreliable (See, e.g., *People v. Ramos* (1997) 15 Cal.4th 1133, 1165), nevertheless, such evidence is obviously of questionable reliability. Indeed, long before informants became a significant part of the criminal justice system, the United States Supreme Court recognized that "the use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "dirty business' may raise serious questions of credibility." *(On Lee v. United States* (1952) 343 U.S. 747, 755.)[16] A

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facility where known informers are confined for their own protection.) The inmate informant would phone law enforcement personnel, pose as a fellow investigating officer, and learn details of the crime. Since those details were known only to law enforcement personnel (who presumably would not disclose them to a prisoner) and to the criminal himself, the informant, by including such details in a false confession, could give his story a spurious air of authenticity. The inmate would then report the false confession to the police and, if requested, testify to it in court. In some cases inmates bargained for specific benefits, **but this was not an essential part of the system; the inmates knew that if they regularly came forward with useful information they would be rewarded**. [Emphasis added] (*People v. Gonzales, supra* 51 Cal.3d at p. 1281)

[16] Given the checkered history of informant reliability, at least two courts and one state legislature have mandated reliability hearings whenever incarcerated informants ("jailhouse snitches") provide evidence . See *Dodd v. State*, 993 P.2d 778, 784 (Ok. Ct. of Crim. App. Jan. 6, 2000) (Strubhar, J., concurring) (approving lower court imposition of "reliability hearing" comparable to *Daubert* hearing); *D'Agostino v. State* (Nev. 1992) 107 Nev. 1001, 823 P.2d 283(holding that before "jailhouse incrimination" testimony is admissible the "trial judge [must] first determine[] that the details of the admissions supply a sufficient indicia of reliability"). Illinois mandates such hearings as a matter of law. See Ill. Comp. Stat., ch. 725, 5/115-21(c) (2003). The Illinois statutory requirement is based on the recommendations of the Governor's Commission on Capital Punishment, which concluded that special preliminary reliability hearings are necessary whenever

prosecutor who does not appreciate the perils of using informant evidence risks compromising the truth-seeking function of the criminal justice system. Courts expect the prosecution team to take all reasonable measures to safeguard the truth seeking function against unfairness. *(Commonwealth of the Northern Mariana Islands v. Bowie* (9th Cir. 2001) 236 F.3d 1083, 1089.)[17] The prosecutor's obligation comes from two sources: first, because the government uses and controls the informant it is in a unique position to evaluate the informant's reliability. Second, the prosecutor has an ethical responsibility to ensure that appellant is given a fair trial. (*Id.*, at p. 1089 [citing *Berger v. United States* (1935) 295 U.S. 78, 88].)

Given the highly questionable reliability of the informant evidence, including the unaccountable discrepancies between the known facts from the crime scene and the recitations in the letter, plus the scientific handwriting evidence casting significant doubt on the document's authenticity, the prosecution should have been required to produce the informant to testify and be cross-examined concerning where and how he obtained the letter. Certainly that was a concern of juror number 2, who wrote the court a note specifically asking how Pincock obtained the letter. (8 R.T. 2342-2344.)

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incarcerated informants are offered as witnesses.

[17] As explained in Issue II, the failure to fully investigate the circumstances under which the letter was written also implicates prosecutorial misconduct. One form of misconduct involves a calculated decision NOT to learn information that might cast doubt on the veracity of an informant or his evidence. (*Commonwealth v. Bowie, supra,* 243 F.3d at p. 1117.)

Perhaps more significantly, however, there is no suggestion that at the time of trial the informant was otherwise unavailable to testify. Instead, the prosecution deliberately chose not to call the informant to the stand **precisely because he was untrustworthy**. As the prosecutor candidly admitted to the jury: "And I will tell you why you don't call a witness like that [Pincock]..... He is a slime ball. He is. I admit that. [Para] Okay. I can't authenticate that letter through a jail inmate. I wouldn't even dream of it. **I wouldn't believe it myself, why would I expect you to?**" (9 R.T. p. 2651 [Emphasis added.].)

Essentially, the prosecutor here tried to turn the rationale for the chain of custody on its head. The chain of custody doctrine is premised on the presumption of regularity in the handling of exhibits by public officials. (*United States v. Coades* (9th Cir. 1977) 549 F.2d 1303, 1306; see also *Baker v. Gourley* (2000) 81 Cal. App.4th 1167, 1171.) Thus, as noted above, minor gaps or omissions in the chain do not implicate the authenticity of the evidence. *(See People v. Catlin, supra*, 26 Cal.4th at p. 134.)

It was **NOT** the case here, however, that the prosecutor was simply unable to prove the entirety of the chain of custody, and therefore had to rely instead on its presumption of reliability. Here, the prosecutor deliberately **chose not to prove the entire chain of custody**. Instead, he invoked the presumption of reliability inherent in the chain of custody doctrine presumably **because he well knew the reliability of the document was suspect.** That is, it came from a concededly incredible source; the document contained inexplicable,

significant factual inaccuracies and there was evidence from a handwriting expert that the document was a complete fake.

By failing to resolve these obvious problems with the authenticity of the letter, the prosecution failed to establish the reliability necessary to constitute a valid chain of custody. This is not a situation where there is only a slight controversy concerning the authenticity of the letter such that the court should have admitted it and left the weight of the evidence for the jury to decide. (Evidence Code section 403, subd. (a)(3) [authenticity of a writing is a preliminary fact to be found by the trial court before submission of the evidence to the jury].) Instead , this was a significant challenge to the authenticity of the letter, and its admissibility was very much at issue. Since the prosecution did not resolve these reliability problems with sufficient clarity to establish a **valid** chain of custody, it failed to carry its burden to show that the letter was admissible.

No Knowledge of the Contents of the Document

Even if the prosecution could surmount the chain of custody problem [which it cannot], the letter failed to meet the requirements for an adoptive admission. As explained above, the two requirements for allowing the jury to hear evidence of an adoptive admission are that appellant had knowledge of the content of a hearsay statement and that he used words or actions indicating his belief in the truth of the hearsay. (*People v. Silva, supra,* 45 Cal.3d at p. 623, and *People v. Davis, supra*, 36 Cal.4th at p. 535 .)

The first problem is that there is no showing that appellant had

knowledge of the entire content of the hearsay statement. As explained above, when a statement has been reduced to writing, the defendant must have the opportunity to read or hear the entire statement before the statement and the defendant's responses can be introduced into evidence. *(People v. Davis, supra,* 48 Cal. 2d at p. 250.) Prosecution Exhibit 1 is a 14 page letter on legal sized paper. The document given to Saavedra was a photocopy reproduced on standard sized paper. It was 18 pages long. Either way, it is not a short document.

It is undisputed here, however, that Saavedra did not show appellant the entire letter. Instead , as Saavedra candidly admitted, he showed appellant the first page of the letter and perhaps some other pages, but he "hopscotched" around and never let appellant read the entire letter. Moreover, appellant never directed him to any particular passage in the letter or brought his attention to any particular portion of the letter. (3 R.T. 1239-1243.)

The prosecution attempted to avoid this problem by urging that since the letter appears to have been written by one person, if appellant admitted writing any part of it, he must have written the entire document. Thus, an admission to anything is an admission to the document's entire contents. (3 R.T. 1255, 1259.)

Such arguments have been repeatedly rejected by the California courts. This court has condemned as fundamentally unfair the practice of requiring point-by-point denial of long narrative statements containing many facts, theories and inferences that may not be in

question form and which the defendant may not be reasonably expected to refute. *(People v. Simmons, supra,* 28 Cal.2d at p. 716-717; accord *People v. Sanders, supra,*75 Cal.App.3d at p. 508. and *People v. Spencer, supra,* 78 Cal.App.2d at pp. 657-658.) Permitting such evidence under the guise of an adoptive admission is a clear abuse of discretion (*People v. Spencer, supra,* 78 Cal.App.2d at pp. 657-658.*)* and may bring so much otherwise inadmissible hearsay before the jury that even a cautionary instruction may be inadequate to overcome the prejudice. (*People v. Davis, supra,* 43 Cal.3d at p. 671.)

No Acknowledgment of the Truth of the Letter

Even if it could be successfully argued that appellant had knowledge of the entire contents of the letter [which it cannot] , however, the letter is still inadmissible.

Tony Saavedra testified at the guilt phase that based on his conversations with appellant, it was his opinion that appellant admitted writing the entire document. (See, e.g., 3 R.T. 1237.) On cross examination, however, he repeatedly admitted, that he never actually asked appellant if he wrote the document. (3 R.T. 1237, 1249; 7 R.T. 2066, 2068, 2072.) His assumption that appellant wrote the letter was based largely on the fact that appellant responded to his questions about the contents of the letter and never specifically denied writing the letter. (7 R.T. 2068.)

That said, at trial, Saavedra admitted that appellant specifically denied killing anyone and denied that he was involved in a plot to harm his grandfather. (7 R.T. 2064-2065, 2072.) Further, appellant

put on evidence from a handwriting expert that he did not write the letter. (8 R.T. 2211-2215.)

It is certainly true that for an adoptive admission to be valid Saavedra did not have to directly accuse appellant of killing his family members and plotting to harm his grandfather to cover up the crime. *(People v. Riel, supra*, 22 Cal.4th at p. 1189.) Nevertheless, for the entire document to be admissible, appellant would have had to manifest some sort of assent to its entire contents, either by affirmative agreement, or conduct that could reasonably be construed to be an agreement, such as failure to deny an accusation that would normally call for a denial. (*People v. Silva, supra,* 45 Cal.3d at p. 623.)

Here, however, on the specific issues that the prosecution wanted the document admitted to prove, i.e., that appellant killed his family and wanted to harm his grandfather to deflect suspicion from himself, appellant made specific denials. That is, according to Saavedra, appellant ***denied*** killing anyone and ***denied*** that he wanted to hurt his grandfather. Further, appellant produced evidence from a handwriting expert that he did not write the letter. It is axiomatic that if a defendant makes an express denial, his statements cannot be construed as an adoptive admission. *(People v. Davis, supra*, 48 Cal.2d at p. 249.) Given those denials, there is simply no discretionary basis upon which to admit the entire letter as an adoptive admission. (See *Williamson v. United States, supra*, 512 U.S. at p. 997.)

Additionally, since Saavedra repeatedly admitted that he never actually asked appellant if he wrote the letter, there was no accusation

for appellant to specifically deny. At best Saavedra's questioning merely demonstrated his own belief that appellant wrote the letter. That is, Saavedra testified that he would say to appellant, "I have a letter that you wrote" or "you wrote here." According to Saavedra, appellant never answered "Yes, I did." or "No, I didn't." (3 R.T. 1237.) Saavedra's prefatory statements, however, were merely declarations of Saavedra's belief. They were NOT accusations calling for a reply.

In *People v. Kazatsky* (1936) 18 Cal.App.2d 105, the reviewing court held that silence was not a tacit admission of guilt in an insurance fraud case where a police officer told the defendant, "[w]e know that there was no accident." The court concluded that the officer's statement was merely a declaration of the officers' belief in what the evidence showed, not an accusation calling for a reply. (*Id.*, at p. 111.) The situation is no different here. Saavedra's assertion that "I have a letter that you wrote" or "you wrote here" were merely his conclusions about the authorship of the letter. They were NOT accusations of criminality calling for a denial.

More telling, however, at the third penalty phase, Saavedra admitted that when he asked appellant questions about matters raised in the letter, appellant's responses did not discriminate between the letter and the crimes generally. (26 R.T. 3182-3183.) That is, none of appellant's responses were definitively limited to the contents of letter.

(26 R.T. 3183.)[18] Moreover, since Saavedra could not remember exactly how many pages or even which pages of the letter he showed appellant (3 R.T. 1232), the entire letter could not possibly constitute an adoptive admission. The letter failed the most basic test for admissibility. That is, far from wholesale adoption of the contents of the letter, appellant's responses to Saavedra's questions were entirely independent of the contents of the letter. This disconnect between appellant's answers and the letter itself is a fatal ambiguity that goes to **the admissibility of the document itself** rather than its weight before

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[18] The exact colloquy was as follows:

Defense counsel:

> Can you distinguish in your mind whether or not the conversation you had with Eddie Charles in January of 1995 can be split, if you will, into portions which related to this document you brought with you and portions which did not relate to the document, but were just conversations about the case? Does that make sense to you?

Saavedra:

> I think so.

Defense Counsel:

> Okay. And is that the way the conversation went? Was that a fair characterization?

Saavedra:

> **It was all together. There wasn't a definitive talk about one and then talk about the other. It was all together.** There were points where questions I asked were related to the document or related to what I had read here, or "You said this. You said that." [Emphasis added]

the jury. (Cf. *United States v. Datz* (2005 CAAF) 61 M.J. 37; 43-44.) As explained above, the test is whether the party "used words or conduct indicating his adoption of, or his belief in, the truth of such hearsay statement." (*People v. Silva, supra*, 45 Cal.3d at p. 623; see also *People v. Davis, supra,* 36 Cal.4th at p. 535.) Absent a proper showing that appellant actually manifested assent to or adoption of the entire written statement, there were no grounds for the trial judge to admit the letter into evidence.

Moreover, as will be explained below in the section dealing with the improper application of the reporter's shield law, at the guilt phase the defense was erroneously prohibited from asking Saavedra about his entire conversation with appellant. Thus, at the guilt phase, the defense was unable to elicit evidence that appellant talked about the letter and the offenses indiscriminately. As appellant also makes clear in the section concerning the reporter's shield law, this restriction on cross examination of Saavedra deprived him of the Sixth Amendment right to confront and cross -examine as well his Constitutional rights to present a defense and have a fair trial. Further, because the document was inadmissible in either the guilt or penalty phase, but was admitted at both, appellant was deprived of his Eighth Amendment right to fair and reliable guilt and penalty phase deliberations.

Saavedra's Opinion Invaded the Province of the Jury

There is, however, another aspect of this adoptive admissions problem that affected appellant's right to due process and a fair trial.

Even if the letter was otherwise admissible [which it was not], Saavedra's opinion was not admissible. Allowing into evidence Saavedra's opinion that appellant wrote the letter invaded the province of the jury.

At the third penalty phase, the new trial judge ruled that Saavedra could not testify that it was his opinion that appellant wrote the letter.[19] The judge concluded that the authorship of the letter was a jury question. That is, because the jury had all the facts it needed to determine whether appellant admitted the contents of the letter, Saavedra's opinion was irrelevant and not of material assistance.

The jury must remain as the exclusive arbiter of questions of fact and the credibility of witnesses. (Cf. *People v. Friend* (1958) 50 Cal.2d 570, 577-578 [overruled on a different point in *People v Cook* (1983) 33 Cal.3d 400, 413.) Therefore, by invading the province of the jury, Saavedra's opinion violated appellant's right to a fair trial guaranteed by due process of law (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and 15), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., Amends. 6 and 14; Cal. Const., art. I, § 16), and his right to a fair and reliable capital trial. (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, § 17.)

While it is true that at the guilt phase the defense did not

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[19] As noted above, after the ruling in the third penalty phase trial, the parties stipulated that Saavedra could not offer his opinion as to the letter's author in the fourth penalty phase trial either. (30 R.T. 4131.)

specifically object to the admission of Saavedra's opinion testimony on the ground that it invaded the province of the jury, the issue is not waived. As noted above, the defense specifically objected to the admission of the document and the admission of the document was predicated almost entirely on Saavedra's testimony. Indeed, without his testimony, the document likely would have been inadmissible. Even Ms. Speare's testimony that the document was in appellant's handwriting probably would not have been sufficient proof that the document was an adoptive admission. (See *People v. Maki, supra*, 39 Cal.3d 707 [Probationer's authenticated signatures on rental car invoice, even when considered in conjunction with fact that it was found when his home was searched, did not provide sufficient foundation for documents to be admitted as "adoptive admission" where documents were introduced not to prove probationer's presence where they were found, but to show his presence outside of jurisdiction.]

As the proponent of the evidence, the prosecution had the burden of proving its admissibility as an adoptive admission. (*People v. Maki, supra,* 39 Cal.3d at pp. 711-713.) Nevertheless, as the trial judge concluded in the third penalty phase, Saavedra's opinion was an inappropriate vehicle for carrying that burden. Moreover, since "[t]rial judges are presumed to know the law and apply it making their decisions" (*Walton v. Arizona* (1990) 497 U.S. 639, 653 [111 L. Ed. 2d 511, 110 S. Ct. 3047] [overruled, on a different ground, in *Ring v. Arizona* (2002) ___ U.S. ___ 122 S.Ct. 2428, 2431; ___ L/Ed.2d ___

]), the guilt phase trial judge in the instant case reasonably could be expected to have understood the entire legal basis for a challenge to the evidence, including the fact that Saavedra's opinion evidence was inadmissible. Certainly if the penalty phase trial judge understood that problem, it would be hard to argue persuasively that the trial judge was ignorant of it. The law is clear that when the issue is understood by the parties, it is preserved for appeal. (*People v. Diaz* (1992) 3 Cal.4th 495, 528.)

Even if that was not the case, the rule barring appellate review does not apply where a new theory on appeal raises only a question of law arising from facts which are undisputed or not open to controversy. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) In addition, consideration of points not raised below may be permitted when important issues of public policy are involved. (*Hale v. Morgan, supra*, 22 Cal.3d 388, 394; see also *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173 and cases cited therein.) Certainly that is the situation here. Not only are important questions of Constitutional due process involved, but the facts are fully set forth on the record. Moreover, even if it could be persuasively argued that the issue was not properly preserved, "[a]n appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party." (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) Under the circumstances presented here this issue should be considered on appeal.

Finally, the Newsperson's Shield Law was Unconstitutionally Applied to Prevent The Defense from Properly Challenging the Admission of the Letter

A. Rules Governing the Application of the Newsperson Shield Law.

The Newsperson's Shield Law is codified in Evidence Code section 1070,[20] as well as the California Constitution.[21] Nevertheless, it

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[20] Evidence Code section 1070 provides:

"(a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(b) Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(c) As used in this section, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a

is not an absolute privilege. It merely protects a newsperson from being adjudged in contempt of court for refusing to disclose either unpublished information or the source of information, whether published or unpublished. (*Delaney v Superior Court* (1990) 50 Cal.3d 785, 797-798.)

The law must yield, however, to a criminal defendant's constitutional right to a fair trial. That is, appellant's federal constitutional rights to confront and cross examine under the Sixth Amendment, and a fair trial under the due process clause of the Fifth and Fourteenth Amendments trump the shield law. (Cf. *Miller v. Superior Court* (1999) 21 Cal.4th 883, 897; *Delaney v Superior Court, supra*, 50 Cal 3d at pp. 805-806; *Fost v Marin County Superior Court* (2000) 80 Cal.App.4th 724, 731)

In order to establish protection under the shield law, a newsperson must make a prima facie showing that he or she is one of the types of persons enumerated in the law, that the information was 'obtained or prepared in gathering, receiving or processing of information for communication to the public,' and that the information has not been 'disseminated to the public by the person from whom

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medium of communication, whether or not published information based upon or related to such material has been disseminated."

[21] The California Constitution , Article I section 2 is almost identical to the Evidence Code section.

disclosure is sought.' " (*Delaney, supra,* at p. 805, fn. 17.)

In order to overcome that prima facie showing by a newsperson, a criminal defendant must show a reasonable possibility that the information will materially assist his or her defense. In that regard, a defendant's right to a fair trial includes disclosure of evidence that may, *inter alia,* impeach a prosecution witness; or, in capital cases, establish mitigating circumstances. (*Delaney, supra,* at p. 809.) The showing need not be detailed or specific, but it must rest on more than mere speculation. Nevertheless, a criminal defendant is not required to show that the information goes to the heart of the case. (*People v. Cooper* (1991) 53 Cal.3d 771, 820*; People v. Von Villas* (1992) 10 Cal.App.4th 201, 234.)

If a defendant satisfies the threshold showing, the court proceeds to the second stage of the inquiry and balances "the defendant's and newsperson's respective, perhaps conflicting, interests." (*Delaney, supra,* 50 Cal.3d at p. 809.) When conducting that balancing test, the court must consider the following factors: (a) whether the unpublished information is confidential or sensitive so that disclosure might threaten the newsperson's access to future sources; (b) **the interests protected by the shield law and whether other circumstances demonstrate no adverse consequences to disclosure, as when the defendant is the source of information**; (c) the importance of the information to the defendant; and (d) whether there is an alternative source for the unpublished information. (*Id.* at pp. 810-811 [Emphasis added].)

B. *Insuffficient Evidence to Establish the Newspersons Privilege.*

The first problem with the invocation of the newsperson shield law in this case is that the newspaper presented insufficient evidence to establish the privilege at all. Here, the prosecution filed several letters from counsel representing the Orange County Register invoking the Reporter's Shield Law on behalf of Mr. Saavedra (2 C.T. 550-558), and Saavedra testified that he was employed by the Orange County Register and was so employed when he talked with appellant. (5 R.T. 1220-1221.) Under the case law as it existed at the time, these were probably sufficient to establish the privilege. (See, e.g., *People v. Vasco* (2005) 131 Cal.App.4th 137, 152.)

The current law on sufficiency, however, is erroneous and violates a defendant's Sixth Amendment rights to confront, cross examine and present a defense, as well as his federal and state rights to a fair trial and due process. To understand how this problem came about, it is necessary to review two cases dealing with the sufficiency of the evidence necessary to invoke the shield law. In *People v. Sanchez* (1995) 12 Cal.4th 1, 56, fn. 3, this court observed that because the defendant litigated the shield law privilege on the assumption that the unpublished information was within the meaning of the shield law, this court did not need to address the question of whether the shield law was even applicable if defendant himself was the source of the information.

In a later court of appeal case, *People v. Vasco, supra*, 131

Cal.App.4th at p 152, the appellate court followed this court's lead in *Sanchez*, and found the sufficiency issue waived by the failure to object on that ground. Nevertheless, in footnote 3, the court of appeal wondered aloud whether the newspaper could properly invoke the shield law at all since the defendant was "both the source of the information and the person seeking its disclosure."

As the *Vasco* court observed, the purpose of the shield law is to "protect a newsperson's ability to gather and report the news." (*Delaney, supra*, 50 Cal.3d at p. 806, fn. 20.) Nevertheless, "[w]here the defendant is both the source of the reporter's information and the person requesting the disclosure, there is no risk the reporter's source (the defendant) will complain her confidence has been breached. (Citation.) Nor is the separate policy of safeguarding press autonomy in any way compromised. (Citation.)" Further, "where the defendant is the reporter's source of information, there appears no reason to assume disclosure would hinder the reporter's ability to gather news in the future." (*Ibid.)*

As always, the burden of establishing the necessity for a privilege is on the proponent. (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1252.) Nevertheless, even though a privilege may be factually established under the law, that circumstance alone does not preclude a court from finding the privilege inapplicable for other reasons. *(United States v. Zolin* (1989) 491 U.S. 554, 568.) [Although attorney-client privilege was factually established during *in camera* hearing, court is permitted to hear

evidence of "crime fraud" exception which would tend to negate the privilege.])

Here, the fact that the Orange County Register proffered letters from its counsel that were within the requirements of the statute did not necessarily bring this case within the ambit of the newsperson's shield law. Because of appellant's countervailing Sixth and Fourteenth Amendment interests in having a fair trial with appropriate confrontation and cross examination, the trial judge should have engaged in balancing of the newspaper's interest in preserving confidences against the Constitutional rights of appellant. Moreover, because as the *Vasco* court pointed out, the newspaper had no valid interest in keeping confidential the information about Saavedra's conversation with appellant, the trial court should have concluded that the proponent did not meet its burden to establish the privilege.

Moreover, because this is a capital case, the procedural requirements of the state newsperson's shield law may not be used in a way that impermissibly infringes on the jury's ability to assess credibility. (Cf. *Davis v. Alaska* (1974) 415 U.S. 308, 320 [39 L.Ed.2d 347, 356, 94 S.CT. 1105]; see also *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [89 L.Ed.2d 674, 106 S.Ct. 1431].) Such a procedure would unconstitutionally compromise the reliability of the truth determining function. (See *Kentucky v. Stincer* (1987) 482 U.S. 730, 736 [96 L.Ed.2d 631, 641-642, 107 S.Ct.. 2658] "We cannot overemphasize the importance of allowing a full and fair cross-examination of government witnesses whose testimony is

important to the outcome of the case." *(United States v. Brooke* (9th Cir. 1993) 4 F.3d 1480, 1489). Additionally, because the evidence at the guilt phase is admissible in the penalty phase, any errors affecting the reliability of the guilt determination necessarily affect the reliability of the penalty phase as well, thus violating the Eighth Amendment. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)[22]

Although appellant sought to cross examine Saavedra on the basis of his information, knowledge and opinion, he did not specifically object to the invocation of the reporter's shield law on the basis of insufficient evidence. Nevertheless, this issue is not waived by the lack of an objection on that specific ground of sufficiency. Indeed, because under the case law as it existed at that time, the letters from counsel were was all that was needed to establish the privilege, any sufficiency objection would have been fruitless. A defendant is not required to anticipate changes in the law, where such substantial changes are made for the first time on appeal. Thus the absence of an objection below will not bar appellate review. (*People v. Kitchens*

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[22] In *Beck v. Alabama* the Court stated:

> "To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. [footnote omitted] The same reasoning must apply to rules that diminish the reliability of the guilt determination." (Id., at p. 638.)

(1956) 46 Cal.2d 260, 263[23]; *People v. Williams* (1976) 16 Cal.3d 663, 667 fn 4.)

C. Appellant Showed That There Was a Reasonable Possibility That the Information Would Materially Assist His Defense.

Even if it could be successfully argued that the newspaper made a proper prima facie showing that the shield law privilege applied, that showing was overcome by appellant's claim that Saavedra had information that would materially assist in his defense. In *Delaney, supra*, this court provided some examples of matters that might override the shield law. They include, but are not limited to:"[E]vidence [that] may establish an 'imperfect defense,' a lesser included offense, a lesser related offense, or a lesser degree of the same crime; **impeach the credibility of a prosecution witness**; or, as in capital cases, establish mitigating circumstances relevant to the penalty determination." (*Delaney, supra*, 50 Cal.3d at p. 809

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[23] As the court explained in *Kitchens*:

"Although we adhere to the rule that ordinarily the admissibility of evidence will not be reviewed on appeal in the absence of a proper objection in the trial court, we conclude that it is not applicable to appeals based on the admission of illegally obtained evidence in cases that were tried before [a recent decision reversing prior case law]. . . . A contrary holding would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal. Moreover, in view of the decisions of this court prior to {the recent reversal] an objection would have been futile, and 'The law never does nor requires idle acts.' (*Civ. Code*, § 3532.)" (*People v. Kitchens, supra*, 46 Cal.2d at pp. 262-263.)

[Emphasis added].)

In both *Sanchez* and *Ramos*, this court concluded that the defendant did not meet his burden because the defense did not present any information during cross examination, or the record did not suggest that the confidential information withheld by the newsperson contained anything of substance that was not already available to the jury otherwise. (*People v. Ramos*, *supra,* 34 Cal.4th at p. 527.) Indeed, defendant's claims were largely speculative based on self serving statements. (*People v. Sanchez, supra*, 12 Cal.4th at p. 57.)

Here, by contrast, there was plenty of evidence that Saavedra, a primary prosecution witness, could be impeached by the unpublished information. As explained above, in the penalty phase, when some of the restrictions on cross examination were removed by the new trial judge, the defense was able to elicit the fact that appellant's responses to Saavedra's questions did not show authorship of the letter, but were in fact just general comments on the incident completely independent of the letter. (26 R.T. 3182-3183.) That admission by Saavedra certainly damaged his credibility and most assuredly impeached his opinion that appellant wrote Prosecution Exhibit 1. Moreover, since the letter was the primary prosecution evidence against appellant, any impeachment of Saavedra's opinion that appellant was the author materially assisted appellant's defense. Under virtually any standard therefore, the refusal of the trial judge at the guilt phase to allow the defense to impeach Saavedra with specific questions concerning unpublished information about how he conducted the interview with

appellant and the specific question Saavedra asked unconstitutionally deprived appellant of his right to cross examine and his right to a fair trial.

That said, there is another dynamic at work in this situation that this court needs to address. In *Delaney*, this court set up a process by which once the newsperson makes a prima facie showing that the shield law applies, the burden shifts to the defendant to show that the confidential unpublished information would materially assist his defense. The flaw in this process is that once the confidential information is ruled off limits to the defense, the defense cannot carry its burden. That is, by making information or conversations confidential, this court deprived the defense of access to the evidence that would demonstrate its right to disclosure. The defense must present evidence that the newsperson's information is wrong or otherwise helpful to the defense when the defense may not know the source of the information or (as here) exactly how it was gathered, or even what it consists of.

Even where, as here, the defendant himself is the source of the information, the only way to overcome the evidence presented by the prosecution would be to force the defendant to waive his privilege against self incrimination and take the stand to present the full panoply of the evidence. Because the shield law prevents the defense from fully cross examining and impeaching the reporter on what exactly took place during their conversation, the current burden shifting process requires the defendant to forfeit his Fifth Amendment right to

remain silent in order to preserve his Sixth and Fourteenth Amendment right to present a complete picture of the evidence and ensure a fair trial. Under these circumstances the defense contends that it is "intolerable that one constitutional right should have to be surrendered in order to assert another. (*Simmons v. United States* (1968) 390 U.S. 377, 394; see also *Arreola v. Municipal Court* (1983) 139 Cal.App.3d 108, 115 ["As a matter of public policy the 'courts should not participate in or encourage a procedure which obliges the accused to forfeit one constitutional right in order to retain the protection of another.' [Citations"]].) "Arriving at the truth is a fundamental goal of our legal system" (*United States v. Havens* (1980) 446 U.S. 620, 621 [64 L. Ed. 2d 559, 100 S. Ct. 1912], and no constitutionally valid purpose is served by allowing a newsperson to invoke the shield law when doing so prevents the defense from investigating or presenting materially favorable evidence.

If there is to be a shield law, and the burden must be placed on the defense to overcome it, this court must invoke a procedure that fairly and properly allows the defense to carry that burden. In situations where the defendant himself is the source of the evidence, as appellant explained above, there is no justification for invoking the shield law at all. Nevertheless, for those situations where other sources or other information forms the basis for the invocation of the shield law, the court should hold an *in camera* hearing, just as it does with a *Pitchess* claim or other types of *Brady* claims, and review all of the information upon which the claim is based. It is only after a thorough

review of the available information that an appropriate determination can be made whether there is information favorable to the defense that must be disclosed.

Although no such *in camera* request was made in this case, the issue is not waived. As appellant explained above, given the current state of the law, such a request would have been fruitless. Nothing in the law mandated or even permitted the trial judge to review the confidential information *in camera*. Thus, because any request for an *in camera* hearing would have been denied, the absence of an objection below will not bar appellate review. (*People v. Kitchens, supra*, 46 Cal 2d at p. 263.)

D. Application of the Shield Law Interfered with the Exercise of Defendant's Constitutional Rights

Finally, the application of the shield law to this case denied the defense the opportunity to adequately confront and cross examine Saavedra on the basis for his opinion that appellant wrote the letter as well as depriving appellant of a fair trial by preventing the jury from receiving adequate evidence to properly assess Saavedra's credibility.

At the guilt phase, even the prosecutor noted that the invocation of the shield law could not contravene the defendant's Constitutional rights under the Sixth Amendment. (7 R.T. 2056.) Thus, even apart from the general legal duty imposed upon the court in *Delaney* to engage in the weighing process, the prosecutor specifically put the court on notice that it had to balance the defendant's Constitutional

rights against the newspaper's interest in preserving confidentiality.

As appellant explained above, the balancing test requires more than simply a prima facie case for the privilege. The court must consider the following factors: (a) whether the unpublished information is confidential or sensitive so that disclosure might threaten the newsperson's access to future sources; (b) **the interests protected by the shield law and whether other circumstances demonstrate no adverse consequences to disclosure, as when the defendant is the source of information**; (c) the importance of the information to the defendant; and (d) whether there is an alternative source for the unpublished information. (*Delaney, supra,* 50 Cal.3d at pp. 810-811 [Emphasis added].)

Here, it does not appear from the record, that the trial court ever actually engaged in that analysis. From the record, it appears that the trial judge determined that once the newspaper made a prima facie showing that the shield law applied, no further inquiry was mandated. Certainly other than a perfunctory inquiry into the areas that the defense wished to explore, the trial court flatly prohibited the defense from inquiring into any area that was not already a matter of public record . (3 R.T. 1217.)

Even if it could be successfully argued [which it cannot] that the trial court implicitly conducted the balancing exercise based on the way it ruled, the outcome of that balancing test was fundamentally flawed. As appellant explained above, because appellant was the source of the information, there is simply no countervailing interest in

preserving the newsperson's confidentiality. (See *People v. Vasco, supra*, 131 Cal.App.4th at p 152.)

Prejudice

The standard for assessing the effect of an error in a trial of a capital case is set forth in *Sullivan v. Louisiana* (1993) 508 U.S. 275. There, the Court noted that a reviewing court does not consider whether the jury would have convicted the defendant in a hypothetical trial in which the error did not occur but rather whether the conviction was "surely unattributable to the errors." (Id. at p. 279.) That is, the case must be reversed if there is any reasonable likelihood that the improper evidence affected the verdict.

Unquestionably, Prosecution Exhibit 1 was the most significant part of the prosecution's case in both the guilt and penalty phases. Not only was it mentioned in opening statement, but the prosecutor read several paragraphs of the letter in his closing argument (9 R.T. 2486) and commented on how it demonstrated appellant's guilt. (9 R.T. 2488.) More to the point, the jury obviously thought it important. Juror number 2 wrote a note to the court right before deliberations asking how Pincock obtained the letter. (8 R.T. 2342-2344.)

As explained above, Saavedra's testimony at the guilt phase that in his opinion appellant wrote the letter invaded the province of the jury. That was bad enough, but thereafter by restricting his cross examination based on the reporter's shield law, the trial court effectively prevented the jury from fully evaluating Saavedra's credibility. As the United States Supreme Court pointed out in *Davis*

v. Alaska, supra, at p. 318; "to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, **as the sole triers of fact and credibility**, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart v. Janis* 384 U.S. 1, 3 [16 L.Ed.2d 314, 86 S.Ct. 1245.]" [Emphasis added.]

While it is certainly true that CALJIC 2.71.5, a cautionary instruction, was given (9 R.T. 2680), that instruction was totally insufficient to offset the prejudice caused by the admission of Prosecution Exhibit 1. While limiting instructions have been utilized to minimize the degree of prejudice that flows from the introduction of improper evidence, these instructions are not panaceas. As Justice Jackson trenchantly observed: "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury, ... all practicing lawyers know to be unmitigated fiction." (*Krulewitch* v. *United States* (1949) 336 U.S. 440, 453 [93 L.Ed. 790, 799, 69 S.Ct. 716] (conc. opn.).) Even this court has observed that in some situations, limiting instructions appear to call for "'discrimination so subtle [as to be] a feat beyond the compass of ordinary minds.'" (*People v. Antick* (1975) 15 Cal.3d 79, 98.) More to the point, the improper admission of a long hearsay statement may bring so much otherwise inadmissible hearsay before the jury that even a cautionary instruction may be

inadequate to overcome the prejudice. (*People v. Davis, supra,* 43 Cal.2d at p. 671; *People v. Bell* (2007) 40 Cal.4th 582, 607-609.)

More importantly, in this case, the adoptive admission was tantamount to a confession, but without the requisite indicia of reliability. According to the letter, by setting up a plot to kill his grandfather, appellant was trying to cover up his involvement in killing the other members of his family. Thus, the letter not only evidenced a consciousness of guilt, but amounted to a virtual confession to the slayings. Moreover, it was not only the prosecution's most direct evidence of the killings, but the most powerful. As the Supreme Court pointed out 'A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.' (*Arizona v. Fulminate* (1991) 499 U.S. 279, 296 [111 S.Ct. 1246, 113 L.Ed.2d 302.]

Additionally, an adoptive admission reflects consciousness of guilt. (*People v. Edelbacher*, *supra*, 47 Cal.3d 983, 1012.) Consciousness of guilt evidence is highly prejudicial if it is not fully substantiated. (Cf. *People v. Warren* (1988) 45 Cal.3d 471, 481.) It destroys the defense and emasculates whatever doubt the jurors may have entertained about the defendant's guilt. (Cf. *People v. Hannon* (1977) 19 Cal.3d 588, 602-603.)

Here, the letter was absolutely the crux of the prosecution's case against appellant. Thus, Saavedra's credibility on the question of whether appellant was the author of the letter was an absolutely

critical issue for the prosecution. (See *Silva v. Brown* (9th Cir 2005) 416 F.3d 980, 987 [reversal required where adoptive admission was erroneously admitted into evidence and the admission was a critical piece of prosecution evidence.)

Moreover to the extent that the jury relied on Prosecution Exhibit 1 to support appellant's convictions, the verdicts are fatally compromised. In *Beck v. Alabama, supra,* 447 U.S. 625, the United States Supreme Court held that because death is a "different kind of punishment from any other," it is vitally important that any death verdict be based on a reliable sentencing determination, **which necessarily includes a reliable guilt determination**. (*Id.* At p. 637 [Emphasis added].) For this reason, "the risk of an unwarranted conviction . . . cannot be tolerated in a case where the defendant's life is at stake." (*Ibid.*) Because of the heightened need for reliability in fact-finding when a death sentence is involved, evidence which may meet the minimum requirements to uphold a noncapital guilt verdict, but which is equivocal, or comes from witnesses whose reliability is in serious doubt, is nonetheless insufficient to uphold a conviction of capital murder and a sentence of death. Certainly predicating appellant's conviction and death sentence on the highly suspect letter violates the *Beck* proscription. As such, the error violates the due process clauses of the state and federal Constitutions as well as the Sixth Amendment right to a jury trial and the heightened reliability standard of the Eighth Amendment. (*Beck v. Alabama , supra*, 447 U.S. at pp. 637-638 [guilt phase]; *Gardner v. Florida* (1977) 430 U.S.

349 [penalty phase].)

Moreover, since the jurors obviously considered the letter and juror #2 was sufficiently concerned to specifically ask about it, the prosecution cannot carry its burden establishing that the error in guilt phase was harmless beyond a reasonable doubt. *(Chapman v. California* (1967) 386 U.S. 18, 24.)

With regard to the last penalty phase, during closing argument, the prosecution read virtually the entire letter. (35 R.T. 5153- 5164.) After each section of the letter, the prosecutor paused and explained why the statements contained in the letter were aggravating and therefore why appellant deserved to be put to death. (35 R.T. 5153-5164.)

Additionally, the jurors requested a readback of Kim Speare's testimony (5 CT 1897), including presumably her testimony that she believed appellant wrote the letter. The jury also asked for the Orange County Register article describing Saavedra's discussions with appellant about the letter. (5 CT 1897.) Although the jurors did not get the newspaper article since it was never introduced into evidence, clearly the jury was having difficulty deciding whether appellant actually wrote the letter.

Since the jury hung **twice** on penalty, even after having heard this otherwise inadmissible evidence that appellant was trying to cover up the killings by having his grandfather murdered, a death sentence was anything but a foregone conclusion. (*People v. Brooks* (1979) 88 Cal.App.3d 180, 188 [hung jury evidence of a close case]; *United*

States v. Paguio (9th Cir. 1997) 114 F.3d 928, 935. [hung jury shows the case is close and the prosecution relied on the evidentiary error, thus reversal is required.]) Had the jury NOT heard the inadmissible evidence , there is a reasonable probability that at least one juror in the fourth penalty phase trial would have again decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 537.)

For these reasons, the improper admission of Prosecution Exhibit 1 was highly prejudicial at both the guilt and penalty phases of trial. Therefore, appellant's conviction and sentence to death must be set aside.

II.

THE PROSECUTOR COMMITTED SEVERAL ACTS OF HIGHLY PREJUDICIAL MISCONDUCT THAT REQUIRE REVERSAL OF THE CONVICTION AND SENTENCE

Introduction

There were three egregious acts of prosecutorial misconduct in this case. Any one standing alone would be sufficient to reverse appellant's conviction. Taken together, however, they fatally undermined the reliability of the fact finding process.

The first instance of misconduct was the prosecutor's failure to investigate the very real likelihood that Prosecution Exhibit I, the letter obtained from Cezar Pincock was completely fabricated. The letter contained numerous errors of fact, and the prosecution's own investigation showed these facts to be false. Further, the letter was obtained from a known jailhouse informant who specifically requested favors in his own case in return for providing the letter. Finally, the only expert witness to testify in the case stated unequivocally that the document was a fake and not written by appellant.

Instead of vigorously investigating the reliability of this document, the prosecution deliberately refused to call Pincock to the stand because he was untrustworthy, and used the procedural device of the chain of custody with its inherent presumption of regularity to shield the source of the document from cross examination. Further,

instead of vigorously examining the discrepancies in the letter, the prosecution did not even mention them in its direct examination of Sgt. Royer. It left any challenge to the authenticity of the letter to the defense to challenge on cross examination and to otherwise contain the damage as best it could.

Moreover, when faced with the expert testimony that the evidence was likely fabricated, instead of taking vigorous action to assure the court and the trier of fact that the document was authentic - such as obtaining handwriting exemplars from Pincock and giving them plus the document to its own expert to examine - it called on appellant's ex-girlfriend - concededly not a handwriting expert- to authenticate the handwriting. Additionally, the prosecution relied on Tony Saavedra's opinion evidence to authenticate the document in the guilt phase which the penalty phase judge ruled was improper.

The second instance of egregious prosecutorial misconduct was telling the jury in rebuttal argument that there was evidence of financial motive to kill when no such evidence was ever presented anywhere in the trial.

Lack of motive was a primary theme of the defense in this circumstantial evidence case. Trying to overcome that major evidentiary deficit, at trial, the prosecution attempted to show that appellant was the sole beneficiary on the decedents' life insurance; a proffer that was repeatedly denied. Nevertheless, in closing argument, the prosecution suddenly urged that appellant was the sole heir to the family home and its contents; facts nowhere in evidence. Although the

defense objection was sustained, the argument implied to the jury that there were facts outside the record that filled this crucial evidentiary gap in the prosecution's case. At that late stage in the proceedings, the defense had no opportunity to ameliorate the fatal damage to its case. By filling a significant evidentiary gap in its own case and improperly destroying a major defense theme, the misconduct so severely prejudiced the defense that reversal is required.

The third act of misconduct was insulting the defense during closing argument and insinuating that it tried to mislead the jury. In a capital case there is no excuse for using such deceptive and reprehensible tactics to obtain a conviction.

Factual Background

Misconduct in Failing to Investigate Presumptively False Evidence

The facts involving the presentation of Prosecution Exhibit I, the letter purportedly written by appellant and obtained from informant Cezar Pincock are set forth in the previous issue. They are incorporated herein by reference.

Misconduct in Closing Argument - False Evidence

The prosecution never alleged financial gain as a special circumstance in this case. Thus, any discussion of inheritance or beneficial income was related solely to motive.

Prior to trial, the defense filed a written *in limine* motion to exclude any evidence of the decedents' family life insurance policy. The defense argued that there was no evidence that appellant was aware of the policy or the amount of the proceeds of the policy. Thus,

the introduction of the evidence would be speculative at best. (1 C.T. 286- 293.)

The prosecution's written response urged that financial gain was the classic evidence of motive. Further, there was at least some circumstantial evidence that appellant was aware of the possibility of financial gain. (2 C.T. 462-469.)

When the issue of motive initially arose during the *in limine* hearings, the judge observed that because any motion like this would be highly dependent on the particular facts and circumstances of the case, and as yet he had no knowledge of those, the defense motion to preclude motive evidence would be premature. (1 R.T. 98- 100.) The defense concurred, but noted that the prosecution wanted to mention the insurance policy in its opening statement. (1 R.T. 100-101.) The prosecutor told the judge that the life insurance policy was taken out by Edward Charles Sr. through his company in 1979, a number of years before this incident. The policy named three people as beneficiaries [appellant, his mother and his brother] and appellant killed the other two. Thus, even though there was no statement from appellant or anyone else that appellant knew anything about the policy, as a matter of common sense, it appeared that the insurance proceeds were one of the motives in this case. (1 R.T. 101, 103, 106.)

The defense responded that one of the big issues in the case was motive - or rather the lack of it. No one knew what the motive was. The parties could speculate that one of the motives was money, but without evidence, that motive was mere speculation. Further appellant

had not actually lived in the family home [he lived with Tiffany Bowen's family] for some months prior to the incident. (1 R.T. 102-103.)

The prosecutor admitted that the policy was obtained by subpoena from the insurance company. Law enforcement never found a copy in the family residence, so there was nothing in the home to which appellant had access that would show the terms of the policy. (1 R.T. 105.)

The trial court observed that the policy excluded payments to a beneficiary if the beneficiary killed the policy holder. (1 R.T. 107.)

In response, the prosecutor noted that appellant tried to cover up the killing. (1 R.T. 108.)

The judge deferred ruling until he could study the matter further. (1 R.T. 108.)

When the matter was raised again during litigation of other *in limine* motions, the trial judge informed the parties that although he still was not making a final ruling, he was not inclined to allow the insurance policy evidence - or comment on it - until the prosecution could make a more substantial showing that appellant was either actually aware of, or reasonably should have been aware of the terms of the policy. (1 R.T. 368-370.)

During opening argument the prosecutor never mentioned motive even once. Instead, he began his outline by telling jurors that three very bad killings plus a cover -up equals a guilty defendant. (5 R.T. 1286.) The prosecutor them went on to outline the evidence in the

case and why it showed that appellant was the killer. (5 RT 1286-1320.)

When the defense made its opening argument, one of the primary defense themes was that there was no evidence of motive. Right at the very beginning of his presentation, defense counsel told the jury,

> "... one of the things that you will not hear about from prosecution witnesses. In fact, you won't hear about it from defense witnesses. And that is that, all things considered, this killing or this alleged killing of his mother, of his father, of his brother, there is no apparent motive for it. There is no evidence of anything in any way -- not money, not greed, not anything -- that says Mr. Charles did this." (5 R.T. 1322.)

Nothing else was ever said during the trial about financial motive for these deaths.

Nevertheless, during the prosecution's rebuttal argument, the district attorney told the jurors that inheritance was the motive for the killings. As the prosecutor explained it: "Consider also the fact that by killing the family, Mr. Charles becomes the sole heir to a beautiful home in a nice neighborhood in Orange County and probable assets." (8 R.T. 2638.)

The defense immediately objected on the grounds that there was no evidence that appellant was the sole heir and the argument misstated the evidence. (8 R.T. 2638.) The court sustained the objection. (8 R.T. 2638) The defense did not specifically ask for an admonition but nothing else was said about financial gain as a motive.

It should be noted that the trial judge instructed the jurors in accordance with CALJIC 1.02 that statements made by the attorneys were not evidence. (See 5 R.T. 1284; 9 R.T. 2662-2663.)[24]

Misconduct in Closing Argument - Insulting the Defense.

Near the end of his guilt phase closing argument, the prosecutor told the jury that he tipped his hat to the defense for "making chicken salad out of you know what." (9 R.T. 2503.) Further, "I hate to -- you know, I hate to laugh about this, but that's what it is. I mean, that's what it is. (9 R.T. 2503.)

Standards for the Prosecution

Any discussion of the issue of prosecutorial misconduct must begin with the unique role of the prosecutor in the criminal justice system. Prosecutors are held to an elevated standard of conduct.

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[24] The judge told the jury,

> Statements made by the attorneys during the trial are not evidence. Although, if the attorneys have stipulated or agreed to a fact, you must regard that fact as conclusively proved.
>
> "If an objection was sustained to a question, do not guess what the answer might have been. Do not speculate as to the reason for the objection. Do not assume to be true any insinuation suggested by a question asked a witness.
>
> "A question is not evidence and may be considered only as it enables you to understand the answer. Do not consider, for any purpose, any offer of evidence that was rejected or any evidence that was stricken by the court. Treat it as though you had never heard of it."

(*People v. Hill (1998)* 17 Cal.4th 800, 819.) Judge Kozinski noted in *United States v. Kojayan (9th Cir. 1993)* 8 F.3d 1315: "Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers." (*Id.* at p. 1323.) The prosecutor is both a public servant and an advocate. (*Berger v. United States* (1935) 295 U.S. 78, 85-88.) In this role as public servant, the prosecutor's "interest . . . in a criminal prosecution is not that he or she shall win a case, but that justice should be done." (*Id.* at p. 88.) As the United States Court of Appeals for the Fifth Circuit observed in *United States v. Murrah* (5th Cir. 1989) 888 F. 2d 24, 27:

> The Supreme Court and the several federal appellate courts have long recognized that the prosecutor has a distinctive role in criminal prosecutions. As representative of the government the prosecutor is compelled to seek justice, not convictions. Justice is served only when convictions are sought and secured in a manner consistent with the rules that have been crafted with great care over the centuries. Those rules have not resulted from happenstance or indifference but are the product of measured, reasoned thought . . . that criminal convictions should be based upon guilt clearly proven in a calm, reflective atmosphere, free of undue passion and prejudice.

This Court also pointed out in *People* v. *Bolton (1979)* 23 Cal.3d 208, 213, that prosecutors are generally viewed with special regard by the jury and therefore improper statements by him or her may be like "dynamite" blowing the proper evidence out of proportion and damaging the prospects for a fair determination. (*Id.* at p. 213.) Similarly, the United States Court of Appeal observed in *Brooks* v.

Kemp (11th Cir. 1985) 762 F.2d 1383, 1399[25], that ". . . the prosecutorial mantle of authority can intensify the effect on the jury of any misconduct."

Prosecutorial misconduct may require the reversal of a conviction based on violations of either or both the United States and California Constitutions. As this Court noted in *People v. Harris* (1989) 47 Cal.3d 1047, 1083: "A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*Id.* at p.1089, quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643"; See also *Douglas v. Alabama* (1965) 380 U.S. 415, 419-420 [13 L.Ed.2d 934, 85 S.Ct. 1074]; [addn. citations.] Even a "single misstep" on the part of the prosecutor may sometimes be so destructive of the right to a fair trial that reversal is mandated. (*United States v. Solivan* (1991) 937 F.2d 1146, 1150, citing *Pierce v. United States* (1936) 86 F.2d 949 .) Moreover, "'[a]n important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence.'" (*People v. Castro (1985)* 38 Cal.3d 301, 313-314, quoting *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [20 L.Ed.2d 476, 88 S.Ct. 1620]; see also (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1386 and *People v. Valentine* (1986) 42

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[25]*Brooks v. Kemp* 762 F.2d 1383, 1409 (CA11 1985) (en banc) vacated on other grounds, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), judgment reinstated, 809 F.2d 700, 817 CA11) (en banc), cert. denied, 483 U.S. 1010, 107 S.Ct. 3240, 97 L.Ed.2d 744 (1987)

Cal.3d 170, 177-178.)

Even if the prosecutor's conduct does not render a trial fundamentally unfair, it violates the California Constitution if it involves the use of deceptive or reprehensible methods to attempt to persuade the court or jury. *(People v. Hill, supra,* 17 Cal.4th at p. 820; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) Nonetheless, prosecutorial misconduct need not be intentional in order to constitute reversible error. (*People* v. *Bolton*, *supra*, 23 Cal.3d at p. 214.) According to the United States Supreme Court, "[t]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." (*Smith v. Phillips* (1989) 455 U.S. 209, 219.) Therefore, a claim of prosecutorial misconduct is not defeated by a showing of the prosecutor's subjective good faith. (*People* v. *Price* (1991) 1 Cal.4th 324, 447.)

Appellant's trial was so tainted by the egregious prosecutorial misconduct that his rights under both the California and United States Constitutions were violated. First, he was deprived of due process and a fundamentally fair trial in violation of the Fifth and the Fourteenth Amendments of the United States Constitution and article I, sections 7 and 15 of the California Constitution. He was also deprived of a reliable adjudication of guilt and penalty in violation of the Eighth Amendment to the United States Constitution. Further, the prosecutorial misconduct here violated appellant's right to an impartial jury in violation of the Sixth Amendment of the United States

Constitution and article I, section 16, of the California Constitution. (*People* v. *Chapman* (1993) 15 Cal.App.4th 136, 141.) Prosecutorial misconduct also compromised his right to present a defense in violation of the Sixth Amendment. (*Crane* v. *Kentucky* (1986) 476 U.S. 683, 690-691.) Finally, the prosecutorial misconduct in this case went to the core of the reliability of the fact finding process. As such, the error corrupted the special reliability standards mandated in capital cases by due process and the Eighth Amendment, and California state constitutional analogues. (U.S. Const., 8th and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 15, 17; *Beck v. Alabama, supra*, 447 U.S. at 637-638; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.)

As the following arguments will make clear, the prosecutorial misconduct in this case was overwhelmingly prejudicial and requires reversal of appellant's conviction and sentence of death.

Prosecutorial Misconduct - Knowing or Reckless Presentation of False Evidence

Legal Standards

The knowing presentation of false testimony is "inconsistent with the rudimentary demands of justice." (*Mooney v. Holohan* (1935) 294 U.S. 103, 112; *Napue v. Illinois* (1959) 360 U.S. 264; see also *Banks v. Dretke* (2004) 540 US 668 [157 LEd2d 1166, 1193; 124 SCt 1256][when police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight; prosecutors are responsible for any favorable evidence known to others acting on the government's behalf in the case, including the police; prosecution's

deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice].)

The Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution and the requirement of fundamental fairness and the Eighth Amendment guarantee against cruel and unusual punishment, mandate reversal of a conviction and death sentence if they are obtained on the basis of false and unreliable evidence. (*Manson v. Brathwaite* (1977) 432 U.S. 98; *United States v. Petty* (9th Cir. 1993) 982 F.2d 1365, 1369 (defendant has due process right not to be sentenced on basis of materially incorrect information). Further, "[d]ue process protects defendants against the knowing use of **any** false evidence by the state, whether it be by document, testimony, or any other form of admissible evidence." (*Hayes v. Brown* (9th Cir. 2005) 399 F.3d 972, 981(en banc) [Emphasis added].) The knowing presentation of false evidence and failure to correct the record at the time of trial violates the Fourteenth Amendment. (*Hayes v. Brown, supra,* 399 F.3d at 982.). This Due Process right even extends to situations in which the prosecution allows a witness to give a false impression of the evidence (see, e.g., *Alcorta v. Texas* (1957) 355 U.S. 28, 31), as well as those in which testimony presented is false outright. (See; e.g., *United States v. Blueford* (9th Cir. 2002) 312 F.3d 962. It also applies to instances where the false testimony is unsolicited by the state, (see *Giglio v. United States* (1972) 405 U.S. 150 , 154[31 L.Ed.2d 104, 92 S.Ct. 763]), as well as those in which the presentation is knowingly made. (See *Napue, supra*, 360 U.S. 264.)

Indeed, even where a prosecutor recklessly, or negligently uses false evidence, a Constitutional Due Process violation occurs because the reliability of the verdict is compromised. (Cf. *Giglio v. United States, supra,* 405 U.S. at p. 154[31 L.Ed.2d 104, 92 S.Ct. 763]; *United States v. Duke* (8th Cir. 1995) 50 F.3d 571, 577; see also *Imbler v. Craven* (C.D.Cal.1969) 298 F.Supp. 795, 801-808, aff'd sub nom. *Imbler v. California* (9th Cir. 1970) 424 F.2d 631, cert. denied, 400 U.S. 865, [91 S. Ct. 100, 27 L. Ed. 2d 104].) Moreover, a new trial is required where false evidence is presented even when the evidence goes just to credibility matters and the prosecutor who served as trial counsel should have been aware of the falsehood. (*Giglio v. United States, supra*, 405 U.S. at p. 154 [31 L.Ed.2d 104, 92 S.Ct. 763]

As the court of Appeal for the Ninth Circuit recently pointed out: "Few things are more repugnant to the constitutional expectation of our criminal justice system than covert perjury, **and especially perjury that flows from a concerted effort by rewarded criminals to frame a defendant**. The ultimate mission of the system upon which we rely to protect the liberty of the accused as well as the welfare of society is to ascertain the factual truth, and to do so in a manner that comports with due process of law as defined by our Constitution. This important mission is utterly derailed by unchecked lying witnesses, **and by any law enforcement officer or prosecutor who finds it tactically advantageous to turn a blind eye to the manifest potential for malevolent disinformation**." [Emphasis added]

(*Commonwealth v. Bowie , supra,* 243 F.3d 1109, 1114 [granting new trial for prosecutorial failure to investigate and bring to attention of court information that suggested perjury may have been committed];

Particularly significant in this case, the government's duty to correct perjury is not discharged because defense counsel knows, and the jury may figure out, that the evidence is false. (*United States v. Alli* (9th Cir. 2003) 344 F.3d 1002, 1007.) "All perjury pollutes a trial, making it hard for jurors to see the truth. No lawyer, whether prosecutor or defense counsel, civil or criminal, may knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain the pollution of the trial." *(United States v. LaPage* (9th Cir. 2000) 231 F.3d 488, 492 [reversing conviction for prosecutorial failure to correct false testimony].) In *Commonwealth v. Bowie, supra,* 243 F.3d at p. 1118, the court observed that "A prosecutor's 'responsibility and duty to correct what he knows to be false and elicit the truth,"[citation] , requires a prosecutor to act when put on notice of the real possibility of false testimony. This duty is not discharged by attempting to finesse the problem by pressing ahead without a diligent and a good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts."

Additionally, "...it is decidedly improper for the government to propound inferences that it knows to be false, or has very strong reason to doubt, particularly when it refuses to acknowledge the error afterwards to either the trial court or to this court and instead offers far

fetched explanations of its actions." (*United States v. Blueford, supra,* 312 F.3d 962, 968, quoting *United States v. Kojayan, supra,* 8 F.3d 1315, 1318-1319.) Both *Blueford* and *Kojayan* reversed and remanded convictions for new trials where trial prosecutors misled jurors and courts about the true facts of a case.

Misconduct in the Use of Prosecution Exhibit One

In this case, the prosecutor actually knew that certain parts of Prosecution Exhibit I, the letter obtained from informant Pincock were untrue. As explained in the prior issue, the letter indicates Edward Charles Sr. was hit in the back of the head several times with a hammer. As the prosecution well knew, however, no hammer was found. (8 R.T. 2118, 2154-2155.) More importantly, the prosecution's theory was that the murder weapon was not a hammer. It was instead, a crescent wrench. (32 R.T. 4602, 4605-4606.) In that regard, the letter further indicates that Danny Charles was found in the trunk of the car and defendant's wrench was on top of him. (8 R.T. 2118-2119). However, no wrench was found on top of Danny in the trunk of the vehicle. The letter also indicates Mrs. Charles had a rusted dog choker around her neck (8 R.T. 2118), but the police found no choker. (8 R.T. 2118, 2155.) Although also mentioned in the letter, no "monkey boots" were found, nor was there evidence that gas from the tank of the Honda had been siphoned. (5 R.T. 1373-1374; 5 R.T. 1386; 8 R.T. 2127-2128.)

Additionally, the letter indicates that defendant got home at 11:30 p.m., found the bodies and started cleaning up. Nevertheless,

Sgt. Royer interviewed Mr. Severino on the sequence of timing. (8 R.T. 2119.) Mr. Severino indicated that he was up around 11:30 p.m. talking to Dolores (8 R.T. 2119-2120), so she was obviously alive at that time.

In short, claims were made in Prosecution Exhibit I that could not be true and the prosecutor knew they could not be true because his own investigation proved them untrue. More importantly, if appellant was the author of the letter, the prosecution provided no explanation (let alone a credible explanation) of why a self confessed murderer would get some of the most significant facts of the crimes wrong in the letter. In that regard, Sgt. Royer did not disclose these discrepancies during his direct examination by the prosecutor. Instead, they were first revealed during cross-examination by the defense. (8 R.T. 2118 -2120.)

Additionally, Cezar Pincock, from whom the letter was obtained, was a conceded informant who used the letter to try and gain an advantage from the prosecution. Sgt. Royer admitted that it was Pincock who contacted him, not the other way around. (8 R.T. 2090, 2109.) While Sgt. Royer testified that he made no deals with Pincock (8 R.T. 2090, 2109), that circumstance is not determinative. What is significant is Pincock's motivation in offering the letter to the prosecution in the first place. Obviously he expected favors in return for the letter. (8 R.T. 2104.) Thus, the very source of the letter is highly suspect and its veracity may be fatally compromised. (*People v. Coyer* (1983) 142 Cal.App.3d 839, 843 "[I]it is the witness'

subjective expectations, not the objective bounds of prosecutorial influence, that are determinative.."; *see also People v. Phillips* (1985) 41 Cal.3d 29, 47-48 [expectation of reward may improperly color an accomplice's evidence even if the reward is not explicit].) As the court observed in *United States v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 333-334: "A prosecutor who does not appreciate the perils of using [informants] as witnesses risks compromising the truth-seeking mission of our criminal justice system. Because the government decides whether and when to use such [informants], and what, if anything to give them for their service, the government stands uniquely positioned to guard against perfidy. By its actions, the government can either contribute to or eliminate the problem.") (citations omitted)"]

While the prosecution did not call Pincock to the stand, certainly it used his tainted letter. More to the point, it did not call Pincock to the stand to authenticate the letter **precisely because he was untrustworthy**. Thus, as appellant explained in the previous issue, the prosecution used the chain of custody with its theory of presumptive regularity to present to the jury a document of questionable authenticity containing conceded falsehoods in an effort to avoid exposing its "slime ball" (9 R.T. p. 2651) source to cross-examination. It hardly needs mentioning that cross-examination is "'the greatest legal engine ever invented for the discovery of truth.'" (*California v. Green* (1970) 399 U.S. 149, 158 [26 L.Ed.2d 489, 90

S.Ct. 1930].)[26] If the prosecution did not want to bring the source of the letter into court for examination because he was untrustworthy and the letter itself contained conceded and unexplainable falsehoods, the prosecution was certainly on notice that the veracity of the document was highly suspect.

Further, when faced with testimony from a defense handwriting expert that the letter was an outright fake, the prosecution apparently never investigated. Instead, it attempted to authenticate the letter using defendant's ex-girlfriend (admittedly not a handwriting expert) and the purported admissions of authorship made to Tony Saavedra as justification for bringing the letter before the jury.

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[26] The usefulness of cross-examination was emphasized by the United States Supreme Court in an early case explicating the Confrontation Clause:

> "The primary object of the constitutional provision in question was to **prevent depositions or ex parte affidavits** ... being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." ([Emphasis added] *Mattox v. United States* (1895) 156 U.S. 237, 242-243 [39 L Ed 409, 15 S Ct 337]; See also also *Kirby v. United States* (1899) 174 U.S. 47, 53 [43 L Ed 890, 19 S Ct 574].)

While the letter here was not a deposition or an affidavit, the way it was used amounted to the functional equivalent. That is, by using the procedural device of the presumption of regularity inherent in the chain of custody, the prosecution was able to shield the document and its source from any meaningful inquiry into whether the evidence was fabricated.

The *Bowie* case cited above is instructive on the issue of prosecutorial misconduct here. In *Commonwealth v. Bowie, supra,* 243 F.3d 1109, the prosecutor was shown a letter apparently written by an accomplice who became a prosecution witness, suggesting a plan to lie and shift blame to the defendant. Although the letter was presented to the prosecutor, the police were not instructed to follow up on the possibility that the evidence had been fabricated. Instead, the letter was simply provided to the defense. According to the court, it did not matter that it was the defendant himself who introduced the letter into evidence. The court noted that there was no waiver of the issue, even though the defense made good use of the letter, because the defendant cannot waive the prosecution's duty to act ethically. Moreover, because the prosecution failed to investigate, the defense was essentially trying to make the best of a bad situation. It should never have had to confront the problem.

Under these circumstances, the court found a denial of due process because the prosecutor did not try to expose a likely plot to offer false testimony. As the court explained, "...[his] clear duty... was to do exactly the opposite of what he did. The law... left no ... doubt that the immediate constitutional obligation to collect potentially exculpatory evidence to prevent a fraud upon the court, and to elicit the truth was promptly to investigate the letter and interrogate their witnesses about it." More importantly, the court made clear that the prosecution's failure was NOT merely a trial error, but a" fatal due process error" and the error "fatally contaminated everything that

followed." (*Id.* at 1117.)

Here the prosecutor committed exactly the same error as did the prosecutor in *Bowie*. Instead of investigating Pincock and the likelihood that he produced fabricated evidence, the prosecutor turned a blind eye to the problem leaving it to the defense to counter the inferences and let the jury try to sort through the issues. Moreover, instead of being forthcoming at the outset about the possibility of fabrication, the prosecutor did not even mention the discrepancies in the letter during his direct examination of Sgt. Royer. Instead he let the defense reveal the problems during cross examination and thereafter deal with trying to control the damage as best it could. (*United States v. Alli, supra* ,344 F.3d at p. 1007.)

Even more egregiously - as appellant noted previously- the prosecution deliberately chose not to call the informant to the stand **precisely because he was untrustworthy**. As the prosecutor candidly admitted to the jury: "And I will tell you why you don't call a witness like that [Pincock]..... He is a slime ball. He is. I admit that. [Para] Okay. I can't authenticate that letter through a jail inmate. I wouldn't even dream of it. **I wouldn't believe it myself, why would I expect you to?**" (9 R.T. p. 2651 [Emphasis added.].)

Moreover, when confronted with expert testimony that the letter was likely a fake, instead of taking vigorous action to verify or dispute its authenticity- like taking handwriting exemplars from Pincock and submitting the letter to its own expert for comparison- the prosecution relied on appellant's ex-girlfriend -concedely not a

handwriting expert- to authenticate the handwriting.

Assuming arguendo that girlfriend-as- handwriting-expert was an appropriate method of authentication for Prosecution Exhibit I, it is certainly curious why the prosecution never asked Jill Roberson if she could authenticate appellant's handwriting on Prosecution Exhibit I. Jill Roberson was a later girlfriend of appellant and was called by the prosecution to testify on the issue of whether appellant tried to suppress evidence. (See Issue IV *infra.*) During that testimony, she noted that while appellant was in jail awaiting trial, she and appellant wrote literally hundreds of letters to each other. (7 R.T. 1934-1935.) This voluminous written correspondence took place during the same general time frame that Prosecution Exhibit I was purportedly generated. While Kim Speare testified that she recognized appellant's handwriting (6 R.T. 1804), there is nothing in the record to indicate that she ever saw anywhere near as much of appellant's handwriting as did Jill Roberson. After all, appellant was not incarcerated when he and Kim Speare were dating, so he saw her regularly and even lived at her house for a year and a half. (6 R.T. 1800.) Thus, letter writing was not as necessary a means of communication as it was with Jill Roberson. Despite that likely disparity in familiarity with appellant's handwriting between the prosecution's two witnesses, apparently the prosecution never approached Jill Roberson to have her authenticate appellant's handwriting on Prosecution Exhibit I.

The omission appears to be significant. At the fourth penalty phase, when Ms. Roberson was again testifying for the prosecution on

the evidence suppression issue, the defense handed her Prosecution Exhibit I. She was asked to take as much time as necessary to review it and to tell the court whether she thought that it looked like appellant's handwriting. After reviewing the document, she said that it did **NOT** look like the writing in the letters she received from appellant. (33 R.T. 4791.) More importantly, she had never been shown Prosecution Exhibit I before. (33 R.T. 4791)

As if relying on an old girlfriend to authenticate the handwriting was not bad enough, the prosecution also relied on Tony Saavedra to authenticate the letter. As explained in the previous issue, Tony Saavedra never should have been allowed to authenticate the letter. Not only did he fail to ask appellant if he wrote the letter, but in the third penalty phase, Saavedra admitted that appellant talked about the incident and the letter indiscriminately. (26 R.T. 3182-3183.) Additionally, the trial judge in the third penalty phase specifically prohibited Saavedra from offering an opinion concerning whether appellant wrote the letter. (30 R.T. 4131; see Issue I, *supra.*) Unfortunately, however, the damage had already been done in the guilt phase. As explained in the statement of facts, during the guilt phase, Saavedra was allowed to testify that appellant admitted writing the letter. (7 R.T. 2061-2062.)

Effectively, therefore, not only did the prosecutor fail to properly investigate the distinct possibility of fabricated evidence, but continued to propound inferences that it knew to be false, or had a very strong reason to doubt. Under the circumstances, these attempts

to shore up the authenticity of the letter can only be described as "far fetched." (*Cf. United States v. Blueford, supra* 312 F.3d at p. 968.) In that regard, the possibility that the letter might not be authentic obviously troubled the jurors. As explained in the statement of facts, right before deliberations when the jurors were allowed to read the letter, juror number 2 wrote a note to the court asking how Pincock obtained the letter. (8 R.T. 2342-2344.)

For these reasons, letting evidence known to be false in significant particulars - and of highly questionable veracity as to the rest - go to the jury without a vigorous inquiry to prevent a fraud on the court is simply indefensible. (*Bowie v. Commonwealth, supra,* 243 F.3d 1117.)

Prosecutorial Misconduct - Closing Argument - False Evidence

Regarding the prosecutor's rebuttal argument concerning appellant's inheritance, an argument is improper when it is neither based on the evidence nor related to a matter of common knowledge. (*People v. Bell* (1989) 49 Cal.3d 502, 539; *People v. Heishman* (1988) 45 Cal.3d 147, 195-196; *People v. Fosselman* (1983) 33 Cal.3d 572, 579-581; *People v. Kirkes* (1952) 39 Cal.2d 719, 724; *People v. Evans* (1952) 39 Cal.2d 242, 251.) More to the point, "[i]t is improper for a prosecutor to present potentially prejudicial "evidence" to a jury in the form of argument. [Citations.]" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 722.) Such comments serve to make the prosecutor his own witness not subject to cross examination and thus constitute

prosecutorial misconduct. (*People v. Bolton, supra*, 23 Cal.3d 208, 213.)

The improper argument here was both a deliberate and a blatant attempt to circumvent the trial judge's ruling on evidence of motive. As the statement of facts makes clear, when addressing the family insurance policy, the trial judge specifically prohibited the prosecution from introducing evidence of financial gain as a motive unless it could show that appellant was aware of the source of the money and the amount of it. (1 R.T. 368-370.) The disposition of the family residence falls into the same category as the disposition of the insurance proceeds. That is, there is no evidence that appellant knew he was the sole heir to the house or that it was in fact worth a significant amount of money (over and above any mortgage that may have been in place).

There is no indication anywhere in the record that the prosecutor had any basis for a good faith argument concerning appellant's status as heir to the house. That is, there is no indication that the prosecutor reviewed any of the family's wills or was aware of the status of any mortgage information.[27] Moreover, the prosecutor never apologized or claimed ignorance that he was violating the

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[27] Moreover, if speculation is called for, it might be equally true that since Danny was a student at the University of Southern California, a private university, and his parents were paying his tuition (27 R.T. 3459), the house had been mortgaged heavily to pay for his education. Thus, the proceeds remaining after a sale would not have been sufficient to provide a financial incentive or motive to kill. Based on the evidence in this case, the foregoing scenario is at least as likely as the prosecutor's bald assertion that the defendant killed in order to benefit financially from inheriting the house.

court's prior order on financial gain as a motive for the crimes. (*People v. Robinson* (1995) 31 Cal.App.4th 494, 504-505 [deliberate and deceptive circumventing of the trial court's previous order constituted prosecutorial misconduct].)[28]

More importantly, inheritance would be the most logical and easily understood motive for the killings. Thus, despite the fact that there was no evidence on the point, the jurors undoubtedly agreed with the prosecutor that appellant was the obvious logical heir.

While intentional conduct is not necessary in order to constitute prosecutorial misconduct (*Smith v. Phillips*, *supra*, 455 U.S. 209, 219 ; *People* v. *Bolton*, *supra,* 23 Cal.3d at p. 214) , there is no question that deliberate, deceptive and reprehensible activities do so. *(People v. Hill, supra,* 17 Cal.4th 800, 820; *People v. Gionis, supra,* 9 Cal.4th 1196, 1215, see also *Gore v. State* (Fla. 1998) 719 So.2d 1197 [death penalty reversed because prosecutor deliberately questioned witness about a matter the trial court previously ruled inadmissible] .)

No Waiver

Generally, in order to preserve the issue for appellate review trial counsel must not only object to prosecutorial misconduct but also

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[28] The decision in *Gore v. State* (Fla.1998) 719 So.2d 1197 is also instructive on this issue. In that case, the Florida Supreme Court reversed a death penalty conviction and remanded for a new trial because, *inter alia*, the prosecutor improperly questioned the defendant concerning a subject about which the trial judge had ruled pretrial no evidence could be introduced. The appellate court registered its concern with the State's "blatant" disregard of the trial judge ruling, noting that "[t]he foundation of our legal system depends on fidelity to rules." (Id. at p. 1199, quoting *Halsell v. State* (Fla. 3d DCA 1996) 672 So.2d 869, 870.)

request an admonition to cure the harm. (See, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 914; *People v. Ghent* (1987) 43 Cal.3d 739, 762) Nevertheless, an objection and request for admonition is not required when the error is of a nature which could not be cured by admonition. (*People v. Kirkes, supra*, 39 Cal.2d at p. 726; *People v. Johnson* (1981) 121 Cal.App.3d 94, 103-104; *People v. Taylor* (1961) 197 Cal.App.2d 372, 382.) If an objection and admonition would not have cured the harm, the appellate court must determine ". . .whether on the whole record the harm resulted in a miscarriage of justice within the Constitution." (*Id.* at p. 34.)

Here, there was an objection, but not a specific request for an admonition. Any admonition, however would not have cured the harm and most likely would have simply exacerbated the problem. The prosecutor's argument here - filling a huge gap in the evidence concerning motive - had such an impact on the fact finding process that it would have echoed in the jurors' minds like the proverbial bell which cannot be unrung. "[F]acts that have been impressed upon the minds of the jurors which are calculated to materially influence their consideration of the issues cannot be forgotten or dismissed at the mere direction of a court." (*People v. Roof* (1963) 216 Cal.App.2d 222, 225.) Indeed, such admonitions can be not just futile but counterproductive in dealing with jury prejudice: "[F]requently admonitions to a jury to disregard that which has already been implanted in their minds serve only to emphasize and underline and sometimes transform the inconsequential into indelibility." (*People v.*

Buchtel (1963) 221 Cal.App.2d 397, 403; accord, Tanford, The Law and Psychology of Jury Instructions (1990) 69 Neb. L.Rev. 71, 86-87, citing numerous studies.) Admonition after the fact would likely do as little good and as much harm as an admonition not to think of an elephant. (See *People v. Massie* (1967) 66 Cal.2d 899, 917, fn. 17; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 468; *United States v. Antonelli Fireworks Co.* (2d Cir. 1946) 155 F.2d 631, 656 (dis. opn. of Frank, J.).) Defense counsel's failure to ask for an admonition, therefore, must be excused as the only tactically sound way to make the best of a bad situation that the defense did not create. (*People v. Calio* (1986) 42 Cal.3d 639, 643 [no waiver where defense counsel endeavors to make the best of a bad situation for which he was not responsible].) Certainly in the absence of an express statement from counsel, the absence of a request for an admonition cannot be viewed as an expression of the defense belief that the prejudice was cured.

More importantly, given the seriousness of the prosecutorial misconduct in this case, it is unlikely that any admonition could have ameliorated the harm caused by the misconduct.

Prosecutorial Misconduct Closing Argument Insulting the Defense

Telling the jury that the defense made "chicken salad out of you know what" (9 R.T. 2503) is highly insulting. Not only that, the prosecutor's remarks were apparently intended to cause laughter at the expense of the defense. As the prosecutor told the jury, "I hate to laugh about this, but that's what it is. I mean, that's what it is." (9

R.T. 2503.)

The remarks were improper, beyond the scope of the evidence, and calculated to ridicule and denigrate the defense case before the jury. The prejudicial impact was unmistakable. (See, e.g., *People v. Wash* (1993) 6 Cal.4th 215, 265 [misconduct to disparage the defense before the jury]; *People v. Thompson* (1988) 45 Cal.3d 86, 1 12; *People v. Wiley* (1976) 57 Cal.App.3d 149, 162, overruled on other grounds in *People v. Wheeler* (1978) 22 Cal.3d 258, 286 [prosecutor may not resort to the use of deceptive methods to influence the jury]; *United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1224; *United States v. Santiago* (9th Cir.) 46 F.3d 885, 892, cert. denied, (1995) 515 U.S. 1162 [suggestion by prosecutor that all defense counsel conceal and distort the truth may violate a defendant's Sixth Amendment right to counsel]; *Davis v. Zant* (11th Cir. 1994) 36 F.3d 1538, 1547.)

While the defense did not object to the remarks, as with the other error in closing argument, an objection and request for admonition would not have cured the harm. Instead these purportedly corrective measures simply would have reinforced that unflattering image in the jurors minds. (See, e.g., *People v. Kirkes, supra.,* 39 Cal.2d at pp. 726-727.) As with the other problem in closing argument, there was no way that an admonition or curative instruction could have "unrung" that bell. *(People v. Johnson, supra,* 121 Cal.App.3d 94, 103-104.)

Prejudice

Because all of the misconduct errors here are of Constitutional

magnitude, any harmless error analysis should apply the standard set forth in *Chapman* v. *California, supra*, 386 U.S. at p. 24. *Chapman* requires the reversal of a conviction if an error deprives a defendant of a federal constitutional right unless the prosecution can demonstrate that the error was "harmless beyond a reasonable doubt." Under the *Chapman* standard, the burden clearly rests with the prosecution to prove harmlessness. If the State cannot show beyond a reasonable doubt that the error did not contribute to the verdict, the error cannot be deemed harmless. (See, e.g., *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.)

As appellant explained previously, in *Sullivan v. Louisiana , supra*, 508 U.S. 275, the Court noted that a reviewing court does not consider whether the jury would have convicted the defendant in a hypothetical trial in which the error did not occur but rather whether the conviction was "surely unattributable to the errors." (*Id.* at p. 279.) That is, the case must be reversed if there is any reasonable likelihood that the improper evidence affected the verdict.

Improper Consideration of Prosecution Exhibit One

The prejudice resulting from the jury's consideration of Prosecution Exhibit I as substantive evidence of guilt and as a matter influencing sentencing has been set forth extensively in the prior issue. Those comments are incorporated herein by reference. In sum, however, Prosecution Exhibit I was the mainstay of the prosecution's guilt phase presentation. Coming as it did in a case involving circumstantial evidence, and often ambiguous circumstantial evidence

at that, the exhibit was a virtual confession to the slayings and proposed an additional plot to kill appellant's grandfather as a cover-up. The callous disregard for appellant's family exhibited in the letter cannot be overstated. Nevertheless, the provenance of the letter caused the jury enough anxiety that juror number 2 even wrote a note to the court specifically inquiring about how Pincock obtained the letter. (8 R.T. 2342-2344.)

Additionally, since the penalty phase jury was different than the guilt phase jury, Prosecution Exhibit I was clearly the mainstay of the prosecution's penalty phase case as well. Moreover, to be sure the jury did not miss the importance of the letter, the prosecutor took the liberty of reading virtually its entire contents in closing argument and commenting on how each section of the letter demonstrated appellant's culpability and suitability for the death penalty. (35 R.T. 5153- 5164.)

Improper Closing Argument - False Evidence

It might be argued that even if the prosecutor committed misconduct in closing argument concerning the false evidence, since the judge sustained the defense objection and eventually gave the jurors the standard instruction that the arguments of the attorneys were not evidence, there was no harm.

At the outset, appellant notes that the impropriety of a closing argument is not necessarily cured because the judge sustained the objection. By its very nature the argument suggested to the jurors that the prosecutor had a source of information unknown to them which

corroborated the truth of the matters in question. Thus it is reasonable to assume that, in spite of the objection the jurors were led to believe that, in fact there was evidence of motive based on financial gain. *(Cf. People v. Wagner* (1975) 13 Cal.3d. 612, 619-620.)

Additionally, reference to the standard instruction is not always sufficient to cure the prejudice. (Cf. *People v. Kirkes, supra*, 39 Cal.2d at p. 727) Although a cautionary instruction is to be considered in weighing prejudice (*People v. Allen* (1978) 77 Cal.App.3d 924, 934-935), the instruction itself is not a magic talisman. It is only one factor to be considered in determining whether the misconduct was so egregious that it infected the trial with unfairness to a degree that the conviction amounted to a denial of due process. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 644 [40 L.Ed.2d at p. 437, 94 S.Ct. 1868]["...some occurrences [of prosecutorial misconduct] at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect...";] cf. *People v. Talle* (1952) 111 Cal.App.2d 650, 676-677.) Moreover, as noted previously, facts given to jurors that materially influence their view of the case " cannot be forgotten or dismissed at the mere direction of a court." (*People v. Roof, supra,* 216 Cal.App.2d at p, 225.)

Morever, this court has noted that in cases involving prosecutorial misconduct, a curative instruction often may not be enough. In footnote 5 of *People v. Bolton, supra*, 23 Cal.3d at p. 215, this court observed: "The question therefore remains: between outright reversal and mere verbal rebuke, are there intermediate

remedies available that may prove effective against prosecutorial misconduct? One possibility is on-the-spot instruction by the trial judge to the jury to ignore the attorney's improper remarks. However, unless the instruction is sharply worded, it may only exacerbate the problem by calling the jurors' attention to the improper remarks. "[Merely] to raise an objection to [improper] testimony and more, to have the judge tell the jury to ignore it often serves but to rub it in." (*United States v. Grayson* (2d Cir. 1948) 166 F.2d 863, 871 (conc. opn. of Frank, J.).)" As these authorities make clear, a curative instruction in cases involving prosecutorial misconduct is seldom sufficient by itself to cure the harm.

Even allowing for some minor palliative effect of a curative instruction, the argument here was overwhelmingly prejudicial. The prosecutor's comments filled in a significant evidentiary gap in its case. Given that one of the main themes of the defense, that appellant had no motive for these killings and therefore he was unlikely to be the killer, telling the jury that the motive was financial gain through inheritance was undeniably prejudicial. (Cf *People v. Modesto* (1967) 66 Cal.2d 695, 714.) [overruled on another ground, *Maine v.Superior Court* (1968) 68 Cal.2d 375, 383, fn. 8.) [misconduct can mandate reversal if the improper comments either "fill an evidentiary gap" in the prosecution's case or "touch a live nerve" in the defense.]

The comments here touched on both of those matters. As appellant explained above, without a motive, these crimes make little sense. Thus, by supplying the jury with an easily understood financial

motive, the prosecution's case was strengthened immeasurably. Additionally, although the jury may have understood that they were to disregard the evidence because the objection was sustained, they may well have thought the judge's ruling was a mere procedural fillip. To the jurors, the possibility that defendant might inherit assets or life insurance proceeds from his parents might have seemed so obvious that the prosecutor's argument may have led them to believe they could make that assumption even without having heard any evidence. Indeed, inheritance would make an almost perfect explanation for an otherwise almost inexplicable crime. While motive may not be a legal requirement for a crime, the reality is that few jurors would believe that a defendant would beat his entire immediate family to death and burn their corpses for no particular reason. Supplying an obvious and commonly accepted motive was an incredibly powerful weapon for the prosecution in this otherwise circumstantial evidence case. Undoubtedly, that is why the prosecutor fought so hard to get the insurance policy into evidence and why the prosecutor made the closing argument that he did - even knowing that there was no evidence to support it. Misconduct in closing argument that goes to the heart of the defense case is unquestionably prejudicial. (*People v. Herring* (1993) 20 Cal. App.4th 1066, 1077.)

In addition to the foregoing, there is the additional prejudice that arose simply from the fact that the error occurred not just in closing argument, but in rebuttal argument. As noted above, prosecutors are generally viewed with special regard by the jury and

therefore improper statements by the prosecutor may be like "dynamite" blowing the proper evidence out of proportion and damaging the prospects for a fair determination. (*People* v. *Bolton*, *supra*, 23 Cal.3d at p. 213.) In the same vein, "[a] prosecutor's closing argument is an especially critical period of trial. [Citation] Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective. [Citation]" (*People v. Pitts, supra,* 223 Cal.App.3d 606, 694.) Misconduct during rebuttal is particularly prejudicial because the defense has no realistic opportunity to respond or otherwise ameliorate the damage.

There are other prejudicial aspects of the misconduct as well. The misconduct here likely misled the jury into believing that the killing was pre-planned and deliberate and thus appellant was guilty of deliberate, premeditated murder. That is, even assuming the evidence was sufficient to convict, it did not point unerringly to guilt of first degree murder. In *Leaks v. State* (Ark. 1999) 5 S.W.3d 448, the court was faced with a similar problem of determining prejudice in a situation where the prosecutor made an improper argument based on facts outside the record. In that case, moreover, the evidence against the defendant was overwhelming. Nevertheless, in reversing the conviction, the court observed: "While the evidence of [defendant's] guilt may have been overwhelming, the question at issue in this case was whether he was guilty of first-degree murder or the lesser-included offense of second-degree murder. [Defendant] was entitled to a fair deliberation by the jury on those two offenses." (*Id* at

p. 456.)

The situation is precisely the same here. The argument focused on financial gain as a motive. Appellant's only first degree murder conviction was for the death of his father; the person most likely responsible for the family's wealth. Under these circumstances, the type of misconduct involved here reasonably could have "tipped the scales" on the homicide charges making the circumstances appear worse than they were. (*People v. Kirkes*, *supra,* 39 Cal.2d at p. 727.) Moreover, because in this case the evidence was entirely circumstantial and because the case was so close, "'any substantial error tending to discredit the defense or to corroborate the prosecution must be considered prejudicial." [Citation]" (*People v. Gonzales* (1967) 66 Cal.2d 482, 493-494.)

Finally, as explained below in issue III, because of this improper argument that filled in an evidentiary gap in the prosecution's case and effectively obliterated one of the main themes of the defense, the standard instruction on motive [CALJIC 2.51] exacerbated the prejudice. By placing the issue of financial gain squarely before the jury, the standard motive instruction forced appellant into a posture of showing not only that he had no motive to kill his parents but that there was some other motive that may have driven another person(s) to kill his family. The arguments presented in Issue III are incorporated herein by reference.

Improper Closing Argument - Insulting the Defense

There is little question that the prosecutor's characterization of

the defense case as chicken manure was inappropriate. The fact that the remark was apparently designed to cause laughter and humiliation takes it out of the harmless situation of a mere faux pas made in the heat of trial. Instead, such underhanded tactics served only to inflame the jury's passions. They are completely impermissible and highly prejudicial where a defendant's life is at stake. (See, e.g., *People v. Bain* (1971) 5 Cal.3d 839, 847 [prosecutorial misconduct to impugn defense]; *People v. Clair* (1992) 2 Cal.4th 629, 662-663; *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 974-975 [reliability of verdict put into question where prosecutor makes improper comments designed to impugn defense and inflame jury]; *United States v. Phillips* (7" Cir. 1990) 914 F.2d 834, 844 [prosecutor's characterization of defense witnesses as "liars," "slimy" and "bozos" was improper]; *State v. Matthews* (N.C. 2004) 591 S.E.2d 535, 541-542 [characterization of defense case as "bull crap" was inappropriate].)

Cumulative Prejudice from Prosecutorial Misconduct

"In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. [Citation.] Where, as here, there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. [Citation]. In those cases where the government's case is weak, a defendant is more likely

to be prejudiced by the effect of cumulative errors. [Citation]" *(United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

Additionally, because the issue involves multiple instances of prosecutorial misconduct, there is the broader question of whether any remedy short of reversal will impress upon prosecutors that they must adhere to their fiduciary duty to seek the truth, not just win convictions. As this court observed in footnote 5 of *People v. Bolton, supra,* 23 Cal.3d at p. 215:

"This court is aware that verbal rebuke alone may have little practical effect in deterring prosecutorial misconduct. As one commentator has noted, 'Appellate justices time and time again have ... warned prosecutors to keep within the bounds of propriety. Later opinions reflect the result, frustrating failure. The appellate tribunals have found to their dismay that they cannot uphold a conviction and yet successfully condemn the method by which it was secured. ... The very act of upholding the conviction has given prosecutors approval, and the 'judicial slap on the wrist' has not deterred the prosecutor from his unethical and improper tactics.' (Citations.)"

Under these circumstances, the state cannot carry its heavy burden to show beyond a reasonable doubt that the multiple instances of prosecutorial misconduct here did not influence appellant's jury. Both alone and in combination, these errors fatally compromised the defendant's Sixth Amendment rights to confront and cross examine as well as his right to present a defense; his Fifth and Fourteenth Amendment rights to Due Process and a fair trial, and the Eighth and

Fourteenth Amendment requirements for reliability in the guilt and sentencing phases of a capital trial. (Cf. *Beck v. Alabama*, *supra*, 447 U.S. 625, 638, 643 [65 L.Ed.2d 392, 403, 406, 100 S.Ct. 2382].) For these reasons, appellant's convictions must be reversed and his death sentence set aside.

III.

THE TRIAL COURT INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

Introduction

CALJIC 2.51 is constitutionally infirm because it places a burden on the defense to show absence of motive in order to demonstrate innocence. Further, it is defective because it does not clearly tell the jury that motive alone is insufficient to prove guilt.

At the outset, appellant recognizes that this court has rejected similar arguments in the past. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750; and *People v. Frye* (1998) 18 Cal.4th 894, 958 .) Nevertheless, because of the facts of this case and the manner in which the instruction affected the juror's deliberations, those arguments should reconsidered.

No Waiver

While it is true that counsel did not specifically object to CALJIC 2.51, objection is not necessarily required. California law clearly mandates that when an appellant's substantial rights are affected, an appellate court may consider the issue of instructional error even if no objection was made at trial. (Penal Code section 1259; *People v. Croy* (1985) 41 Cal.3d 1, 12, n. 6; *People v. Anderson* (1994) 26 Cal.App.4th 1241, 1249.)

Moreover, an instruction containing an incorrect statement of law is not susceptible to a claim of waiver and can always be

challenged on appeal. (*Suman v. BMW of North America* (1994) 23 Cal.App.4th 1, 9; see also *Cummings v. County of Los Angeles*, (1961) 56 Cal.2d 258, 264.) Both conditions are present in the instant case.

Instruction Improper

The trial court instructed the jury under then CALJIC No. 2.51:

> "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled."

(9 R.T. 2539.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of a motive in order to establish innocence. The instruction therefore violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

The Instruction Allowed the Jury to Find Guilt Based on Motive Alone

CALJIC 2.51 states that motive may tend to establish that the defendant is guilty. As a matter of law, however, it is beyond question that motive alone is insufficient ~~as~~ to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia* (1979) 443 U.S. 307.) Motive alone does not meet this standard because a

conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 [motive alone insufficient to prove larceny].)

The motive instruction stood out from the other standard evidentiary instructions given to the jury in this case. (CALJIC No. 2.00, *et seq.*) Notably, the other instruction that covered an individual circumstance included an admonition that it was insufficient to establish guilt. (See, e.g., 9 R.T. 2678 [CALJIC No. 2.06 (Efforts To Suppress Evidence): "However, this conduct is not sufficient by itself to prove guilt . . . ."].)

Because CALJIC No. 2.51 is startlingly anomalous in this context, it prejudiced appellant during deliberations. The instruction intentionally omits any caution about the sufficiency of motive evidence and allows the jury to determine guilt based solely upon motive. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (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].)

This Court has recognized that differing standards in instructions create erroneous implications:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the

> instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

(*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *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 context of the instruction highlighted the omission. Thus, the jury would have understood that if it found the defendant had a motive to harm his family, such as the financial gain through inheritance, that motive alone could establish guilt. Thus, even if it could be said that the instruction was proper [which it is not], as it was used here, it simply reinforced the prejudice resulting from the prosecutor's misconduct. Accordingly, the instruction violated appellant's constitutional rights to due process of law and a fair trial by jury. (U.S. Const., 5th, 6th and 14th Amends.) The instruction also rendered the resulting verdict unreliable in violation of the Eighth Amendment.

The Instruction Shifted the Burden of Proof to Imply That Appellant had to Prove His Innocence

CALJIC 2.51 also told the jury that the absence of motive could be used to establish innocence. Unfortunately, that language in the context of the prosecutorial misconduct in this case effectively placed the burden of proof on appellant to show a motive other than financial gain. That is, the instruction confirmed that the jury could convict

unless the defendant showed that financial gain was NOT a motive, or that someone else might have a specific motive to kill his family. The defense, however, never had a burden to prove anything. It is only through the prosecutorial misconduct in this case that this instruction effectively placed a burden on him.

Prejudice

The instructional error was particularly prejudicial in this case because the evidence connecting appellant with the crimes was so weak and because the prosecution erred in placing a purportedly commonsense motive before the jury. The instruction just exacerbated an already untenable situation resulting from the prosecutor's improper injection of the financial gain motive into the trial. More importantly, since appellant did not testify, the jury may well have concluded that he failed to carry the burden to prove that he had an innocent motive.

Reversal is Required

As discussed previously, the trial court's error implicated appellant's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. As used in this case, CALJIC 2.51 also deprived appellant of his constitutional rights to due process and fundamental fairness. (*In re Winship* (1970) 397 U.S. 358, 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution submitting the full measure of proof. (See

Beck v. Alabama, supra, 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].) For the reasons discussed above, the error is not harmless beyond a reasonable doubt. Reversal is required.

IV.

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR BY INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT

Introduction

The consciousness of guilt instructions given at appellant's trial were constitutionally infirm for two reasons. First, they created permissive inferences that were overbroad. That is, they allowed the inference of guilty mental state from conduct unrelated to the mental state; they permitted an inference of guilt of three homicides from a single untoward act or statement. Second the instructions are impermissibly argumentative. They highlight particular evidence for the specific purpose of inferring consciousness of guilt. Effectively, they focused the attention of the jury on evidence favorable to the prosecution, thus lightening the prosecution's burden of proof. Compounding the problem, they placed the trial judge's imprimatur on the prosecution's evidence.

Instructions Improper

At the request of the prosecutor, the trial judge instructed the jury on so-called consciousness of guilt. The first instruction was CALJIC No. 2.04, which reads as follows:

"If you find that a defendant attempted to persuade a witness to testify falsely, such conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(9 R.T. 2677.)

The trial judge also gave CALJIC 2.05 which provides:

"If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized such effort.

"If you find defendant authorized that effort, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(9 R.T. 2678)

Finally, over strenuous defense objection (8 R.T. 2432-2440)[29] the trial judge instructed the jury, pursuant to CALJIC No. 2.06, which states:

If you find that a defendant attempted to suppress evidence against himself in any manner, such as by destroying the evidence, or by concealing evidence, such attempt may be considered by you as a circumstance

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[29] The defense did not specifically object to CALJIC 2.04 or 2.05. Nevertheless, the problems with these two instruction may be considered on appeal. As appellant noted previously, California law clearly mandates that when an appellant's substantial rights are affected, an appellate court may consider an issue even if no objection was made at trial. (*People v. Croy, supra,* 41 Cal.3d at p 12, n. 6; Penal Code section 1259; *People v. Anderson, supra*, 26 Cal.App.4th at p. 1249.)

Moreover, an instruction containing an incorrect statement of law is not susceptible to a claim of waiver and can always be challenged on appeal. (*Suman v. BMW of North America, supra* , 23 Cal.App.that p. 9; see also *Cummings v. County of Los Angeles, supra*, 56 Cal.2d at p. 264.) Both conditions are present in the instant case.

tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove that a killing was deliberated and premeditated, and its weight and significance, if any, are matters for your consideration.

(9 R.T. 2678

For the reasons which follow, the trial court erred in giving each of these instructions.

The Instructions Create Improper Permissive Inferences

CALJIC Nos. 2.04, 2.05 and 2.06 authorize permissive inferences;[30] that is, they each permit the jury to infer one fact (an elemental fact) -- appellant's consciousness of guilt[31] -- from other facts (basic facts) –attempts to fabricate evidence and attempts to suppress evidence. When the prosecution proves the basic fact contained in the permissive inference, the jury is permitted, but not required, to infer the elemental fact. (*County Court of Ulster County, New York* v. *Allen* (1979) 442 U.S. 140, 157.) The United States Supreme Court has held that a permissive inference instruction is constitutional only if the connection between the facts found by the jury from the evidence and the facts inferred pursuant to the

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[30]As the United States Supreme Court noted in *Francis v. Franklin* (1986) 471 U.S. 307, 314: "A permissive inference suggests to the jury a possible conclusion to be drawn if the state proves predicate facts, but does not require the jury to draw that inference." This definition concerns the *proper* form of permissive inferences. In this case, however, the conscious-of-guilt instructions created *improper* permissive inferences.

[31] "Consciousness of guilt" is not literally an element, but a lay jury is likely to understand the phrase as referring to "consciousness of guilt of the charged offense" and hence as the equivalent of an element – and, indeed, all the elements of the charge offense.

instruction is rational. (*Id.*; see also *United States* v. *Gainey* (1965) 380 U.S. 63, 66-67.) Further, the connection must be more likely than not to follow from the proved fact to the inferred fact. (*Leary* v. *United States* (1969) 395 U.S. 6, 36.) Also, this court has recognized that the Due Process Clause of the Fourteenth Amendment requires that inferences "be based on a rational connection between the fact proved and the fact to be inferred." (*People* v. *Castro, supra,* 38 Cal.3d 301, 313.)

The record shows that the prosecution probably requested CALJIC 2.04 and 2.05 because Jill Roberson [Brodhagen] testified - inconsistently and almost incoherently - that she was responsible for telling investigators that she was with appellant on the night of the homicides. On direct examination she admitted telling the District Attorney's investigator that she wrote a letter to the defendant saying that she was going to tell defense investigators that she was with him on the night of the homicides. (7 R.T. 1900, 1901-1902.) Nevertheless she consistently denied that it was his idea that she provide him with an alibi. She claimed it was her idea. (See, e.g., 7 Rt 1899, 1902.) Appellant specifically told her not to lie. (7 R.T. 1900, 1902-1903.) Nevertheless, she also admitted telling defense investigator Christianson that appellant tried to get her to lie about being his alibi. (7 R.T. 1904-1905.)

On cross examination she admitted that she was an alcoholic, that she spent time in jail as a result of her drinking and that she wrote to appellant while she was in jail. (7 R.T. 1908-1909.) She again

stated that appellant never asked to provide him with an alibi. (7 R.T. 1913-1914.) Ms. Roberson admitted, however, that she told a number of other people that she was with appellant on the night of the homicides, particularly when she was inebriated. (7 R.T. 1914.) At the time she was making these statements to various people, she was inebriated at least twice per week. (7 R.T. 1915.) She also admitted that the drinking interfered with her memory and that she sometimes blacked out and did not remember conversations. (7 R.T. 1928-1929.) Further, even though she stopped drinking in May 1995, she slipped up once in awhile. Nevertheless, she denied having anything to drink on the morning before her testimony. (7 R.T. 1932-1933.) She noted that the defense never subpoenaed her to testify about providing an alibi for Mr. Charles. (7 R.T. 1915.) She also admitted lying to the defense repeatedly about providing an alibi for appellant. (7 R.T. 1916.)

Under pressure from the defense about her propensity to lie, however , she changed her story and said that she and appellant discussed her alibi repeatedly. (7 R.T. 1918.) Nevertheless, she conceded that she was the one who initially raised the subject of providing appellant an alibi. (7 R.T. 1919.) She also admitted that at least once appellant told her not to lie. (7 R.T. 1919.) She clarified that appellant once ruminated that it would be to his benefit if someone provided him with an alibi and she immediately volunteered. (7 R.T. 1921.) She admitted writing a letter to appellant that before she spoke with the defense investigators she was "buzzed." (7 R.T.

1923-1924.) Finally, she admitted that she loved appellant during this period of time and she would do almost anything, including provide him with an alibi, to get him out of jail. (7 R.T 1924-1925, 1933.) She also admitted that she and appellant must have written at least one hundred letters to each other. (7 R.T. 1934-1935.)

When asked if it was true that in none of those letters did appellant ever mention anything about an alibi, she replied that she could not recall. (7 R.T. 1935.) In the one letter she wrote to appellant saying that she was going to provide him with an alibi she wrote: "I told them the truth as I know it. If I can help, fine. I don't have to prove it. It is the D.A. that has to prove it is not the truth." (7 R.T. 1937.) She again admitted that appellant never told her to do any of this and she lied to the defense about the alibi. (7 R.T. 1938- 1939.)

The problem with instructions on these alleged alibis, however, is that Ms. Roberson repeatedly admitted that she came up with the idea for an alibi and appellant told her not to lie. Further, the defense never called her to the stand to testify about an alibi. Thus, there was no solid factual basis for the jury to find that appellant authorized any alibi.

With respect to the attempt to suppress evidence [CALJIC 2.06], the defense objected on the ground that there was no evidence to support the instruction. In the defense view, this was a "who-done-it" case. (8 R.T. 2432.) That is, the issue for the jury was whether the defendant was the perpetrator. CALJIC 2.06 would be improper under those circumstances. (8 R.T. 2432-2433.) The prosecutor responded that putting the evidence in the dumpsters was the heart of the

rationale for the instruction. The letter to Pincock and the statements to Hyatt were part of it as well. (8 R.T. 2433-2435.) The defense responded that since under the prosecution's own theory appellant purportedly wrote Prosecution Exhibit I and voluntarily gave the statements to Deputy Hyatt, those pieces of evidence were obviously not part of any attempt to suppress evidence. (8 R.T. 2435.)

The judge noted that he thought the instruction pertained to burning the bodies. (8 R.T. 2437) The prosecutor replied that he really didn't want to focus on that. He wanted to focus on evidence linking appellant to the killing itself. (8 R.T. 2437.) Nevertheless, he concluded that the burned bodies would be another basis for the instruction. (8 R.T. 2438.)

The Judge then determined that he would allow the instruction based on the burning of the bodies and the disposal of the murder weapon. (8 R.T. 2438-2440.)

Oddly enough, when the trial judge refused to allow the prosecution to present gruesome photos of the burned bodies, he did so under the rationale that the family was already dead when the bodies were burned. Therefore, those photos were irrelevant to appellant's mens rea **before** the homicides took place. The burning could have been simply a method of disposing of the corpses like burial. (8 R.T. 2183- 2184, 2193-2194.)

If the burning of the bodies was irrelevant to appellant's mens rea before the homicides, it would not be relevant to show consciousness of guilt of first degree murder.

It might be argued that burning the bodies would be a way of

hiding evidence that might connect appellant to the killings. However, for such an argument to have merit, the jury would have to find independent evidence that appellant actually burned the bodies in order to conceal first degree murders. Otherwise the inference is simply bootstrapping.

For example, while fear of apprehension may be relevant on the question of whether a criminal homicide was committed, it does not establish that the homicide was committed with malice aforethought or premeditation and deliberation. (See, *People v. Anderson* (1968) 70 Cal.2d 15, 32-33; *Commonwealth v. Anderson* (Mass. 1985) 486 NE2d 19, 23, fn 12; see also, LaFave (1972) Criminal Law, § 33 at 565; *Solomon v. Commissioner* (E.D.N.Y. 1992) 786 F.Supp 218, 225 [acts subsequent to victim's death cannot show killing was committed with "depraved indifference."]; see also *People v. Crandell* (1988) 46 Cal.3d 833, 871["A reasonable juror would understand 'consciousness of guilt' to mean 'conscious of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.'"].) Thus, here CALJIC 2.06 certainly would not be appropriate on the rationale that the burning of the bodies might show first degree murder.

More importantly, however, the real problem with the instruction is that it is inappropriate when the issue facing the jury is whether or not appellant was the perpetrator. For example, when identity is a contested issue in a flight case [flight also shows consciousness of guilt - see CALJIC 2.52] the jury must proceed logically by first deciding whether the person who fled was the

defendant. (*People v. Mason* (1991) 52 Cal. 3d 909, 943; *People v. London* (1988) 206 Cal.App.3d 896, 903-904; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1243-1245.)

The same is obviously true for efforts to suppress evidence. That is, the jury cannot make a logical inference of consciousness of guilt of first degree murder from efforts to suppress evidence unless it first determines that the defendant is the actual perpetrator. Nothing in CALJIC 2.06, however, tells the jury that it must first determine that the defendant was the perpetrator. Instead, the instruction allows the jury to infer consciousness of guilt and - therefore that the appellant was the perpetrator - solely from efforts to suppress evidence. Here, for example, appellant allegedly told Deputy Hyatt that his grandfather killed the family members and that he [appellant] cleaned up the scene and disposed of the weapon and bodies in an effort to protect his grandfather. Under CALJIC 2.06 as it was read to the jurors, however, if the jury found that appellant cleaned up the scene and disposed of the weapon and bodies, **those facts alone** would allow the jury to infer that he was a first degree murderer. That is not the law and never has been. Thus, as phrased in this case, CALJIC 2.06 was an incorrect statement of the law.

Accordingly, these "facts" did not provide the basis for a logical and rational inference that appellant was conscious of his guilt of first degree murder. Thus, because the alleged suppressed evidence did not necessarily relate to the charged crimes or provide a solid basis for inferring the requisite mens rea, the instruction was inappropriate. (*People v. Rankin* (1992) 9 Cal.App.4th 430, 435-436 [in *Rankin*, the

defendant's false statement about where he got a stolen credit card was irrelevant to the charged crime of using a stolen card. Indeed, the defendant never denied knowing that the card was stolen].)

Another reason why the consciousness of guilt instructions are improper is that they do not limit the jury's use of evidence to a single permissible inference but instead advise the jurors that they can attach whatever weight and significance to the evidence that they choose. The evidence noted above, refers to statements or conduct by appellant **after** the murder. Such evidence is not, however, relevant to a defendant's state of mind **prior to or during the killing**. In *People* v. *Anderson*, *supra*, 70 Cal.2d 15, this court pointedly observed that while statements made by the defendant to cover up the crime "may possibly bear on defendant's state of mind *after* the killing, it is irrelevant to ascertaining defendant's state of mind immediately prior to, or during, the killing." (*Id.* at p. 32.)

Similarly, these instructions do not either specifically mention the defendant's mental state nor specifically exclude it from the inferences which supposedly can be drawn from any misleading statements or suppression of evidence by the defendants. Indeed, the instructions suggest that the scope of permissible inferences is very broad because the jurors are told that they can determine what weight and significance they wish to give the evidence.

The disputed instructions are also constitutionally infirm because they permit the jury to infer from any actions allegedly taken by appellant that he is guilty of *all* the offenses with which he has

been charged.[32] Because these instructions permitted the jury to draw irrational and sweeping inferences of guilt against appellant, their use violated the standards for acceptable permissive inference instructions set forth by the U.S. Supreme Court in *County Court of Ulster County v. Allen, supra.* Accordingly, the use of the instructions undermined the reasonable doubt requirement and denied appellant a fair trial and due process of law. (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and 15.) The instructions also deprived him of his right to a properly instructed jury and to reliable capital guilt and sentencing determinations in violation of the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and article I, section 1,7, 15,16, and 17 of the California Constitution.

These Instructions Were Impermissibly Argumentative

This court has held that argumentative instructions are impermissible. (*People* v. *Sanders, supra,* 11 Cal.4th 475, 560.) The reason for this prohibition is that such instructions present the jury with a partisan argument disguised as a neutral statement of the law. (*People* v. *Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Argumentative instructions also tend to unfairly single out facts favorable to one party while also suggesting to the jury that special consideration should be given to those facts. (*Estate of Martin* (1950) 170 Cal. 657, 672.)

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[32] Indeed, the decision in *People* v. *Rodrigues* (1994) 8 Cal.4th 1060, approved such sweeping inferences. The court held that the defendant's false statements about an injury to his arm "tended to show consciousness of guilt of *all* the charged crimes." (*Id.* at p. 1140; emphasis in the original.) Appellant requests the court to reconsider its endorsement of such a far reaching use of consciousness of guilt evidence.

This court has defined argumentative instructions as those which "invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People* v. *Mincey* (1992) 2 Cal.4th 408, 437.) Instructions which ask the jury to consider the impact of specific evidence or imply a conclusion to be drawn from the evidence are argumentative and should be refused. (*People* v. *Daniels* (1991) 52 Cal.3d 815, 870-871; *People* v. *Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9.)

Under these standards, CALJIC Nos. 2.04, 2.05 and 2.06 are argumentative. It is useful to compare the syntax of these three instructions with the argumentative instruction analyzed in *People* v. *Mincey, supra.* In *Mincey*, the disputed instruction read as follows:

> If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense willful, deliberate, or premeditated.

(*Id.* at p. 437, fn. 5.) All three instructions state that "[i]f you find" certain facts, then "you may" infer another more ultimate fact. Since the instruction in *Mincey* was found to be argumentative, so should CALJIC Nos. 2.04, 2.05 and 2.06.

Appellant is mindful that this court has previously rejected the claim that these instructions (CALJIC Nos. 2.04, 2.05 and 2.06) are impermissibly argumentative[33]; however, he respectfully requests the court to reconsider the issue.

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[33] See, e.g., *People v. Cash* (2002) 28 Cal4th 703 [CALJIC 2.06 is proper]

In *People* v. *Kelly* (1992) 1 Cal.4th 495, 532, the court gave the following reason why consciousness of guilt instructions are permissible:

> "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence."

This reasoning does not appear to take into consideration the fact that the jury is told, via other instructions, to consider all the evidence. (CALJIC Nos. 1.00 and 2.90.) It is not necessary, therefore, to expressly invite the jury to consider certain evidence for the specific purpose of inferring consciousness of guilt.

Moreover, the analysis in the *Kelly* opinion, *supra,* fails to explain why a trial judge should be permitted to single out evidence favorable to the prosecution and invite the jury to consider that evidence as showing consciousness of guilt. The fact that these instructions also advised the jurors that the weight and significance of the so-called consciousness of guilt evidence are matters for their determination does not mitigate the fact that the trial court is singling out evidence which is favorable only to the prosecution. Moreover, if the language concerning the "weight and significance of the evidence" somehow confers a benefit on the defense as the *Kelly* opinion suggests, then the defense ought to be able to waive that benefit and preclude the instruction from being given at all. (Cf. *Cowan v. Superior* Court (1996) 14 Cal.4th 367, 371 ["Permitting waiver.... is consistent with the solicitude shown by modern jurisprudence to the defendant's prerogative to waive the most crucial of rights.

[Citation]"].) Obviously, however, that is not the case with at least CALJIC 2.06 because it was given over specific defense objection.

Not only did the consciousness of guilt instructions focus the attention of the jury on evidence favorable to the prosecution and lighten the prosecution's burden of proof, they placed the trial judge's imprimatur on the prosecution's evidence. In so doing, these instructions violated appellant's right to a fair trial as guaranteed by due process of law (U.S. Const., Amends. 5 & 14; Cal. Const., art. I, §§ 7 and 15); his right to have his guilt found beyond a reasonable doubt by an impartial and properly instructed jury (U.S. Const., Amends. 6 and 14; Cal. Const., art. I, § 16); and his right to a fair and reliable capital guilt and penalty determinations. (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, § 17).

Prejudice

Because these instructions violated federal constitutional guarantees, the appellant's convictions and judgment of death must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. That is, the State must show that the erroneous instructions did not contribute in any way to appellant's convictions for murder and other crimes. (*People v. Guzman* (2000) 80 Cal.App.4th 1282, 1290, citing *Chapman* v. *California, supra*, 386 U.S. at p. 24.) Given the paucity of evidence supporting appellant's convictions and the lack of any reliable evidence which shed light on appellant's state of mind, the prosecution cannot meet this burden. Accordingly, the error was not harmless, and appellant's convictions and death sentence must be reversed.

V.

THE TRIAL COURT ERRED IN GIVING CALJIC 2.71.5 [ADOPTIVE ADMISSIONS] OVER DEFENSE OBJECTION

Introduction

CALJIC 2.71.5 , the adoptive admission instruction, was given in this case over vigorous defense objection. Giving the instruction was error for two reasons. First, as explained in Argument I, *supra* Prosecution Exhibit I was improperly admitted, and thus there was no basis for the instruction. Second, even if the exhibit was properly admitted, the instruction should not have been given over defense objection. CALJIC 2.71.5 is a cautionary instruction; thus it may be waived by the defense.

The defense was severely prejudiced by the instruction because it focused the jury's attention on Prosecution Exhibit I, the prosecution's highly improper yet highly influential letter from the informant.

Factual Background

At the conference on jury instructions, the defense specifically objected to giving CALJIC 2.71.5. The defense argued that there was no evidence to support the instruction because Mr. Saavedra never put appellant in the position of actually admitting or denying that he wrote the letter. (8 R.T. 2443-2445)

The prosecutor argued that the statements in the letter connected appellant to the crime. (8 R.T. 2445-2446.)

The trial judge ruled that the instruction should be given. In the court's view, when the reporter put the letter up to the glass, appellant could have denied he wrote it. (8 R.T. 2446-2447.)

Ultimately, the jury was instructed in accordance with CALJIC 2.71.5 as follows:

> "If you should find from the evidence that there was an occasion when the defendant; one, under conditions which reasonably afforded him an opportunity to reply; two, failed to make a denial in the face of an accusation, expressed directly to him or in his presence, charging him with the crime for which this defendant now is on trial or tending to connect him with its commission; and three, that he heard the accusation and understood its nature, then the circumstance of his silence and conduct on that occasion may be considered against him as indicating an admission that the accusation thus made was true. Evidence of an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the accused in the face of it. **Unless you find that the defendant's silence and conduct at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement.**"

(9 R.T. 2679-2681 [Emphasis added].)

CALJIC 2.71.5 Improperly Given

To warrant instructing with CALJIC No. 2.71.5, "it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide." (*People v. Edelbacher, supra,* 47 Cal.3d 983, 1011.)

In issues I and II, the defense vigorously argued that

Prosecution Exhibit I did not constitute an adoptive admission and should not have been allowed into evidence in any event. Those arguments are incorporated herein by reference.

Assuming arguendo, however, that the evidence was sufficient to support an instruction similar to CALJIC 2.71.5, the instruction should not have been given over defense objection.

Evidence Code section 403, subd. (c)(1) provides that when the court admits evidence subject to the existence of preliminary facts, it "[m]ay, *and on request shall*, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist." [Italics added.] Thus, "[o]n its own terms, this provision makes it discretionary for the trial court to give an instruction regarding a preliminary fact unless the party makes a request." (*People v. Lewis* (2001) 26 Cal.4th 334, 362.)

People v. Carter (2003) 30 Cal.4th 1166, 1198 reviewed the foregoing rules and concluded that contrary to inferences from prior case law, there was no *sua sponte* duty to give CALJIC 2.75.1 at the guilt phase of a trial. The court further explained: "In a given case, it may be far from clear whether the defendant would wish the court to give CALJIC No. 2.71.5. The instruction is largely a matter of common sense-silence in the face of an accusation is meaningful, and hence may be considered, only when the defendant has heard and understood the accusation and had an opportunity to reply. **Giving the instruction might cause the jury to place undue significance on bits of testimony that the defendant would prefer it not examine so**

closely. (Cf. *People v. Phillips, supra,* 41 Cal.3d 29, 73, fn. 25 [for similar reasons, a court has no *sua sponte* duty to instruct on the elements of other crimes at the penalty phase of a capital trial].)" (*Ibid.*) Therefore, "**a trial court must give CALJIC No. 2.71.5 only when the defendant requests it.**" (*Ibid.* [Emphasis added.)[34]

While there is clearly no *sua sponte* duty to give CALJIC 2.71.5, the question remains whether it may be given over specific defense objection. In *People v. Frye* (1998) 18 Cal.4th 894, this court noted that a similar instruction, CALJIC 2.71[oral admissions should be viewed with caution.] is a cautionary instruction, the effect of which is to benefit the defendant. (*Id.,* at pp. 988-989.) Nevertheless, cautionary instructions may be waived as long as no major public policy prohibits it. Indeed, "an accused may waive **any** rights in which the public does not have an interest and if waiver of the right is not against public policy." (*People v. Trejo* (1990) 217 Cal. App. 3d 1026, 1032.[Emphasis added.)

Therefore, should the defense wish to avoid such an instruction for strategic reasons (e.g., the instruction could encourage the jury to conclude that the defendant's statements admitted or confessed guilt), the defense should be able to resist the instruction

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[34] As this court pointed out in a somewhat similar context involving CALJIC 2.71; "Because juries--and witnesses--may disagree over whether a particular communicative act or statement by a defendant reflects competency or its opposite, an instruction cautioning a jury to view a defendant's admissions, whether direct or adoptive, with caution **should be given only on request**. (*People v. Dunkle* (2005) 36 Cal. 4th 861, 898 [Emphasis added].)

under the theory that a beneficial cautionary instruction may be waived at the discretion of the defendant. (See *Cowan v. Superior Court, supra,* 14 Cal.4th at p. 371 ["Permitting waiver.... is consistent with the solicitude shown by modern jurisprudence to the defendant's prerogative to waive the most crucial of rights." (*People v. Robertson* (1989) 48 Cal.3d 18, 61; see also Civil Code section 3513 [party may waive right that exists for the party's benefit].)

CALJIC No. 2.71.5 is not particularly favorable to the defense *(People v. Lynn* (1984) 159 Cal. App. 3d 715, 738) and therefore the defense may well not want the instruction to be given. As noted above, in *People v. Carter, supra,* at p. 1198, this court observed that the instruction might cause the jury to place undue significance on testimony that the defendant did not want to emphasize. Hence, when the defense specifically objects to an instruction that is designed for the defendant's benefit, it should not be given. (See , e.g., *People v. Towey* (2001) 92 Cal.App.4th 880, 884 [whether or not CALJIC 2.60 and CALJIC 2.61 should be given is a matter of trial tactics on the part of the defense].) Further, "A reasonable attorney may . . . tactically conclude[] that the risk of a limiting instruction ... outweigh[s] the questionable benefits such instruction would provide." (*People v. Maury* (2003) 30 Cal.4th 342, 394; see also *People v. Hernandez* (2004) 33 Cal.4th 1040, 1053 ["defense counsel might reasonably have concluded it best if the court did not explain how the evidence could be used"].)

As the foregoing demonstrates, CALJIC 2.71.5 is a cautionary instruction and thus may be waived. For these reasons, the trial court

erred in giving it over specific defense objection.

Prejudice

In most situations, the omission of instructions about admissions "does not constitute reversible error if upon a reweighing of the evidence it does not appear reasonably probable that a result more favorable to defendant would have been reached in the absence of the error." (*People v. Carpenter* (1996) 15 Cal.4th 312, 393.) "Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately." (*People v. Pensinger, supra,* 52 Cal.3d 1210, 1268, and cases there cited.)

Nevertheless, jury reliance upon an unreliable or untruthful admission or confession would implicate the defendant's state (Art. I, § 15 and § 16) and federal constitutional rights (5th, 6th and 14th Amendments) against self-incrimination, to trial by jury and to due process. Thus the instructional error would be of federal Constitutional dimension. Here, therefore, appellant's convictions and judgment of death must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. That is, the State must show that the erroneous instruction did not contribute in any way to appellant's convictions for murder. (*People v. Guzman, supra,* 80 Cal.App.4th 1282, 1290, citing *Chapman* v. *California, supra*, 386 U.S. at p. 24.)

Under either standard, however, the error here compels reversal. As appellant explained at length in both Issues I and II, the purported adoptive admission, Prosecution Exhibit I, contains several known falsehoods. It was provided to the police by an informant seeking favors, and there was expert witness testimony that the document is a complete fake. Further, the prosecution never investigated the reliability of this document and used the chain of custody with its inherent presumption of regularity to get the document into evidence specifically because it knew the source of the document was a "slime ball" and did not want him subjected to defense cross-examination.

Additionally, as defense counsel pointed out, Mr. Saavedra never actually asked appellant if he wrote Prosecution Exhibit I. Nevertheless, at the guilt phase Saavedra was allowed to testify that in his opinion appellant was the author. As the penalty phase judge correctly ruled before a different jury, however, Saavedra's opinion invaded the province of the jury. Moreover, at the guilt phase, because of the inappropriate invocation of the reporter's shield law, the defense was improperly precluded from inquiring into the basis for that opinion, thus giving the jury a false impression of Saavedra's credibility on the point. It wasn't until the third penalty phase that Saavedra finally admitted that appellant talked about the letter and the incident indiscriminately. Thus, there was no factual basis for Saavedra's conclusion that appellant wrote the letter. By that time, however, the damage already had been done and appellant had been convicted.

These circumstances were so egregious that they corrupted the

truth seeking function to such a degree that the resulting conviction amounted to an unequivocal denial of due process. (*Donnelly v. DeChristoforo, supra,* 416 U.S. at p. 644 [40 L.Ed.2d at p. 437, 94 S.Ct. 1868].)

While CALCIC 2.71.5 was at least ostensibly a cautionary instruction, it certainly was not a magic talisman. Facts given to jurors that materially influence their view of the case " cannot be forgotten or dismissed at the mere direction of a court." (*People v. Roof, supra,* 216 Cal.App.2d at p, 225.)

More importantly, the instruction merely highlighted this inappropriate adoptive admission and suggested the conclusion of guilt. Even in circumstances where a cautionary instruction might be appropriate, unless the instruction is sharply worded, it may only exacerbate the problem by calling the jurors' attention to the evidence. As appellant previously observed, however, CALJIC No. 2.71.5 is not an instruction favorable to the defense. *(People v. Lynn, supra,* 159 Cal. App. 3d 715, 738.) It is not sharply worded and focuses the jury on the adoptive admission itself. Adoptive admissions are highly incriminating because they reflect consciousness of guilt. (*People v. Edelbacher, supra,* 47 Cal.3d at p. 1012.) More to the point, consciousness of guilt evidence is **highly prejudicial** if it is not fully substantiated. (Cf. *People v. Warren, supra,* 45 Cal.3d at p 481.) It destroys the defense and emasculates whatever doubt the jurors may have entertained about the defendant's guilt. (Cf. *People v. Hannon, supra*, 19 Cal.3d at pp. 602-603.)

Moreover, here, the adoptive admission amounted to a virtual

confession and "'[a] confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." (*Arizona v. Fulminate, supra*, 499 U.S. at p. 296 [111 S.Ct. 1246, 113 L.Ed.2d 302.].) Given this reality, defense counsel made a strenuous effort to minimize the damage of this highly incriminating evidence by objecting to the instruction. By the court's overruling the defense objection and giving the instruction anyway, the defense was ineluctably prejudiced.

Moreover, by emphasizing this evidence, the instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].) For the reasons discussed above, the error is prejudicial under any standard. Reversal is required.

PENALTY PHASE ISSUES

VI.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION A FOURTH PENALTY PHASE TRIAL.

Introduction

Granting the prosecution a fourth penalty phase trial was error. There was no justification for a fourth penalty phase trial such as the introduction of new evidence. The fourth penalty phase trial here violated appellant's state and federal due process right to be free of undue harassment. More importantly, since the prosecution failed to persuade prior juries to impose death, even when it had no burden of proof at all, a fourth penalty phase was simply an exercise in forum shopping to find a jury that would find the prosecution's case persuasive. Forum shopping is itself a due process violation.

Factual Background

After the third penalty phase trial ended in a hung jury, the question arose whether the prosecution would seek a fourth penalty phase trial. The prosecutor noted that although a second penalty phase was mandatory if the prosecution sought it, a third penalty phase would be discretionary with the judge. The defense might want time to prepare a motion to ask that no fourth penalty phase be instituted. The prosecutor noted, however, that he recommended a fourth penalty phase trial and his senior, the District Attorney was inclined to agree. (29 R.T. 3898.)

Defense counsel noted for the record that there had never been a third penalty phase trial in Orange County, let alone a fourth. (29 R.T. 3998-3900.) Further, it would need time to prepare a motion asking the court to preclude a fourth penalty phase. (29 R.T. 3900)

The court agreed to set the matter over for 60 days. (29 R.T. 3902.)

When the court reconvened two months later, the defense informed that it had been invited to discuss the question of a fourth penalty phase with the District Attorney's staff [in a *Livesay* hearing]. (29 R.T. 3904-3905.)

Clarifying his position, the prosecutor told the court that he would not ask for a retrial if his office decided that it did not want one after a *Livesay* hearing. (29 R.T. 3907.)

The court noted that it made more sense to allow it to rule on the defense motion first and the defense and the District Attorney could take up the *Livesay* hearing later. (29 R.T 3910.) In context, the defense and the court recognized that if the court ruled in the defense favor, a *Livesay* hearing would not be necessary. (29 R.T. 3910.)

The court noted that since it had not received any points and authorities on the issue from either side during the 60 day recess, it researched the issue on its own. The court conceded that there wasn't much guidance from the California Supreme Court on what factors the court should consider in granting or denying a retrial of penalty phase. (29 R.T. 3910)

After allowing the parties a brief recess to consider their arguments, the court allowed the parties to argue the matter. (29 R.T.

3910.) The defense asked the court to terminate the proceedings and sentence the defendant to life without parole. The defense noted that a fourth penalty phase would be an extraordinary situation and its research uncovered no other instance in the entire state where a fourth penalty phase trial had been conducted. (29 R.T. 3912.) Even conceding the serious nature of the charge in this case, defense counsel observed that this type of case did not always end up with death or even death being sought by the prosecution. (29 R.T. 3913.) Thus, there was a certain subjective element in deciding whether death is appropriate. Given that there had been several hung juries in this case, the defense believed that death was not appropriate. Indeed, after a second penalty phase retrial, the prosecution no longer had a right to demand a penalty phase retrial. (29 R.T. 3915.) The defense then asked the seminal question, "At what point do we decide we are not going to try this case forever?" (29 R.T 3916.)

The defense noted that the prosecution's case likely wasn't going to get any better because the facts would not change. (29 R.T. 3916.) The vote was originally 8-4 for death and gradually it moved. Nevertheless, the jury still could not agree. By contrast, the defense could do better. It could make adjustments, particularly with respect to its expert witness, Dr. Vicary, whose testimony the jury asked to have reread in the third penalty phase trial. (29 R.T. 3916-3917.) Further, as the court was aware, the families of the decedents did not want a death sentence. (29 R.T. 3918.)

The prosecutor countered that the jurors represent society not the family. (29 R.T. 3919.) Further, giving the defendant life without

parole would decrease the value of the death penalty; a penalty that the electorate said it wanted. (29 R.T. 3919.) Additionally, the case might get better for the prosecution because the defendant failed to control himself in jail. (29 R.T. 3920.)

The prosecutor conceded that he was not aware of any other case where there had been four penalty trials. (29 R.T. 3921.) Nevertheless, a fourth penalty phase trial would not be a big waste of resources as the prosecution case consumed only two days. (29 R.T. 3921.) Moreover, the fact that both penalty juries eventually hung 11-1 meant that 34 of 36 folks felt the death penalty was appropriate. The fact that the juries could not come to a proper agreement may be more the fault of the prosecutor in the way he selected the juries and perhaps he could remedy that when selecting new jurors. In any event, in the prosecutor's view, the penalty was appropriate for the defendant's crimes . (29 R.T. 3922.)

Explaining its decision, the court first noted that it was called upon to exercise its discretion in accordance with Penal Code section 190.4. (29 R.T 3923.) The standard was concededly somewhat amorphous "in the interest of justice" standard. Under that standard, the court must balance the interest of the defendant against the interest of society. The court noted that it must examine the nature of the offenses, weighing the evidence, against the possible undue harassment and burden imposed on the defendant and the likelihood of additional evidence being presented at a retrial.

The court acknowledged that society has a legitimate interest in a fair prosecution and that an arbitrary denial of that right without a

showing of detriment to the defendant would be an abuse of discretion. (29 R.T 3923.) The court noted that economic consequences are not the province of the court, they are the province of the prosecution.

Nevertheless, in the *Borousk* case [*People v. Borousk* (1972) 24 Cal.App. 3d 147], the appellate court noted that a consideration was how the jurors voted. Here, the vast majority voted for death. The trial court also reviewed the penalty phase evidence observing that the most significant penalty phase mitigation was the lack of prior criminality. (29 R.T. 3924.) Nevertheless, there was substantial evidence upon which a jury could vote for death, although the court was not making a determination that death was the appropriate penalty. (29 R.T. 3925.)

Although the prosecution made no representation that there would be new or additional evidence presented at a fourth penalty phase trial, nevertheless, "beyond the obvious," there did not appear to be any additional prejudice to the defendant. The trial court concluded that legally, there was no justification to deny the People's request for a fourth penalty phase - although that trial might be the last one. (29 R.T. 3925.)

Applicable Law

The function of determining which persons are to be charged with what criminal offenses is that of the executive branch. But when the decision to prosecute has been made, the process which leads to acquittal or sentencing is fundamentally judicial in nature. (*People v. Geiger* (1984) 35 Cal.3d 510, 529-530.) Hence, Penal Code section

1385[35], has long been recognized as an essential tool to enable a trial court to properly individualize the treatment of the offender. (*People v. Tanner* (1979) 24 Cal.3d 514, 530 (conc. and dis. opn. of Tobriner, J.).) Furthermore, the authority to dismiss the whole includes the power to dismiss or strike out a part. (*People v. Burke* (1956) 47 Cal.2d 45, 51.) "Society receives maximum protection when the penalty, treatment, or disposition of the offender is tailored to the individual case. Only the trial judge has the knowledge, ability, and tools at hand to properly individualize the treatment of the offender. Subject always to legislative control and appellate review, trial courts should be afforded maximum leeway in fitting the punishment to the offender." (*People v. Williams* (1981) 30 Cal.3d 470, 482, citation and internal quotation marks omitted.) Dismissal in the "furtherance of justice" pursuant to section 1385 requires that the trial court consider not only the defendant's rights, background, and the nature of the present offenses, but also the interests of society and other individualized considerations. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530-531.)

Penal Code section 1385 "does not confer on defendant the privilege of moving to dismiss in the furtherance of justice, [although] a trial court may adopt defendant's suggestion that the matter be dismissed on the court's own motion." (*People v. Shaffer* (1960) 182 Cal.App.2d 39, 44.)

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[35] Section 1385, subdivision (a) provides in pertinent part, "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed."

Additionally, while a trial court has broad discretion to dismiss or not dismiss an action in furtherance of justice under Penal Code section 1385, that discretion is not absolute. As noted above, the court must weigh the constitutional rights of the defendant and the interests of society in determining whether dismissal is appropriate. Further, "when a dismissal occurs after trial, the court must consider the evidence indicative of guilt or innocence, the nature of the crime involved, the fact that the defendant has or has not been incarcerated in prison awaiting trial and the length of such incarceration, the possible harassment and burdens imposed on the defendant by a retrial, and the likelihood, if any, that additional evidence will be presented on a retrial." [citations omitted] (*Casey v. Superior Court* (1989) 207 Cal.App.3d 837, 843-844.) However, unarticulated reasons and personal views of what is in the interest or furtherance of justice are insufficient to justify dismissal under the statute. (*People v. Andrade* (1978) 86 Cal.App.3d 963, 976.)

Nevertheless, "[w]hen the balance falls clearly in favor of the defendant, a trial court not only may but should exercise the powers granted to him by the Legislature and grant a dismissal in the interests of justice." *(People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 505.) Indeed, in determining whether to dismiss a criminal action in furtherance of justice, if a trial judge is convinced that the only purpose to be served by a trial or a retrial would be harassment of the accused, the judge may dismiss the action notwithstanding sufficient evidence of guilt to sustain a conviction on appeal; his

discretion to dismiss is not limited to where such evidence is insufficient as a matter of law. (*Ibid.*)

Trial Judge Improperly Weighed the Relevant Factors When Allowing a Fourth Penalty Phase Trial.

The trial judge properly recognized that in determining whether he should permit a fourth penalty phase trial, he had to weigh several factors. He noted that those included the interest of the defendant against the interest of society. That is, the court had to weigh the nature of the offenses against possible undue harassment of the defendant and the likelihood of additional evidence being presented at a retrial. (29 R.T 3923.) The court discounted any economic consequences but noted that an additional consideration was how the jurors voted. Because the majority of the jurors here voted for death, the court considered that to be a factor well worthy of consideration. (29 R.T. 3924.) Moreover, although there was **no** representation that the prosecution's evidence would change upon a retrial, nevertheless, there was substantial evidence upon which a jury could vote for death. (29 R.T. 3925.) Finally, and perhaps most importantly, the trial court found no harm to the defendant through a retrial, "beyond the obvious." Therefore, there was no legal justification to deny the People's request for a fourth penalty phase. (29 R.T. 3925.)

While the trial court certainly considered those factors favoring a retrial to carry great weight, it did not give similar weight to the factors pertaining to the defendant's constitutional right to be free from undue harassment resulting from repeated or vexatious litigation.

Normally, undue harassment concerns arises in the context of federal Double Jeopardy[36] issues. (*Arizona v. Manypenny* (1981) 451 U.S. 232, 246 [68 L. Ed. 2d 58, 101 S. Ct. 1657].) While double jeopardy does not strictly apply to multiple penalty phase retrials after hung juries, the right to be free of undue harassment and vexatious litigation certainly applies under the due process guarantees of both the state and federal constitutions. (See *In re Krieger* (1969) 272 Cal.App. 2d 886, 890.)

In California, the Legislature has taken a fairly restrictive view of what constitutes undue harassment of a defendant. Penal Code section 1387[37] - a sister section to Penal Code section 1385 - is often

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[36] "Traditional" constitutional rights -- such as the privilege against self-incrimination, the right to counsel, double jeopardy, due process and equal protection -- also apply to the penalty phase. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 100 L.Ed.2d 284; *Estelle v. Smith* (1981) 451 U.S. 454; *Arizona v. Rumsey* (1984) 467 U.S. 203; *Ake v. Oklahoma* (1985) 470 U.S. 68; *Gardner v. Florida* (1977) 430 U.S. 349; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622-624; *Lesko v. Lehman* (3rd Cir. 1991) 925 F.2d 1527; *Presnell v. Zant* (11th Cir. 1992) 959 F.2d 1524; *Landry v. Lynaugh* (5th Cir. 1988) 844 F.2d 1117, 1121.)

[37] Penal Code section 1387 provides in pertinent part:
(a) An order terminating an action pursuant to this chapter, or Section 859b, 861, 871, or 995, is a bar to any other prosecution for the same offense if it is a felony or if it is a misdemeanor charged together with a felony and the action has been previously terminated pursuant to this chapter, or Section 859b, 861, 871, or 995, or if it is a misdemeanor not charged together with a felony, except in those felony cases, or those cases where a misdemeanor is charged with a felony, where subsequent to the dismissal of the felony or misdemeanor the judge or magistrate finds any of the following:

(1) That substantial new evidence has been discovered by the prosecution which would not have been known through the exercise of due diligence at, or prior to, the time of termination of the action.

referred to as the "two dismissal rule." It is a bar to prosecution of an action which has been twice terminated, whether at the request of the prosecution or through dismissal by a magistrate. (*Dunn v. Superior Court* (1984) 159 Cal.App.3d 1110.) Moreover, when an action has been dismissed twice on the merits, particularly for insufficiency of the evidence, further prosecution is absolutely barred. (*Ramos v. Superior Court* (1982) 32 Cal.3d 26, 35.)

More significantly for this case, however, is the purpose for the "two dismissal" rule. The basic policy behind the rule **is to prevent the prosecution from harassing defendants or forum shopping for a judge who would rule in favor of the prosecution.** (*Landrum v. Superior Court* (1981) 30 Cal.3d 1, 14.) Although Penal Code section 1387 is solely a creature of statute (*Marler v. Municipal Court for San Diego Judicial Dist.* (1980) 110 Cal.App.3d 155, 161-162), nevertheless, it appears in the same chapter as section 1385 [the section governing this case] , that is, chapter 8 of title 10 of the Penal Code entitled "Dismissal of the Action for Want of Prosecution or Otherwise." Therefore, because it is part of the same chapter and governs the same concepts, section 1387 appears to represent an overall Legislative determination that anything more than two failed prosecutions -particularly prosecutions based on the same evidence - amounts to undue prosecutorial harassment and possibly forum shopping.

Whether or not Penal Code section 1387 is directly applicable to

this case, the legislative determination that two dismissals is enough should carry great weight in a trial court's determination whether to allow multiple penalty phase retrials under Penal Code section 1385. This concern is particularly weighty where, as here, the trial court conceded that the prosecution would not [and in fact, did not] produce any substantially new evidence that would justify yet another penalty phase trial. (29 R.T. 3925.)

The failure to offer new evidence is particularly important in the weighing process. Under Penal Code section 1387, for example, if the prosecution cannot produce new evidence, further prosecution is completely barred. (*Ramos v. Superior Court, supra,* 32 Cal.3d at p. 35.) Further, it should be noted that the prosecution has to prove a crime using the beyond-a -reasonable- doubt standard.

By contrast, in the context of the penalty phase of a capital case, the prosecution has no burden of proof at all regarding the appropriate penalty. If the Legislature concluded that the prosecution was required to set the defendant free if it could not prove a crime after two attempts, what principled rationale could there be for allowing many more attempts to impose death rather than life imprisonment, especially when the prosecution failed to persuade a jury twice without even laboring under a burden of proof requirement?

Certainly the judge noted another factor as well; that although the juries were hung, more jurors voted for death. Nevertheless, while the manner in which the jurors voted may be a consideration, it is a consideration of very small weight. For example, suppose the

prosecution got a majority of jurors to vote for death, but five, or six, or twenty seven penalty phase retrials actually hung. Would the fact that a majority of jurors voted for death permit yet another retrial? Even the trial judge here conceded that a fourth penalty phase retrial might be the last. (29 R.T. 3925.) On what principled basis, however, could the trial court make a distinction between whether three or four or twenty seven penalty phase retrials was enough? Certainly as the *Andrade* court pointed out, personal views of what is in the interest or furtherance of justice are insufficient to justify dismissal under Penal Code section 1385. (*People v. Andrade, supra,* 86 Cal App 3d at p. 976.) Therefore, if juror voting patterns were a significant consideration, as long as the prosecution could persuade more jurors to vote for death than not -even though all penalty phase trials hung- it could successfully ask for yet another penalty phase trial. Obviously, however, at some point the trial court would abuse its discretion in allowing continual retrials.

Thus, the seminal question is the one specifically asked by the defense, "[a]t what point do we decide we are not going to try this case forever?" (29 R.T 3916.) The appropriate response is that unless the prosecution can find some extraordinary reason to ask for a fourth penalty phase trial, two mistrials is enough.

Here, the prosecution did not offer an extraordinary reason for yet another penalty phase trial. Instead, it argued that the justification for a fourth penalty phase trial was that a sentence of life without parole would cheapen the value of the death penalty that the voters

indicated they wanted. (29 R.T. 3919.)[38] It should be noted, however, that under Penal Code section 1387, the Legisalture has determined that if there is a violation of the "two dismissal rule" the remedy is to release the defendant. (See *In re Krieger, supra,* 272 Cal. App. 2d at p. 890 ["We agree with the municipal court judge that release of the petitioner may not be in the immediate best interests of society, but in light of *In re Bevill* (1968) 68 Cal.2d 854 and section 1387 of the Penal Code, denial of the writ [asking to prohibit further prosecution] would violate due process of law guaranteed by the Fourteenth Amendment of the federal Constitution and article I, section 13, of the state Constitution."].)

Here by contrast, even if the trial court refused a fourth penalty phase trial, appellant would remain in prison for life without the possibility of parole. Thus, the public would be protected regardless of whether the court refused a fourth penalty phase trial. Therefore, since the Legislature indicated in Penal Code section 1387 that it was perfectly willing to release a criminal defendant back into society rather than subject him to undue prosecution harassment or forum shopping, it is hard to make a plausible argument that life without

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[38] The prosecutor also asserted that the defendant might not behave himself in jail (29 R.T. 3919), perhaps referring to the contraband found in the defendant's cell. On that matter, however, the argument is patently frivolous. If jurors could not agree to a death sentence based on three homicides, it is hardly likely that they would have done so based on a jail infraction that was so minor that even the jailers did not pursue it and discarded the evidence. Indeed, when the contraband evidence actually was presented in the third penalty phase trial (28 R.T.3726-3736), and the jury specifically asked how to deal with it (28 R.T. 3871), the jury still hung. (28 R.T. 3893.)

parole would somehow impose a greater burden on society if a fourth penalty phase trial was denied. Therefore, compared to appellant's state and federal due process guarantees to be free of vexatious and harassing repeated litigation, the prosecution's justification concerning cheapening the value of the death penalty amounts to little more than rhetorical flourish.

There is however, another significant consideration at work in this case. Absent an extraordinary reason, the prosecution's request for a fourth penalty phase trial was simply an exercise in forum shopping; hoping that a different death qualified jury would give it the verdict it sought. Indeed, in his argument to the trial judge, the prosecutor specifically stated that had he been better at picking a jury, it would not have hung. He hoped to remedy that problem when picking a jury for the fourth penalty phase. (29 R.T. 3922.) A more clear assertion of forum shopping for a more prosecution oriented jury could scarcely be imagined. "[T]he law will not permit harassment of a defendant through repeated prosecutions for the same offense by presenting the same facts over again in different proceedings." (*People v. Podesto* (1976) 62 Cal.App.3d 708, 721.) Indeed, our sister states have addressed the problem more directly. In *State v. Morgan* (Utah 2001) 34 P.3d 767, 771, the court observed: "'fundamental fairness,' the touchstone of due process,' precludes, without limitation, a prosecutor from seeking an unfair advantage over a defendant through forum shopping... ."]; *See also, Stockwell v. State* (Idaho 1977) 573 P.2d 116, 125 [dismissal and refiling of criminal complaints by the

prosecutor done for the purpose of forum shopping may rise to the level of due process violation].)

More importantly, the trial judge's ruling was not a principled exercise of discretion. As explained above, juror voting patterns are matters of little consequence in determining whether to allow more than two penalty phase hearings. The fact that the trial court also concluded that there was sufficient evidence to support a death verdict was similarly unavailing. As this court observed decades ago in *People v. Superior Court (Howard), supra,* 69 Cal.2d at p. 505, if a trial judge is convinced that the only purpose to be served by a trial or a retrial would be harassment of the accused, the judge may dismiss the action notwithstanding sufficient evidence of guilt. Thus, the trial court's observation that there was sufficient evidence to support a death verdict is apropos of nothing. Indeed, if there was no evidence supporting a death verdict, the prosecution would be precluded from having a penalty phase trial at all. Nowhere in the trial court's ruling did it ever set forth a reason why allowing a fourth penalty phase trial would amount to anything more than harassment of appellant or prosecutorial forum shopping for a more favorable jury.

There is, however, a more troubling aspect of the trial court's ruling. When announcing its decision, the trial court asserted that because of the factors it cited, legally, it could not deny the prosecution's request for a fourth penalty phase. (29 R.T. 3925.) This assertion betrays a fundamental misunderstanding of the scope of the trial court's discretion on this issue. While the trial court has to treat

the parties equally (*People v. Andrade, supra*, 86 Cal App 3d at p. 976), it certainly had the discretion to rule in favor of the defense, particularly on the factors present here. As appellant explained above, the trial court could have denied the request for a fourth penalty phase despite its belief that there was evidence to support a death verdict. (See *People v. Superior Court (Howard), supra,* 69 Cal.2d at p. 505.)

There was nothing in the factors presented by the prosecution that legally bound the trial court to rule in its favor. Moreover, as the United States Supreme Court observed in an analogous situation; "It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law. [Citations]" (*Schlup v. Delo* (1995) 513 U.S. 298, 333 [115 S.Ct. 851, 130 L.Ed.2d 808] (Conc. opn of O'Connor J.)

Therefore, because the trial court did not understand the extent of its discretion; because it did not properly exercise its discretion in balancing the factors favoring dismissal in any event and because the record reveals that the primary purpose behind the prosecution's request for a forth penalty phase trial was simply forum shopping in violation of appellant's state and federal due process rights, the trial court erred in allowing a fourth penalty phase trial. This court must set aside appellant's death verdict and, at the very least, reduce the penalty to life without parole.

VII.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT'S FAMILY TO COMMENT ON HOW A DEATH VERDICT WOULD AFFECT THEM

Introduction

This case presented the somewhat unusual situation where the decedents' family was also the defendant's family. Here the defendant's family did not want him put to death. Nevertheless, when the defendant tried to present that testimony during the penalty phase portion of the trial, the trial court refused. The trial court reasoned that under state law, the decedents' family was precluded from offering an opinion on the ultimate punishment or how the defendant's death would affect them.

Such testimony was admissible for two reasons. First, it was proper mitigation evidence because it was evidence bearing on appellant's character. Second it was admissible as "execution-impact" evidence to counter the state's "victim-impact" evidence.

Moreover, since the previous penalty phase jury heard similar evidence and deadlocked, death was anything but a foregone conclusion on the facts of this case. Had this jury been allowed to hear that the decedents' family wanted it to spare appellant's life, the result likely would have been different.

Factual Background

Prior to trial, the defense filed a written motion to preclude the

prosecution from seeking the death penalty. (1 C.T. 294 et seq.) The defense argued that since appellant had been an excellent citizen, this incident was clearly an aberration. The entire family was close and none of his relatives had any inkling that this event was about to occur. Moreover, the closest relatives of appellant and his family had written to the prosecution asking that the death penalty not be imposed in this case. (1 C.T. 296-297.) Individualized consideration of his circumstances under the Eighth Amendment, required that the death penalty not be imposed. The death penalty would constitute cruel and unusual punishment under the circumstances presented here. (1 C.T. 297-301.) Attached to that motion were copies of the letters to the prosecution from those defendant's relatives who opposed the imposition of the death penalty in this case. (1 C.T. 303-309.)

When the in limine motion was initially argued, the defense pointed out that since appellant's family did not want the death penalty, the District Attorney was unlikely to get it. Moreover, eliminating the death penalty option would save a lot of time during voir dire. (1 R.T. 34-35) The trial court ruled that the motion was premature at this point, and that appellant's family members would be able to tell the jury their wishes. (1 R.T. 36.) Appellant's relatives did not testify about the ultimate penalty at the first penalty phase trial.

Prior to the second penalty phase trial, the prosecution filed a written motion in limine to argue Penal Code section 190.2 "factor K" evidence. Part of that motion was a request to prohibit appellant's relatives from testifying that they did not want the jury to impose a

death sentence. (3 C.T. 951-954) . The defense filed its opposition. (3 C.T. 986-991.)

The argument on the motion began with the trial court noting that it read a number of cases on the question of whether the decedents' relatives could testify on the ultimate punishment it wished the jury to impose. (12 R.T. 249-253.) The court concluded that the resolution of that issue was not entirely clear, but it appeared that the witnesses should not be allowed to testify on that ultimate issue. (12 R,T, 253-254.) The prosecutor concurred. He noted that allowing witnesses to ask for the death penalty was totally improper. Moreover, although the witnesses could say almost anything they wanted about appellant, their opinion on the penalty was irrelevant under factor K because that evidence did not tell the jury anything about appellant. (12 R.T. 254-256.)

Defense counsel argued that under the unique circumstances of this case where the decedents' family was also appellant's family, if the defense put on the family members without allowing them to speak to the ultimate issue the jury could easily infer that they wanted death - which was obviously not what the family wanted. Moreover, since the witnesses would also testify about their relationship with appellant and his immediate family, that information would reflect on appellant's character. Therefore, an opinion on the ultimate issue did not invade the province of the jury. (12 R.T. 257-259.)

The court remained unconvinced. (12 R.T. 260-261.)

Defense counsel then reiterated that without the request for life

imprisonment instead of death, the jurors would think that while the family members might have good things to say about appellant, nevertheless, they might well agree with the prosecution's view that death is the appropriate punishment. Certainly that was not the situation here. (12 R.T. 261-262.)

After further argument on these same points, the trial court decided to take the issue under advisement. (12 R.T. 269-271.)

Prior to seating the jury, the defense raised the issue again. (15 R.T. 188-1096.) The court tentatively ruled that the family members would be permitted to testify about what they thought of appellant but they would not be allowed to testify about the penalty they thought should be imposed. (15 R.T. 1097.) The following morning, the court rendered its formal ruling. The court told the parties that opinions on the ultimate punishment are not admissible under "factor K" since they do not go to the circumstances of the crime or the character of appellant. Further, the Due Process clause of the Constitution does not permit the defendant to bring in any evidence that he believes might make the jury less likely to return a death verdict. (16 R.T. 1099-1102.)

At the fourth penalty phase trial, after new defense counsel as well as a new trial judge were substituted into the case, the prosecution filed a written in limine motion to preclude the defense from having its witnesses offer an opinion on the ultimate punishment or to testify about how the defendant's death would affect them. (6 CT 1872-1888.) At the hearing on the motion, the prosecution argued

that during the third penalty phase trial [which ended in a hung jury], the defense witnesses testified to the manner in which appellant's death would affect them. This testimony was effectively evidence on the ultimate issue of the appropriate punishment. (34 R.T 4924-4928.)

The court noted that the parties agreed that they would abide by the rulings of the prior judge in this case and under those rulings appellant's family members could not offer an opinion on the ultimate punishment. If the defense witnesses ventured into that area, an admonition would be required. Further, the court assumed that the defense instructed its witnesses not to offer an opinion on the ultimate punishment. (34 R.T. 4929.) The defense replied that it had. (34 R.T. 4929-4930.) Nevertheless, the defense argued that the evidence here amounted to victim impact evidence. (34 R.T. 4931.) The prosecution objected to that characterization and reiterated that some defense witness testimony was actually an opinion on the ultimate penalty. (34 R.T. 4930-4932.)

The trial court responded that the answers given in the prior penalty phase trial actually were not responsive to the defense questions. Therefore, if the prosecution wanted to prevent that sort of thing from coming into evidence, it had to make an objection and request an admonition. (34 R.T. 4932-4933.)

During the final penalty phase trial, none of appellant's family members offered an opinion on the ultimate punishment to be awarded. Moreover, Ms. Prindiville was limited to testifying only that the rest of the family was behind her one hundred percent in their

desire to be able to maintain a relationship with appellant. (34 R.T. 5067.) Joanne Irene, appellant's first cousin once removed, was also limited in her testimony. She was confined to a concurrence with Ms. Prindiville that the family continued to support appellant and that they wished to maintain a relationship with him. (34 R.T. 5074-5075.)

Error to Exclude Defense Witness Testimony on the Effect of the Appellant's Death on his Family.

Mitigation Evidence

The essence of the prosecution's argument and the crux of the trial judge's ruling is that evidence concerning the impact of the execution of the defendant on his family is irrelevant. That is, it does not inform the jury about the defendant's character nor does it deal with the circumstances of the offense, both requirements under "factor K." Because it is irrelevant evidence, it must be excluded.

The judge's ruling, however, ignores the fact that the evidence is admissible as mitigation. The Eighth and Fourteenth Amendments require that jurors must be allowed to consider any aspect of a defendant's character that the defendant proffers in the penalty phase as a basis for a sentence less than death. (*Mills v. Maryland* (1988) 486 U.S. 367, 373; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 121.) As well, the jury must be allowed to consider any sympathy or pity for the defendant raised by the evidence. (*Lockett v. Ohio* (1978) 438 U.S. 586; *Woodson v. North Carolina* (1976) 428 U.S. 280, 303-305; *People v. Benavides* (2005) 35 Cal.4th 69, 108; *People v. Easley* (1983) 34 Cal.3d 858, 857-878; *Weeks v. Angelone* (2000) 528 U.S.

225, 232 ["the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence ...."].)

In this regard, defendants must be allowed to offer evidence of their family members' love, since such evidence constitutes indirect evidence of the defendant's character. (*People v. Ochoa* (1998) 19 Cal.4th 353, 456.) Similarly, testimony from family members regarding the impact of the defendant's execution on them is admissible when it illuminates some positive quality of the defendant's background or character. (*Ibid.*; see also *People v. Smith* (2005) 35 Cal.4th 334, 367 [opinion of defendant's former tutor that he should not be executed was admissible as evidence of defendant's character].) Indeed, this court has held that testimony from somebody "with whom defendant assertedly had a significant relationship, that defendant deserves to live, is proper mitigating evidence as 'indirect evidence of the defendant's character. '" (*People v. Ervin* (2000) 22 Ca1.4th 48, 102; *People v. Heishman, supra,* 45 Cal.3d 147, 194 [the defense should have been allowed to ask the defendant's ex-wife whether she thought he should get the death penalty].) see also *People v. Mickle* (1991) 54 Ca1.3d 140, 194 [court should have allowed friend who viewed the defendant as a grandson to testify that he thought the defendant should live];

Additionally, the ABA Guidelines clearly direct counsel to seek out and present "Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones," ABA

Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.11F(4). These Guidelines provide a valuable legal standard for judging counsel's duties. See *Williams v. Taylor* (2000) 529 U.S. 362, 396; *Wiggins v. Smith, supra,* 539 U.S. 510, 522, 524; *Rompilla v. Beard* (2005) 545 U.S. 374, 386, using ABA Guidelines as norms for evaluating counsel's performance in death penalty cases. These standards make clear that the trial court erred when it excluded this evidence.

Evidence of the impact of Mr. Charles' execution would have on them was thus indirect evidence of his character -- for it necessarily concerned his relationship with his relatives and their love for him. This evidence also illuminated Mr. Charles' character, and also would have provided facts from which the jury was entitled to find sympathy and pity for him. As set forth above, the Eighth Amendment requires that jurors in penalty phase must be allowed to consider this kind of evidence. Its exclusion was therefore error.

Execution Impact Evidence

Additionally, however, aside from the admission of this evidence as evidence of the defendant's character, this evidence should have been admitted on its own as "execution impact" mitigation evidence. This is, evidence necessary to fairly balance any "victim impact" aggravation evidence presented by the state.

Under California and federal Constitutional law "victim impact" evidence is admissible aggravation evidence. "[E]vidence showing the direct impact of the defendant's acts on the victim's family

and friends is not barred by state or federal law." *(People v. Benavides, supra*, 35 Cal.4th at p. 108, citing *People v. Pollock* (2004) 32 Cal.4th 1153, 1180.) Indeed, admission of such "victim impact" evidence - the impact of the crime on the victim's family - at the penalty phase is permissible under the Eighth Amendment. (*Payne v. Tennessee* (1991) 501 U.S. 808.) However, evidence of the effect of the crime and potential execution on the defendant's family is currently inadmissible under California law. (*People v. Ochoa, supra,* 19 Cal.4th at 456 ["What is ultimately relevant is a defendant's background and character- not the distress of his or her family."].)

As set forth below, it was error for the trial court to exclude this evidence on the ground that it was inadmissible execution impact evidence. The exclusion was error on its own (in other words, regardless of whether the state introduced "victim impact" evidence at all), and was also error when coupled with admission of the state's victim impact evidence.

(a) *Because execution impact evidence is actually relevant mitigating evidence under United States Supreme Court precedents, it therefore should be admissible.*

In 1991, the United States Supreme Court overruled two of its previous decisions - *Booth v. Marvland* (1987) 482 U.S. 496, and *South Carolina v. Gathers* (1989) 490 U.S. 805 - to hold that "victim impact" evidence was admissible in capital sentencing proceedings. (*Payne v. Tennessee, supra*, 501 U.S. at pp. 817-830.) Before *Payne*, the Court had held that "victim impact" evidence was inadmissible, because it did not in general reflect upon a defendant's

"blameworthiness." (*Booth* at p. 505.) Nevertheless, the Court decided that since assessment of the harm caused by a defendant had long been an important factor in determining punishment, "victim impact" evidence should also be admissible. That is, victim impact evidence was simply another method of informing the sentencer of the harm. (*Payne* at pp.817-827.)

Contrary to this Court's holding in *People v. Ochoa, supra*, it is clear under *Payne* and the United States Supreme Court's other established precedents that Mr. Charles' execution impact evidence was admissible as well. The *Payne* decision explained that it was necessary to reverse the holdings in *Booth* and *Simmons* in order to tip the "unfairly weighted ... scales in a capital trial ...." back toward the prosecution. (*Payne v. Tennessee, supra*, 501 U.S. at p. 822.) The *Payne* decision recognized that "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances ...." (*Ibid.*; emphasis added.) Thus, *Payne* held it was only fair that the prosecution be allowed to introduce penalty phase evidence of the victim's life and the loss to the victim's family and society resulting from the defendant's homicide. (*Ibid.*)

The Court's characterization - of tipping-the-scales back toward the prosecution necessarily incorporates a recognition that the defense is, and has been, able to introduce execution impact evidence. Otherwise, what would be causing the imbalance that the *Payne* Court felt compelled to correct by allowing the prosecution to introduce

"victim impact" evidence?

Certainly the Court's earlier holdings support this inclusion, as well. For instance, "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty." (*McClesky v. Kemp* (1987) 481 U.S. 279, 305-306.) Sympathy is one of those relevant circumstances, and so is a defendant's capacity for relationship with others. (*Lockett v. Ohio, supra*, 438 U.S. at p. 601; *Woodson v. North Carolina, supra*, 428 u.S. at p. 304.)

Execution impact evidence is a fact from which the jury is able to find those circumstances. (See also *Richmond v. Lewis* (1992) 506 U.S. 40, 43 [noting Arizona's practice of accepting evidence of the effect of the execution upon defendant's family in mitigation of death]; *Cardona v. State* (Fla. 1994) 641 So.2d 361, 365, cert. denied, 513 U.S. 1160 (1995) [while not allowing such evidence from children's guardian ad litem, it would allow children themselves to testify and the defense to argue that it would be in the children's best interest if their father was not executed]; *State v. Benn* (Wash. 1993) (en banc) 845 P.2d 289, 316, cert. denied sub nom 510 U.S. 944 (1993) [recognizing as relevant evidence the loss suffered by family if defendant is executed].)

Moreover, as explained above, if the prosecution is allowed to introduce "victim impact" evidence as a way of "informing the sentencing authority about the specific harm caused by the crime in question" *(Payne v. Tennessee, supra*, 50 I U.S. at p. 825), the defense

must necessarily be allowed to introduce evidence of the execution's impact as a way of informing the sentencing authority about the defendant's character. In a dissent presaging *Payne's* holding, Justice White recognized that fairness required that the state be able to introduce evidence that "the victim is an individual whose death represents a unique loss to society and in particular to his family." (*Booth v. Maryland, supra*, 482 U.S. at p. 517 (White, J., dissenting).) This was true because the prosecution "has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in ... [regarding how] the murderer should be considered as an individual ...." (*Ibid.*; emphasis added.) Thus, the Court's holdings regarding victim impact evidence carry within them an implicit recognition that execution impact evidence is also necessarily admissible.

(b) California state legislative intent also mandates admission of evidence regarding the impact Mr. Charles execution would have on his family.

Appellant recognizes that in *People v. Ochoa, supra*, 19 Cal.4th 353,454-456, this Court held that neither the Due Process Clauses of the federal and state constitutions, nor the Eighth Amendment, required a capital sentencer to consider in mitigation the impact of an execution on the defendant's family. (Accord *People v. Smithey* (1999) 20 Cal.4th 936, 999-1000 [holding there was no Eighth Amendment violation in telling the jury that sympathy for the defendant's family could not be considered]; *People v. Bemore* (2000) 22 Cal.4th 809, 855-856 [same].)

But as this Court has recently and unanimously noted, cases are not authority for propositions neither presented nor considered. (See People v. Williams (2004)34 Cal.4th 397 at p. 405.) It is clear from both *Ochoa* and *Bemore* that this Court was not presented with, nor did it resolve, the statutory construction argument that Mr. Charles presents below. As set forth below, statutory construction principles dictate that Mr. Charles' execution impact evidence was admissible.

The current law fixing the penalty for first degree murder - Penal Code section 190.3 - was enacted by voter initiative in November 1978. Once a defendant has been convicted of special circumstances murder, section 190.3 provides for a separate penalty phase to determine the appropriate penalty: life without parole, or death. The section also describes the admissible evidence at penalty-phase: "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition."

Thus, under the plain terms of this statute, the parties are

permitted to introduce "any matter relevant" to three distinct areas: (I) aggravation; (2) mitigation; and (3) sentence. Under the express language of section 190.3, this "includ[es] but [is] not limited to" a number of areas, including "the defendant's character, background, history, mental condition and physical condition." Basic principles of statutory construction compel a conclusion that execution impact testimony is admissible under this statute.

The primary goal of statutory construction is to determine the legislative intent and therefore effectuate the purpose of the law. (*DuBois v. Workers' Comp. Appeals Board* (1993) 5 Cal.4th 382, 387.) This principle applies equally to statutes passed through the initiative process. (See, e.g., *People v. Jones* (1993) 5 Cal.4th 1142, 1146; *Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 538.) In determining the statutory intent, a court looks first to the statute's words. *(DuBois v. Workers' Comp. Appeals Board, supra*, 5 CaL4th 382, 387.) Where those words include terms with already-recognized meanings in the law, "the presumption is almost irresistible" that the terns have been used in the same way. (*In re Jeanice D.* (1980) 28 Cal.3d 210, 216; see also *Hoya v. Superior Court* (1977) 75 Cal.App.3d 122, 133.) This same principles applies where the statute arose through initiative. (*In re Jeanice D., supra,* 28 Cal.3d 210, 216.)

Section 190.3 permits defendants to introduce "any matter relevant to ... mitigation ...." The term "mitigation" as used in the 1978 statute was not new. Prior to the 1978 law, the same term had been used repeatedly in sentencing statutes and court rules governing

sentencing. For example, Penal Code section 1203, subdivision (b) provided that where a person had been convicted of a felony, the probation officer would prepare a report to "be considered either in aggravation or mitigation." Subdivision (c)(3) of that section provided that grant of probation was appropriate if the trial court found "circumstances in mitigation ...." Similarly, Penal Code section 1170, subdivision (b)which governed the trial court's selection of sentence between upper, middle, and lower terms of imprisonment if probation was denied - provided for a middle term of imprisonment unless there were circumstances in "aggravation or mitigation." There is little dispute as to the meaning of the word "mitigation" in these contexts. At the time the electorate enacted section 190.3 in 1978, both section 1203 and 1170, subdivision (b) had court rules to implement them. Rule of Court 414 [which was in effect at the time of appellant's trial] set forth "criteria affecting probation" as related to aggravation and mitigation under section 1203. That rule provided that, in deciding whether circumstances in mitigation existed that warranted probation, the court was required to consider factors including the impact of the sentence "on the defendant and his or her dependents." Indeed, courts have long relied on this mitigating factor in determining an appropriate sentence. (See, e.g., *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 834 and fn. 15.)

Similarly, Rules of Court 421 and 423 [which were also in effect at the time of appellant's trial] set forth aggravating and mitigating factors designed to implement inquiry into aggravation and

mitigation under section 1170. The advisory committee note to Rule 421 made clear that "the scope of 'circumstances in aggravation or mitigation' under section 1170(b) is ... coextensive with the scope of inquiry under the similar phrase in section 1203."

In describing the type of evidence admissible at penalty-phase, the 1978 electorate used the very same term that was used in sections 1203 and 1170. As noted above, section 190.3 permits the admission of any evidence at the sentencing phase of a capital trial regarding "any matter relevant to ... mitigation ...." Under the statutory construction principles set forth above, mitigation in section 190.3 should have the same meaning as the identical term had in sections 1203 and 1170. Indeed, at least one court has explicitly recognized that "the mitigating and aggravating circumstances set forth in the determinate sentencing guidelines are also proper criteria" in selecting a sentence under section 190.3 (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1149.) Because the term "mitigation" in sections 1203 and 1170 includes the impact of a sentence "on the defendant and his or her dependents," it should be given the same meaning in section 190.3.

Indeed, this Court has itself construed section 190.3 in this exact way. (See, e.g., *People v. Weaver* (2001) 26 Cal.4th 876, 986 [jury told it could consider in mitigation "sympathy or pity for the defendant or his family"]; *People v. Osband* (1996) 13 Cal.4th 622, 705 [jury told it could consider in mitigation "the likely effect of a death sentence on [defendant's] family, loved ones and friends"];

People v: Mickle, supra, 54 Cal.3d 140, 194 [trial court properly admitted evidence of impact of execution on defendant's family and friends].) Mr. Charles was entitled to that same statutory construction.

Even if the term "mitigation" did not have a well-recognized meaning at the time section 190.3 was passed by the electorate, or even if this Court were to hold that the electorate intended "mitigation" in section 190.3 to mean something other than "mitigation" as used in sections 1203 and 1170, exclusion of this evidence from the penalty-phase here was error because by its very terms, section 190.3 broadly permits evidence "as to any matter relevant to aggravation, mitigation and sentence . ..."
(Emphasis added.)

In determining what the electorate intended by authorizing evidence "as to any matter relevant to ... sentence," it is important that the electorate must have intended something other than evidence relating to "aggravation" or "mitigation." "Otherwise, the clause would be mere surplusage and serve no purpose, in direct contravention of our rules of statutory construction." *(State Farm Mut. Auto Ins. Co. V. Garamendi* (2004) 32 Cal.4th 1029, 1046.) The breadth of the statutory language is just as important. Section 190.3 does not purport to define the type of evidence relevant to the sentence narrowly. Instead, the statute broadly permits "any matter" relevant to the sentence.

Assuming arguendo that the phrase "any matter relevant to ...

mitigation" was not intended to incorporate the meaning of the phrase as already-established by other Penal Code sections, the phrase "any matter relevant to ... sentence" must surely incorporate that other evidence. After all, as the case law, statutes and court rules prior to 1978 recognized, the impact of a sentence on the defendant's family was not only relevant to the sentence, but was a factor which the court rules themselves specifically required the trial courts to consider. (See Rule 414.) Moreover, section 190.3 goes on to state that the evidence admissible at penalty-phase is "not limited to ... the defendant's character, background [and] history."

Finally, this Court consistently recognizes that when a criminal statute is susceptible of two reasonable interpretations, the reviewing court should ordinarily adopt the interpretation more favorable to the defendant. (See, e.g., *People v. Garcia* (1999) 21 Cal.4th 1, 10; *People v. Gardeley* (1996) 14 Cal.4th 605, 622.) Moreover, interpreting section 190.3 as allowing admission of execution impact evidence would also avoid a construction of the statute raising a serious constitutional question: affording defendants not facing execution consideration of sentencing factors that defendants facing execution are denied. This approach is squarely contrary to United States Supreme Court jurisprudence, which consistently recognizes that the protections afforded to capital defendants must be more - not less - rigorous than those provided to non-capital defendants, and this approach would therefore raise serious equal protection concerns as well. (See *Ake v. Oklahoma, supra,* 470 U.S. 687, 87; *Eddings v.*

Oklahoma, supra, 455 U.S. 104, I 17-118; *Lockett v. Ohio, supra,* 438 U.S. 586, 606-606.)

Additionally, however, under the unique circumstances of this case, the evidence was really victim-impact evidence, since the close family members of the decedents and the defendant were the same, the impact was the same: grief, loss, and impact on surviving family members would clearly be admissible under controlling precedent if offered by the state. (*Payne v. Tennessee, supra*, 501 U.S. at pp 814-15 (evidence of how 3-year-old child missed his murdered mother and sister and cried for them admissible); *State v. Gentry* (Wash. 1995) 888 P.2d 1105, 1134-35 (impact on victim's father of "effects of his young daughter's murder on his work, his emotions and his family" admissible under Payne).

Admissibility, however, cannot turn on the identity of the party offering the evidence. If grief and loss is relevant to the reasoned moral decision about whether the defendant should live or die when offered by the state – and it is under *Payne* (*Ibid.* at pp 838-839) – then those same victims' grief and loss must be relevant to the reasoned moral decision about whether the defendant should live or die when offered by the defense. It is "reasoned moral response," (*id.*), evidence no matter who offers it. It defies common sense to admit it when it weighs towards death, but not life.

Indeed, "[S]tate trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate a defendant's due process rights

under the Fourteenth Amendment. (*Wardius v. Oregon* (1973) 412 U.S. 470,473; see also *Washington v. Texas* (1967) 388 U.S. 14, J9 [due process violation where state rule allowed accomplice to testify for the state but not for the defendant]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295-298 [unconstitutional to bar defendant from impeaching his own witness although the government was free to impeach that witness].)

Prejudice

Evidence of family ties is so powerful that it can be outcome-determinative. (see e.g., *Mak v. Blodgett, supra,* 970 F.2d 614, 618-621 (ineffective for defense counsel to fail to present humanizing evidence of Mak's role in, and love from family, especially halting testimony of his mother regarding her love; requiring issuance of writ even in 13-person murder case).

Significantly, in this case, when the defense testimony concerning family impact was not as limited in the third penalty phase as it was in the fourth - the jury hung. The comparison between the testimony in the third and fourth penalty phase trials is instructive.

In the third penalty phase, Mrs. Prindiville testified not only that she wanted to maintain a relationship with appellant, but that killing appellant would not bring the rest of her family back and that she had no need for vengeance. (27 R.T. at p. 3585.) Further, on cross examination by the prosecution, she told the jurors that she did not believe capital punishment served as a deterrent. (27 R.T. 3587-3588.) On redirect, she testified that the family had suffered so much

already that losing appellant would make things even worse. (27 R.T. 3588-3589.)

Ms. Irene testified that she fully supported appellant. Moreover, given all the horror the family had gone through with the deaths of Daniel, Delores and Edward senior, appellant's death would not help. (27 R.T. 3598.)

This testimony was much broader that the testimony of the fourth penalty phase where both women were permitted to testify only that they wished to maintain a relationship with appellant. Moreover, since the restriction on the testimony of Mrs. Prindiville and Mrs. Irene in the fourth penalty phase was the one of the few substantive differences between the third and fourth penalty phase trials, that improper restriction was clearly one of the significant factors contributing to the death sentence in the final penalty phase trial.

For this reason, the improper restriction on the defense testimony in the fourth penalty phase affected the outcome and thus appellant's death sentence must be set aside.

VIII.

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

Introduction

CALJIC 8.88, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles and was misleading and vague in crucial respects. Whether considered singly or together, the flaws in that crucial instruction violated appellant's fundamental rights to due process (U.S. Const., 14th Amend.), to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and to a reliable penalty determination (U.S. Const., 8th & 14th Amends.), and require reversal of his sentence. (See, e.g., *Mills v. Maryland, supra,* 486 U.S. 367, 383-384.)

Appellant recognizes that this court has held that CALJIC 8.88 is an appropriate instruction. (See, e.g., *People v. Duncan* (1991) 53 Cal.3d 955.) Nevertheless, for the reasons set forth below, appellant urges the court to reconsider its prior decisions.

No Waiver

While it is true that counsel did not specifically object to CALJIC 8.88, objection is not necessarily required. As appellant

explained previously, California law clearly mandates that when an appellant's substantial rights are affected, an appellate court may consider an issue even if no objection was made at trial. (Penal Code section 1259; *People v. Croy, supra* 41 Cal.3d at p. 12, n. 6; *People v. Anderson, supra*, 26 Cal.App.4th 1241, 1249.)

Moreover, an instruction containing an incorrect statement of law is not susceptible to a claim of waiver and can always be challenged on appeal. (*Suman v. BMW of North America, supra,* 23 Cal.App.4th at p. 9; see also *Cummings v. County of Los Angeles, supra,* 56 Cal.2d at p. 264.) Both conditions are present in the instant case.

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

The sentence of CALJIC 8.88 that purported to guide the jurors' decision on which penalty to select told them they could vote for death if "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it [sic] warrants death instead of life without parole." (35 R.T. 5105.) Thus, the decision whether to impose death hinged on the words "so substantial," an impermissibly vague phrase which bestowed intolerably broad discretion on the jury. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

In short, there is nothing about the language of CALJIC 8.88 that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S.

420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222, 235-236.)

The Instruction Did Not Convey That The Central Determination Is Whether The Death Penalty Is Appropriate, Not Merely Authorized Under The Law

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra*, 428 U.S. 280,305; *People v. Edelbacher, supra,* 47 Cal.3d 983,1037.) Indeed, this Court has consistently held that it would mislead jurors to say that the deliberative process is merely a simple weighing of factors, in which the appropriateness of the chosen penalty should not be considered. (*People v. Brown* (1985) 40 Cal.3d 512, 541.) Jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances. (*People v. Milrzer* (1988) 45 Cal.3d 227, 256-257.)

Again, CALJIC 8.88 told the jurors they could "return a judgment of death [ifl . . . persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." In addition to infecting the deliberative process with ambiguity by using the term "so substantial," that instruction also failed to inform the jurors that the central inquiry was not whether death was "warranted," but rather whether it was appropriate.

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

Jurors decide whether death is "warranted" by finding that special circumstances authorize the death penalty in a particular case. Thus, just because death may be warranted or authorized does not mean it is appropriate.

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

In sum, the deliberative instruction violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty.

Further, this Court has assumed that the pattern instructions

adequately communicate to the jury that a death sentence is not appropriate for all defendants for whom a death penalty is warranted. This is not so. Instead, the evidence shows that a substantial minority of jurors who have been read the pattern instructions believe that they are required to sentence the defendant to death once they have found aggravation. (Bentele & Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 Brook. L.Rev. 101 1,1031-1041 (2001); Bowers, Steiner & Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction, America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Acker, Bohm, Lanier edits., 2003 (2nd Edit)) p. 440.)

Many jurors who have been instructed with the pattern instructions do not understand their duty and do not wait for evidence in the penalty phase about whether the death penalty is appropriate in light of all the additional mitigation and aggravation, but rather have decided at the end of the guilt and special circumstance phase that the sentence is death. (Bowers, Steiner & Antonio, supra, at p. 427 ["Many jurors appear not to wait for the penalty phase, and arguments regarding the appropriate punishment . . ."I.) Such jurors are deciding for death without having even been exposed to, much less considered, mitigating evidence. (*Id.* at p. 428.) Again, the judge's instructional omission denied appellant his rights to a reliable penalty determination, to a jury which deliberated with an accurate

understanding of its responsibility for the decision, and to full consideration of his mitigation evidence. (U.S. Const., 6th, 8th & 14th Amends.)

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

The instruction in question was also defective because it failed to inform the jurors, as this Court has held they must be informed, that neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital-sentencing jury must be clearly informed of the applicable standards, so it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700: "To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]" (*Id.* at pp. 727-728.)

Illinois, like California, does not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at 727.) Nonetheless, the district court in *Peters* held that the Illinois pattern

sentencing instructions were defective because they failed to apprise the jury that no such burden is imposed.

The instant instruction, taken from CALJIC 8.88, suffers from the same defect, with the result that appellant's jury was not properly guided on this crucial point in violation of the 8th Amendment.

The Instructional Deficiencies Violated State Law And The Federal Constitution

The instructional deficiencies discussed above unconstitutionally allowed appellant to be sentenced to death under vague, standardless and inaccurate instructions which violated California law and the federal constitution. The errors violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) which preclude arbitrary or capricious determination of death eligibility and require heightened reliability in the determination of both guilt and penalty before a sentence of death may be imposed. (See *Maynard v. Cartwright, supra,* 486 U.S. 356; *Beck v. Alabama, supra,* 447 U.S. 625; *Kyles v. Whitley* (1995) 514 U.S. 419; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Godfrey v. Georgia, supra,* 446 U.S. 420; *White v. Illinois* (1992) 502 U.S. 346, 363-64 [reliability required by due process]; *Donnelly v. DeChristoforo, supra,* 416 U.S. 637, 646 [same].)

Additionally, pursuant to well established California law "the trial court has both the duty and the discretion to control the conduct of the trial. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 346; Penal Code section 1044; see also section 1093(f) [power to instruct

jury]; section 1127 [same].) The judge's erroneous instruction violated the above state law rules as well as the substantive California Constitutional and statutory rights identified in this issue. These violations of appellant's state created rights abridged the Due Process Clause (14th Amendment) of the United States Constitution. *(Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

For the reasons set forth above, appellant's death sentence must be set aside.

IX.

THE UNCONSTITUTIONAL USE OF LETHAL INJECTION RENDERS APPELLANT'S DEATH SENTENCE ILLEGAL

Introduction

Appellant's sentence of death is illegal and unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution, because execution by lethal injection, the method by which the State of California plans to execute him, violates the prohibition of cruel and unusual punishment.

Claim Timely Made

In *People v. Boyer* (2006) 38 Cal.4th 412, 485, this court rejected a similar argument on the ground that the claim was premature. In *Cooper v. Rimmer* (9th Cir. 2004) 379 F.3d 1029, 1033, however, the Ninth Circuit denied relief because a similar claim was first made in federal court at the "eleventh hour." Thus, in order to properly preserve this claim for federal review, appellant must make it in this court at this time.

Lethal Injection is a Prohibited Method of Execution

The state of California plans to execute appellant by means of lethal injection. In 1992, California added as an alternative means of execution "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections." (Penal Code

section 3604.) As amended in 1992, Penal Code section 3604 provides that "[plersons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection." As amended, section 3604 further provides that "if either manner of execution . . . is held invalid, the punishment of death shall be imposed by the alternate means . . . ."

In 1996, the California Legislature amended Penal Code section 3604 to provide that "if a person under sentence of death does not choose either lethal gas or lethal injection . . ., the penalty of death shall be imposed by lethal injection."

On October 4, 1994, the United States District Court for the Northern District of California ruled in *Fierro v. Gomez* (N.D. Cal. 1994) 865 F.Supp. 1387 that the use of lethal gas is cruel and unusual punishment and thus violates the constitution. In 1996, the Ninth Circuit affirmed the district court's conclusions in *Fierro*, concluding that "execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments." (*Fierro v. Gomez* (9th Cir. 1996) 77 F.3d 301, 309.) The Ninth Circuit also permanently enjoined the state of California from administering lethal gas. (*Ibid.*) Accordingly, lethal injection is the only method of execution currently authorized in California.

The Constitution prohibits deliberate indifference to the known risks associated with a particular method of execution. (Cf. *Estelle v.*

Gamble (1976) 429 U.S. 97, 106.) There are a number of known risks associated with the lethal injection method of execution, and the State of California has failed to take adequate measures to ensure against those risks.

The Eighth Amendment safeguards nothing less than the dignity of man, and prohibits methods of execution that involve the unnecessary and wanton infliction of pain. Under *Trop v. Dulles* (1958) 356 U.S. 86, 100, the Eighth Amendment stands to safeguard "nothing less than the dignity of man." To comply with constitutional requirements, the State must minimize the risk of unnecessary pain and suffering by taking all feasible measures to reduce the risk of error associated with the administration of capital punishment. (*Glass v. Louisiana* (1985) 471 U.S. 1080, 1086; *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 709-7 11 (Reinhart, J., dissenting); see also, *Zant v. Stephens* (1985) 462 U.S. 862, 884-85 [state must minimize risks of mistakes in administering capital punishment]; *Eddings v. Oklahoma, supra,* 455 U.S. 104, 11 8 (O'Connor, J., concurring) [same].)

The Eighth Amendment prohibits methods of execution that involve the "unnecessary and wanton infliction of pain." (*Gregg v. Georgia* (1976) 428 U.S. 153 at 173.) It is virtually impossible to develop a method of execution by lethal injection that will work flawlessly in all persons given the various individual factors which have to be accessed in each case. Appellant should not be subjected to experimentation by the State in its attempt to figure out how best to kill a human being.

California's use of lethal injection to execute prisoners sentenced to death unnecessarily risks extreme pain and inhumane suffering. (See *Morales v. Tilton* (ND. Cal. 2006) 465 F. Supp. 2d 972, 979-981. [as currently applied, state protocol for administering lethal injection does not meet Eighth Amendment standards] .) Such use constitutes cruel and unusual punishment, offends contemporary standards of human decency, and violates the Eighth Amendment of the United States Constitution.

The recent United States Supreme Court case of *Baze v. Rees* (U.S. Apr. 16, 2008) 2008 U.S. LEXIS 3476 does not change that result. In *Baze*, a plurality of the High Court concluded that lethal injection per se did not violate the Eighth Amendment. Nevertheless, the Court left open the possibility that as applied, the lethal injection process could be so fraught with problems that its application in a specific case could violate the Eighth Amendment. Essentially, however, that is the holding on *Morales v. Tilton*, *supra.* That is, the *Morales* decision concluded that as used in California, the lethal injection process is so lacking in procedural safeguards and so deficient in its medical application that it violates Eighth Amendment standards.

Because that problem continues to exist in the California lethal injection process, and because the state should not be allowed to simply experiment on the defendant as a means of developing an alternate or more appropriate lethal injection procedure, appellant's sentence to death should be reduced to life without parole.

X.

BECAUSE DEATH SERVES NO LEGITIMATE PENOLOGICAL OR SOCIETAL PURPOSE AFTER THE EXTRAORDINARY DELAY BETWEEN SENTENCE AND EXECUTION, AND BECAUSE OF THE RESULTING EXTENSIVE SUFFERING OF THE INMATE, INTERNATIONALLY RECOGNIZED AS THE "DEATH ROW PHENOMENON," BOTH LARGELY THE RESULT OF INADEQUATE RESOURCES PROVIDED BY THE STATE TO REVIEW DEATH VERDICTS AND THE COMPLEXITY OF REVIEW MANDATED BY PAST ABUSES, IMPOSITION OF THE DEATH PENALTY IS A VIOLATION OF THE NORMS OF A CIVILIZED SOCIETY AND THUS OF THE EIGHTH AND FOURTEENTH AMENDMENT

In *Lackey v. Texas* (1995) 514 U.S. 1045, in a memorandum respecting the denial of certiorari, Justice Stevens addressed petitioner Lackey's argument that executing a prisoner who has already spent seventeen years on death row would violate the Eighth Amendment's prohibition against cruel and unusual punishment. Justice Stevens stated that "though novel, petitioner's claim is not without foundation," and "petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from further study" by state and federal courts. (*Ibid.*) Justice Breyer noted his agreement, "the issue is an important

undecided one." (*Ibid.*; accord, *Ceja v. Stewart* (9th Cir. 1998) 134 F.3d 1368, 1369 (Fletcher, J., dissenting).)

In 1999, Justice Breyer again agreed with Justice Stevens's analysis in another dissent from the denial of certiorari. (*Knight v. Florida* (1999) 528 U.S. 990 [120 S.Ct. 459, 145 L.Ed.2d 370].) In a case where the petitioner had been on Death Row for 20 years, Justice Breyer argued that "Where a delay, measured in decades, reflects the State's own failure to comply with the Constitution's demands, the claim that time has rendered the execution inhuman is a particularly strong one." (*Id.*, at p. 8, slip opn., 120 S.Ct. 459, p. 8.) Justice Breyer noted that as of 1997, there were 125 people on Death Row in the United States who had been convicted during or prior to 1980. (*Id.*, at p. 21, slip opn.)

It should be noted as well that although California alone accounts for almost 20% of all death judgments rendered in the United States, it accounts for only 1% of the actual executions. (Tempest, Death Row Often Means a Long Life; California Condemns Many Murderers, but Few Are Ever Executed, L. A. Times, Mar. 6, 2006, p. B1.) In his January 10, 2008, testimony before the California Commission on the Fair Administration of Justice in Sacramento, Chief Justice George even admitted that the post conviction process in Californa capital cases was currently "dysfunctional." The California Supreme Court could not realistically hope to catch up with the backlog of unresolved capital post conviction cases unless the review process was significantly altered. Indeed, absent significant change,

increasing delay in the already lengthy post conviction review process is inevitable. In that regard, the defense notes that even after Chief Justice George's comments to the California Commission on the Fair Administration of Justice, he withdrew his proposal to alter the California Constitution to speed up the capital case post conviction review process because it was infeasible given the current budget climate. (See State of the Judiciary Address Delivered to a Joint Session of the California Legislature March 25, 2008.)

Appellant recognizes that this court has repeatedly rejected this issue. (See, e.g., *People v. Ochoa* (2001) 26 Cal.4th 398, 462-463.) Appellant respectfully requests, however, that this court revisit this important issue and hold that the extraordinary delay in this and other cases renders the imposition of the death penalty cruel and unusual within the meaning of the Eighth Amendment to the United States Constitution, as well as the Due Process Clauses of the Fifth and Fourteenth Amendments.

The "death row phenomenon" is the term used to describe the cumulative circumstances--including both the physical conditions and the emotional and mental anguish--that a death row inmate necessarily faces over a period of years as part of his daily existence there. This aspect of the sentence of death is recognized by international norms as affecting whether the sentence in a particular case constitutes torture or inhuman or degrading punishment. (*Soering v. United Kingdom* (1989) 161 Eur. Ct. H.R. (ser. A), at p. 34 [reprinted in 11 Eur. Hum. Rts. Rep. 439] [hereinafter Soering]; accord, *Lackey v. Texas, supra,*

514 U.S. 1045 (memorandum of Justice Stevens respecting the denial of certiorari).) "Combine a hospital ward for the terminally ill, an institution for the criminally insane, and an ultramaximum security wing in a penitentiary, and one begins to approach the horror of death row. The inherent dangerousness of the inmates, their utter despair, the futility of any efforts at rehabilitation or training all contribute to an environment that combines extreme security measures, confinement to cells for most of the day, and virtual inactivity." (William A. Schabas, Developments in Criminal Law and Criminal Justice: Execution Delayed, Execution Denied (1994) Rutgers Univ. School of Law 5 Crim. L.F. 180, 184.)

In his *Lackey* dissent, Justice Stevens noted that there had been frequent commentators on the toll of those waiting years, citing the following authorities: "*People v. Anderson* (1972) 6 Cal.3d 628, 649, 493 P.2d 880, 894, 100 Cal. Rptr. 152 (1972) ('The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture') (footnote omitted); *Furman v. Georgia* (1972) 408 U.S. 238, 288-289, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (Brennan, J., concurring) ('The prospect of pending execution exacts a frightful toll during the inevitable long

wait between the imposition of sentence and the actual infliction of death'); *Solesbee v. Balkcom* (1950) 339 U.S. 9, 14, 94 L. Ed. 604, 70 S. Ct. 457 (Frankfurter, J., dissenting) ('In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon'); *Suffolk County District Attorney v. Watson* (1980) 381 Mass. 648, 673, 411 N.E.2d 1274, 1287 (Braucher, J. concurring) (death penalty is unconstitutional under state constitution in part because 'it will be carried out only after agonizing months and years of uncertainty'); *id.*, at 675-686, 411 N.E.2d at 1289-1295 (Liacos, J., concurring). (*Lackey v. Texas, supra*, 514 U.S. at 1045; see also Michael L. Radelet, editor, Facing the Death Penalty: Essays on a Cruel and Unusual Punishment (1989).)

The Eighth Amendment's proscription against cruel and unusual punishment is an "evolving standard of decency." In *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, Justice Stevens, writing for the majority observed, "The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society.' *Trop v. Dulles*, *supra,* 356 U.S. 86, 101 (plurality opinion) (Warren, C. J.). In performing that task the Court has reviewed the work product of state legislatures and sentencing juries, and has carefully considered the reasons why a civilized society may accept or reject the death penalty in certain types

of cases. [Fns. omitted.]" *(Thompson v. Oklahoma, supra,* at p. 821-822.)

The Court held early in the last century that 15 years of hard, chained labor, deprivation of civil rights, and a perpetual state of surveillance constituted "cruel and unusual punishment" under the Bill of Rights of the Philippines (then under United States control.) (*Weems v. United States* (1910) 217 U.S. 349, 373.) The Court premised its opinion on the similarity of the Philippine "cruel and unusual punishments" clause to that of the United States and wrote: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gives it birth." (*Id.* at pp. 373-374.) The court concluded, "The [cruel and unusual punishments clause] in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." (*Id.* at p. 378.)

In *Hutto v. Finney* (1978) 437 U.S. 678, Justice Stevens noted that the clause also prohibits penalties that transgress today's "'"broad and idealistic concepts of dignity, civilized standards, humanity, and decency."' [Citations omitted.]" (*Id.* at p. 685.) Justices Goldberg, Douglas, and Brennan, dissenting from the denial of a petition for certiorari, believed that assessment should be whether punishment was cruel and unusual in consideration of the standards of decency which mark the progress of a maturing society, or standards of decency that

are more or less universally accepted. (*Rudolph v. Alabama* (1963) 375 U.S. 889, 890.) "To borrow a phrase from Justice Potter Stewart, inhuman treatment may be difficult to define but we should know it when we see it." (William A. Schabas, Developments in Criminal Law and Criminal Justice: Execution Delayed, Execution Denied, *supra*, Rutgers Univ. School of Law 5 Crim. L.F. at p. 185 [*citing Jacobellis v. Ohio* (1964) 378 U.S. 184, 197 (Stewart, J., concurring) ("I shall not today attempt . . . to define [hard-core pornography] . . . . but I know it when I see it . . . .")].)

International human rights standards are relied on to provide interpretative guidance in federal and state constitutional provisions, including the Eighth Amendment. (See, e.g., *Thompson v. Oklahoma, supra*, 487 U.S. at pp. 830-831, 851-852 [plur. opn. and conc. opn. of O'Connor, J.] [reference to international treaties and practices to preclude execution of juveniles under age 16 as an Eighth Amendment violation]; *Coker v. Georgia* (1987) 433 U.S. 584, 596, fn. 10 [Eighth Amendment violation in part because only three major nations retained death penalty for rape]; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22 [death penalty for defendant who did not intend to kill found cruel based on practices of Europe]; *Trop v. Dulles, supra,* 356 U.S. 86, 102, and n. 35, [divestiture of citizenship for desertion from military, a condition deplored by the international community]; see also *Hilton v. Guyot* (1895) 159 U.S. 113, 163 ["International law . . . is part of our law . . . ."]; *Filartiga v. Pena-Irala* (2d Cir. 1980) 630 F.2d 876, 886 [same]; *Forti v. Suarez-Mason* (N.D. Cal. 1987) 672

F.Supp. 1531, 1539-1540; *Lareau v. Manson* (D. Conn. 1980) 507 F.Supp. 1177, 1187 n.9 [mod. on other grds. (2d Cir. 1981) 651 F.2d 96]; see generally Strossen, Recent U.S. And International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis (1990) 41 Hast.L.J. 805 [hereinafter "Strossen"].)

Appellant's contention is further supported by three decisions of foreign courts criticizing the American "death row phenomenon" - the protracted incarceration of condemned prisoners under a sentence of death in extreme conditions of confinement. These cases reflect the growing international recognition of the need to redress institutional failures that have resulted in an added dimension of punishment in capital cases that was unknown at the time the Eighth Amendment was ratified.

One decision comes from the Privy Council of the British House of Lords, the highest court in England and the most authoritative interpreter of British common law. (*Pratt & Morgan v. Attorney General for Jamaica* (Privy Council 1993) 3 SLR 995, 2 AC 1, 4 All ER 769 (en banc).) American Courts have long been guided by the decisions of the Privy Council. Sitting en banc for the first time in fifty years, the Privy Council unanimously held that to execute two inmates who had been on death row for fourteen years and who had been read execution warrants on three occasions would constitute "torture or inhuman or degrading punishment" in violation of section 17(1) of the Jamaican Constitution, a document rooted in the English

common law tradition. (Slip op. at pp. 13, 20.) The Privy Council explained that "[t]here is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time." (*Id.* at p. 16.)

The Privy Council commuted the sentences of the two men to life imprisonment. Though the decision did not involve an interpretation of the cruel and unusual punishment clause of the English Bill of Rights of 1689-- the source of the Eighth Amendment of the U.S. Constitution-- the Privy Council did survey English common law and conclude that extended imprisonment on death row and the repeated setting of execution dates were not practices condoned historically at common law. Such a conclusion strongly suggests that the cruel and unusual punishment clause of the 1689 Bill of Rights, and in turn the cruel and unusual punishment clause of our Eighth Amendment, would prohibit the execution of an inmate who had been under a sentence of death for a protracted period of time.

With regard to the State's attempt to assign fault for the delay of execution, the Privy Council reasoned,

> "[A] State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of

> the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. (*Id.* at p. 20.)

As one commentator observed, "Yet reconciling the two norms of prompt execution and fair appeal may well be impossible, with capital punishment caught in a judicial 'Catch 22.'" (William A. Schabas, Developments in Criminal Law and Criminal Justice: Execution Delayed, Execution Denied, *supra*, Rutgers Univ. School of Law 5 Crim. L.F. at p. 189; see also David Pannick, Judicial Review of the Death Penalty 77-89, 84, fn. 17 (1982) ["A legalistic society will be unable to impose the death penalty without an unconstitutionally cruel delay, and hence it will be unable lawfully to impose the death penalty at all. It must, at the very least, be accepted by a society committed to due process of law and the rule of law that a death sentence becomes constitutionally cruel unless carried out within a reasonable time after it has been awarded, and without the incidental infringement of any of the other rights (such as the right to appeal against conviction and sentence) guaranteed by due process."]; G. Richard Strafer, Symposium on Current Death Penalty Issues: Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, NW School of Law 74 J. Crim. L. 860, 864 ["Inmates are put to the Hobson's choice of prolonged torture by incarceration or swift torture by execution. An inmate's 'choice' of the latter alternative over the former is no more voluntary than a confession beaten out of a police suspect during a custodial

interrogation; only the method utilized to exact that 'choice' is unique"].)

The second foreign decision concerning the death row phenomenon also comes from a court following the English common law tradition. In *Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General*, No. S.C. 73 (Zimb. June 24, 1993) (reported in 14 Hum. Rts. L. J. 323 (1993), the Supreme Court of Zimbabwe held that prolonged death row incarceration constituted "inhuman or degrading punishment" in violation of its constitution, and thus forbade the execution of four prisoners confined under death sentence for between 4-1/2 and 6 years. (Slip op. 9, 45-46.) In reaching its decision, the Court considered such factors as the "physical conditions endured daily" on death row and "the mental anguish" of the condemned prisoners. (*Id.* at pp. 4-5.)

The third decision comes from the tribunal that enforces the European Convention on Human Rights: the European Court of Human Rights. (*Strossen, supra*, 41 Hast.L.J. at p. 807.) In *Soering v. United Kingdom, supra*, 161 Eur. Ct. H.R. (ser. A), at p. 34 [reprinted in 11 Eur. Hum. Rts. Rep. 439], the court was presented with the issue of whether Great Britain's extradition of a German national to the State of Virginia, where capital murder charges were pending against him, would violate the European Convention prohibition against inhuman or degrading treatment or punishment. The European Commission on Human Rights had held that the protracted delays in carrying out death sentences in Virginia, which it

averaged at 6-8 years, constituted inhuman and degrading punishment in violation of Article 3 of The European Human Rights Convention Charter, a provision that "enshrines one of the fundamental values of the democratic societies making up the Council of Europe." (*Id.*, 161 Eur. Ct. H.R. (ser. A) at p. 26.) Reviewing the commission's decision, the Court, in an unanimous opinion by eighteen judges, held that subjecting an individual to prosecution for capital murder, so as to expose him to the "death row phenomenon," violates the prohibition against "inhuman or degrading treatment or punishment" in Article 3 of the European Convention. The Court recognized that the conditions of detention awaiting execution are examples of the factors that can render the sentence in violation of the European Convention of Human Rights. (*Id.* at p. 41.)

In California, the average stay is much longer than a mere six to eight years. Indeed, at the time of filing of this brief-- the first filed in appellant's appeal, appellant has been on Death Row for more than eight years. (6 C.T. 2082, 2078.) Because of the repeated problems and difficulties with the penalty phase trials, it has been more than eleven years since the guilt verdicts were rendered. (2 C.T. 669, 680.) By the time this appeal is decided, another three or four more years are likely to have passed. If the decision goes against appellant, the state habeas petition will still need to be resolved, and the federal post-conviction process will only then begin.

At the point when this brief is filed, no state habeas counsel has even been selected. Moreover, at the time of filing this brief, well over

280 prisoners on death row have no habeas counsel assigned to their cases. Therefore, habeas counsel for appellant is unlikely to be assigned for several more years. Moreover, even after the state habeas proceeding is completed, an unsuccessful habeas petition would move the case into federal court. An ever-increasing number of California death cases is causing a glut in federal court as they work their way slowly through the system. Thus, the "length of stay" considerations discussed in *Soering* are even greater as the death penalty is currently administered in this state and in this case.

The European Court in *Soering* also recognized that the time required by the inmate to pursue collateral remedies was largely beyond the inmate's control since it is within his constitutional rights to pursue every available remedy open to him. The Court weighed more heavily the consequences of the complex Virginia post-sentencing procedures; "[t]he condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death." (*Ibid.*) The Court also considered the daily conditions to which the condemned person would be subjected on death row. (*Soering, supra*, 161 Eur. Ct. H.R. (ser. A), at pp. 27-28, 42.) The condemned prisoner's regime is worsened in the Court's view because he is subjected to it for an extended time. (*Id.* at p. 43.) (See generally *Soering v. United Kingdom*: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 354-355.)

Additionally, in finding an Article 3 violation, the *Soering* Court was also influenced by the circumstance that the failure to extradite would not result in a criminal going unpunished, since *Soering* could be extradited to Germany and punished there. (*Soering, supra*, 161 Eur. Ct. H.R. (ser. A), at p. 44.)

The European Convention does not expressly prohibit the imposition of the death penalty, although the death penalty no longer exists in peacetime in any contracting state. (*Id.*, at p. 40.) However, even if Soering's exposure to the penalty of death alone had been insufficient to constitute inhuman or degrading treatment or punishment under Article 3 of the European Convention, the Court concluded this does not mean circumstances relating to a death sentence can never give rise to an issue under Article 3. (*Id.*, at p. 41.) As the Court stated:

> "The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3. (*Ibid.* [emphasis added].)

The Court concluded Soering's possible exposure to the "death row phenomenon" was such serious treatment that his extradition would be contrary to Article 3. (*Ibid.*)

In his memorandum respecting the denial of certiorari in *Lackey v. Texas*, *supra*, 514 U.S. 1045, Justice Stevens observed that although

the Court in *Gregg v. Georgia*, *supra*, 428 U.S. 153 had held that the Eighth Amendment does not prohibit capital punishment, that decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers, see *id.*, at p. 177 (opinion of Stewart, Powell, and Stevens, JJ.), and (2) the death penalty might serve "two principal social purposes: retribution and deterrence," *id.*, at 183. (*Lackey, supra*, 514 U.S. 1045.) Justice Stevens noted that neither of these arguments retained much validity for a prisoner who had spent some 17 years under a sentence of death. (*Ibid.*)

"Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. Over a century ago, this Court recognized that 'when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it.' *(In re Medley* (1890) 134 U.S. 160, 172 [33 L. Ed. 835, 10 S. Ct. 384].) If the Court accurately described the effect of uncertainty in *Medley*, which involved a period of four weeks, see *ibid.*, that description should apply with even greater force in the case of delays that last for many years. Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems

minimal. (See, e. g., *Coleman v. Balkcom* (1981) 451 U.S. 949, 952 [68 L. Ed. 2d 334, 101 S. Ct. 2031] (STEVENS, J., respecting denial of certiorari) ('the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself'). As Justice White noted, when the death penalty 'ceases realistically to further these purposes, its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.' *Furman v. Georgia*, *supra*, 408 U.S. 238, 312, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (opinion concurring in judgment); see also *Gregg v. Georgia*, *supra*, 428 U.S. at 183 ("The sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"). (*Lackey, supra*, 514 U.S. 1045.)

In his concurring opinion in the recent case of *Baze v. Rees, supra,* 2008 U.S. Lexis 3476, Justice Stevens said in dicta that he now questions whether any of the rationales announced in *Gregg* still justify the death penalty. (*Id.*, at U.S. Lexis pp. 76-85.)

The concerns expressed above apply equally to appellant's death sentence. He, too, has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death. Indeed, San Quentin's death row has been under the scrutiny of a consent degree and court appointed

monitor for over a decade in response to allegations that conditions there constituted cruel and unusual punishment and a denial of due process under the state and federal constitutions. (*Thompson v. Enomoto* (9th Cir. 1990) 915 F.2d 1383.) (Currently the case is titled *Thompson v. Gomez*, C-79-1630 N.D. Cal. and a recent order has disposed of some Constitutional claims; see *Lancaster v. Tilton*, 2008 U.S. Dist. LEXIS 11702 (N.D. Cal. Feb. 15, 2008))

Appellant would have to so endure even if this Court were to reverse his conviction or sentence on direct appeal, because the automatic appeal process takes years; more time is required to present and litigate meritorious claims in collateral proceedings. Appellant will live "in the ever-present shadow of death" for many years under any circumstances due to the nature of the process and through no fault of his own.

The claim here is twofold: that delay in itself constitutes cruel and unusual punishment, and that the actual carrying out of appellant's execution would serve no legitimate penological ends. These are issues that have not been addressed by the Supreme Court. (*Lackey v. Texas, supra*, 514 U.S. 1045 (memorandum of Justice Stevens respecting the denial of certiorari; *Ceja v. Stewart, supra*, 137 F.3d at p. 1370 (Fletcher, J., dissenting).) Federal appellate courts have only addressed the first of these issues, and to date have rejected the argument. (See, e.g., *Ibid.*, *Carter v. Johnson* (5th Cir. 1997) 131 F.3d 452, 466; *Bonin v. Calderon* (9th Cir. 1996) 77 F.3d 1155, 1160-1161; *White v. Johnson* (5th Cir. 1996) 79 F.3d 432, 437-438;

Stafford v. Ward (10th Cir. 1995) 59 F.3d 1025, 1025 cert. denied 115 S.Ct. 2640; *Richmond v. Lewis* (9th Cir. 1990) 948 F.2d 1473, 1491; *Andrews v. Shulsen* (D. Utah 1984) 600 F.Supp. 408, 431, aff'd, 802 F.2d 1256.)

Since the current state of postconviction review renders the "death row phenomenon" inevitable, at least in California, the sentence of death should be reversed as violative of the Eighth and Fourteenth Amendments. In appellant's case should his sentence be reversed, he would not be unpunished. As in *Soering* he would rather be sentenced to life imprisonment without the possibility of parole, the only alternative for such crimes in this state.

Soering represents international law as interpreted by civilized Western nations. Its holding is solidly in accord with established Eighth Amendment jurisprudence as interpreted and expressed in United States Supreme Court opinions. (See, e.g., *Sawyer v. Whitley* (1992) 505 U.S. 333, 360 (Court expressed concern that the legitimacy of the death penalty could be undermined by the Court's placement of more procedural barriers on the federal court's power to reach and address the constitutional claims of those sentenced to death) (Blackmun, J., concurring); *Maynard v. Cartwright, supra,* 486 U.S. 356, 362 (the Eighth Amendment requires channeling and limiting of the sentencer's discretion in imposing the death penalty in order to sufficiently minimize the risk of wholly arbitrary and capricious action); *Godfrey v. Georgia, supra,* 446 U.S. 420, 438- 439, 441-442 (the death penalty may be unconstitutional because objective standards

and even handedness in imposing the death penalty cannot be reached) (Marshall, J., concurring) [plur. Opn.]; *Hutto v. Finney, supra,* 437 U.S. 678, 685-687 (Eighth Amendment considerations apply to length of confinement and conditions of imprisonment); *Gregg v. Georgia, supra*, 428 U.S. at pp. 169-173 (Eighth Amendment has been interpreted in a flexible and dynamic manner to accord with contemporary values and evolving standards of decency); *Woodson v. North Carolina*, *supra*, 428 U.S. 280, 288-301 (contemporary community standards and evolving social values are relevant in determining what constituted cruel and unusual infliction of punishment); *Furman v. Georgia, supra,* 408 U.S. 238, 271, 272 (mental suffering, demoralization, uncertainty and consequent psychological hurt inherent in the punishment must be considered in interpreting Eighth Amendment) (Brennan, J., concurring.); *Furman v. Georgia, supra*, at p. 288 (citing, Cf. *Ex parte Medley, supra,* 134 U.S. 160, 172 (death penalty is extremely severe and cruel and unusual, in part, because the prospect of pending execution exacts a frightful toll during the inevitably long wait between the imposition of sentence and the actual infliction of death) (Brennan, J., concurring)); *Trop v. Dulles, supra*, 356 U.S. at pp. 100-101 (the words of the Eighth Amendment are not precise, and their scope is not static; the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society); *Weems v. United States, supra*, 217 U.S. at p. 378 (Eighth Amendment is progressive, "not fastened to the obsolete but may acquire meaning as

public opinion becomes enlightened by a humane justice."); *Weems v. United States, supra*, at p. 372 (the Eighth Amendment does not only limit infliction of physical pain or mutilation but also infliction of severe mental suffering). These principles should be followed here as well. Indeed, as Mr. Justice Frankfurter noted, "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." (*Solesbee v. Balkcom, supra,* 339 U.S. 9, 14 (dissenting opinion).)

Until a system of post-conviction review is developed that avoids the death row phenomenon, and especially under the particular circumstances of appellant's case, maintenance of the pending sentence of death would be cruel and unusual punishment in violation of the federal and state constitutions, irrespective of whether such a sentence is ever ultimately imposed. To carry out the execution long years after the sentence serves no legitimate penological purpose and would therefore be cruel and unusual in violation of the federal and state Constitutions.

Consequently, even if the guilt judgment is not reversed, the judgment of death should be vacated, and a sentence imposed of life imprisonment without the possibility of parole. (*Ceja v. Stewart, supra*, 13 F.3d at p. 1378 (Fletcher, J., dissenting).)

XI.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date, the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, fn. 6.)[39] See also,

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[39]In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a

Pulley v. Harris (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of

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capital conviction." (126 S.Ct. at p. 2527.)

the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all.

Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. *Appellant's Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad.*

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"

(*People v. Edelbacher, supra,* 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special

circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained thirty special circumstances[40] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of

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[40]This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-three.

special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law. (See Section E. of this Argument, *post*).

B. *Appellant's Death Penalty Is Invalid Because Penal Code § 190.3(a) as Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.*

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in

aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[41] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[42] or having had a "hatred of religion,"[43] or threatened witnesses after his arrest,[44] or disposed of the victim's body in a manner that precluded its recovery.[45] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge

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[41]*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

[42]*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[43]*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[44]*People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[45]*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

(*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright, supra*, 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia, supra,* 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. *California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Determination of Each Factual Prerequisite to a Sentence of Death; it Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.*

As explained above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to

condemn a fellow human to death.

1. *Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.*

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 549 U.S. ___ [166 L. Ed. 2d 856, 127 S. Ct. 856], [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.*, at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. **Any** factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of

the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham,* the high court rejected this Court's

interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham v. California, supra,* Section III.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a. *In the Wake of Apprendi, Ring, Blakely, and Cunningham, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.*

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

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

factors) substantially outweigh any and all mitigating factors.[46] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (35 RT 5102),"an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[47] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment

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[46]This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

[47]In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at p. 460)

notwithstanding these factual findings.[48]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[49] In *Cunningham* the principle that any fact which

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[48]This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I), supra,* 40 Cal.3d 512, 541.)

[49]*Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether,

exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Id.*, pp. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra,* p. 13.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, p. 14.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to

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in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p.8.)

> exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (*Cunningham, supra,* at p. 13.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th 226 at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[50] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized

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[50]Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

This argument overlooks *Apprendi*'s instruction that "The relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151." (*Ring*, 124 S.Ct. at 2431.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole

("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b. *Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.*

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (AZ 2003) 65 P.3d 915, 943; accord, *State v. Whitfield,* 107 S.W.3d 253 (Mo. 2003); *State v. Ring,supra,* 65 P.3d 915 (Az. 2003); *Woldt v. People,* 64 P.3d 256 (Colo.2003); *Johnson v. State, supra,* 59 P.3d 450.[51])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[52] As the high

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[51]See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[52]In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant

court stated in *Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443:

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

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

[are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

2. *The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.*

a. *Factual Determinations*

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

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship*, *supra*, 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida, supra,* 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's

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

b. *Imposition of Life or Death*

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas, supra,* 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but

> also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

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

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the

stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. *California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.*

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538 at p. 543; *Gregg v.*

Georgia, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[53] The

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[53]A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of

same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 390 at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland*, *supra*, 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetroulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a

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future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. *California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.*

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative

proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris, supra,* 465 U.S. 37, 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review.*"

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra.* (See Section A of this Argument, *ante.*) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase

sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173 at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. *The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.*

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under 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; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant including the possession of contraband in his cell and placing another prisoner in a headlock. (33 R.T. 4848, 4854-4873.)

The U.S. Supreme Court's recent decisions in *U. S. v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by an unanimous jury. Appellant's jury was not instructed on the need for such an unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. *The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.*

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, (1988) 486 U.S. 367; *Lockett v. Ohio,*

supra, 438 U.S. 586.

7. *The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.*

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher, supra,* 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 304; *Zant v. Stephens, supra,* 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating

factors weighing towards a sentence of death:

> "The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*" (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel, supra,* 5 Cal.4th 877, 944-945; *People v. Carpenter, supra,* 15 Cal.4th 312, 423-424.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived

appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma, supra,* 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black, supra,* 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before

different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings*, *supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. *The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-capital Defendants.*

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d

236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[54] as in *Snow*,[55] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly

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[54]"As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, *supra*, 30 Cal.4th at p. 275; emphasis added.)

[55]"The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., Penal Code sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[56]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to loss

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[56]In light of the supreme court's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

of life; they violate equal protection of the laws.[57] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra,* 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

E. *California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments to the United States Constitution.*

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g.,

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[57]Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

Stanford v. Kentucky (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot*, *supra*, 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304 at p. 316, fn. 21, citing the

Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, since the law of nations now recognizes the impropriety of capital punishment as a regular punishment, it is unconstitutional in this country since international law is a part of our law. (*Hilton v. Guyot, supra,* 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[58] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra*.)

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[58]See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

Thus, for the reasons set forth above, the very broad death scheme in California and death's use as regular punishment violates both international law and the Eighth and Fourteenth Amendments. Therefore, appellant's death sentence should be set aside.

XII.

THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE REQUIRE THAT APPELLANT'S CONVICTIONS AND DEATH SENTENCE BE REVERSED

Even if the errors in appellant's case standing alone do not warrant reversal, the court should assess the combined effect of all the errors. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15; *Phillips v. Woodford* (9th Cir. 2001) 267 F.3d 966, 985.)

Appellant has identified numerous errors that occurred at each phase of the trial proceedings. Each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a fair trial, of his right to trial by a fair and impartial jury and to a unanimous jury verdict, and of his right to fair and reliable guilt and penalty determinations, in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error, by itself is sufficiently prejudicial to warrant reversal of appellant's convictions and death sentence; but even if that were not the case, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

The prosecution's case against appellant was based in large measure on Prosecution Exhibit I, a letter obtained from a jailhouse informant who wanted consideration in his own case in return. The letter amounted to a virtual confession to the homicides and never

should have been admitted into evidence. It did not qualify as an adoptive admission; appellant denied that he wrote the letter, produced expert testimony that it was a complete fake and the letter contained conceded errors that the true assailant would have to know were errors. Moreover, because the prosecution candidly admitted that the jailhouse informant was not credible, it relied on the improper testimony of a newspaper reporter and an invalid chain of custody to get the letter admitted at all.

In that regard, even though the letter contained conceded errors and its authenticity was repudiated by appellant and his handwriting expert, the prosecution completely failed to investigate its authenticity. Instead, it turned a blind eye to the distinct possibility that the letter was a forgery. This prosecutorial misconduct was exacerbated in closing argument by supplying the jury with a motive for the homicides that had no support in the evidence, and by calling the defense case chicken manure. Both individually and collectively, these instances of misconduct served to undermine confidence in the reliability of the verdict.

Finally the inappropriate jury instruction on motive reinforced the misconduct and the instructions demonstrating consciousness of guilt emphasized the inadmissible letter and magnified its effect.

The errors in the penalty phase of appellant's trial were equally grave. Not only did the trial court improperly allow the prosecution a fourth penalty phase - an exercise that amounted to little more than prosecutorial forum shopping- it then improperly instructed on

CALJIC 8.88 and refused to allow family members to testify that the death penalty was unwarranted for appellant. All of these errors tainted appellant's penalty phase trial.

Finally, there were systemic errors that affected the penalty phase. The lethal injection process is irredeemably flawed and the death penalty statute in California has multiple deficiencies and is thus unconstitutional in both its construct and as applied.

Prejudicial Federal Constitutional Errors

The Eighth Amendment and the Due Process Clause of the Fourteenth Amendment requires heightened reliability in a capital case. *(Johnson v. Mississippi, supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens, supra*, 462 U.S. at p. 885.) The Fourteenth Amendment also protects a criminal defendant's rights to the proper operation of the procedural sentencing mechanisms established by state statutory and decisional law. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) In a death penalty case, the state-created liberty interest described in *Hicks* means the right to due process in accordance with state law.

In a capital case, the principles of the *Hicks* rule also implicate the Eighth Amendment. Just as *Hicks* guards against arbitrary deprivations of liberty or life, so the Eighth Amendment prohibits the arbitrary imposition of the death penalty. (*Parker v. Dugger* (1991) 498 U.S. 308, 321.)

When any of the errors is a federal constitutional violation, an appellate court must reverse unless it is satisfied beyond a reasonable doubt that the combined effect of all the errors in a given case was

harmless. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.) In assessing prejudice, errors must be viewed through the eyes of the jurors, not those of the reviewing court. A reasonable possibility that an error may have affected even a single juror's view of the case compels reversal. (See, e.g., *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 669.) It certainly cannot be said that the errors in this case had "no effect" on at least one juror. (*Caldwell v. Mississippi* (1985) 472 U.S. 320 at p. 341.)

Prejudicial Errors Under State Law

The combined errors in this case also compel reversal of appellant's death sentence under state law. In *People v. Brown, supra,* 46 Cal.3d 432, 446-448, this court held that the standard for penalty phase error in a capital case is the "reasonable possibility" harmless error standard. It is "the same in substance and effect" as the *Chapman* [59]"reasonable doubt" standard. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965.) It is a more exacting standard than that used for assessing prejudice for guilt phase error under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Brown, supra,* 46 Cal.3d at p. 447.)

The decision of whether to sentence a defendant to death or to life without the possibility of parole requires the personal moral judgment of each juror. (*People v. (Albert) Brown (Brown I), supra,*

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[59]*Chapman v. California, supra*, 386 U.S. p. 24, held that the test for prejudice for federal constitutional error is that reversal is required unless the prosecution can demonstrate "beyond a reasonable doubt that the error [or errors] complained of did not contribute to the verdict obtained."

40 Cal.3d 512, 541.) In a death penalty case, "individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'" (*McCleskey v. Kemp, supra,* 481 U.S. 279, 311; internal citation omitted.) Different jurors will have different interpretations of and assign different weights to the same evidence. (*United States v. Shapiro* (9th Cir. 1982) 669 F.2d 593, 603.) These differences in the decision-making process in the penalty phase of a capital case necessarily complicate the task of an appellate court in assessing the effect of trial error.

Given the interrelationship and the severity of the trial court errors in this case, their cumulative effect was to deny appellant fair and reliable guilt and penalty determinations. Appellant's convictions and death sentence, therefore, must be reversed.

CONCLUSION

For the reasons set forth herein, the multiple guilt phase errors involving the improper admission of the primary prosecution evidence, the multiple instances of prosecutorial misconduct and the improper jury instructions all compel reversal of appellant's convictions.

The penalty phase errors, including multiple penalty phase retrials that amounted to nothing more than forum shopping, improper jury instructions and the constitutional infirmities of the death penalty statue itself combined to undermine confidence that the sentence of death was appropriate. Therefore, the sentence, as well as the convictions must be set aside.

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

I am the attorney for appellant Edward Charles III. Based upon the word-count of the Word Perfect 12.0 program, I hereby certify the length of the foregoing brief, including footnotes but not including tables, this certificate or the proof of service, is 72,664 words. (California Rules of Court, , rule 8.630 (b)(1)(A).)

I declare under penalty of perjury of the laws of the State of California that the foregoing is true.

Date: May 27, 2008

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PROOF OF SERVICE BY MAIL

STATE OF ARIZONA, COUNTY OF YAVAPAI

I, Nancy D. Seaman, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is P.O. Box 12008 Prescott, AZ 86304. On May 27, 2008, I served the within

APPELLANT'S OPENING BRIEF

printed on re-cycled paper, on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States mail at Prescott, AZ addressed as follows:

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I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that I signed this declaration on May 27, 2008 at Prescott, AZ.

Nancy D. Seaman

Nancy D. Seaman