IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **DONALD RAY DEBOSE, JR.,** Defendant and Appellant.	**Case No. S080837** (Los Angeles Superior Court No. YA035529)

AUTOMATIC APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES
HONORABLE JAMES R. BRANDLIN, JUDGE, PRESIDING

APPELLANT'S OPENING BRIEF

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Under Appointment by the Supreme
Court of California

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INTRODUCTION

In this case, both the guilt and penalty verdicts are riddled with error. Appellant was convicted of a special circumstance, arson-murder, which was not applicable to his case. During the guilt phase, the trial court erred by dismissing a juror without good cause and in violation of Appellant's constitutional rights. Additionally, prejudicial hearsay evidence, violating Appellant's constitutional rights, was admitted into evidence without any cautionary instructions given to the jury.

During the penalty phase, the trial court prejudicially erred when it refused to declare a mistrial after the jury had announced that, after several ballots, it was hopelessly deadlocked. The trial court erred by refusing to answer the jury's question regarding what would happen if they failed to reach a verdict. The trial court improperly restricted Appellant's attorney from conducting death qualification voir dire of the jury. The prosecutor committed prejudicial misconduct during his opening statement of the penalty phase. Appellant's death sentence is invalid because of the various constitutional infirmities of California's death penalty law. Finally, Appellant's death sentence was fundamentally unfair in light of the fact that the co-defendants, who had far worse criminal backgrounds, received a sentence of life-without-the possibility-of parole (hereinafter referred to as LWOP).

Appellant asks that both the guilt verdicts and death judgment be set aside and that this Court remand the case for a new trial.

PROCEDURAL HISTORY

On May 20, 1998, the Los Angeles District Attorney filed an Information charging Appellant, Donald Ray Debose, Jr., and co-defendants Anthony Flagg and Carl Higgins, with the following crimes: the murder of Dannie Kim in violation of Penal Code section 187, subd. (a)[1]; the robbery of Dannie Kim in violation of sections 211 and 12022.7, subd. (a); arson causing great bodily injury in violation of section 451, subd. (a); anal penetration by a foreign object in violation of section 289, subd. (a); and genital penetration by a foreign object in violation of section 289, subd. (a). It was also alleged that during the commission of the robbery Appellant inflicted great bodily injury to Dannie Kim (section 12022.7, subd. (a)), and that he personally used a firearm during the commission of these offenses (sections 1203.06, subd. (a)(1) and 12022.5, subd. (a)(1)). Special circumstances were alleged: that the murder was committed during the commission of the crime of rape by instrument (section 190.2, subd. (a)(17)); that the murder was committed during the commission of the crime of arson (section 190.2, subd. (a)(17)); that the murder was committed during the commission of the crime of robbery (section 190.2, subd.

(a)(17)); and that the murder was intentional and involved the infliction of torture (section 190.2, subd. (a)(18)). (CT[2] 304-312.)

Finally, Appellant was separately charged for the premeditated and deliberate attempted murder and robbery of Vassiliki Dassopoulos (sections 664, subd. (a)/187 and 211). As to these crimes, it was further alleged that Appellant inflicted great bodily injury (sections 12022.7, subd. (a); 1203.06, subd. (a)(1); and 12022.5, subd. (a)(1).) (*Ibid.*)

Appellant was arraigned and pled not guilty to all counts and denied all allegations. Deputy Public Defender Michael Clark was appointed to represent Appellant. (CT 314.) On August 5, 1998, Mr. Clark declared that his office had a conflict, Judge Stephen O'Neil relieved the Office of Public Defender as counsel, and private attorney Bruce L. Karey substituted in as counsel for Appellant. (CT 366.)

On October 19, 1998, Mr. Karey declared a conflict of interest in representing Appellant. Judge James Brandlin relieved Mr. Karey and subsequently appointed attorney James Hallett to represent Appellant. (CT 381.) On December 15, Mr. Hallett was relieved as counsel and attorney Richard Leonard was appointed to represent Appellant. (CT 385.)

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[1]Unless otherwise specified, all references are to the Penal Code.

[2]"CT" refers to the Clerk's Transcript.

On March 29, 1999 jury trial began. (CT 585.) On May 13, 1999, the jury found Appellant guilty of murder and found true the special circumstances of robbery-murder and arson-murder. However, the jury deadlocked as to the special circumstances of rape by foreign instrument and torture. The jury also found Appellant guilty of the other charged offenses involving Kim, but deadlocked as to the charges of anal and genital penetration by a foreign object. The jury found true the great bodily injury and gun use enhancements. (CT 680-684,1000-1004.) Co-defendant's Flagg and Higgins' were also found guilty of the same charges. (CT Supp. III, 299-301,311-313.) Finally, Appellant was found guilty of the attempted pre-meditated murder and robbery of Dassopoulos, and all allegations regarding those crimes were found to be true. (CT 680-684,1000-1004.)

On May 17, 1999, the penalty phase began for Appellant and the co-defendants. (CT 805-806.) On June 2, 1999, after hearing the penalty phase evidence and arguments, the jury informed the trial court that it was deadlocked. After polling the jury, the trial court ordered them to continue deliberations. (CT 834-835.) On June 3, 1999, the jury returned a verdict of death for Appellant and LWOP for the co-defendants. (CT 836-837, 1005; CT Supp. II, 229A, CT Supp III, 323-324.)

On July 21, 1999, Appellant appeared for sentencing. The trial court denied Appellant's motion to modify the sentence and reduce the penalty from death to LWOP. Thereafter, the court sentenced Appellant to death. (CT 955-957.) In addition, as to the crimes involving Kim, the court imposed the upper term of ten years for the gun use enhancement; a consecutive sentence of one year for the robbery conviction and a consecutive sentence of nine years for the arson with great bodily injury conviction. (CT 961.) As to crimes against Dassopoulos, the trial court imposed a consecutive term of life imprisonment for the attempted murder conviction; a consecutive term of four years eight months for the gun use enhancement and a consecutive one year term for the robbery. (CT 960-961.) This appeal is automatic.

STATEMENT OF THE FACTS

A. GUILT PHASE

1. The Prosecution's Case

a. *Summary*

The prosecution presented evidence that Appellant and the two co-defendants went to the Hollywood Casino where Dannie Kim, the victim, frequently gambled. According to the prosecution's theory, all three defendants were watching Kim gamble and later followed her in her

vehicle. Several hours later, Kim was discovered in the trunk of her burning vehicle after having been shot. She died several days later. The evidence against Appellant was almost entirely circumstantial. The only alleged eyewitness to the actual crime, Willard Lewis, was a crack cocaine user who had been convicted of multiple felonies, was facing a possible life sentence, and who, after having shared a jail cell with one of the co-defendants, and having access to law enforcement reports regarding the crime, came forward several months after the homicide and claimed to have witnessed the incident.

In addition, the prosecution presented evidence of another incident which involved the attempted murder and robbery of Vassiliki Dassopoulos, who also frequently gambled at the Hollywood Casino, and who was robbed and shot about one week after the Kim homicide. Although she identified Appellant as the robber at trial, she had previously picked out someone else as well in a photo lineup.

The primary issue at trial was the identify of the robbers in both incidents, and, in particular, who was the shooter in the Kim homicide.

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b. *The Kim Murder*

1.) The Crime Scene

Miah Richey, is the sister of Dannie Kim. On December 16, 1997, Kim was visiting Richey from Las Vegas when they decided to go to the Hollywood Casino for lunch. (RT 1206, 1208-1210.) Afterwards both stayed at the casino and gambled. They stayed in touch while at the casino using cell phones. Richey stated that she had loaned her cell phone to Kim. At around 11:00 p.m., Richey left the casino and went home, while Kim remained at the casino. (RT 1210-1212.)

Kim did not come back to Richey's house that evening and did not call her to let her know where she was, which was unusual. Richey unsuccessfully called Kim several times. (RT 1214.) In an attempt to locate Kim, Richey later called the casino, as well as a friend of hers who worked for the Los Angeles Police Department. (RT 1214-1216.)

Rosemarie Howard lived in an apartment building located at 533 Osage Avenue in Inglewood, California, which was located across the street from Kelso Elementary school. (RT 1225.) On December 17, 1997, at around 5:00 a.m., she was tending to her son's nose bleed, when she heard a woman speaking loudly in a foreign language, possibly Spanish. (RT 1225-1226, 1235.) Subsequently, Howard heard approximately five gunshots

coming from that area. (RT 1226.) About fifteen minutes later she heard an explosion. She looked outside her son's bedroom window and saw smoke coming from a car (later identified as Kim's) near the school. (RT 1227-1228.) About five to ten minutes later, the fire department arrived and put out the fire. She observed one of the fireman open the trunk of the car. (RT 1231-1232.)

Valerie Hutchinson-Gluck, a teacher at Kelso Elementary School, normally arrived for work between 6:15 and 6:30 a.m. (RT 1297-1298.) On December 17, 1997, while driving to the school she observed a person wearing dark baggy pants and a dark jacket standing outside of Kim's car and leaning in the window.[3] (RT 1300- 1304.)

She then parked her car in the school parking lot and went into her classroom. Approximately five minutes later a student came in and told here that there was a car on fire; the same student later came back and stated that there had been an explosion and that a body had been found inside the trunk of the car. (RT 1306-1308.)

Firefighters and paramedics responded to the scene around 6:30 a.m. They observed smoke coming from Kim's vehicle, a blue Chrysler Le Baron. The convertible top of the car had been burned off and the interior

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[3]In court, she identified photographs of clothing similar to the ones worn by the individual she saw on December 17th. (RT 1304-1305)

was on fire. (RT 1249-1252.) After about ten minutes the firefighters were able to put out the fire. (RT 1254.) At that point one of the firefighters observed through a hole in the back seat that there was a body in the trunk of the car. (RT 1255.) The trunk was then pried open and they found Kim. She had suffered extensive burns to her left side. (RT 1255, 1257-1258,1334-1335.) However, she was still alive. An ambulance was called and aid was given. (RT 1256-1260, 1329-1331

After Kim was removed from the trunk of the car and put on a gurney, it was discovered that she had gunshot wounds; two in her torso area and one in her left arm. Kim was then transported to Martin Luther King hospital. (RT 1337-1340.)

The next day, December 18th , Kim's sister, Richey, received a call from Kim's husband, Bruce. At that time Bruce was in Florida and asked Richey about Kim's car having been abandoned. (RT 1216.) After seeing a report on television about the crime, Richey then called Detective Lawler and subsequently went to the hospital to see if she could identify Kim's body. (RT 1217.)

Kim's car was later examined by an arson investigator who concluded that the fire started in the front seat floorboard area near the center console. (RT 1368.) The investigator believed that the fire was

intentionally set by the use of an "ignition source," such as gasoline. (RT 1371-1372.)

At the crime scene, both in the trunk of the car and on the ground, police found bullet projectiles and casings. (RT 1262, 1266, 1385-1386.) Near the right passenger seat area the police recovered a burnt Hollywood Park casino chip. (RT 1389.) No comparable latent prints were found on the vehicle. (RT 1429-1430.)

Detective Craig Lawler of the Inglewood Police Department was one of the investigating detectives. (RT 2527.) He arrived at the Kim crime scene and attempted to determine who was the owner of the vehicle. He discovered that the car was registered in Washington State and that Kim and Kenneth Klundt were the registered owners. (RT 2528.) At that time he did not know the identity of Kim, so he contacted the Walla Walla, Washington police department and asked them to contact a family member, which they subsequently did. (RT 2529-2530.)

Lawler also took the partially burnt casino chip recovered from Kim's vehicle to the Hollywood Park Casino and contacted Dan Stegemann, head of security for the casino. He then asked Stegemann to review videotapes from the casino's surveillance cameras. (RT 2532-

2533.) In addition, Lawler showed a DMV photo of Kim to several casino employees who recognized her. (RT 2534.)

Lawler subsequently received a call from Miah Richey on December 18, 1997. (RT 2535.) He then contacted her and her husband and showed the husband the DMV photo as well as a photo of Kim taken at the hospital. (RT 2536.)

Records of Air Touch Cellular, which was the cell phone company that Miah Richey used, showed several calls made on December 17, 1997, in the Los Angeles area. (RT 2356-2358, 2363-2364.) The first call was made at 5:22 a.m. The cell sites that picked up these calls were located at South Western Street and Century Boulevard. (RT 2370-2375.) One of these calls was made in the general area of Hollywood Park. (RT 2377-2379.) In addition, evidence was also introduced which showed that Kim's Visa card was either used or attempted to be used at various gas stations in this same area during this time. (RT 1845-1852, 1860.) Finally, it was stipulated that Anthony Flagg lived about two blocks from Kelso Elementary school. (RT 2393.)

2.) Willard Lewis's Testimony

Willard Lewis, who was currently in custody, had several prior criminal convictions stemming from 1991 until March, 1998. These

convictions were for robbery, theft and drugs. (RT 1460-1462;1532-1533) Lewis admitted that he used and abused cocaine and paid for it by stealing. (RT 1462.) He claimed, however, that he was a "functional smoker" of cocaine and could work while under the influence of drugs.

Lewis testified that in December of 1997, he was still smoking cocaine, but asserted it did not affect his job performance at Cabbot, Lode and Associates, where he claimed to work as a senior associate doing financial arbitration. (RT 1463-1464.) According to Lewis, he was earning between $3,500 to $5,600 per month. (RT 1462.)

On December 17, 1997, Lewis was scheduled to go to work at 7:30 a.m. He left his house at around 5:00 a.m., driving a 1981 Honda Civic, in order to find a "strawberry" and smoke cocaine. According to Lewis, a "strawberry" is a prostitute who will exchange sex for drugs. (RT 1464-1465.) Around 5:15 a.m., at the corner of Century and Prairie Street, Lewis picked up a woman named Jasmine and they then drove to the area of Osage Street. (RT 1467.)

After they parked, Lewis and Jasmine both smoked cocaine, reclined their seats all the way back, and engaged in oral sex. (RT 1536.) After about twenty minutes, Lewis stated that he heard someone arguing which caused him to look up. He claimed he saw an Asian woman and two other

men, who he identified in court as Appellant and co-defendant Higgins. According to Lewis, the woman kept saying "no, no, no." (RT 1467-1468; 1497, 1502-1503.) During this time, Lewis kept lifting his head up and down so as not to be noticed. He observed the woman standing between the two men and claimed that Appellant had hold of her by the shoulder. (RT 1468, 1502-1503.)

About five minutes later, Lewis stated he saw one of the men pull the woman back towards the car. (RT 1469.) Lewis then laid back down, heard a car door or trunk slam shut and then heard three to four gunshots. (RT 1469) Lewis stated that the gunshots came from the direction of where he had seen Appellant, who afterwards appeared to be tucking something away in his clothing. (RT 1552-1554.) Lewis testified that he also saw a shadow of what may have been a third person standing near where he claimed to have seen the other two men. (RT 1470-1471.)

After hearing the gunshots, Lewis looked up and heard co-defendant Higgins say "come on, Don." (RT1471-1472.) He then observed Higgins walk about fifteen to seventeen feet away from Lewis's car. It was at that point that Lewis allegedly was able to see both men's faces. Lewis believed that he and co-defendant Higgins possibly made eye contact. (RT 147, 1476) Lewis claimed that he and Jasmine stayed in the car for several more

minutes and then drove around the corner where Jasmine got out and called 911. (RT 1472.) After Jasmine made the call, she left and Lewis drove around for about twenty minutes before coming back to the scene. When he came back he saw the same car on fire and the fire department had arrived. (RT 1476-1477.)

Lewis never told anyone about what he saw that day until April of 1998, when he informed the jail chaplain, Steve Moss, that he had seen the person who said "come on Don," and who was known as C-Crazy, in the county jail. (RT 1475-1476, 1552-1554.) Later, Lewis told Detective Lawler what he had seen and identified both Appellant and co-defendant Higgins from photo lineups he was shown. (RT 1504-1507, 1509.) Lewis conceded that he did not actually see anyone get shot or set the car on fire. (RT 1525-1526.)

Lewis admitted that one of the reasons he came forward was his hope of receiving a more lenient sentence. (RT 1523-1525.) Lewis testified that the current offenses to which he had pled guilty were commercial burglary and petty theft with a prior. He knew he was facing sentencing under the Three Strikes Law. According to Lewis, the judge told him that if he pled guilty he would receive ten years in prison and that the trial court was going to strike a strike; however, if Lewis testified

truthfully, the court would consider giving him a sentence of less than ten years. (RT 1548-1551.) He also admitted that he was in the same cell with co-defendant Higgins, but denied looking at any papers that co-defendant Higgins had in his possession. (RT 1529-1530.)[4]

Stephen Moss was a volunteer chaplain at the Los Angeles County Jail. Around June or July of 1998, Willard Lewis told him that he had witnessed a murder. (RT 1568-1569.) Lewis stated that he was with a prostitute, named Jasmine, in January of 1998, and that they were across the street from a gambling place in Inglewood, California, when Lewis saw someone shoot a female in a car. (RT 1572-1573,1576.) Lewis claimed he could identify both men and that one of them he had seen in jail. (RT 1573.) Moss then contacted Detective Lawler and told him what Lewis had stated. (RT 1575.)

3.) Forensic Evidence

a.) *Alleged Sexual Assault and Autopsy Evidence*

Chris McClung, a sexual assault nurse, examined Dannie Kim while she was in the hospital. McClung observed swelling in the Kim's vaginal

[4]Lewis also testified that at trial, during a recess, Appellant said something to the effect of "I'm going - smoke you bitch." (RT 1497-1503.) The bailiff, who was present during this incident, testified that he heard Appellant say "smoke you" to Lewis. (RT 1584-1585.)

area which she opined demonstrated a strong possibility of sexual assault. (RT 2058-2078.) McClung also examined Kim's rectal area and observed multiple tears that showed, in her opinion, penetration of the rectum. (RT 2078-2090.)

However, a police criminalist also examined the sexual assault kit done on Kim, as well as her clothing, and found no sign of semen. (RT 2138-2142.) An examination of Kim's vehicle for blood, semen or trace evidence revealed nothing. (RT 2259-2260.)

Kim lived for about five days after the incident. (RT 2461.) The pathologist who performed the autopsy opined that 50 to 55% of her body was burned, including her legs, face and hands. As a result of these burns, her right leg was amputated. (RT 2443-2449, 2461.) The pathologist also observed a pre-mortem fracture of the clavicle. (RT 2449-2450.) In addition, he noted injuries in both her vaginal and anal areas which he believed were consistent with a sexual assault. (RT 2456-2459.)

The autopsy also revealed two gunshot entrance wounds, one in the back of the left shoulder, and one in the top of the left shoulder. (RT 2435-2437, 2439-2440.) One of the bullets was recovered. (RT 2431-2435, 2440-2443.) The cause of death was believed to be multiple gun shot wounds and multiple thermal burns. (RT 2459.)

b.) *Casino Videotapes*

Anthony Cato, a police officer with the Los Angeles Police Department, received a video tape from the Inglewood Police Department on January 6, 1998. While reviewing the tape he recognized a person known as "C-Crazy" and whom he identified as co-defendant Higgins. On January 8, 1998, he assisted in the arrest of Higgins. (RT 2511-2514.)

Detective Lawler also viewed the video tapes from the casino. He was able to identify Kim and the times that she was there. (RT 2538-2539.) The tapes showed that when she left the casino three other people left around the same time using a different door. (RT 2540, 2543.) One of these three was wearing a navy coat with a light collar, who Lawler identified as Appellant. (RT 2543.) Another person was wearing all black, who Lawler identified as co-defendant Flagg. The third person Lawler identified in the video tape was co-defendant Higgins. (RT 2544.)

Dan Stegemann was the head of surveillance at Hollywood Park Casino. Stegemann had previous experience working surveillance in other casinos. (RT 2618-2635.) He planned and installed the video surveillance at the Hollywood Park Casino. This involved having a video camera over every gaming table which could pan and tilt as well as zoom in-and-out. There were also video cameras located outside the casino in the parking lot

areas, but those were operated and controlled by casino security which was not his department. (RT 2637-2640.) Stegemann testified that there was a VIP parking lot that was reserved for regular players and can only be entered by using a key card. (RT 2665.)

Stegemann described the interior of the casino and noted that one area was just for poker games. Each poker table is separately numbered. (RT 2646-2649.) Each table also had a numbered seat. (RT 2657-2658.) The poker games varied from small betting games to games with no limits. The area where the big games were played is called the Pegasus gaming area. (RT 2646-2651.)

Stegemann was asked by the Inglewood police to review video tapes from December 16-17, 1997, after being informed of a possible "follow-home" robbery, which is where a suspect follows the person from the casino to their home and then robs them. (RT 1912-1913, 2663-2665.) Stegemann knew who Dannie Kim was as she had played numerous times at the casino. He stated that Kim also played with other high caliber gamers in Las Vegas. (RT 2661-2662.) After looking at the video tapes, Stegemann was able to verify that Kim was playing in the Pegasus area of the casino the day of the incident. (RT 2566-2568.) He also viewed the security tapes from

the outside parking areas and was able to identify Kim's car enter the VIP parking lot. (RT 2669-2675.)

After reviewing all of the video tapes, he made a composite tape as well as a flow chart, which showed where all three suspects were during the time they and Kim were in the casino. It also showed the vehicles that Kim and the suspects were driving. (RT 2687-2689, 2696-2702.)

This composite videotape, which was played for the jury, showed Kim's vehicle entering the VIP parking lot. (RT 2709.) At 10:57 a.m. she went to play in the Pegasus area. (RT 2709.) At 11:08 a.m., she went to poker table number five and sat at seat number nine. (RT 2709.) At 7:36 P.M., she then went to poker table number nine. (RT 2710.) At 12:14 a.m., she then went to poker table number seventeen and sat at seat number five. (RT 2710.) At 12:21 a.m., she went to poker table number thirteen and played. (RT 2710.)

According to Stegemann, at 2:24 a.m., what he described as the suspect vehicle, entered gate number four in the west parking lot, which faces Century Boulevard. (RT 2712.) At that point, three individuals were seen walking from the vehicle towards the casino. The first suspect was wearing a blue jacket with a white collar. The second suspect had a shaved

head and was wearing a long black jacket. The third suspect was wearing a brown jacket. (RT 2713-2714.)

At 2:37 a.m. all three suspects were seen on the video at poker table number seventy-one. (RT 2719.) Shortly thereafter, they all went to separate tables. (RT 2719-2720.) During the entire time all three suspects were in the casino, Kim was gambling at table number thirteen. (RT 2721.) At one point, the first suspect sat down at a table close to where Kim was gambling. (RT 2724-2725.) Later, the second suspect went over to where Kim was playing and appeared to be watching the game. (RT 2725-2727.) According to Stegemann, the video did not show any of the suspects gambling, although he could not say for sure whether they did nor did not gamble. (RT 2721, 2831, 2865.)

Kim won several hundred dollars gambling. During that time suspect number two was looking at the table where Kim was playing. (RT 2727-2732.) At 3:47 a.m., according to the videotape, Kim went to the cage area to cash in her chips. Around that same time, all three suspects met up in an area approximately 100 feet from the cashier's cage. (RT 2732-2735.) Kim cashed in some of her chips, which totaled $1900.00. (RT 2736-2743.) At that point, all three suspects left the casino. Next, Kim left the casino through the VIP doors. (RT 2743-2749.)

Kim's car was observed on the videotape backing out of her parking space at around 3:53 a.m. According to Stegemann, the suspect vehicle, a Ford Taurus, was then seen pulling into the valet parking area. (RT 2749-2758.) Kim's car then went towards gate number four, followed by a taxicab, followed by the suspect vehicle. Kim's car was last seen turning onto Century Boulevard followed by the suspect vehicle. (RT 2759-2761.) Under oath, Stegemann admitted that he could not say who was driving the suspect vehicle or how many people were in it. (RT 2821-2823.)

c. *The Dassopoulos Attempted Murder and Robbery*

Vassiliki Dassopoulos, known as "Billie", was also a professional card player who gambled at the Hollywood Park Casino. On December 22, 1997, she went to the casino around 6:30 p.m. and parked in the VIP parking lot. She entered the casino through the VIP door and gambled until approximately 5:00 a.m. She won a total of about $4,700 and cashed in around $2025 of it, which she placed in her purse. (RT 1448-1753, 1808.)

After cashing out, she went to the bathroom, left the casino and got into her car, a Toyota Corolla. She then drove back to her home in Rancho Cucamonga. When she arrived home, it was still dark outside. She opened her garage door with her remote control and then drove into the garage. (RT 1757-1759.)

Dassopoulos turned off the engine and car lights; however the garage door light remained on. After she put her keys in her purse, she saw a person wearing a dark jacket and a knitted cap, whom she identified in court as Appellant, grab the driver's door. (RT 1759-1760, 1766, 1770.) According to Dassopoulos, Appellant started to pull her out of the car. As he did so she honked the horn and tried to get her keys. (RT 1760-1761.) Finally, the man, who had appeared to be angry, grabbed her by the head and pulled her out of the car. (RT 1762-1763.)

At that point, Dassopoulos began to struggle with him, and saw that he had pulled a gun from his waist band area, which she attempted to take away. Then, the garage door light went off. (RT 1764-1765.) As she continued to struggle with him, he placed the gun to her neck, shot her and took her purse. (RT 1767-1770.)

After being shot, she fell to the floor and saw the man looking at her before she passed out. (RT 1770-1771.) When she came to, she managed to crawl to the garage door, stuck her head outside and began yelling for help. (RT 1771-1773.) A few minutes later the paramedics arrived and she was taken to the hospital. (RT 1773.) As a result of the gun shot wound she lost one of her vocal cords. (RT 1775.)

On January 8, 1998, she was shown a photo lineup with six pictures. She identified the person in photo number three as the robber. (RT 1775-1777.) Dassopoulos testified that the gunman did not have any facial hair and was about 5'11" in height, although she admitted that while in the hospital she may have told a detective that he was 5'6" tall. (RT 1801-1803.) She also admitted that when she was shown the photo lineup none of the individuals in the pictures were wearing hats; rather, she used a piece of paper to cover the hair of the men in the photographs. (RT 1804.) She also never attended a live lineup. (RT 1806-1807.) She stated that she did not see anyone else besides Appellant at her residence on the night of the robbery, although she was shown another photographic lineup containing a photograph of another suspect (Derrick Grey), but was unable to pick anyone out. (RT 1810.)

On December 23, 1997, at around 5:47 a.m., Mike Redmond, a fire captain for Rancho Cucamonga, responded to a call of an injured female at 9858 Solazzo Drive in Rancho Cucamonga, California. (RT 1720-1722.) When Redmond arrived at the residence, he saw an ambulance there and medical personnel attending Dassopoulos, who was laying in a pool of blood with what looked like a head or neck injury. (RT 1723-1725.)

Ernie Kopasz, a deputy sheriff with San Bernardino County Sheriff's department, showed Dassopoulos a photographic lineup containing six pictures. He read her the standard admonition regarding a photographic lineup. Appellant's photo was number three in the lineup. (RT 1812-1813.)

According to Kopasz, Dassopoulos was confused by the hairstyles worn by the persons in the photographic lineup. (RT 1815.) Dassopoulos eliminated the persons shown in photographs one, two four and six. She then told Kopasz that the suspect was either photograph number three or photograph number five. (RT 1815.) She also told him that the suspect was possibly 5'6" in height and could not remember if he was wearing a jacket at the time of the robbery. (RT 1816.)

Records show that a Bank of America card in the name of Dassopoulos was used at the Texaco gas station located at 3100 West Manchester in Inglewood, CA in December of 1997. (RT 1839-1843.) A Visa statement of Dassopoulos showed that two charges were made on her card on December 23, 1997 at 4:10 p.m. and 6:32 a.m. (RT 1855-1859.)

According to Stegemann, Dassopoulos and her husband were also regular gamblers at the Hollywood Park Casino. (RT 2662-2663.) Stegemann reviewed the surveillance video the night that Dassopoulos was

robbed. According to the composite video that he prepared, there were two suspects observed at the casino the evening, Appellant and Derrick Gray. (RT 2766-2768.)

Stegemann related that on December 22, 1997, at around 7:19 p.m., Dassopoulos's car entered at the parking lot and a few minutes later she then entered the casino through the VIP doors. (RT 2770-2771.) She then went to table fifteen, where she gambled for several hours. (RT 2772.)

Sometime after 4:00 a.m., the same suspect vehicle that was seen in the Kim incident, a Ford Taurus, entered the parking lot of the casino. (RT 2773-2774.) Around 4:10 a.m., Appellant, who according to Stegemann, was wearing the same coat as on the night of the Kim incident, was seen in the video walking from the west parking lot, followed by Derrick Gray.[5] enter the casino and proceeded to the Pegasus area, where Dassopoulos was gambling. (RT 2776-2777.)

According to Stegemann, during this time both suspects were seen looking towards the table where Dassopoulos was gambling. (RT 2785-2788.) The videotape showed that at around 4:40 a.m., Dassopoulos cashed out her chips, placed the money in her wallet and entered the bathroom (RT 2789-2793.) When she came back out, both suspects were seen together

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[5]Detective Lawler also reviewed the videotapes from the Casino and identified an individual wearing a brown jacket as Derrick Grey who was later

talking and then leaving the casino via the south doors. (RT 2793-2794.) However, both men re-entered the casino as Dassopoulos was going out the VIP doors. (RT 2795-2796.) Both suspects also then left, and got into their vehicle. (RT 2797.)

According to the videotape, Dassopoulos's car was last seen exiting the VIP parking lot, and then turning right on Century Boulevard. A few seconds later the suspect vehicle was observed going down Century Boulevard in the same direction. (RT 2798-2799.

d. *Subsequent Investigation and Arrest of Appellant*

Phrashant Patel worked as a manager at the La Mirage Hotel located at Hawthorne and Imperial Highway. He identified hotel records which showed that Appellant had registered at the hotel from December 22 through December 24, 1997, and gave his home address as 1101 W. 58th St, Los Angeles, California. (RT 1597-1599.) The records revealed several phone calls were made from that room to other numbers in the 213 area code. One of the telephone calls was to a Gwendolyn Flagg. (RT 1599-1601, 2578.) Patel also identified a record that showed a person named Donald Jessie register at the hotel on December 19, 1997, and left on December 20, 1997. This person gave an address of 1255 W. 60th Street in

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arrested on January 6, 1998. (RT 2580-2583.)

Los Angeles and had the same drivers license number as that previously given by Appellant. (RT 1602-1603.)

Detective Michael McBride of the Inglewood Police Department went to the La Mirage Hotel on December 25, 1997, met with Patel and discovered that Appellant had been staying in room number 321. (RT 1613-1616.) McBride began surveillance of Appellant's room and observed a heavy set black female, later identified as Crystal Johnson, leave the hotel room around 11:30 a.m. and get into a taxi. Mc Bride then instructed other officers to arrest Ms. Johnson. (RT 1618-1620.)

Jaime Hernandez, a police officer with the Inglewood Police Department, also worked security at the Hollywood Park Casino. (RT 1626-1628.) On December 25, 1997, he was working at the casino in the surveillance room. While watching the camera monitors he observed Appellant with another individual. Hernandez then contacted the detectives working the case. Hernandez was instructed to go outside and look for a red vehicle in the parking lot. (RT 1628-1632.) Hernandez went to a security booth located in the parking lot when, around 1:00 a.m., he was informed that the other person who Appellant was with had left the casino. That person, later identified as Shondell Jones, entered the passenger side of a red Ford Taurus. Around 4:00 a.m., Appellant left the casino, got into the

driver's seat and was then arrested. (RT 1635-1639, 1642-1643, 2585-2586.)

A .380 caliber gun was recovered from under the right front passenger seat of the red Ford Taurus. (RT 2593.) Test firings done from that gun matched the expended casings and bullets recovered from both the Kim and Dassopoulos crime scenes. (RT 1871-1880, 1880-1888, 1914, 2559.) During the booking process a Visa card in the name of Dassopoulos, a motel key from room number 321 of the La Mirage hotel and a cell phone (not Kim's) were recovered from Appellant,[6] (RT 1621-1623, 1906, 2605.)

2. **The Defense**

a. *Impeachment of Willard Lewis*

Lewis testified in the defense case that he first appeared in superior court for arraignment on May 13, 1998 and pled guilty on October 22, 1998. The trial court at that time stated that he would be facing a maximum of ten years in prison but the sentence could be reduced if he cooperated and testified for the prosecution in Appellant's case. (RT 2941-2951.)

[6] At trial, Dassopoulos identified the Bank of America card that was in her purse when she was robbed. (RT 1775.)

Charles Cervantes was the deputy public defender who first represented Lewis. (RT 3203-3203.) According to Cervantes, Lewis had been charged with petty theft with a prior. Because of his prior convictions, under the Three Strikes law, Lewis was facing a potential sentence of twenty-five-years-to-life imprisonment. (RT 3204.). When Cervantes informed Lewis that he was facing a life sentence, Lewis became concerned. (RT 3204). Cervantes tried to find a deputy district attorney or judge that was willing to strike some of the prior convictions, so as to lessen the potential sentence, but was unsuccessful. (RT 3205-3208.)

Cervantes appeared with Lewis at his arraignment in superior court on May 13, 1998. Prior to that date, Lewis had never told Cervantes that he had witnessed the Kim murder. (RT 3209-3210.) At the time of the arraignment, Lewis appeared to be more desperate. (RT 3212.)

On May 20, 1998, Lewis called Cervantes and told him that he had information about a well-known murder case and wanted to know if it would be of benefit to Lewis. (RT 3213.) When Lewis began stating some of the facts, it sounded familiar to Cervantes and he realized that his office was at that time representing one of the defendants. (RT 3214.)

Contrary to his trial testimony, where he claimed that he went to work that day, Lewis told Cervantes that on December 17, 1997 between

5:30 a.m. and 6:00 a.m., he was parked on Osage street and was playing hooky from work. (RT 3216.) He had some drugs, was looking to obtain some sexual favors, and subsequently picked up a prostitute by the name of Jasmine. Lewis told him that he heard what he thought was an argument and saw three men and a girl. (RT 3216-3217, 3233.) Lewis claimed he recognized two of the men, and stated that one was named Carl Higgins. About four minutes later he heard four gunshots. Lewis never stated that he saw either suspect shoot the woman. (RT 3218.) He waited another five to ten minutes and then left the area. (RT 3218-3219.) Lewis never told Cervantes that he saw the car, which he described as a green colored Le Baron, on fire that day. Rather, he stated that he had driven right up to the car, looked at it and saw that no one was around. (RT 3222-3224.)

Lewis stated that it was co-defendant Higgins, who he also knew as "C-Crazy", that he saw coming towards his car. (RT 3219.) Lewis did not tell Cervantes that he had been housed in the same cell as co-defendant Higgins. (RT 3220.)

After this conversation, the Public Defenders office was required to declare a conflict because they were representing one of the defendants. (RT 3222.) Lewis was appointed a new attorney by the name of Welbourn.

Lewis testified he asked Welbourn if his sentence would be reduced if he testified. (RT 2973-2975.)

On January 28, 1999 Lewis was sentenced to nine years in prison. According to Lewis, attorney Welbourn asked the court to consider recalling the case for re-sentencing after Lewis testified. (RT 2976-2980.) Lewis was aware of the procedure for recalling a case for re-sentencing as he had made such a motion in 1993 but that motion was not granted.[7] (RT 2981-2985.)

Records from the Los Angeles County jail showed that Lewis and co-defendant Higgins were housed in the same module and shared the same cell between May 4, 1998 and May 14, 1998. (RT 3023-3027.) Co-defendant Higgins was an inmate worker which allowed him to go to and from his cell. Inmates can keep documents in their cell which are subject to being viewed by other inmates. (RT 3027-3030.)

Erskine Richmond is a corrections agent who sent co-defendant Higgins a report which provided details regarding the Kim murder. The

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[7]The trial court also read to the jury the provisions of Penal Code section 1170, subd. (d), which authorizes a trial court to recall and re-sentence a defendant ninety days after being sentenced to state prison. In addition, the trial court informed the jury that it had handled Lewis's case from arraignment through sentencing. (RT 2993.)

report included the names of Appellant and co-defendants Higgins and Flagg, and it also noted that they were seen at the casino at the same time as Kim. In addition, this report provided details including the location of the incident, the time that it occurred and other information. (RT 3001-3006.) Richmond talked to co-defendant Higgins in the county jail about a month later, and based upon that conversation, believed that co-defendant Higgins had received the report he had sent him. (RT 3006-3012.)

Stephanie Boyce worked for Cabot, Lodge and Associates and knew Willard Lewis as a friend of Boyce's cousin. (RT 3118-3119.) According to Boyce, Lewis was not employed as a senior financial agent as he claimed; rather, he was a sales agent who solicited business for the company. (RT 3119.) Lewis worked for the company for about three months, starting in November of 1997 and ending around January of 1998. After that he did not return to work. (RT 3121-3122.)

Initially, when he first began, Lewis went to work every day. However, he would later disappear for days and not go into work at all. (RT 3125.) According to Boyce, Lewis did not have any children in college, and in December of 1997, did not own a car. (RT 3126-3127.) He got possession of a 1991 Honda Civic in January of 1998. (RT 3127.) The

total amount of money that Lewis was paid was $1055.52. (RT 3128) Lewis was never paid $3500 to $5000 in any period. (RT 3124.)

b. *Defense Expert Testimony Rebutting Sexual Assault Evidence*

Dr. Earl Fuller was a medical doctor who specialized in obstetrics and gynecology. He reviewed the forensic evidence and believed that there had not been a sexual assault on Kim. (RT 3046-3047, 3049.) He opined that the tears in her anus most likely came from rectal thermometers used to take her temperature while she was in the hospital. (RT 3049-3050, 3054.) He also believed that the vaginal injuries could have been caused by wiping of the area by medical personnel, the insertion of a catheter and burn injuries in the vaginal area. (RT 3056-3058, 3061-3063.) Finally, Dr. Fuller stated that the fractured clavicle could have been caused by Kim thrashing around in the trunk of the car after she had been placed there. (RT 3073-3075.)

c. *Appellant's Alibi*

Terri Casey had known Appellant, who goes by the nickname of "Boo," since September of 1997. (RT 2910, 2917.) She met Appellant on the telephone when he was at a friend of her's house. (RT 2932-2934.) About a week after was when she met Appellant in person. (RT 2935.) She

acknowledged that she and Appellant were dating in December of 1997. (RT 2924.) On December 17, 1997, at about 4:30 a.m., she received a page from Appellant, who had given her the pager a month earlier. (RT 2910-2911.) Prior to her receiving the page, she was at her son's grandparent's home, visiting and drinking. She had arrived at their house about 9:00 p.m. (RT 2923.) Casey called the number displayed on the pager and Appellant answered the phone. After talking for a while, she went and picked him up at the corner of 135th and Prairie. It was about 5:00 a.m. when she met up with him. Appellant was by himself at that time. (RT 2912-2913.)

Casey took Appellant to his house which was located on 58th Street in Los Angeles. She dropped him off at about 5:20 a.m. (RT 2914.) She remembers the date because it was a week before Christmas. Casey later learned of Appellant's arrest while watching the news on television. (RT 2915-2916.)

Casey admitted that she talked to a defense investigator on the telephone by the name of Joe Brown around March 9, 1999. (RT 2919-2920.) She did not tell Brown that she remembered the incident because it occurred a week before Christmas, although she does not believe that Brown asked her that particular question. (RT 2920-2222.) She did not tell Brown that she left to pick Appellant up at 4:30 a.m. (RT 2927.) She

later stated that she believed that she did tell Brown the time but admitted it was not in his report. (RT 2936-2937.) Casey denied knowing anyone by the name of Tonica Harris. (RT 2926.)

d. *Co-Defendant Flagg's Alibi*

Carolyn Jackson, who at the time of her testimony, was in custody on a drug charge, observed a vehicle on fire in December 1997 near the Kelso Elementary School. (RT 3154-3158.) Jackson stated that she was the person who called 911 to report the fire. (RT 3161.) She told the police that she saw a tall light complected man wearing a blue jacket and tan pants walk past the car. (RT 3162-3164.) She stated that she first saw the man walking with a short and stubby-looking light complected black woman who was about 5'3" tall.[8] (RT 3164, 3176.) Several minutes later she saw the man walking alone, and shortly thereafter she saw the car on fire. (RT 3165, 3172-3173.)

Jackson could not identify for police the person she saw near the car. She was unable to pick anyone out, including Appellant, in a live lineup or photo lineup. (RT 3170, 3174-3177.)

Gwendolyn Flagg, co-defendant Flagg's mother, testified that on the evening of the Kim murder, her son was at her house. She last saw him at

[8] Testimony established that Crystal Johnson was a black woman who was light skinned. (RT 3257.)

6:30 p.m. with her daughters. (RT 3181-3182.) He left the house but came back between 5:00 a.m. and 5:30 a.m. She knew that because he had post-nasal drip and she heard him making nasal sounds at that time. (RT 3184.) Shortly thereafter, she heard shots and a few minutes later heard helicopters overhead. She stated that was when she actually saw her son in the house. (RT 3185, 3191.)

3. **Prosecution's Rebuttal**

Joe Brown, an investigator for Appellant, interviewed Terri Casey. (RT 3280-3281.) Casey did not tell Brown what date that she had picked up Appellant. However, she did state that it was the same date that an Asian woman was killed. (RT 3283.) Casey told Brown that Appellant had been at Tonica Harris's house, and that he paged her from Tonica Harris's house but had left. (RT 3283-3284.) Brown recognized that his written report did not indicate that Casey told him the exact time she received the page from Appellant, but this information was in his notes. (RT 3285-3286.) Brown also does not remember Casey making any reference to Christmas when he interviewed her. (RT 3286.) Casey told him that the last time she saw Appellant was that night. (RT 3288.)

Tonica Harris testified that in December of 1997 Appellant came to her house on a Saturday sometime before 8:00 a.m., which is when she goes to work.[9] (RT 3291.)

Detective Lawler testified that the Inglewood Police Department does not have a helicopter and that they have to use a helicopter that belongs to the Los Angeles Police Department. (RT 3294.) When Lawler first arrived at the crime scene on December 17, 1997, there were no helicopters. Helicopters from various news stations did arrive on the scene at a later time. (RT 3295-3297.)

B. PENALTY PHASE

1. The Prosecution's Case

a. *Victim Impact Evidence*

Bruce Galbreath was the husband of Dannie Kim. He first met Kim in Oregon and they later moved to Utah and they were married in 1995. (RT 4535-4537.) Galbreath, who was a truck driver, first became aware that something had happened to Kim when he was in Florida. At that time he only knew that she had been shot but was later told that she had been put in the trunk of a car and the car set afire. (RT 4538-4540.)

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[9] The trial court took judicial notice that December 17, 1997, was a Wednesday. (RT 3293.)

Galbreath went to see Kim at the hospital but barely recognized her. He attempted to talk to her but she could not respond. He stayed at the hospital until she died. The funeral was about 10 to 11 days later. (RT 4541-4542.) Galbreath identified a photograph of her grave. (RT 4542) After the funeral Galbreath was unable to return to work right away. He thinks about Kim when he is alone. (RT 4543-4544)

Han Kim was the younger brother of Dannie Kim. Han was originally from Korea but later moved to the United States because both his sisters, Dannie and Miah Richey, lived here. (RT 4545-4548) Han was close to Dannie. A few weeks before the crime she had given him money because she always shared everything she had with him. (RT 4549-4550)

After Dannie was shot, Han went to the hospital with his sister Miah but, because of the burns, could not recognize Dannie. He later learned that her leg had been amputated. Her death has made Han constantly worry as there are many black homeless people where he works. (RT 4551-4554.)

Miah Richey, Dannie Kim's sister, read a statement that she had written. Miah related how Dannie had died three days before Christmas and had never got to open her Christmas presents. At the hospital, Miah related how Dannie cried out "no, no, no" - and wondered if those were her last

words. Miah related how she watched her sister hang on to "life for five days of pure hell." (RT 4561.)

Miah stated that she "felt her bullet and can still smell her burnt body and it still haunts me with countless nightmares." (RT 4561.) As a result of Dannie's death, Miah has lost faith in life and God and fell into a deep depression. Miah felt completely lost, could not return to work, could not function without medication and was afraid to take go outside. (RT 4562.)

According to Miah, it took her a year to rebuild her physical health. She was still under a doctor's care and was taking medication for anxiety despite her being pregnant. According to Miah, Dannie was a tender and soft-hearted person. (RT 4562-4563)

Miah further testified stated that Dannie had two children from a previous marriage, and identified a picture of them. (RT 4556-4558.) Miah stated that the older child was angry at Dannie when he was younger but now, as a result of her death, has feelings of guilt and is in therapy. (RT 4559)

Miah related that she is the oldest in her family, and was kicked out of her parents' home because she would protect her siblings from beatings, as well sexual and emotional abuse. (RT 4559-4560, 4564) She moved to the United States and Dannie followed her a few years later. Together they

brought their brother, Han, to the United States. (RT 4565-4566.) Miah was the one who had to make the funeral arrangements for Dannie. She identified a photograph which showed her father at the funeral facing away from her grave. (RT 4567.) Miah stated that at Dannie's funeral she promised her that she would take care of Dannie's children. (RT 4569.)

b. *Aggravating Evidence Against Appellant*

1.) Jail Incidents

Evidence that Appellant had twice possessed a shank and been involved in an altercation while in custody at the Los Angeles County jail was introduced.

On June 29, 1998, a deputy working at the jail observed Appellant, and another inmate named, Griggs, arguing. (RT 3857.) The deputy overheard Griggs say "Just drop it, fool, and we can do it." Appellant then responded by saying "Just chill man. We'll handle it when the police leaves." (RT 3858)

At that point both were told to stop arguing and lie down on the floor. However, they continued to argue and additional deputies were called to the scene. Both Griggs and Appellant were then required to lay down on the floor. (RT 3859.)

As he was being led away, Griggs shouted that Appellant had a shank and that Griggs was going to defend himself. (RT 3860-3861.) Appellant was subsequently searched and a shank, which appeared to be made from a broom handle, was found in Appellant's waistband. (RT 3861.)

On September 2, 1998, a deputy observed several inmates, including Appellant, in a fighting stance. Appellant and another inmate were then ordered to lay down on the floor. The deputy overheard Appellant say to the other inmate that "This shit ain't over, yet." The other inmate replied "Well, bring it on." (RT 3848-3850) The deputy did not actually see any fight, although he observed that Appellant's hand appeared to be swollen. (RT 3851-3858.)

On Feb. 12, 1999, while conducting a search of Appellant's cell, a piece of sharpened metal wrapped with a cloth handle was discovered underneath a mattress. (RT 3837-3840.) The shank was later destroyed but a photocopy of it was introduced into evidence. (RT 3840) The deputy who found the shank admitted that shanks are commonly found in the Los Angeles County jail and can be used for either offensive or defensive purposes. (RT 3842.)

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2.) Gun Incident

On March 30, 1994, while on patrol, Los Angeles police officers heard three gunshots. They then observed Appellant and another black male running. (RT 3880-3381) Appellant, who appeared to have something in his hands, was seen running into a parking lot and the police pursued him. (RT 3881-3882.)

Appellant attempted to climb a fence but was unable to do so. He bent down and discarded something under a trash dumpster. (RT 3883-3884.) Appellant was ordered to put his hands up and was then taken into custody. Police recovered a .25 caliber semi-automatic handgun underneath the dumpster. (RT 3884-3885.) Appellant identified himself to the police as Timothy Hawkins. Three rounds were found in the weapon. (RT 3884-3887.)

c. *Aggravating Evidence Against Co Defendant Flagg*

Evidence was introduced regarding three robberies committed by co-defendant Flagg. The first robbery occurred on March 27, 1989 when Flagg approached the victim and forcibly took his wallet. (RT 3914-3916, 3934-3935.) The second robbery occurred on March 28, 1990 when the victim picked up Flagg, and Flagg subsequently pulled a gun, hit the victim and robbed him of his vehicle. (RT 4073-4076, 4309,4316, 4320-4321.) The

third robbery occurred on November 15, 1991, when Flagg and another individual robbed the victim at gunpoint and stole his gold chain and wallet. (RT 3950-3954, 3983, 3990, 4014-4015, 4061.)

d. *Aggravating Evidence Against Co-Defendant Higgins*

Evidence was presented that in March of 1993, a shank was found in the county jail cell which was occupied by co-defendant Higgins. (RT 4092-4094, 4096)

Evidence was also presented regarding co-defendant Higgins convictions for two counts of voluntary manslaughter.[10] These convictions involved a gang attack on one of the victims, Stephen Pope, who was stomped and shot to death. (RT 4112, 4115.) A witness testified that the area where the incidents occurred was claimed by the Rolling 60's gang. After asking Pope if he was a gang member, various gang members jumped on Pope and started stomping on his head. Another gang member then came up and shot him fatally in the head. (RT 4207-4210, 4212-4217, 4268.) Several of the individuals involved had guns and they began shooting at people. (RT 4218.) It was at that point that the second victim, Ravi Cherkoori, was shot in the back while driving away and subsequently died. (RT 4245-4248, 4251, 4377-4379.) Higgins was identified as being at

the scene of the shootings and as one of the individuals that had beaten Pope. (RT 4376, 4380-4381, 4489-4491.)

2. Defense Mitigation

a. *Appellant's Mitigation*

Appellant's mother, Kimberley Ashley, testified that she had given birth to Appellant, who at the time of trial was 22 years old, when she was 14 years old. She was never married to Appellant's biological father but subsequently married Tony Broomfield when Appellant was approximately six years old. She has had three other children by Broomfield. (RT 4592-4593.)

Ashley apologized for Appellant's behavior during the trial and offered her sympathy to the victims and their family. She stated that to know Appellant is to love him and that "the person that you've seen in this courtroom is not the person that I lived with." (RT 4593.) Appellant is a caring person and does a lot of different things to help his friends and to help her. However, he is not as mature as he should be for his age. (RT 4593-4594.) Appellant has taken care of other people's children, paid their bills and has done a lot of things for the church they attend. (RT 4594)

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[10] The court records showing that Higgins had pled guilty to two counts of manslaughter were also introduced into evidence. (RT 4493.)

Ashley believed that Appellant did take this case seriously. She knows that he is not perfect but he does not deserve to die as it will not solve anything. She loves Appellant and he is like a best friend to her. As a result of this case, she has not been working, is depressed, and is on medication. (RT 4594-4596)

According to Ashley, at time of the crimes, Appellant was working for Starving Students moving company. (RT 4599.) Ashley blamed Appellant's involvement in this case on Crystal Johnson and did not like his being with her. (RT 4600.) She admitted that when he was younger, Appellant got suspended from school and went to "probation school." (RT 4601.) She also admitted that she raised Appellant the best she could and that he was kicked out of more than one school. (RT 4605- 4606.)

Sylvia Thornton, who lived nearby to Appellant, had known him since he was around 11 or 12 years old. She had a handicapped son who Appellant would help. She described Appellant as a happy individual. (RT 4610-4613)

Irene Broomfield, Appellant's sister, stated that he was a sweet person who was always helping others and who was determined to succeed. He would help her with her son. (RT 4620-4622)

Mariah Mack knew Appellant through his sister, Irene. She described him as a sweet person who loved his family and was helpful to her, like a big brother. She never saw Appellant become violent or disrespect his family. (RT 4625-4627) She indicated that she met Appellant in 1997 and did not believe that he had committed these crimes.[11] (RT 4627-4629)

Tony Broomfield, Appellant's step-father, testified that he had been married to Appellant's mother for 22 years. Broomfield, who had a felony conviction for robbery some seventeen years prior, currently worked as a surgical technician at UCLA. (RT 4635-4636.) Broomfield described Appellant as a very bright young man while growing up. (RT 4636.) Broomfield stated that he loved him as one of his own and that Appellant respected him. Broomfield acknowledged that he had taught Appellant the difference between right and wrong. (RT 4637.). He did not believe that Appellant was the type of person who would have committed these type of crimes. (RT 4638.)

Bryan Harris, who was sixteen years old, testified that he knew Appellant and that Appellant was a fun person to be around. Harris did not consider him dangerous. Harris was shocked when he heard that Appellant

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[11]It was stipulated that Appellant was in custody at the California Youth Authority from June of 1994 until April of 1997. (RT 4630.)

had been convicted, as that is not the person he knows. Harris had never known Appellant to be disrespectful to his parents. Appellant always treated him like a brother. (RT 4646-4649)

Billy Ashley, a cousin who lived a few blocks away from Appellant, had known him since he was 5 years old. According to Ashley, Appellant was a hard worker and a nice guy. He was never disrespectful to his parents nor was he a violent person. (RT 4655-4659)

b. *Co-Defendant Flagg's Mitigation*

Expert witness testimony was presented that co-Defendant Flagg was borderline mentally retarded and suffered from a broad range of global deficits, including low attention and reasoning skills. He functioned below the fourth grade in terms of reading, spelling and arithmetic. (RT 4435-4438, 4440.) In addition, Flagg had a history of auditory hallucinations and was prescribed anti-psychotics while in jail. (RT 4439)

A family friend who had known Flagg since he was a young man, testified that after Flagg's father left the family, Flagg changed for the worse. (RT 4670-4672)

Flagg's father testified that he had been a heroin addict since 1968 and had been in prison. (RT 4683, 4723.) He admitted that when he baby sat Flagg he used drugs in front of him, and as a child Flagg would imitate

taking drugs. (RT 4685-4686, 4689.) He also stated that when Flagg was born the umbilical cord was wrapped around his neck which cut off the flow of oxygen. As a result, Flagg had learning disabilities. (RT 4690-4691, 4724.) When he was a child, Flagg had also fallen from a balcony and had been hit by a car. (RT 4731-4732.)

Gwendolyn Flagg, Flagg's mother, corroborated the fact that when he was born the umbilical cord was wrapped around his neck and resulted in some brain damage. He also had learning disabilities. She also admitted that his father was a heroin addict and not been there for Flagg when they split up. She asked the jury to give her son a chance and reminded them that he never had a life. (RT 4755-4787)

c. *Co-Defendant Higgins' Mitigation*

A friend, an uncle, and the parents of co-defendant Higgins testified that he was respectful to his parents and more of a follower than a leader. His father was not present when Higgins was growing up, the family moved around a lot and they always lived in a low income neighborhood. (RT 4789-4808, 4817-4825.) Higgins was described as a good son who had never been arrested as a juvenile. (RT 4827-4832.)

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POINTS AND AUTHORITIES

I.

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE SPECIAL CIRCUMSTANCE OF ARSON MURDER

A. Introduction

In this case one of the two special circumstances found true was arson-murder. (Penal Code section 190.2, subdivision (a)(17)(H).) (CT 681, 1004.) However, there was insufficient evidence to support this finding. As a result, Appellant's right to due process under both the United States and California Constitutions were violated. Furthermore, Appellant's right to a reliable sentence under the Eighth Amendment of the United States Constitution was violated.

B. The Standard of Review

A conviction violates due process if it is not supported by substantial evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307.) A conviction must be reversed for insufficiency of evidence under *Jackson v. Virginia* and *People v. Johnson* (1980) 26 Cal.3d 557, unless, in light of the whole record, there is "substantial" evidence of each of the essential elements. (*Id.* at pp. 576-577.)

In order for the evidence to be "substantial," it must be "of ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*Id.* at pp. 576-578.) While the reviewing court "must review the whole record in the light most favorable to the judgment below," and "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence" (*Id.* at pp. 576, 578), where the evidence is not substantial, and the judgment is based upon speculation, conjecture, unwarranted inference, or mere suspicion, reversal is required. (*People v. Allow* (1950) 97 Cal.App. 2d 797, 802-803; *People v. Morris* (1988) 46 Cal.3d 1, 21, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543.)

C. The Car was Not a Dwelling for Purposes of the Arson-Murder Special Circumstance

The uncontraverted evidence established that Dannie Kim was placed in the trunk of her car and the car then set on fire. No evidence was presented that her car was a dwelling. Section 190.2. subd. (a)(17)(H) requires that in order to prove the arson-murder special circumstance it must be shown that the "[a]rson [was in] violation of subdivision (b) of section 451."

Section 451, subd. (b), at the time of the commission of the offense, read as follows:

> A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property.
>
> (b) Arson that causes an inhabited structure or
>
> (c) inhabited property to burn is a felony punishable by imprisonment in the state prison for three, five, or eight years.

This Court has also held that the arson-murder special circumstance, as enacted at the time the crime, applies only to the arson of an inhabited dwelling. "The arson special circumstance thus applies only to arson of an *inhabited* structure or *inhabited* property." (*People v. Clark* (1990) 50 Cal.3d 583, 606, fn. 13 (emphasis added.); see also *People v. Oliver* (1985) 168 Cal.App.3d 920, 926.)

In this case, the evidence showed that Kim was placed in the trunk of her car and the car then set afire. There was no evidence produced that Kim used the car as a dwelling. Thus, the arson-murder special circumstance was inapplicable and must be reversed.

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D. Respondent Has Previously Conceded that the Arson-Murder Special Circumstance Does Not Apply Under the Facts of this Case and Thus is Estopped from Arguing its Application in Appellant's Case

Both co-defendants Flagg and Higgins, who were sentenced to LWOP appealed their case to the Second District Court of Appeal. During the review of the record, the Court of Appeal requested all parties to provide supplemental briefing on the issue of whether or not the arson-murder special circumstance was applicable to the facts of the case. (*People v. Flagg* (July 17, 2002, B135685) [nonpub. opn.].) Respondent conceded that it did not, and the Court of Appeal struck the arson-murder special circumstance. (*Ibid.*)

Under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution, Respondent is bound by its concession in *People v. Flagg*, *supra*, that the arson-murder special circumstance does not apply in Appellant's case. Due process requires equal application of the law in both cases. Furthermore, allowing the arson-murder special circumstance to stand in Appellant's case, while having struck it in the co-defendants' case, would be in violation of the Eighth Amendment's requirement of reliability.

This Court has previously condemned the use of inconsistent theories by the prosecution in order to obtain convictions or harsher sentences. (*In re Sakarias* (2005) 35 Cal.4th 140.) As this Court stated: "Because it

undermines the reliability of the convictions or sentences, the prosecution's use of inconsistent and irreconcilable theories has also been criticized as inconsistent with the principles of public prosecution and the integrity of the criminal trial system." (*Id.* at 159;.)

Although *Sakarias* involved the use of inconsistent prosecutorial theories at trial, the same rationale should apply to prevent the prosecution, in this case the Attorney General, from arguing inconsistent and irreconcilable theories on appeal as to different co-defendants convicted at the same trial on the same facts. "The doctrine of judicial estoppel essentially acts to prevent a party from abusing the judicial process by advocating one position, and later, if it becomes beneficial to do so, asserting the opposite. The doctrine is designed not to protect any party, but to protect the integrity of the judicial process. [citation.] (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1261-1262.) This doctrine should "apply where a prosecutor's assertion of inconsistent theories would act to undermine society's confidence in the fairness of the process. . . ." (*Id.* at 1262; see also *Thompson v. Calderon* (9th Cir. 1996) 109 F.3d 1358 (overruled on other grounds in *Calderon v. Thompson* (198) 523 U.S. 538); *Drake v. Francis* (11th Cir. 1984) 727 F.2d 990.)

Furthermore, to allow the prosecution in this case to assert that the arson-murder special circumstance applies to Appellant would violate not only due process, but the Eighth Amendment's requirement for a "heightened need for reliability in capital cases." (*Id.* at 160; see *Jacobs v. Scott* (1995) 513 U.S. 1067 (dis. opn. of Stevens, J., from denial of stay.)

Because they were all tried together, the facts as set forth in the co-defendants appeal are the same as in Appellant's case as to the Kim homicide. In both appeals no evidence was presented that Kim's vehicle was used as a dwelling. Thus, because the prosecution has conceded that the arson-murder special circumstance could not apply in the co-defendants' case, it must concede that it cannot apply in Appellant's case.

E. Appellant's Verdict Must be Reversed

The guilt verdict must be reversed because the special circumstance of arson-murder never should have been alleged, as the law at the time of Appellant's trial established that this special circumstance did not apply.

The penalty verdict must be reversed because during the penalty trial the jury was told, pursuant to CALJIC 8.85, that it could consider the arson-murder special circumstance as a factor in aggravation. (CT 847; RT 412.) Appellant recognizes that in *Brown v. Sanders* (2006) 546 U.S.212, the United States Supreme Court held that the invalidity of one special

circumstance did not necessarily prejudice the penalty verdict if other special circumstances were found to be valid. The Court established the following rule in such circumstances: "An invalid sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." *(Id* at 220.)

However, in *Brown* the defendant had been convicted of four special circumstances of which two were held to be invalid. Thus, he remained subject to the death penalty because two of the special circumstances found to be true by the jury were upheld on appeal. In Appellant's case, he remains subject to the death penalty only because of the true finding of the robbery-murder special circumstance. In this case, the prosecution argued that the jury should consider this special circumstance and sentence Appellant to death. (RT 4942, 5049.) Furthermore, the evidence in aggravation against Appellant was not as strong as that introduced against the co-defendants, both of whom received a sentence of LWOP. Moreover, this was a close case for penalty determination as the jury reported that it was hopelessly deadlocked after taking several ballots. (See Argument

VIII, *post.*) The true finding of the arson-murder special circumstance added an improper element to the aggravation scale in the weighing process that was not overcome by any of the other evidence in aggravation. Thus, the jury's consideration of the arson-murder special circumstance was prejudicial and requires the penalty verdict to be reversed.

II.

THE MERGER DOCTRINE PROHIBITS THE APPLICATION OF THE SPECIAL CIRCUMSTANCE OF ARSON-MURDER IN APPELLANT'S CASE

A. Introduction

The prosecution's case alleged that Appellant and the co-defendants followed Kim from the casino, robbed her and then returned with her and her car to the Osage Street area. The prosecution further argued that Kim was placed in the trunk of her car, shot by Appellant, and the car set afire. According to the pathologist, the cause of death was believed to be multiple gun shot wounds and multiple thermal burns. (RT 2459.)

In regards to the special circumstance of arson-murder, the trial court instructed the jury, per CALJIC 8.81.17 as follows:

> To find that the special circumstance, referred to in these instructions as murder in the commission of the crime of arson, to be true, it must be proved:

1. The murder was committed while a defendant was engaged in or was an accomplice in the commission or attempted commission of the crime of arson; and

2. The murder was committed in order to carry out or advance the commission of the crime of arson or to facilitate the escape there from to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the arson was merely incidental to the commission of the murder. (CT 746; RT 3450-3451.)

The jury found true the special circumstance of arson-murder (section 190.2, subd. (a)(17)) as to Appellant and the co-defendants. (CT 681, 1004.) However, as argued below, the merger doctrine prohibited the special circumstance of arson murder from applying to Appellant. As a result, Appellant's Sixth, Eighth and Fourteenth Amendment rights were violated. Finally, the prejudice that resulted from this finding requires that Appellant's sentence of death be reversed.

B. The Merger Doctrine Prohibits Application of the Arson-Murder Special Circumstance in Appellant's Case

The seminal case on the merger doctrine is *People v. Ireland* (1969) 70 Cal.2d 522. There, the defendant fatally shot his wife. (*Id.*, at 527.) On appeal, he contended the jury should not have been instructed on second degree felony-murder for a killing during an assault with a deadly weapon. (*Id.*, at 538.) This Court held that the felony-murder rule should not apply when that theory "is based upon a felony which is an integral part of the

homicide and which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged." (*Id.*, at p. 539; original italics; footnote omitted.)

The merger doctrine applies to first degree felony-murder as well as second degree felony-murder. In *People v. Wilson* (1969) 1 Cal.3d 431, this Court held the merger doctrine would apply to felony murder on a burglary theory where the intent at the time of entry is to commit an assault with a deadly weapon upon someone inside the building. (*Id.*, at 440-442.) This Court recognized that the doctrine applied even though burglary felony-murder is first degree murder. (*Id.*, at 441, fn. 4.) This Court found that the burglary was "included in fact" within the killing. (*Id.*, at 441.)

The holding in *Wilson* was reaffirmed by this Court in *People v. Sears* (1970) 2 Cal.3d 180, 185-188.) In *Sears*, the defendant apparently entered the home with the intent to kill his wife, but ended up killing his stepdaughter. (*Id.*, at 188.) This Court again held that the merger doctrine nevertheless applied and noted it would be anomalous to apply the doctrine to a defendant who kills his intended victim but deny the doctrine to a defendant who inadvertently kills someone else. (*Id.*, at 188-189.)

Finally, in *People v. Burton* (1971) 6 Cal.3d 375, the Court somewhat limited the scope of *Ireland*. In *Burton*, *supra*, the underlying felony was

armed robbery. (*Id.*, at 384.) The defendant argued the merger doctrine applied because armed robbery necessarily included an assault with a deadly weapon as the means of applying force or fear (section 211) to accomplish the taking of property. (*Id.*, at 386.) The Court pointed out that the net effect of the defendant's argument would be to apply the merger doctrine to all felonies committed with a deadly weapon. (*Id.*, at 386-387.)

While this Court acknowledged that this was a possible interpretation of its prior merger cases, it rejected such an expansive application of the doctrine, finding that the focus of the merger doctrine is not on the use of a weapon but on the "purpose of the [defendant's] conduct." (*Ibid.*) Where the purpose is to inflict bodily injury on another, and the desired infliction of bodily injury was not satisfied short of death, there is a single course of conduct with a single criminal purpose, and merger applies. (*Ibid.*) But where there is an independent felonious purpose -- such as the acquisition of money or property in the case of robbery -- merger does not apply. (*Ibid.*)

Thus, under the merger doctrine, even if a felony was included within the facts of the homicide, and is integral to the homicide, the court must determine if the homicide resulted from conduct for an independent felonious purpose as opposed to a single course of conduct for a single

purpose. (*People v. Smith* (1984) 35 Cal.3d 798, 805-806.) Merger applies when the defendant engages in conduct constituting a separate felony with no independent felonious intent other than to harm the victim. (*Id.*, at 806-808.) But where the harm is not intended but arises from an independent felony with an independent felonious purpose, merger does not apply. (*Id.*, at 807-808.)

The merger doctrine also applies to felony murder special circumstances. In *People v. Green* (1980) 27 Cal.3d 1, this Court held that there must be an independent felonious purpose for the felony and that it must not be merely incidental to the murder. "To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive 'the risk of wholly arbitrary and capricious action' condemned by the high court plurality in *Gregg*. [citation.]" (*Id.* at 61-62; see also *People v. Clark* (1990) 50 Cal.3d 583, 608, [special circumstances are "inapplicable to cases in which the defendant intended to commit murder and only incidentally committed one of the specified felonies while doing so."].)

For example, in *People v. Oliver* (1985) 168 Cal.App.3d 920, the defendant had been rejected by his girlfriend. In order to get even with her he threw a Molotov cocktail into her house. The house caught on fire and a guest that was staying there died as a result of the fire. (*Id.* at 588-589.) The court in *Oliver* held that the merger doctrine did not apply, because "the evidence was such as to support a conclusion appellant intended either to kill through the device of a deadly weapon, or that his purpose was restricted to causing destruction by means of arson." (*Id.* at 590.) In *People v. Clark, supra,* 50 Cal.3d 583, the defendant threw gasoline into a house occupied by a couple and their infant daughter. The defendant then ignited the gasoline which caused the house to catch on fire and which resulted in the death of the father. (*Id.* at 594.) As in *Oliver*, this Court found that the merger doctrine did not apply and that the jury could have found that the defendant acted with an independent felonious purpose in committing the crime of arson. (*Id.* at 608-609.)

In Appellant's case, the rule of both *Ireland* and *Green* apply. Appellant and co-defendants allegedly set Kim's car on fire in order to injure, kill or finish killing her, not for any independent felonious purpose. The car was set afire after she had been shot and placed in the trunk of her vehicle thus making it clear that they expected the fire to kill the victim.

This case must be contrasted to one in which the defendant sets a fire for the purpose of destroying or damaging property, as was the case in *Oliver* and *Clark*. Here, there is no indication Appellant and co-defendants wanted to destroy property for its own sake. The alleged purpose was to kill or injure the Kim. There was no independent felonious purpose involved. Accordingly, the finding of the arson-murder special circumstance must be set aside.

C. Appellant's Death Verdict Must be Reversed

As stated in Argument I, *supra*, the error in finding true the arson-murder special circumstance requires the reversal of Appellant's death sentence. Appellant incorporates herein the same reasons as stated in that argument as to why his death verdict must be reversed because of this error.

III.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT DISMISSED JUROR NUMBER TWO

A. Factual Background

During trial testimony on April 12, 1999, the trial court informed all trial counsel, outside the presence of the jury that the bailiff had informed it that a spectator in the court room was apparently "utilizing a tape recorder." (RT 1245.) The court told the spectator, Kimeko Campbell, that she was

not permitted to tape record trial proceedings. Campbell told the court that she did not know that, and would not record any further proceedings. (RT 1246.)

On April 16, 1999, outside of the presence of the jury, co- defendant Flagg's attorney, James Brewer, informed the court that the night before he had found out that Campbell's father was apparently dating one of the jurors. (RT 1650.) Brewer also stated that Campbell was friends with the family of co-defendant Flagg, but that she had intentionally sat on the other side of the courtroom from where Flagg's family had been sitting. (RT 1650.) Brewer asked Campbell if she in fact knew the juror, who was seated as number two, and whose number was 5646. (RT 1650.) Campbell told Brewer that they may have met once but that Campbell did not know her and that they had not spoken nor made eye contact. Campbell also told Brewer that she was observing the trial because she is writing a story about the case for a class. (RT 1650.)

The prosecutor requested that juror number two be excused and stated that he had seen Campbell sitting with some of co-defendant Flagg's family. He also claimed that Campbell was present at the preliminary hearing with Flagg's family. (RT 1651.)

In chambers, the trial court questioned juror number two. In response to the trial court's question, she stated that she did recognize a person in the courtroom by the name of Kim, who was in fact Kimeko Campbell. She explained that she was currently dating Campbell's father. (RT 1653.) She had been dating him for around one year but she knew that Campbell did not live with her father. (RT 1653.)

Juror number two related that she had seen Campbell about four or five times at her father's house and had no idea what her interest in this case was. (RT 1654.) She stated that she has not discussed the case with Campbell and was "shocked to see she was even in the courtroom." (RT 1654.) She had asked Campbell why she was there and Campbell told her that she was doing a school project. (RT 1654.)

Juror number two was emphatic that she had not discussed the case with Campbell and that it was a coincidence that Campbell was there. She stated that the fact that Campbell was in court would in no way influence her as a juror. (RT 1655.) She had not previously brought this to the court's attention because she did not think that it mattered. She understood that she was not allowed to talk to Campbell and that "it was never an issue, you know, of trying to communicate with her, or her trying to communicate with me." (RT 1655, 1658.)

Campbell told her that she was there for a class project and that she had been following the case since it began. (RT 1657.) Juror number two stated that she sees Campbell's father about every weekend but did not know Campbell that well. (RT 1657.)

The trial court then had Campbell brought into chambers. When asked if she knew juror number two, Campbell stated that although she recognized her, Campbell did not really know her, had never been introduced to her, and did not know her name. (RT 1660.) Campbell related that she had seen juror number two at her father's house on one occasion when Campbell had dropped off her laundry. (RT 1660.) Campbell stated that she was not aware of what their relationship was. (RT 1661.) Campbell informed the court that she was interested in the case because she is a writer and had never observed a murder trial. (RT 1662.)

Campbell also stated that she was not involved with any of the parties but had talked to someone named Tynesha, who was Campbell's niece, at the preliminary hearing. (RT 1664.) It was Campbell's understanding that Tynesha was either a girlfriend or ex-girlfriend of one of the co-defendants. (RT 1664.) Campbell denied ever discussing any of the facts of the case with her father and stated that she would abide by a court

order prohibiting her from talking about the case with her father. (RT 1665.)

The trial court then recalled juror number two into chambers for further questioning. In response to the trial court's question, juror number two stated that the man she was dating was named Ernie Campbell, and that as far as she knew, he had only one child, Kim. (RT 1670.) She again assured the court that, if hypothetically, a relation to Ernie Campbell, or Kimeko Campbell, was dating one of the defendant's, it would not influence her, as she did not even know them and it would have nothing to do with her. (RT 1671-1673.) Juror number two stated that she had never really spoken to Campbell the few times she had seen her and would not be at all influenced by Campbell or her relationship to any of the co-defendants. (RT 1672.) As Juror number two told the trial court:

> No. I won't feel awkward, because first of all, I have to let my conscience be my guide. That's number one.
>
> And I – like I said, I'm not – If I were closer to them, maybe, yes, it would bother me. But I don't even know them. You know. I don't know – All I know is Kim, and I only know her by just sight.
>
> You know, we haven't even had a conversation, so to speak. You know. And – so no, it won't bother me, because I don't know them.. (RT 1675.)

Subsequent to this examination, the prosecutor informed the trial court that during one of the breaks, Miah Richey had allegedly heard juror number two make a comment to the effect that it was a shame to have murders at casinos. (RT 1677.) At that point, the trial court then recalled juror number two into chambers and asked her if she had made any such comments. Juror number two denied making any such statements. (RT 1678-1679.)

Miah Richey was then called into chambers and sworn. She stated that when she came back from lunch the previous morning, she heard a person, whom she identified as juror number two, talking to other jurors. (RT 1681, 1683-1684.) Richey did not know exactly what was said but believed that juror number two "was saying casino being there, there's a murders [sic] happening around there. . . . . And she kept talking about casinos. Casinos, and this is – causes murders around the people, blah, blah, blah." (RT 1681.) According to Richey, one of the other jurors she saw juror number two talking to was an older woman with multiple color hair braids. (RT 1683-1684.) After Richey was excused, the prosecutor admitted that she had told him about it yesterday, but that he had forgotten about it and did not bring it up to the court at that time. (RT 1687.)

Appellant's attorney then suggested that the trial court examine, in chambers, juror number six, as he believed that would have been the other juror who number two had been allegedly talking with. (RT 1688-1689.) Juror number six was then brought into chambers and stated that she did not hear any other juror discussing any aspect of the case in the hallway. She specifically stated that she never heard any one discussing casinos causing murders or anything of that nature. (RT 1690.) She did state that juror number two had told her that she was going to Las Vegas for the weekend. (RT 1691.)

In open court, but this time at the bench, Campbell was again questioned by the trial court. (RT 1694.) She stated that Tynesha's last name was Coleman, but she was not aware that she was identified on the witness list. (RT 1694-1695.)

In open court, the prosecutor argued that juror number two should be excused. (RT 1696-1698.) Appellant's attorney objected and argued against her dismissal. (RT 1698-1700.) After hearing argument from all sides, the trial court stated as follows:

> This is not a subjective standard. This is an objective standard, based upon the facts that are produced in this court. The section is Penal Code section 1089. The court makes a determination of good cause that the juror is unable to perform her duty as a juror.
>
> This is an objective standard.

> The mere fact that the juror may indicate that she still feels comfortable is not the end of the discussion, or the end of the question.
>
> The question is whether or not the court is satisfied on an objective standard that she can perform her duty as a juror, based upon the relationship this juror and Ms. Campbell, and Ms. Campbell and Tynesha Coleman and the defendant.
>
> I'm not satisfied that this juror can perform her services as a juror.
>
> The court finds good cause under Penal Code section 1089. Juror number two is going to be discharged. (RT 1708-1709.)

The trial court subsequently noted that its reasons for discharging juror number two "had nothing to do with the allegations that were made by Ms. Richey." (RT 1715.)

Appellant's attorney then moved for a mistrial, which the trial court denied. (RT 1709-1712.) Juror number two was then discharged, and an alternate juror was picked to replace her. (RT 1710, 1717.) As argued below, the trial court prejudicially erred in discharging this juror.

B. Dismissal of Juror Number Two was an Abuse of Discretion Under Penal Code section 1089

Section 1089, in pertinent part, reads as follows:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefore, the court may

> order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.[12]

By its express language, section 1089 does not invest the trial court with unbridled discretion to discharge a juror. Instead, it restricts a court's power by setting forth a limited number of circumstances under which the court may discharge a juror. "A brief historical review of Penal Code section 1089 shows the significant limitation on the trial court's discretion to discharge jurors and the reasoning underlying the limitation." (*People v. Bowers* (2001) 87 Cal.App.4th 722, 729.)

These circumstances fall into three broad categories: (1) illness or death; (2) good cause resulting in a finding the juror is unable to perform his or her duty; and (3) a request from the juror for discharge coupled with good cause for such discharge. (*People v. Delamora* (1996) 48 Cal.App.4th 1850, 1855.) This case concerns the second category. To fall within this category, there are two requirements: (1) that there exist good cause and (2) that the good cause be such as to support a finding of *inability* to perform the duties of a juror.

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[12] Former section 1123, which was repealed in 1988 (stats. 1988, ch. 1245, sect. 42) also provided that a court could discharge a juror on the basis of sickness or other good cause showing the juror to be unable to perform his or her duty. Some of the case law discussing the statutory basis for discharge of a jury was

With respect to the standard of review, the appellate court reviews for an abuse of discretion. (*People v. Marshall* (1996) 13 Cal.4th 799, 843.) If there is substantial evidence supporting the trial court's finding, that finding will be upheld on appeal. (*Ibid.*) However, a juror's inability to perform his or her function must appear in the record as a demonstrable reality. (*People v. Beeler* (1995) 9 Cal.4th 953, 975; *People v. Holloway* (2004) 33 Cal.4th 96, 125.) Thus, "[t]he trial court has at most a limited discretion to determine that the acts show an inability to perform the functions of a juror." (*People v. Compton* (1971) 6 Cal.3d 55, 60; *People v. Collins* (1976) 17 Cal.3d 687, 696.) Furthermore, if the grounds for discharge is juror misconduct, "such misconduct must be 'serous and willful.'" (*People v. Bowers* (2001) 87 Cal.App.4th 722, 729, citing *People v. Daniels* (1991) 52 Cal.3d 815, 864.)

A trial court's ruling will be reversed if it "cannot withstand scrutiny under the precise language of section [] 1089." (*People v. Compton*, *supra*, 6 Cal.3d at p. 60.) Accordingly, the purported good cause must be such that it "actually renders [the juror] 'unable to perform his duty.'" (*Id.* at p. 59.) "The court must not presume the worst." (*People v. Franklin* (1976) 56 Cal.App.3d 18, 26.)

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decided before the repeal of former section 1123 and therefore discusses that section as well as section 1089.

Several cases have found a number of things to constitute good cause showing a juror is unable to perform his or her duty. Often times a finding of good cause is based in part on the juror's admission that the matter in question would effect his or her ability to perform his or her duty as a juror.[13]

For example, in *People . Marshall*, *supra*, 13 Cal.4th 799, 845-846, the court learned during trial that the juror had appeared in municipal court on a speeding ticket and was going to have a hearing on the ticket the next week. The juror stated that under his employer's rules this ticket, which was his fifth, would result in the loss of his job, and the juror acknowledged this situation would affect his ability to serve as a juror and focus on the trial in which he was serving as a juror. In *People v. Fudge* (1994) 7 Cal.4th 1075, 1098-1100, the juror initially said that anxiety about a new job she was about to begin would not affect her ability to perform her duties. After speaking to her employer, however, she said it would. This Court found that this change supported a finding of good cause to discharge the juror. In *People v. Collins*, *supra*, 17 Cal.3d 687, 690-691, 696, the juror asked to be excused, stating that she was unable to follow the court's instructions, felt

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[13]Conversely, a juror's recantation of a claim of inability to judge the case will provide a basis for not discharging the juror. (See, e.g., *People v. Beeler*, *supra*, 9 Cal.4th at pp. 972-975; *People v. Goldberg* (1984) 161 Cal.App.3d 170, 191-192; *People v. Franklin*, *supra*, 56 Cal.App.3d at pp. 24-26.)

she was emotionally involved in the case, was unable to cope with the experience of being a juror, and thought she was not able to make a decision based on the evidence or the law. Again, this Court found that this supported a finding of good cause to discharge the juror. (See also *People v. Hecker* (1990) 219 Cal.App.3d 1238, 1242-1245 [defendant had joined the juror's church during the trial and the juror was unable to give any assurances she would decide the case without reference to this].)

In other cases, while there is no admission by the juror of inability to perform his or her duties, there is evidence from which such inability plainly appears. The most common example is in cases of illness. (See, e.g., *People v. Sanders* (1995) 11 Cal.4th 475, 539-541 [juror with severe high blood pressure discharged when she collapsed for the second time during trial, requiring emergency medical treatment from paramedics; on the first occasion she stopped breathing and the court clerk resuscitated her with mouth-to-mouth resuscitation]; *People v. Roberts* (1992) 2 Cal.4th 271, 323-325 [juror ill with a sore throat and high blood pressure stated she might be able to resume her duties as a juror in three days]; *People v. Pervoe* (1984) 161 Cal.App.3d 342, 354-356 [juror had arthritis, was unable to raise her arm, dress herself, or drive a car, and was feeling sick to her stomach and fainting because of medication she had taken].)

Other examples of good cause to discharge a juror is concealment or misrepresentation of information of prior criminal charges or arrests[14] (*People v. Johnson* (1993) 6 Cal.4th 1, 21-22; *People v. Price* (1991) 1 Cal.4th 324, 399-401; *People v. Farris* (1977) 66 Cal.App.3d 376, 385-387, where a juror has fallen asleep during the trial. (*People v. Johnson*, *supra*, 6 Cal.4th at pp. 21-22.), when the juror requests discharge because of the death of a close relative, since the grief which accompanies such a loss would make it difficult for the juror to perform his or her duties. (*People v. Ashmus* (1991) 54 Cal.3d 932, 986-987 [death of juror's mother]; *In re Mendes* (1979) 23 Cal.3d 847, 852 [death of juror's brother].), refusal of a juror to participate in deliberations. (E.g. *People v. Feagin* (1995) 34 Cal.App.4th 1427, 1434-1437; *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1332-1333.).

Finally, good cause also can consist of a juror having contact with members of the defendant's family and then falsely denying such contact, thereby showing the loss of impartiality and the inability to perform the duty of a juror. (*People v. Green* (1995) 31 Cal.App.4th 1001, 1010-1012.)

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[14] Concealment of information by a juror also constitutes implied bias which justifies disqualification for cause. (*People v. Morris* (1991) 53 Cal.3d 152, 183-184, disaproved on other grounds in *People v. Stanley* (1995) 9 Cal.4th 824, 830, fn. 1.)

Here, the trial court found that because juror number two had met Campbell, and because Campbell's niece was Tynesha Coleman who allegedly was the girlfriend of one of the co-defendants, that this would impair juror number two's ability to be impartial. The problem with this reasoning is that there was no evidence that juror number two even knew that Coleman was related to Campbell or that this fact would ever be disclosed to juror number two. What the trial court did was to "presume the worst," something it cannot do. (*People v. Franklin, supra,* 56 Cal.App.3d at 26.)

In fact, juror number two gave no reason to show that she could not be impartial. She repeatedly and emphatically stated that she hardly knew Campbell, would not be influenced by the fact that Campbell was present at trial, and that even if she found out, hypothetically, that someone related to Campbell or her father was dating one of the defendants, it would in no way influence her as a juror. (RT 1655, 1658, 1671-1673.) The basis for the trial court's decision was speculation and not objective evidence demonstrating a possible bias on the part of juror number two. As such, the trial court abused its limited discretion under section 1089.

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C. Dismissal of Juror Number Two Violated Appellant's Rights Under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution

Even though the procedure under section 1089 has been found to be constitutional under both the Sixth and Fourteenth Amendments of the United States Constitution (See *Miller v. Stagner* (9th Cir. 1985) 757 F.2d 988), its application may still violate both the Sixth and Fourteenth Amendments if, in fact, the dismissal of a juror was improper. (See *Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1429 (Judge Nelson, diss.).)

Furthermore, under the Sixth Amendment right to a fair and impartial jury and the Fourteenth Amendment right to due process, the trial court cannot dismiss a juror on the basis of implied bias except "in 'exceptional' or 'extraordinary' cases. [citation.]" (*Sanders v. Lamarque* (9th Cir. 2004) 357 F.3d 943, 949 [error for trial court to excuse juror who had failed to disclose during voir dire that she lived in gang area and son's association with gangs.] Moreover, as the United States Supreme Court has recognized, "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." (*Smith v. Phillips* (1982) 455 U.S. 209, 217.) Therefore, a finding of implied bias can only be made in "some extreme situations . . . . (*Id.*, at 222 (O'Connor, J., concurring).)

In a very recent case, this Court has recognized that "[r]emoving a juror is, of course, a serious matter, implicating the constitutional protections defendant invokes. While a trial court has broad discretion to remove a juror for cause, it should exercise that discretion with great care." (*People v. Barnwell* (July 26, 2007, S05528) ___ Cal.4th ___ [at 14].) In *Barnwell*, this Court held that in determining whether or not the trial court properly exercised its discretion, "the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury." (*Id* at p. 15.) This Court pointed out that this test is less deferential to the trial court:

> The demonstrable reality test entails a more comprehensive and less deferential review. It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied.
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> In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but the record of reasons the court provides. A trial court facilitates review when it expressly sets out its analysis of the evidence, why it reposed greater weight on some part of it and less on a another, and the basis of its ultimate conclusion that a juror was failing to

> follow the oath. In taking the serious step of removing a deliberating juror the court must be mindful of its duty to provide a record that supports its decision by a demonstrable reality. (*Id.* at 15-16.)

Although *Barnwell* dealt with the removal of a juror during deliberations, the same constitutional protections and test must apply to jurors removed before deliberations commence. Here, the trial court did not apply the demonstrable reality test. There was no evidence that juror number two had ever discussed the case with either Campbell or her father. She assured the court that the presence of Campbell or Tynesha would in no way affect her impartiality. There was nothing in the record to rebut her assertion. "One may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether her has an unbiased mind in a certain matter." (*Dennis v. United States* (1950) 339 U.S. 162, 171.)

Moreover, her impartiality is supported by her answers in both the jury questionnaire and during voir dire. In her questionnaire, juror number two stated that she was a strong supporter to the death penalty and felt that it was used too seldom. (CT Supp. IV, 68-69.) During voir dire she stated that she would be completely objective and would not allow any outside factors to influence her opinion. (RT 820.) "As a final matter, it is highly

significant that the trial court made a preliminary determination that Juror 4 was partial, objective, and did not hold impermissible bias." (*Sanders v. Lamarque*, *supra*, at 949.) Additionally, the trial court never found that juror number two was untruthful. The trial court assumed that because Campbell was the daughter of a man she had been dating, juror number two could not be impartial, even though she had met Campbell only a few times, had never discussed the case with her, and was surprised to see her in the courtroom during the trial. (RT 1654.) While the trial court may have believed that Campbell was not entirely honest with the trial court in her answers, there was no finding by the trial court that juror number two had in any way been dishonest or showed any bias. The demonstrable reality test was not met.

Finally, the improper discharge of juror number two undermines the reliability required by the Eighth and Fourteenth Amendments for a conviction of a capital offense. (*Beck v. Alabama* (1980) 447 U.S. 625.) Juror number two did not commit any misconduct and the trial court was wrong to find that there was implied bias on her part and that she could not serve as a juror.

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D. The Error was Prejudicial

When a juror is improperly excused and the trial court subsequently denies a motion for mistrial based upon such excusal, as in this case, Appellant's rights under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution have been violated. Such error requires automatic reversal as it cannot be shown to be harmless. (*Sanders v. Lamarque*, *supra*.)

Even under the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18, reversal is required, since the prosecution cannot establish that the discharge of juror number two did not result in prejudice to Appellant. The jurors were out for a lengthy period during the guilt phase deliberations and requested read back of testimony as well as asking several questions. (CT 785-791.) Furthermore, during penalty phase deliberations, the jury announced that they were hung after having taken several ballots. Appellant was entitled to a fair and impartial jury, the right to due process and the right to a reliable penalty determination. The trial court's dismissal of juror number two violated those rights and therefore Appellant's convictions and sentence must be reversed.

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IV.

THE TRIAL COURT COMMTTED PREJUDICIAL ERROR BY ALLOWING WILLARD LEWIS TO TESTIFY THAT HE HEARD A CO-DEFENDANT AT THE SCENE IDENTIFY APPELLANT

A. Factual Background

During the direct examination of Willard Lewis, the prosecutor asked him if he heard the men he identified as Appellant and co-defendant Higgins say anything to each other. Over trial counsel's objection on hearsay grounds, Lewis testified that he allegedly heard Higgins say "come on, Don." (RT 1471-1472.) The prosecutor elicited this testimony from Lewis several times. (RT 1472-1473, 1476-1478, 1505.) As argued below, this was inadmissible hearsay. Furthermore, admission of this testimony violated Appellant's Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution. Finally, this error was not harmless, was highly prejudicial and requires reversal of both guilt and penalty phase verdicts.

B. Standard of Review

As discussed, below, in the criminal context, the hearsay rule and the confrontation clause largely serve the identical purpose: reliability and the right to confront and cross-examine. Because only legal and constitutional

standards are applicable, this Court reviews de novo the trial courts ruling receiving such evidence. (*Lilly v. Virginia* (1999) 527 U.S. 116, 136-37 (plurality opn.); *People v. Cervantes* (2004) 118 Cal.App.4th 162, 174-75; *United States v. Peterson* (9th Cir. 1998) 140 F.3d 819, 821; see generally *People v. Cromer* (2001) 24 Cal.4th 889, 892-93 (confrontation-clause issues under the Sixth Amendment are reviewed de novo).)

C. This Testimony Violated the Hearsay Rule

Evidence Code section 1200, subd. (a) defines hearsay evidence as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the mater stated." Subdivision (b) of that section, states that "[e]xcept as provided by law, hearsay evidence is inadmissible." Moreover, the statement of an unavailable person, conveyed by another, which identifies a defendant as a criminal perpetrator, is hearsay when offered to prove that the defendant is the perpetrator. (*People v. Sims* (1993) 5 Cal. 4th 405, 457; *People v. Heishman* (1988) 45 Cal. 3d 147, 171.)

While in appropriate cases, the prosecution may seek to introduce a hearsay identification for its truth under a statutory hearsay exception, in this case, none was ever suggested, invoked, or applied, nor can the foundational facts for a particular exception be asserted for the first time on

appeal. Thus, the statement "Come on, Don" was inadmissible hearsay and should have been excluded.

Assuming, arguendo, that the basis for the admission of this statement was as a declaration against penal interest, pursuant to Evidence Code section 1230[15], it was still inadmissible. For purposes of the state-law exception, the proponent must also show that the statement was sufficiently reliable to warrant admission, despite its hearsay character. (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611.) That was not shown in this case. As argued below the testimony of Lewis was inherently unreliable and should not have been admitted.

D. This Testimony Violated Appellant's Rights Under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution

Both the United States and the California Constitutions guarantee criminal defendants the right to confront the witnesses against them. (U.S. Const., 6th Amend.; CA Const., art. I, 15.) The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal

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[15] Evidence Code section 1230 reads as follows:

Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social

prosecution "to be confronted with the witnesses against him." In addition, the right to cross-examine is part of the Fourteenth Amendment's guarantee of due process. "Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." (*Pointer v. Texas* (1965) 380 U.S. 400, 405.) The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings "means more than being allowed to confront the witness physically." (*Davis v. Alaska* (1974) 415 U.S. 308, at 315. Indeed, "'[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.'" (*Id.*, at 315-316 [citation.]).

While they are not coextensive, the hearsay rule and the confrontation clause of the Sixth Amendment serve nearly identical purposes. (*People v. Valdez* (1947) 82 Cal. App. 2d 744, 749.) Both are concerned with reliability of evidence. "The mission of the Confrontation Clause . . . is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" (*People v. Green* (1971) 3 Cal. 3d 981, 985, quoting *California v. Green* (1970) 399

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disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

U.S. 148,) It has been long held that the right to confrontation under the Sixth Amendment was merely the application of the common law rule against the use of hearsay. (*People v. Valdez*, *supra*; *People v. Andrews* (1965) 234 Cal.App.2d 69, 78.)

When a co-defendant has made an extrajudicial statement that implicates the defendant, receiving evidence of the statement violates the silent defendants Sixth and Fourteenth Amendment right to be confronted with and to cross-examine the witnesses against him. (E.g., *People v. Fletcher* (1996) 13 Cal.4th 451, 455, fn. 1.) A limiting instruction is not sufficient. (*Id.* at p. 455.) Accordingly, if the declarant (confessing co-defendant – here, Higgins)) does not testify, his statement is only admissible if the court redacts any reference to the silent defendant. (*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123; *Fletcher*, 13 Cal.4th at pp. 455, 467.)

In *People v. Aranda* (1965) 63 Cal.2d 518, 530-531 (hereafter *Aranda*), this Court held that when the prosecution seeks to introduce an extrajudicial statement of one defendant that implicates a codefendant, the trial court must adopt one of three procedures: (1) in a joint trial, effectively delete direct and indirect identifications of codefendants; (2) grant a severance of trials; or (3) if severance has been denied and effective

deletion is not possible, exclude the statement. In the absence of a holding by the United States Supreme Court, the *Aranda* court declared these rules were not constitutionally compelled, but judicially declared to implement the provisions for joint and separate trials of Penal Code section 1098. (*Aranda, supra,* 63 Cal.2d at 530.)

Three years later, the United States Supreme Court in *Bruton v. United States* (1968) 391 U.S. 123 (hereafter *Bruton*), held that introduction of an incriminating extrajudicial statement by a codefendant violates the defendant's right to cross-examination, even if the jury is instructed to disregard the statement in determining the defendant's guilt or innocence. Thus became known the *Aranda-Bruton* rule.[16]

In *Richardson v. Marsh* (1987) 481 U.S. 200, the United States Supreme Court limited *Bruton's* holding by finding that "the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." (*Id.* at 212, fn. omitted.) The Court distinguished *Bruton* because in *Richardson* "the redacted confession was not

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[16] In *People v. Mitcham* (1992) 1 Cal.4th 1027, the court held, "To the extent *Aranda* corresponds to the Bruton rule, it was not abrogated by the 1982 adoption of Proposition 8 (specifically section 28, subdivision (d) of article I of

incriminating on its face, but only when linked to other evidence. [citation.]" and reasoned that "Express incrimination is more vivid than inferential incrimination and more difficult to thrust out of the mind." (*People v. Song* (2004) 124 Cal.App.4th 973, 983.)

In *Gray v. Maryland* (1998) 523 U.S. 185, the Supreme Court had another opportunity to again consider its holding in *Bruton* in the context where the defendant's name was replaced with another word. The *Gray* Court held that "[w]hether *Bruton, supra*, 391 U.S. 123 or *Richardson, supra*, 481 U.S. 200 applied depended not on whether an inference was required to incriminate defendant, but on the type of inference required. Where the confession made a direct reference to a perpetrator other than the speaker and the jury could infer immediately that perpetrator was defendant, without considering other evidence, admission of the confession was *Bruton* error despite the limiting instruction. [citation.]" (*People v. Song, supra*, at 983.) In Appellant's case the statement allegedly made by co-defendant Higgins of "Come on, Don" was in reference to Appellant, as that is his first name. This clearly incriminated Appellant.

There is one small group of cases that have held that *Aranda-Bruton* does not apply if the co-defendants statement is trustworthy and otherwise

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the California Constitution, the 'Truth-in-Evidence provision.)'" (*Id.* at 1045, fn. 6.)

admissible as a declaration against interest under Evidence Code section 1230. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 334; see also *People v. Cervantes*, *supra*, 118 Cal.App.4th at pp. 174-77 (applying *Greenberger*).) However, in order for a declaration against interest to apply, there still must be a showing of unavailability as well as a showing of reliability. (Evidence Code section 1230.)

However, *Greenberger* has been superseded by subsequent United States Supreme Court and California Supreme Court authority holding that only the specifically disserving portions of the statement (namely, the portions that implicate only the actual declarant) are admissible. In *Lilly v. Virginia*, *supra*, 527 U.S. 116, 132-33, 138-39, the Court held that a co-defendants statement implicating both himself and defendant was not admissible under the Sixth Amendment because it tended to shift or spread blame. The court explained it viewed an accomplices statement that shifts or spreads the blame to a criminal defendant as falling outside the realm of those hearsay exceptions that are so trustworthy that adversarial testing can be expected to add little to the statements reliability. (*Id.* at 133.) The Court of Appeal has also recognized that the plurality decision in *Lilly* does cast doubt on the continuing validity of aspects of *People v. Greenberger*. (*People v. Schmaus* (2003) 109 Cal.App.4th 846, 857.)

Moreover, as noted, a declaration against penal interest has been held to be admissible under the Confrontation Clause only upon a showing of particularized guarantees of trustworthiness (the residual-trustworthiness test) even though the penal-interest exception is not a firmly rooted exception that automatically authorizes admission. (*Idaho v. Wright* (1990) 497 U.S. 805, 815; *Ohio v. Roberts* (1980) 448 U.S. 56, 66*; People v. Duke* (1999) 74 Cal.App.4th 23, 30.) To be admissible under this exception, the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief must demonstrate that the evidence is so trustworthy that adversarial testing would add little to its reliability. (*Wright* at 821.) Additionally, the fact that, as in this case, the admission was made to a private party, rather than to the police in a custodial setting, is not dispositive. "We agree with [defendant] that *Boone* [*United States v. Boone* (9th Cir. 2000) 229 F.3d 1231] did not establish a universal rule that all declarations against penal interest made outside of police custody to persons other than police officers are *per se* trustworthy; rather, the inquiry whether the declaration was made under conditions which imparted a particularized guarantee of trustworthiness is fact-specific." (*Padilla v. Terhune* (9th Cir. 2002) 309 F.3d 614, 619.)

The issue, rather, is whether, on all the facts of the particular case, the declarant had an apparent motive to lie. (*People v. Duke, supra,* 74 Cal.App.4th at p. 31.) In this case, Willard Lewis had every reason to lie about what statements co-defendant Higgins made inculpating Appellant. Lewis was an inherently unbelievable witness whose credibility was so much in dispute that even the prosecutor in this case was forced to argue that the jury did not need his testimony in order to find the defendant's guilty. (RT 3496-3502, 3658-3662) His testimony regarding co-defendant Higgins statement of "Come on, Don" lacked a presumption of reliability to make it admissible under the declaration against penal interest exception to the hearsay rule. (*Lilly, supra*, 527 U.S. 137.) Nor does it satisfy the residual trustworthiness test such that the evidence is so trustworthy that adversarial testing would add little to its reliability. (*Wright, supra*, 497 U.S. at p. 821.) For these reasons, it cannot be said that the statement was trustworthy under the circumstances. (*Ibid.*)

Finally, even if the alleged statement made by co-defendant Higgins, as related by Lewis is somehow found to be reliable, that is still not sufficient for purposes of the Sixth Amendment. In *Crawford v. Washington* (2004) 541 U.S. 36 the Supreme Court held that out-of-court statements that are testimonial must be excluded under the confrontation

clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the declarant. (*Id.* at p. 68.)

In doing so, the Court in *Crawford, supra*, 541 U.S. 36 abandoned its "adequate indicia of reliability" standard (*Ohio v. Roberts* (1980) 448 U.S. 56) and "announced a new rule regarding the effect of the Confrontation Clause on the admission of hearsay statements in criminal prosecutions." (*People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1400.) The "new rule" announced by the court in *Crawford* is that the Sixth Amendment is satisfied only when testimonial statements of witnesses, who are absent from trial, are admitted where the declarant is unavailable, and the defendant has had a prior opportunity to cross-examine.

In *Crawford, supra*, the Court found that despite the state having an exception to the hearsay rule, in that case, the declaration against penal interest which had a reliability requirement, the Sixth Amendment's right of confrontation precluded admission of such hearsay. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." (*Id.* at 63.) This Court has recognized Crawford's applicability in *People v. Cage* (2007) 40 Cal.4th 965, where it held that under *Crawford,* and the subsequent case of *Davis v. Washington*

(2006) 547 U.S.__ [165 L.Ed.2d 224, 126 S.Ct. 2266], "testimonial" statements, as opposed to "non-testimonial" statements, were subject to exclusion under the Sixth Amendment. Here, the alleged statement made by co-defendant Higgins as related by Lewis was testimonial in nature because, viewed objectively, it was given to establish a fact in a criminal trial. (*Cage*, *supra*, 40 Cal.4th at 984.)

Thus, in Appellant's case, regardless of whether or not the statement by co-defendant Higgins is found to be reliable, its admission violated Appellant's right to confront and cross-examine under the Sixth Amendment, as well as his right to due process under the Fourteenth Amendment. Finally, as a result, the admission of this evidence, which, as argued below, was prejudicial, invalidates Appellant's death sentence as the reliability requirement of the Eighth Amendment was violated.

E. The Error Was Prejudicial

The United States Supreme Court has held that a *Bruton* violation is subject to the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18. (*Harrington v. California* (1969) 395 U.S. 250, 254; *Brown v. United States* (1973) 411 U.S. 223, 231-232; *People v. Anderson* (1987) 43 Cal.3d 1104, 1128; *People* v. *Orozco* (1993) 20 Cal.App.4th 1554, 1566; *People* v. *Jacobs* (1987) 195 Cal.App.3d 1636,

1652; *People v. Song*, *supra*, 124 Cal.App.4th at 984-985; *People v. Pirwani* (2004) 119 Cal.App.4th 770, 790-791.). Likewise, *Crawford* error is also subject to the *Chapman* analysis. (*People v. Cage*, *supra*, 40 Cal.4th at 991.)

The *Chapman* test does not simply look to the amount of untainted evidence available for the jury to consider, but instead looks to whether the tainted evidence itself affected the jury's verdict: The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. (*O'Neal v. McAninch, supra* 513 U.S. at 438. see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [harmless-error analysis requires a reviewing court consider what effect the constitutional error actually had on the guilty verdict in the case at hand].)

In a close case, a tie goes to the defendant. "We conclude that the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (i.e., as if it had a 'substantial and injurious effect or influence in determining the jury's verdict')." (*O'Neal v. McAninch*, *supra* 513 U.S. at 435.) The question, then, is whether the erroneous admission of co-defendant Higgins statement had a "substantial and injurious effect or influence in determining the jury's verdict."

Willard Lewis's testimony that he heard co-defendant Higgins say "Come on, Don" had a "substantial and injurious effect or influence in determining the jury's verdict" and was thus prejudicial. On direct examination, the prosecutor elicited this statement from Lewis several times. (RT 1472-1473, 1476-1478, 1505.) In addition, the prosecutor, in summation argued that although he did not need Lewis's testimony to convict, Lewis was a truthful and therefore believable witness. (RT 3496-3501, 3660-3661.) He specifically argued that the statement "Come on, Don" proved that Appellant was the shooter. (RT 3501.) Moreover, it was Lewis's testimony that provided the key evidence that Appellant was not only present during the homicide, but was the actual shooter. Finally, the trial court failed to give the jury a cautionary instruction regarding how to use this evidence, something it should have done. (See Argument No V, *infra*.)

Lewis's testimony that he allegedly heard co-defendant Higgins say "Come on, Don" was in violation of the hearsay rule. It also violated Appellant's right to confrontation and cross-examination under both the California and United States Constitutions as well as his right to due process under the Fourteenth Amendment and to a reliable sentence determination under the Eighth Amendment. Because Willard Lewis was

untrustworthy, there was no indicia of reliability for its admission. In any event, it violated the rule set forth in *Crawford v. Washington*, *supra*. Because this error was highly prejudicial, Appellant's guilt and penalty convictions must be reversed.

V.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO GIVE A CAUTIONARY INSTRUCTION TO THE JURY REGARDING THE CO-DEFENDANT'S STATEMENT IDENTIFYING APPELLANT

A. Introduction

During the first jury instructional conference held on April 20, 1999, the trial court and counsel went over some of the preliminary instructions that the court intended to give the jury. The trial court indicated, with the concurrence of Appellant's counsel, that it would instruct the jury pursuant to CALJIC 2.07, which states that certain evidence was limited to one defendant only.[17] (RT 1994.) The trial court then questioned the prosecutor

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[17]CALJIC 2.07, at the time of Appellant's trial, and as later given to the jury, read as follows:

> Evidence has been admitted against one or more of the defendants, and not admitted against the others
>
> At the time this evidence was admitted you were instructed that it could not be considered by you against the other defendants.

regarding the applicability of CALJIC 2.08, which the prosecution had submitted, and which specifically cautions the jury not to use a post-arrest statement made by one defendant against the other defendants.[18] The prosecution, with the consent of Appellant's counsel, then requested to withdraw this instruction. The trial court granted that request and the instruction was withdrawn. (RT 1994.) The trial court also indicated that it would instruct the jury as to CALJIC 2.09, which states that certain evidence was limited as to its purpose.[9] (RT 1994.)

Do not consider this evidence against the other defendants. (CT 695; RT 3416.)

[18] CALJIC 2.08, at the time of Appellant's trial, read as follows:

Evidence has been received of a statement made by a defendant after his arrest.

At the time the evidence of this statement was received you were instructed that it could not be considered by you against the other defendants.

Do not consider the evidence of this statement against the other defendants. (CT 783.)

[9]CALJIC 2.09, at the time of Appellant's trial, read as follows:

Certain evidence was admitted for a limited purpose.

At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.

Do not consider this evidence for any purpose except the limited purpose for which it was admitted. (CALJIC 2.09)

On May 20, 1999, another jury instruction conference was held. The trial court, without objection, stated that it intended to give CALJIC 2.07. (RT 3328.) The trial court again brought up the applicability of CALJIC 2.08, opining that 2.07 "adequately addresses the issue." *(Ibid.)* The trial court stated that "[t]he issue is whether or not the alleged statement by Mr. Debose in court directed to Mr. Lewis, if it happened, whether or not CALJIC 2.07 adequately addresses the issue. . . . 2.08 relates more to a statement, such as an admission or confession." (*Ibid.*) The court stated that this issue was "covered in 2.07." (RT 3331.)

At that point, co-defendant Flagg's attorney asked if there were "any statements that were admitted regarding the defendants?" (RT 3331-3332.) The trial court responded "only the one alleged statement which occurs here in court." The trial court then refused to give CALJIC 2.08. (RT 3332.) Turning its attention to CALJIC 2.09, the trial court stated as follows:

> As to CALJIC 2.09, evidence limited as to purpose. There was a number, or there a number of times in which the jurors were instructed that certain evidence was offered for a limited purpose.
>
> However, the concern that I have with regards to prosecution exhibit 93-A is that the jurors, if they're not otherwise instructed, would accept that document for the truth of the matter asserted.

So what I've done is I've created an instruction that specifically pinpoints that issue for them, and tells them that in essence – well I'll just read it into the record.

This part I added to 2.09:

"Certain documents were received following the testimony of corrections Agent . . . ."

At the time they were received, you were instructed that they were admitted for a limited purpose; namely, whether or not witness Willard Lewis was an actual percipient witness to the alleged events involving Dannie Kim, or whether he may have obtained this information from other source, such as the described documents."

"You may not consider the information contained within the documents for the truth of the matter stated. It may be considered by you only as it relates to what knowledge or information may have been potentially available to Mr. Lewis." (RT 3333.)

However, the prosecutor objected and, after a lengthy discussion, the trial court stated that it would allow the prosecutor to submit any changes that he felt were appropriate. (RT 3333-3339.) The prosecutor subsequently did, and at the subsequent jury instruction conference held the next day, the trial court stated that it would give the instruction as modified by the prosecutor. (RT 3398) The instruction that the trial court finally gave to the jury read as follows:

Certain evidence was admitted for a limited purpose.

> At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.
>
> Do not consider the evidence for any purpose except the limited purpose for which it was admitted.
>
> Certain documents were received following the testimony of Agent Richmond. At the time they were received, you were instructed that they were admitted for a limited purpose.
>
> You may not consider the information contained within the documents for the truth of the matter stated. It may be considered by you only as it relates to what knowledge or information may have been potentially available to Mr. Lewis. (CT 696; RT 3417.)

As stated in Argument IV, *supra*, the trial court erred in admitting the statement allegedly made by co-defendant Higgins "Come on, Don." As argued below, the jury was never given a cautionary instruction as to this statement. Such an instruction should have been given sua sponte. The failure of the trial court to do so was prejudicial error.

B. The Trial Court had a Sua Sponte Duty to Give a Cautionary Instruction

It is well settled that the court must instruct the jury to view evidence of a criminal defendant's oral admissions outside of court with caution. (*People v. Carpenter* (1997) 15 Cal.4th 312, 392; *People v. Lang* (1989) 49

Cal.3d 991, 1021; *People v. Beagle* (1972) 6 Cal.3d 441, 455.) The reason for the cautionary instruction is to assist the jury in determining if the purported admissions were in fact made. *(People v. Carpenter, supra,* 15 Cal.4th at pp.392-393; *People v. Ford* (1964) 60 Cal.2d 772, 780-784.) This is particularly important in cases where the alleged admissions are reported by witnesses biased against the defendant or those with a motive to fabricate in order to save themselves at the defendant's expense. (*People v. Lopez* (1975) 47 Cal.App.3d 8, 14.)

Furthermore, under the *Aranda-Bruton* rule discussed in Argument IV, *supra*, when a statement by a co-defendant is admitted against another defendant, at the very least a cautionary instruction is required telling the jury that a statement by one defendant is limited to that defendant only and cannot be used against the other defendant.

The trial court has a sua sponte obligation to instruct the jury that evidence of oral admissions must be viewed with caution. (*People v. Beagle, supra.*) An example of such an instruction is contained in CALJIC 2.70 and 2.71.[19] For purposes of CALJIC 2.71 (5th ed. 1988) and its

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[19] CALJIC 2.70, at the time of Appellant's trial, read as follows:

> A confession is a statement made by a defendant in which [he] [she] has acknowledged [his] [her] guilt of the crime[s] for which [he] [she] is on trial. In order to constitute a confession, the statement must acknowledge participation in the crime[s] as well as the required [criminal intent] [state of mind].

counterpart 2.70, "an admission simply is any extrajudicial statement--whether inculpatory or exculpatory-- 'which tends to prove his guilt when considered with the rest of the evidence.' [Citation.]" (*People v. Mendoza* (1987) 192 Cal.App.3d 667, 675-676.) For purposes of the cautionary instruction, the courts have not distinguished between actual admissions and other damaging statements of the accused relating to the crime. (*People v.*

> An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence.
>
> You are the exclusive judges as to whether the defendant made a confession [or an admission], and if so, whether that statement is true in whole or in part.
>
> [Evidence of [an oral confession] [or] [an oral admission] of the defendant not made in court should be viewed with caution.]

CALJIC 2.71, at the time of Appellant's trial, read as follows:

> An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence.
>
> You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part.
>
> [Evidence of an oral admission of [a] [the] defendant not made in court should be viewed with caution.]

Beagle, *supra*, 6 Cal.3d at 455, fn. 5; *People v. James* (1987) 196 Cal.App.3d 272, 286; *People v. Lopez, supra,* 47 Cal.App.3d at 12.) The statement need not even be incriminating to qualify as an admission. (*People v. Aho* (1984) 152 Cal.App.3d 658, 663; *People v. Perkins* (1982) 129 Cal.App.3d 15, 23.)

In this case, the alleged statement of co-defendant Higgins "Come on, Don" was an admission that both Higgins and Appellant were present at the time of the homicide. Worse yet, it was substantial evidence used to prove that Appellant was the shooter, and was thus more culpable. The trial court had a sua sponte duty to give a cautionary instruction regarding this statement. As argued below, the error was prejudicial.

C. Failure to Instruct Violated Appellant's Rights Under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and was Prejudicial Error

In this case, because Appellant did not have the opportunity to cross-examine co-defendant Higgins, the failure of the trial court to give a cautionary instruction regarding his alleged statement violated Appellant's Sixth Amendment right. Furthermore, verbal admissions, as a class of evidence, are singularly subject to error and abuse. (*People v. Lopez*, *supra*, 47 Cal.App.3d at 13.) When the trial court fails to give a cautionary instruction that limits such a statement so that it does not violate the Sixth

Amendment, the error is of constitutional dimension and the rule enunciated *in Chapman v. California* (1967) 386 U.S. 18, 24, applies. (*United States v. Marsh* (9th Cir. 1998) 144 F.3d 1229, 1240-1241.) In the same manner, the failure to give a cautionary instruction as to how highly prejudicial evidence is to be used can constitute a violation of the due process clause of the Fourteenth Amendment. (*Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769 (overruled on other grounds in *Woodford v. Garceau* (2003) 538 U.S. 202)

The fact that the trial court instructed the jury via CALJIC 2.07 and 2.09 did not cure this error. First, as to CALJIC 2.07, when Willard Lewis testified as to the alleged statement of co-defendant Higgins which identified Appellant, the trial court never instructed the jury that this evidence was not to be used against Appellant. Rather, this instruction was given in reference to the evidence of the Dassopoulos robbery and the incident in court where Appellant allegedly threatened Lewis. In fact, the court was under the misimpression that the only admissions of the defendants that were admitted during trial was this alleged threat. (RT 3328-3332.) Second, as to CALJIC 2.09, this instruction primarily related to the documents sent to co-defendant Higgins by his parole officer. As with CALJIC 2.07, the trial court never instructed that jury that the

statement allegedly made by co-defendant Higgins could not be used against Appellant.

As a result, Appellant's death sentence does not have the indicia of reliability as required under the Eighth Amendment. For the same reasons as stated in Argument IV, *supra*, the error was not harmless beyond a reasonable doubt. Appellant's convictions and sentence must be reversed.

VI.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE JURY THAT A ROBBERY IS STILL IN PROGRESS FOR PURPOSES OF THE FELONY MURDER RULE SO LONG AS THE PURSUERS ARE ATTEMPTING TO CAPTURE THE ROBBER OR REGAIN THE STOLEN PROPERTY AND HAVE CONTINUED CONTROL OVER THE VICTIM

A. Factual Background

During the jury instructional conference held on May 5, 1999, the trial court proposed to instruct the jury with modified version of CALJIC 8.21.1, which read as follows:

> For the purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time.
>
> A robbery is still in progress after the original taking of physical possession of the stolen property while the

> perpetrator is in possession of the stolen property and fleeing in an attempt to escape. Likewise it is still in progress so long as immediate pursuers are attempting to capture the perpetrator or to regain the stolen property.
>
> A robbery is complete when the perpetrator has eluded any pursuers, has reached a place of temporary safety, and is in unchallenged possession of the stolen property after having effected an escape with the property.
>
> A perpetrator has not reached a place of temporary safety if the continued control over the victim places the perpetrator's safety in jeopardy. A perpetrator's safety is in jeopardy if at any unguarded moment, the victim might have managed to escape or signal for help. (CT 732.)

Co-defendant Flagg's counsel specifically objected to that part of the instruction that read "Likewise, it is still in progress so long as the immediate pursuers are attempting to capture the perpetrator or to regain the stolen property" as well as the third paragraph of the instruction. (RT 3391-3392.) In addition, Flagg's counsel also objected to the last paragraph, which had been proposed by the trial court,. (RT 3392-3393.) Appellant's counsel joined in both objections. (RT 3391-3393.) However, the trial court overruled the objection and subsequently instructed the jury with this modified version of CALJIC 8.21.1. (CT 732; RT 3339, 3437-3438.)

As argued below, this instruction was erroneous. As a result, Appellant's rights under the Sixth, Eighth and Fourteenth Amendments were violated. Finally, this error was prejudicial.

B. The Trial Court Erred in Instructing the Jury That a Robbery is Complete Only when the Perpetrator has Eluded his Pursuers

1. *This Instruction Required the Jury to use an Improper Subjective Standard*

The third paragraph of CALJIC 8.21.1, states that one of the requirements for a robbery to be complete is when the robber has eluded any pursuers. This language had no applicability to the facts in Appellant's case because there was no evidence that he was ever being pursued. Therefore, this language was confusing and should not have been included. Moreover, this part of the instruction defines a robber's liability, under the felony murder special circumstance, to depend upon the actions of third parties, which he may be unaware of and incapable of ascertaining. This standard goes beyond the "strict liability" intended by the felony murder rule, because even the felony-murder rule contemplates that a defendant knows or should know when he is committing the predicate felony. (*People v. Coefield* (1951) 37 Cal. 2d 865, 868.) Indeed, the deterrent purpose of the felony-murder rule, which is to deter the commission of the felony itself by imposing the maximum risk on its consequences, is not served unless a defendant knows or should know he is in the process of committing the felony. (see *People v Dillon* (1983) 34 Cal. 3d 441, 498, fn.5 (conc. op. of Bird, C.J.).)

Similarly, imposing liability on a defendant who commits homicide during the immediate flight after a robbery makes sense from a public policy standpoint, but only under circumstances where the defendant knows or should know that he is fleeing. Although the case law concerning termination of robbery (and other felonies) does not expressly address this "objective" component, it is implicit in a series of decisions. (See *People v. Kendrick* (1961) 56 Cal. 2d 71, 90-91; *People v. Ford* (1966) 65 Cal. 2d 41, 56-57.)

For example, in *People v. Laursen* (1972) 8 Cal. 3d 192, 199-200, this Court explained that the flight phase of robbery is defined not only in terms of time and distance but also by a "single-mindedness of the culprit's purpose." Similarly, in *People v. Kendrick*, *supra*, 56 Cal. 2d 71, 90, the shooting was within the felony murder rule because the defendant was engaged in hot flight and "in the belief that the officer was about to arrest him for the robbery." Finally, in *People v. Salas* (1972) 7 Cal. 3d 812, 823, the Court repeated the criterion drawn from *Kendrick*, *supra*, that the defendant acted "in the belief that the officer was about to arrest him for the robbery."

Thus, under the third paragraph of CALJIC 8.21.1, it is apparent that the mental state of the defendant determines when a robbery terminates,

because it required the defendant to determine when he is no longer being pursued. A test using the defendant's subjective state of mind is vague and thus improper. By requiring an objective standard the jury can use the reasonableness test to determine whether a defendant's expectations are reasonable or not. Instead of providing for liability where "immediate pursuers are attempting to capture the perpetrator or to regain the stolen property," it should provide for liability where the defendants "know or reasonably should know that immediate pursuers are attempting to capture them or regain the stolen property." Because this portion of CALJIC 8.21.1 uses a subjective rather than an objective standard it is improper.

2. *This Instruction Violated Appellant's Right to Due Process*

Where severe criminal sanctions are at stake, especially in a capital case, the defendant must be capable of determining whether his conduct is prohibited, and to what extent. (*Morisette v. United States* (1952) 342 U.S. 246; *People v. Hernandez* (1964) 61 Cal. 2d 529, 532].) Felony murder requires the mens rea underlying the predicate felony, and is not a "strict liability" offense in that respect. However, the specific intent to commit robbery does not linger after the taking of property is complete. A different mental state must be identified to distinguish between a completed robbery and an incomplete robbery. CALJIC 8.21.1 fails to do so.

Furthermore, a statute is unconstitutional if it is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." (*People v. Superior Court (Engert)* (1982) 31 Cal. 3d 797, 801, quoting *Connally v. General Construction Co.* (1926) 269 U.S. 385, 391 [70 L.Ed. 322, 46 S.Ct. 126].) Likewise CALJIC 8.21.1, as given by the trial court in this case, fails this constitutional test for the very reason that it imposes liability on the basis of facts which the actor could not ascertain if he tried. As discussed below, this error was prejudicial.

C. The Trial Court's Instruction that a Perpetrator has not Reached a Place of Safety if His Continued Control Over the Victim Places Him in Jeopardy was Argumentative and Created an Impermissible Mandatory Presumption

In proposing and then giving the additional pinpoint instruction as part of CALJIC 8.21.1, the trial court relied on *People v. Carter* (1993) 19 Cal.App.4th 1236. However, both the trial court and the Court of Appeal in *Carter* were wrong. In fact, this pinpoint instruction is argumentative because it uses the term "is in jeopardy" as opposed to the non-argumentative "may be in jeopardy." As a result, and contrary to the rationale in *Carter*, this instruction does give rise to a presumption that a robbery continues so long as the victim is held captive, no matter what period of time has passed. Defense counsel correctly pointed this problem

out when he stated that "the jury could determine that as long as they have a victim, the robbery is ongoing, no matter it's a year from now, ten years from now, a hundred years from now. And I just don't think that liability was intended to extend out that long." (RT 3392.) By giving this instruction, the trial court created a mandatory presumption which is unconstitutional as it violates the due process clause of the Fourteenth Amendment. (*Sandstrom v. Montana* (1979) 442 U.S. 510.)

D. These Errors Were Prejudicial

Instructional errors which violate constitutional rights are to be adjudged using the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 118. The erroneous instructions given by the trial court were prejudicial. The evidence did not show when any items were taken from Kim. In fact, any items that may have been taken from Kim could have been removed after the killing, and thus would not constitute a robbery. (*People v. Kelley* (1990) 220 Cal.App.3d 1358.) Alternatively, the items could have been taken from Kim hours before she was killed and the robbery was completed. Finally, the jury could have found that the defendants, after robbing Kim, but before killing her, had reached a place of safety. Thus, the prosecution cannot show that this error was harmless. Furthermore, because this was prejudicial error, Appellant's

death sentence lacked the indicia of reliability required under the Eighth Amendment. For these reasons Appellant's convictions and sentence must be reversed.

VII.

THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS REQUIRES REVERSAL OF THE GUILT JUDGMENT

Multiple serious constitutional errors occurred during the guilt phase of Appellant's trial and, as argued *supra*, each error was sufficiently prejudicial to warrant reversal of Appellant's guilt judgment. However, a further measure of harm to Appellant is the cumulative effect of these errors rather than their individual harm. These multiple errors undermined the fundamental fairness of Appellant's trial, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding state constitutional provisions.

All of the guilt phase errors must be considered in order to determine if Appellant received a fair trial. (*United States v. Rivera* (10th Cir. 1990) 900 F.2d 1462, 1470; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Buffum* (1953) 40 Cal.2d 709, 726, overruled on other grounds in *People v. Morante* (1999) 20 Cal.4th 403.) Additionally, when errors of federal magnitude combine with non-

constitutional errors, all errors should be reviewed together under a *Chapman* standard. (*In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470.) Furthermore, multiple constitutional errors require an even higher level of scrutiny. In *People v. Williams* (1971) 22 Cal.App.3d 34, the court summarized the multiple errors committed at the trial level and concluded:

> Some of the errors reviewed are of constitutional dimension. Although they are not of the type calling for automatic reversal, we are not satisfied beyond a reasonable doubt that the totality of error we have analyzed did not contribute to the guilty verdict or was not harmless error . . . [Citations.] (*Id.* at 58-59.)

Appellant has demonstrated that a number of errors of federal constitutional dimension occurred during the guilt phase, and that each such error mandates reversal. These errors include the true finding of an improper special circumstance, improper dismissal of a juror, introduction of inadmissible hearsay that violated both state law and the federal constitution, and improper jury instructions. "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, emphasis in original.) The cumulative effect of these errors requires reversal of Appellant's convictions.

PENALTY PHASE ERRORS

VIII.

THE TRIAL COURT ERRED BY INSISTING ON FURTHER DELIBERATIONS AND REFUSING TO DECLARE A MISTRIAL AFTER THE JURY DECLARED THAT IT WAS DEADLOCKED

A. Factual Background

Shortly after the trial court responded to the jury's question regarding the consequences of a hung jury (see Argument IX, *infra*), the jury indicated to the bailiff that they were deadlocked. After hearing from counsel, the trial court brought the jury into the courtroom to inquire regarding their status. (RT 5071-5073.)

In response to the court's question, the foreperson stated that as to both Appellant and co-defendant Flagg, five ballots had been taken; as to co-defendant Higgins, one ballet was taken. (RT 5074-5075.) According to the foreperson, in the last two ballots taken regarding Appellant and co-defendant Flagg, there had been no changes in the numerical voting. (RT 5075.) Furthermore, the foreperson stated that neither further deliberations, any rereading of instructions, rereading of testimony, clarification of instructions or viewing of exhibits would help the jury reach a verdict. (RT 5075-5076.)

The trial court then inquired *individually* of each juror whether "further reading of instructions, further reading of testimony, review of exhibits that have been received in this trial, would assist the jurors in reaching a unanimous verdict?" (RT 5076.) Each of the twelve jurors answered in the negative. (RT 5076-5077.)

Outside the presence of the jury, the court then inquired of counsel. Appellant's counsel moved for a mistrial. (RT 5077.) When Appellant's counsel asked the trial court if it was going to inquire of the jury what the numerical split was, the trial court responded "I think at this point, it's premature." (RT 5079.) The trial court stated that "These jurors are tired in the box. They're frustrated. It's pretty easy to see. Been going at it two months, and they've only been deliberating a day and a half." (RT 5079.)

The trial court then stated to the jury as follows:

> Ladies and gentlemen, the task that I ask you to do I understand is not a simple task. There's no question that in American civilization, this is probably the hardest task that anybody asks for its citizens.
>
> But considering the fact this has been almost a two-month trial, and the fact that deliberations have only been a little less than two days, I'm going to ask that you simply take a recess this afternoon.
>
> Come back tomorrow morning at 10:30 a.m. continue your discussions. If it's apparent to you after a period of time that those discussions are fruitless, and there's nothing else that the court is going to be able to do to assist you in reaching a decision, then sobeit.

But I want you to just take a break from it now. Come back tomorrow when you're fresh, you're not tired. Begin your deliberations again.

Let me know tomorrow how things go, and we'll address that issue tomorrow." (RT 5080.)

The trial court then admonished the jury and they were excused for the day. (RT 5079-5080.) The following day the jury returned a verdict of death for Appellant and LWOP for the co-defendants. (CT 836-837, 1005, CT Supp II 229A, CT III 333-334; RT 5088-5089.) As argued below, the failure of the trial court to declare a mistrial violated Appellant's rights under state law, as well as his right to a fair trial under the Sixth Amendment, his right to due process under the Fourteenth Amendment and his right to a reliable sentence under the Eighth Amendment of the United States Constitution.

B. Penal Code Section 1140 Required the Trial Court to Declare a Mistrial when the Jury Declared it was Hopelessly Deadlocked

Section 1140 permits the trial court to discharge the jury and declare a mistrial where "it satisfactorily appears that there is no reasonable probability that the jury can agree." (Penal Code 1140.) This Court has held that the trial court is vested with broad discretion in determining whether there is a "reasonable probability" of agreement. (*People v. Rodriguez*

(1986) 42 Cal.3d 730, 775.) The court must exercise its power, however, without either express or implied coercion of the jury, so as to avoid displacing the jury's independent judgment in favor of considerations of compromise and expediency. (*Rodriguez*, *supra*; see also *People v. Rojas* (1975) 15 Cal.3d 540, 546; *People v. Carter* (1968) 68 Cal.2d 810, 817.)

It is permissible for the court to urge agreement after learning of the numerical division of the jury, without seeking to discover how many are for conviction or for acquittal. (*People v. Fain* (1959) 174 Cal.App.2d 856.) However, where the court discovers that a majority of the jurors are for conviction, and then urges agreement, this is usually held to be impermissible coercion of the majority jurors. (*People v. Gainer* (1977) 19 Cal.3d 835; *People v. Talkington* (1935) 8 Cal.App.2d 75, 83.)

In *People v. Sheldon* (1989) 48 Cal.3d 935, this Court reemphasized that there is always a potential for coercion once the trial court has learned that a unanimous judgment of conviction is being hampered by a single hold out juror favoring acquittal. Thus, while it is true that insisting on further deliberations or further comments to a jury split 11 to 1 in favor of conviction does not automatically and necessarily constitute jury coercion, it is an important factor in evaluating whether coercion occurred. (*Sheldon*, *supra*, at 48 Cal.3d 959.)

Here, although requested by Appellant's counsel, the trial court refused to inquire into the numerical split of the jury. (RT 5079.) This was contra to what the trial court did during the guilt phase deliberations, when it asked for, and received, a numerical breakdown after the jury announced, after two days of deliberation, that they were hung on two of the special circumstances. (RT 3745-3754.) The trial court should have made the same inquiry when the jury announced it was deadlocked during the penalty phase deliberations.

Inquiring into a jury's numerical division, without asking which way they were voting, is a procedure that has been expressly approved by this Court. (*People v. Carter*, *supra*, 68 Cal.2d at 815; *People v. Rodriguez, supra,* 42 Cal.3d at 776; *People v. Proctor* (1992) 4 Cal.4th 499, 538-539.) "Such inquire is justified in the discharge of the court's 'statutory responsibility of assuring that a verdict is rendered 'unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that he jury can agree.' [citations.]" (*Proctor*, *supra* at 538.)

By not inquiring as to the numerical division, the trial court could not know whether or not requiring the jury to continue deliberations was coercive. Yet, there is a strong indication that requiring the jury to continue

deliberations was coercive. This is demonstrated by juror number five's comments to the trial court after the verdict that he was very troubled by the refusal of the court to answer the question regarding what would happen if there was a hung jury. (RT 5100-5101.) Thus, it may well have been the case that only one or a two jurors were holding out and the trial court's ordering them to continue deliberations had a coercive effect. (*People v. Gainer*, *supra*, 19 Cal.3d 835; *People v. Hinton* (2004) 121 Cal.App.4th 655.)

In this case, the jury had taken five ballots on Appellant's sentence and in the last two ballots there had been no change in numerical voting. (RT 5075.) Every juror, when asked by the court, stated that there was nothing the court could do which would help them in reaching a unanimous verdict. (RT 5076-5077.) In *People v. Lovely* (1971) 16 Cal.App.3d 196, the jury similarly announced that after several ballots it was hung as to the issue of guilt on one of the charges. In that case, the trial court, after inquiring of the jury, was informed that the jury was evenly split and that no further deliberations would help them arrive at a unanimous verdict. (*Id.* at 200-201.) The Court of Appeal upheld the trial court's declaring a mistrial. (*Id.* at 202-203; see also *In re Chapman* (1976) 64 Cal.App.3d 806.)

Here, the trial court's failure to inquire as to the numerical split of the jury was error because had it done so the court would have been in a better position to know whether or not requiring further deliberations was coercive. As already noted, the record tends to suggest that it was. Furthermore, the fact that five ballots had been taken and no change in the juror's position had occurred after the last two ballots, as well as the jurors unequivocal statements to the court that nothing more could be done to assist them in deliberations, strongly suggests that any further deliberations were inherently coercive. In addition, the jury had deliberated for approximately the same period that they had deliberated during the guilt phase, when the trial court granted a mistrial as to the two special circumstances. Because of the potential coercive affect requiring the jury to continue to deliberations, the trial court erred and Appellant's death sentence must be reversed.

C. Appellant's Rights Under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution Were Violated By the Trial Court Refusing to Declare a Mistrial

Requiring a deadlocked jury to continue deliberations violates a defendant's right to a fair trial by jury under both the California Constitution and the Sixth Amendment, to due process under the Fourteenth

Amendment, and to a reliable, individualized sentencing determination under the Eighth Amendment.

In this case, as argued *supra*, the trial court improperly ordered the jury to continue deliberations even after they had voted five times. Moreover, the court failed to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party. (*United States v. Beattie* (9th Cir. 1980) 613 F.2d 762, 765; *Sullivan v. United States* (9th Cir. 1969) 414 F.2d 714, 718; *Shea v. United States* (9th Cir. 1919) 260 F. 807, 809-10, *Peterson v. United States* (9th Cir. 1914) 213 F. 920, 922.) The failure to do so is, under these circumstances, reversible error. (*United States v. Mason* (9th Cir.1981) 658 F.2d 1263.)

In Appellant's case, requiring the jury to continue deliberations impliedly communicated the trial court's desire for a unanimous verdict The vice of doing so is that jurors may feel disapprobation if they cause a mistrial by failing to yield to majority pressure. (*See, e.g., Quong Duck v. United States* (9th Cir. 1923) 293 F. 563, 564.) When evidence of such undue pressure is present, reversal is necessary. (*Jenkins v. United States* (1965) 380 U.S. 445, 446 (*per curiam*).) Such pressure was present in this case, as demonstrated by juror number five's comments to the trial court after the verdict was received. (RT 5100-5101; see Argument IX, *infra*.)

Because the trial court violated Appellant's Sixth, Eighth and Fourteenth Amendment rights, his death sentence must be reversed.

IX.

THE TRIAL COURT ERRED BY REFUSING TO ANSWER THE JURY'S QUESTION AS TO WHAT WOULD HAPPEN IF THEY COULD NOT REACH A VERDICT

A. Factual Background

On June 2, 1999, during the penalty phase deliberations, the jury sent a note which read as follows:

> We, the jury in above-entitled action, request the following:
>
> If the jury deadlocks on the verdicts and penalty phase, what would happen?
>
> Would, One: The defendants be tried all over again? Two, Would defendants be tried over again in penalty phase only with different jury?
>
> Three, would defendants get the lesser degree sentence automatically of life without possibility of parole. (CT 842; RT 5068.)

In response to this question, the trial court stated that "My thought is that I should respond that this is not an appropriate consideration for the jury, and that I can't respond to the question, or I can't give them an answer." (RT 5069.) Appellant's trial counsel agreed with the trial court, as did the co-defendant's counsel and the district attorney. (RT 5069.)

Without objection, the trial court then sent the jury the following note: "This is not an appropriate factor for your consideration. You are ordered to disregard this consideration. The court cannot answer this question." (RT 5070.)

On June 25, 1999, after the verdict of death, and at a hearing to pick a sentencing date for Appellant, the trial court informed all counsel that after the jury had been discharged the trial court had the bailiff bring the jurors into the trial court's chambers so that he could thank them for their service. (RT 5099.) The court informed the jurors that there were likely to be news reporters in the hallway and that if the jurors were interested in protecting their anonymity, they would be provided an alternate access out of the courthouse. (RT 5099.)

However, several of the jurors told the trial court that they wanted to talk to the attorneys but not in the hallway. The trial court then offered them the use of the jury deliberation room and stated that he would notify the attorneys that the some of the jurors desired to speak with them. (RT 5099-5100.) Both prosecutors and co-defendant Flagg's attorney were present and spoke with the jurors, who apparently informed them that the jurors had found certain evidence that the prosecutors had overlooked. (RT 5100.)

In addition, one of the African-American jurors, juror number five, told the court that he needed to know the answer to the question they had previously sent regarding what would happen if there was a hung jury during the penalty phase. (RT 5100-5101.) The trial court stated as follows:

> It appeared to the court he was very troubled by that particular question. I told him that I couldn't talk to him; that the case itself was over for him, but it wasn't over for the court. But he did seem somewhat disturbed by that question.
>
> What I ended up doing is I ended up giving that juror, and others that asked for it, my business card, and told them that when this is over, and over for the court, that I can talk to them. But I couldn't talk to them before then. So I gave them some business cards. (RT 5101.)

Despite Appellant's counsel acquiescence in the trial court's decision not to answer the jury's question, the trial court had a duty, sua sponte, to adequately answer this question. This is especially so, as explained below, in light of the fact that during the guilt phase, the jury asked a similar question which the trial court answered. The failure of the trial court to answer this question accurately was in violation of state law as well as Appellant's Sixth, Eighth and Fourteenth Amendment rights.

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B. The Trial Court Had a Sua Sponte Duty to Answer the Question

Where, during deliberations, a jury expresses confusion regarding the meaning or application of the law, the trial court has a mandatory duty to clear up that confusion. (*Bollenbach v. United States* (1946) 326 U.S. 607, 612-613; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.) In California, section 1138 requires the court provide a jury any information on a point of law which they require. That section reads as follows:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.

A violation of section 1138 becomes federal constitutional error when the trial court fails to clarify the law so as to address a jury's explicit difficulties. (*Beardslee v. Woodford* (9th Cir. 2004) 358 F.3d 560, 574-575 [court's refusal to clarify instruction after specific jury requests, coupled with implication that no future clarification would be forthcoming, violated section 1138 and due process]; *People v. Weatherford* (1945) 27 Cal.2d 401, 420 [section 1138 violation implicates defendant's right to fair trial]; *United States v. Frega* (9th Cir. 1999) 179 F.3d 793, 808-811 [confusing

response to jury's questions infringed on defendant's Sixth Amendment rights]; *United States v. Warren* (9th Cir. 1993) 984 F.2d 325, 330 [error, not harmless beyond a reasonable doubt, from trial court's failure to provide a supplemental instruction sufficient to clear up uncertainty which question from deliberating jury had brought to court's attention].)

In this case, it was incumbent upon the trial court to answer the jury's question regarding what would happen if the jury deadlocked as to the penalty. This is because the trial court answered a similar question posed by the jury during guilt phase deliberations.

During the guilt phase deliberations, the jury sent the trial court a note which asked "If we deadlock on one particular special circumstance on Count 1, will that cause that count to be dropped?" (CT 789; RT 3723.) The trial court answered no. (CT 790.) However, by not answering the similar question regarding what would happen if the jury deadlocked over the penalty, and, as argued in Argument VIII, wrongly requiring the jury to continue deliberations after they stated they were deadlocked, those jurors who had been voting for life may well have believed that the entire trial, including the guilt phase, would have to be retried. In their own mind, rather than force a retrial on both guilt and penalty, these jurors relented by voting for death.

Appellant is aware of this Court's decision in *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193-1194, where the jury asked what would happen if the jury deadlocked, and the trial court, with the agreement of counsel told the jury that they were not to speculate on that possibility and should not consider it in deciding a penalty. (*Ibid.*) This Court held that the trial court acted properly and to answer that question would cause confusion. (*Ibid.*)

However, this case is different. Here, the jury asked more than just a general question regarding what would happen if the jury deadlocked. They specifically asked whether both guilt and penalty phases would have to be tried over again in the event of a deadlock. In addition, as noted, during guilt phase deliberations, the trial court answered the jurors question of the outcome of a hung jury as to some of the special circumstances by informing them that the underlying count would not be retried or dismissed Here, by contrast, because the trial court did not answer this question, some jurors may well have thought that the entire guilt and penalty phase would have to be retried and thus voted for death for that very reason.

This is borne out by the fact that after the trial, when the jurors talked to trial counsel and the trial court, juror number five, as noted by the trial court, "appeared to be very troubled by that particular question" and

still wanted to know the answer. (RT 5100-5101.) Because the trial court refused to answer this question, it erred.

C. The Error Was Prejudicial

As noted above, the failure of the trial court to answer the jury question regarding what would happen if it deadlocked, violated Appellant's Sixth Amendment right to a fair jury trial and his Fourteenth Amendment right to due process. In addition, the trial court's error calls into question the reliability of the death sentence handed down by the jury.

In *People v. Brown* (1988) 46 Cal.3d 432, 446-448, this Court clarified that the standard for penalty phase error is the "reasonable possibility" harmless error standard. Under this extremely high standard, it is very difficult for the prosecution to establish that any error, let alone a combination of errors, was harmless with respect to the penalty verdict. The *Brown* standard is "the same in substance and effect" as the *Chapman* "reasonable doubt" standard. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965; see *People v. Brown*, *supra*, 46 Cal.3d at 467 (conc. opn. of Mosk, J.).) It is a "more exacting standard" than the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, used for assessing state law guilt phase error. (*People v. Brown*, *supra*, 46 Cal. 3d at 447.)

Here, the trial court's failure to answer the questions posed by the jurors cannot be said to be harmless. Given the fact that trial court, in response to the jury's query during guilt phase deliberations, told them that the underlying count would not be retried or dismissed if they hung on a special circumstance, its refusal to answer their question of what would happen if they hung as to the penalty, may well have caused some jurors to believe that the entire guilt as well as penalty phase would have to be retried. This could well have been the very reason those jurors, after announcing that they were hopelessly deadlocked, ultimately voted for death. Thus the error was prejudicial.

X.

THE TRIAL COURT PREJUDICALLY ERRED IN RESTRICING DEATH QUALIFICATION VOIR DIRE OF THE JURY

A. Factual Background

On March 25, 1999, co-defendant Higgins filed a motion for sequestered voir dire of the jury, in what is commonly known as "*Hovey*" voir dire (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80) (CT Supp. III, 279-283.) During a hearing held the same day, Appellant's attorney, along with co-defendant Flagg, joined in that motion. The prosecutor did not object. (RT 381.) However, the trial court denied the motion stating that "I

don't believe that *Hovey* voir dire is required in this case, nor do I believe that it's particularly helpful." (RT 381.)

The questionnaire that was subsequently given to the prospective jurors to fill out contained a section dealing with their views on the death penalty. (See e.g. CT Vol. VII, 1472-1479.) This included whether they had any philosophical or religious beliefs as to the death penalty (RT 1474-1476.), whether they would always or never impose the death penalty (RT 1475, 1478.) and whether they could follow the instructions the trial court would give them regarding the death penalty. (RT 1477, 1479.)

Jury selection commenced on April 5, 1999. The trial court's voir dire consisted of asking the prospective jurors follow-up questions to clarify certain answers they had given in the questionnaire. (RT 610-706.) After the trial court's initial voir dire of the jury, Appellant's attorney began his voir dire. The first juror he questioned was juror number 6265. (RT 720-721.) In regards to that juror's view regarding the death penalty the following dialogue took place:

> Mr. Leonard: Now, because this is a death penalty case, we have to look at the possibility that we may get to a second phase of the trial
>
> To get to the second phase of the trial, you'd have to find my client guilty of first-degree murder, and allegations of rape, allegations of robbery, on a named victim. A woman. Miss Kim.

Then there's another the (sic) charge to my client, another attempted murder and robbery.

Assuming you found all those things to be true, you get to the penalty phase, you only have two choices: life without the possibility of parole, or the death penalty.

Would you say to yourself because of the nature of the crimes that my client was found guilty of, that you would automatically vote for death, sir?

Prospective Juror 6265: Good possibility.

Mr. Leonard: Could you consider the other alternative for my client? That's life without possibility of parole?

Prospective Juror 6265: It would be considered.

Mr. Leonard: So you wouldn't just say automatically for Mr. Debose, "I would vote death"; would you, sir?

Prospective Juror 6265: No.

Mr. Leonard: You'd have to consider both penalties?

Prospective Juror 6265: Yes.

Mr. Leonard: Do you think life without the possibility of parole, go to jail, you die in jail, that that's a punishment?

Prospective Juror 6265: I feel it is somewhat of a punishment. In some cases, not a just punishment.

Mr. Leonard: What do you mean by not a just punishment?

Prospective Juror 6265: I agree with the death penalty if – when it is fit.

Mr. Leonard: Okay.

In some cases you'd say well, for that reason, he only deserves death; is that correct?

Prospective Juror 6265: That's correct

Mr. Leonard: But what little bit you know about this case as of right now, what would you say?

Prospective Juror 6265: Not guilty.

Mr. Leonard: How about in the penalty phase? (RT 722-724.)

At that point, the trial court had a side bar with all counsel and the following discussion took place:

The Court: I'm concerned with asking the jurors to prejudge what the potential decision would be in a death penalty case, based on the allegations alone.

I don't think it's proper to do. I think it's certainly proper to voir dire as to whether or not they would consider both punishments, as whether or not they predetermine what an appropriate punishment should be.

But my concern is that eventually, we're going to now piecemeal it down to what if you found this allegation true, or that allegation true, or guilty on this count, or on that count, what would your decision then be.

Mr. Leonard: I don't think I was basing it on that, Judge. I wasn't asking this man to prejudge. If I did, I misspoke. Because I can't do that.

The Court: I agree.

Mr. Leonard: That's just not right.

The Court: I agree.

But it's just not you. I don't think it's proper for anybody, including the prosecution, when they stand up and do their voir dire, to ask the jurors the same question.

Mr. Leonard: I agree.

The Court: I think the only thing you can do is ask questions whether or not they have an open mind as to either of the possibilities, and the court can make a determination as to whether or not there's a reasonable possibility they could apply either one of those verdicts.

Mr. Leonard: The only thing I think you can do is go into some facts of the case, based on these facts, would you automatically vote death, and never consider a life without possibility of parole.

That's about as far as I think you can go.

The Court: I think that you're in treacherous waters, Mr. Leonard. I don't think it's appropriate to ask them to prejudge that.

They know what the general allegations are. If you want to say you've heard the general allegations, you know, with those general allegations, in mind, you know, are you in a position where you're automatically going to go one way or the other.

But don't break it town. Don't ask them to prejudge which factors they would find aggravating or mitigating. I think that's inappropriate. (RT 724-725.)

The trial court then asked all other counsel if they wished to be heard. All counsel submitted. (RT 725-726.)

As argued below, the trial court's ruling restricted Appellant's death qualification voir dire of the jury. This violated Appellant's Sixth, Eighth

and Fourteenth Amendment rights under the United States Constitution. As a result, Appellant's convictions and death sentence must be reversed.

B. The Trial Court Improperly Restricted Voir Dire

Appellant was accused of the gruesome murder, torture and sexual assault of one woman, and, as opposed to the co-defendants, was also accused of the attempted pre-meditated murder and robbery with a gun of another woman. In addition, there was substantial evidence in aggravation consisting of Appellant possessing shanks in jail, fights in jail, and his possessing and shooting of a firearm shortly after he had been released from the California Youth Authority.

In selecting a jury, it was therefore imperative for Appellant's attorney to determine whether or not the circumstances of the crimes he was charged with, as well as the factors in aggravation alleged, would induce a juror to vote automatically in favor of death, regardless of the law or of other mitigating evidence in the case. This necessity was both practical and constitutional, for it is well settled that the Fourteenth Amendment of the Constitution guarantees a penalty jury free from such prejudice, and assures a voir dire adequate for the selection of impartial penalty jurors. (*Morgan v. Illinois* (1992) 504 U.S. 719, 729-730, 733-734; *Wainwright v. Witt* (1985) 469 U.S. 412, 424.) Article I sections 7, 15, and 16 of the California

Constitution provides the same protection. (*People v. Williams* (1997) 16 Cal.4th 635, 666-667.) In addition, the Eighth Amendment also guarantees the right to an impartial jury in a capital case because the lack of such a jury denies the right to a reliable penalty determination. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340.)

The constitutional requirement that prospective jurors in a death penalty case be questioned on whether their views on the death penalty would interfere with their ability to be impartial is not discharged by general questioning about the juror's overall ability to be fair and impartial. (*Morgan v. Illinois*, *supra*, 502 U.S. at 731.) Nor can the constitutional requirement be discharged in all cases by questions pegged at a level of abstraction so high as to preclude some reference to certain factors in the case which can affect a juror's ability to remain impartial on the question of penalty. (*People v. Pinholster* (1992) 1 Cal.4th 865, 917-918.)

In Appellant's case, the trial court's view, that death-qualification voir dire could not go into the facts of the case, and was confined only to what is charged in the information, is wrong. Although voir dire for death-qualification "'seeks to determine only the views of the prospective jurors about capital punishment in the abstract,'" nonetheless a challenge for cause must be sustained against any prospective juror "who would invariably vote

either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances . . . whether or not the circumstance that would be determinative for that juror has been alleged in the charging document." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1004-1005, emphasis added; *People v. Davenport* (1995) 11 Cal.4th 1171, 1203-1204; *People v. Cash* (2002) 28 Cal.4th 703, 719-722.)

Thus, this Court in *People v. Noguera* (1992) 4 Cal.4th 599, found it proper for the trial court to allow the prosecutor to ask prospective jurors whether they would automatically vote for life imprisonment if the defendant was only 18 or 19 at the time of the murder, and whether they would require the prosecutor to prove multiple victims before imposing a death penalty. (*Id.*, at 645-646.) In *People v. Livaditis* (1992) 2 Cal.4th 759, this Court upheld the dismissal for cause of a juror who stated she could not vote for the death penalty in the case before her because of lack of a prior murder. (*Id.* at 772.) Further, in *People v. Rich* (1988) 45 Cal.3d 1036, this Court sanctioned as within the law, the question: "'If the facts in this case disclose that [defendant] is guilty of four separate murders and multiple rapes, including the murder of an eleven-year-old girl who was sexually abused and was killed by being thrown off a high bridge, would

those facts trigger emotional responses in you that would make it hard to consider life imprisonment without possibility of parole, or would you under those circumstances vote for the death penalty?'" (*Id.* at 1104-1105.) Finally, in *People v. Cash*, *supra*, this Court reversed the death verdict where the trial court prohibited defense counsel from questioning the jurors about evidence in aggravation that the prosecution intended to introduce. (See also *People v. Zambrano* (July 30, 2007, S05368) ___ Cal.4th (conc. & diss. opn. of Kennard, J.).)

Appellant realizes that the degree of specificity to be allowed in a permissible area of questioning is within the discretion of the trial court. (*Mu'Min v. Virginia* (1991) 500 U.S. 415, 424-426, 429; *People v. Sabayon* (1997) 15 Cal.4th 795, 823.) For example, in *People v. Davenport*, *supra*, 11 Cal.4th at 1204, this Court held that the trial court was within its discretion to deny as too remote death-qualification questioning about childhood sexual victimization suffered by prospective jurors. In *People v. Clark* (1990) 50 Cal.3d 583, 596, this Court held it to be within the trial court's discretion to refuse death-qualification questions concerning how the jurors' view of penalty might be affected by evidence that the victims had suffered serious burn injuries. Finally, in *People v. Roybal* (1998) 19 Cal.4th 481, 518-519, this Court approved the rejection of questions about

"the death penalty for a person who killed a 65-year-old woman", while also approving the trial court's use of the open-ended question, "'In what types of cases/offenses the death penalty should be imposed?'" (*Id.*, at 518.)

However, the court's discretion to limit voir dire must not conflict with the fundamental right, guaranteed by the State and Federal constitutions, of a fair and impartial jury to determine whether the defendant shall live or die. (*Morgan v. Illinois*, *supra*, 504 U.S. 719.) Failure to discharge the duty to exercise such discretion is error (see *People v. Bigelow* (1984) 37 Cal.3d 731, 742-743; see also *People v. Penoli* (1996) 46 Cal.App.4th 298, 306), and such discretion cannot be said to have been exercised unless "there is no misconception by the trial court as to the legal basis for its action." (*In re Carmelita B.* (1978) 21 Cal.3d 482, 496.) Clearly, the trial court here operated under a misconception as to the legal basis for its restriction on defense counsel's voir dire. The error was both serious and of constitutional magnitude.

In Appellant's case, the failure to exercise discretion "gains in significance because on the record in this case it would have been an abuse of discretion" (*People v. Bigelow*, *supra*, 37 Cal.3d at 743) to deny more detailed questioning the general facts surrounding the charges as well as the factors in aggravation. The "allegations" the trial court was referring to,

involved not only the charges of first degree murder and attempted murder, but the special circumstances of robbery, arson, torture and sexual assault as well as the factors in aggravation. The inflammatory nature of these allegations in a murder case is apparent. The Constitution recognizes this reality because death qualification, which necessarily applies only in cases of murder, is one of only two subjects for voir dire compelled, as a matter of law, by the Fourteenth Amendment (*Morgan v. Illinois*, *supra*, 504 U.S. 719) -- the other one being racial prejudice in a case involving a violent crime alleged to have been committed by a black defendant against a white victim. (*Mu'Min v. Virginia*, *supra*, 500 U.S. at 424.)

In *People v. Cash*, *supra*, this Court reversed the death sentence where the trial court refused to allow trial counsel to voir dire the prospective jurors regarding certain aggravating factors alleged – that as a juvenile the defendant had murdered both of his grandparents. It specifically refused defense counsel to inquire of the prospective jurors "'whether there are any aggravating circumstances which would cause a prospective juror to automatically vote for the death penalty, without considering the alternative of life imprisonment without possibility of parole.'" (*Id.* At 555.)

In finding this to be error, this Court reasoned that such a restriction violated the defendant's constitutional rights explaining as follows:

> Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it failed to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. [Citation.] In deciding where to strike the balance in a particular case, the trial courts have considerable discretion. [Citations.] They may not, however, as the trial court did here, strike the balance by precluding mention of any general fact or circumstance not expressly pleaded in the information. [Citations.] (*Id.* At 721-722.) (See also *People v. Zambrano, supra,* ___ Cal.4th ___ (conc. & diss. opn. of Kennard, J.).)

In Appellant's case, as in *Cash*, the trial court improperly restricted defense counsel from inquiring regarding any general facts not expressly pleaded in the information. Although Appellant's counsel did ask, without objection, prospective juror number 2738, whether the fact that "a woman was put in the trunk of a car alive and burned" would mean that he or she would automatically vote for death. (RT 729), and also asked juror number 1589, without objection, if Appellant was found guilty of the murder of Kim and the attempted murder of Dassopoulos would he or she automatically vote for death (RT 741-742), this did not alleviate the error.

As noted above, counsel was not allowed to inquire regarding some

facts of the case as well as the aggravating factors to be presented in the penalty phase. This was in contrast to the trial court allowing the prosecutor, over defense objection, to voir dire the jury regarding applying the death penalty when a defendant is not the shooter. (RT 974-976.) The restrictions placed on Appellant's counsel rendered the voir dire inadequate under the Fourteenth and Eighth Amendments of the United States Constitution, and under Article I sections 7, 15, 16, and 17 of the California Constitution.

C. The Error was Prejudicial.

If the inadequacy of voir dire leads a reviewing court "to doubt that [appellant] was sentenced to death by a jury impaneled in compliance with the Fourteenth Amendment, his sentence cannot stand." (*Morgan v. Illinois*, *supra*, 504 U.S. at 739.) There must be doubt in the instant case, because unquestionably not only the facts surrounding the murder and attempted murder figured decisively in the penalty decision of the jurors, but so too must have the aggravating evidence presented in the penalty phase. (See *People v. Lanphear* (1980) 26 Cal.3d 814, 831.) Without being told more about the facts of the crimes for which Appellant was on trial, as well as the aggravating factors to be presented at the penalty phase, there is substantial doubt whether the jury that decided this case had the ability to

remain impartial and make a decision based only on the law and evidence -- in short, a jury "impaneled in accordance with the Fourteenth Amendment." Thus, "by barring any voir dire beyond facts alleged on the face of the charging document, the trial court created a risk that a juror who would automatically vote to impose the death penalty on a defendant who had previously committed murder was empanelled and acted on those views, thereby violating defendant's due process right to an impartial jury. [citation.]" (*People v. Cash*, *supra*, 28 Cal.4th at 723.)

Furthermore, because of the trial court's error it is impossible for this Court to determine from the record whether any of the individuals seated as jurors held such a disqualifying view of the death penalty. (*Ibid.*) As a result, this error cannot be held harmless and Appellant's sentence of death must be reversed. (*Ibid*; See also *Morgan v. Illinois*, *supra*, at 739.)

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XI.

THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL AFTER THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN HIS OPENING STATEMENT BY ARGUING THAT THE JURY ACTS AS THE CONSCIENCE OF THE COMMUNITY

A. Introduction

During his opening statement to the jury at the beginning of the penalty phase, the prosecutor outlined the various acts in aggravation against Appellant and co-defendant's that he intended to prove. He also stated his belief that the factors in aggravation would substantially outweigh those in mitigation. Finally he told the jury the following:

> And that after you decide that all these factors in aggravation substantially outweigh factors in mitigation, the jury will then have the opportunity to then find a verdict of death.
>
> And each of you will have to make that decision. And then you will have to make that decision collectively. *And in making that decision collectively, you will be acting as a conscience of the community.* (RT 3810.) (emphasis added.)

At that point co-defendant's counsel objected and the trial court sustained that objection. (RT 3810.) Subsequently, counsel for co-defendant Flagg moved for a mistrial. (RT 3811-3812.) Counsel for Appellant joined in that motion, which was denied by the trial court. (RT 3813.) As argued

below, the trial court erred in not granting the motion for mistrial based upon prosecutorial misconduct. As such, Appellant's death sentence must be reversed.

B. The Prosecutor's Comment Was Improper and Violated Appellant's Rights Under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution; Therefore the Trial Court Erred in not Granting a Mistrial

Prosecutorial misconduct does not require an intentional act by the district attorney. This Court has held that "the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 .) Thus, the intent of the prosecutor is irrelevant. "Because we consider the effect of the prosecutor's action on the defendant, a determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct." (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

In addressing the jury, a prosecutor cannot make appeals to passion and prejudice. (*Viereck v. United States* (1943) 318 US. 236, 247-248.) This is particularly so in the penalty phase of a capital case where "a prosecutor may not make an appeal to the jury that is directed to passion or

prejudice rather than to reason and to an understanding of the law." (*Cunningham v. Zanf* (11th Cir. 1991) 928 F.2d 1006, 1020.) This is exactly what the prosecutor did in this case. The Eighth Amendment requires that the capital sentencing decision must be based upon the facts and circumstances of the crime and the offender's character and background. (*Gregg v. Georgia* (1976) 428 U.S. 153, 189.) Moreover, improper remarks such as the one made by the prosecutor in this case, can deny the defendant due process under the Fourteenth Amendment as well as the right to a fair trial under the Sixth Amendment. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.)

The conscience of the community has no role in the jury's individualized sentencing decision. To appeal to the conscience of the community was a blatant appeal to emotion in an effort to inflame the jury against Appellant. In essence, the prosecution was telling the jury to send a message by sentencing Appellant to death. This was improper. (See *United States v. Solivan* (6th Cir. 1991) 937 F.2d 1146.)

Moreover, the fact that the trial court offered to admonish the jury (RT 3813), was not sufficient to cure any prejudice from the improper comment. As a general rule, the jury is presumed to obey the court's admonitions and instructions. (*People v. Adcox* (1988) 47 Cal.3d 207,

253.), and while in some cases, an admonition might be a sufficient remedy, in Appellant's case, given the prejudicial nature of the crimes, as well as the evidence in aggravation, it was not possible to "unring the bell." (*People v. Hill*, *supra*, 17 Cal.4th 800, 845.) Appellant was more prejudiced by this comment than the co-defendants, given the fact that he had been found guilty of the attempted premeditated murder and robbery of Dassopoulos as well as having used a gun to murder Kim. Thus, any admonition given by the court would not have undone the harm to Appellant.

C. The Error was Prejudicial

As stated in previous arguments, a violation of Appellant's federal constitutional rights require that the prosecution must show that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1979) 386 U.S. 18.) In this case the error cannot be shown to be harmless. Here, the jury deliberated for a lengthy period of time, and after taking several ballots, announced that it was deadlocked as to the penalty. This factor alone requires the trial court to give higher scrutiny to prosecutorial misconduct that violates Appellant's constitutional rights. Moreover, as argued above, Appellant was, by the jury's verdict, the more culpable of the defendants, and thus, the most likely to be prejudiced by prosecutorial misconduct. Because the comments of the prosecutor violated Appellant's

constitutional rights and were prejudicial, the trial court erred in not granting Appellant's motion for a mistrial. Thus, his death sentence must be reversed.

XII.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED TO APPELLANT'S CASE, VIOLATES THE UNITED STATES CONSTITUTION

A. Introduction

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.)[20] See also, *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.

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[20] 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

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 section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and

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imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at 2527.)

freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

B. Appellant's Death Penalty is Invalid Because Penal Code Section 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* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1991) 1 Cal.4th 103, 148.)

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-one special circumstances[21] 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 special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The United States Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be

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[21]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.

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*).

C. Appellant's Death Penalty is Invalid Because Penal Code Section 190.3, subd. (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.[22] 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,[23] or having had a "hatred of religion,"[24] or threatened witnesses after his arrest,[25] or disposed of the victim's body in a manner that precluded its recovery.[26] 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 (*Tuilaepa v. California*

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[22]*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

[23]*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[24]*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[25] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[26] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

(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* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 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.

D. Appellant's Death Penalty is Invalid Because California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing, 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 shown *supra*, 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 (section190.2) or in its sentencing guidelines (section 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, Thus 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) 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.)* 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.[27] 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, "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; (RT 4931-4932.) (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.[27] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[28]

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[27] 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.)

[28]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)

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.)

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42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[29] In *Cunningham* the principle that any fact which 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. (127 S.Ct., *supra*, at 867-868.) 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,* at 873.)

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.*, at 876.)

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[29] *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, 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 873.)

> 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 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 874.)

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 at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[30] 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 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 867.)

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

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[30]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."

> 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, 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* 65 P.3d 915, 943 (Az. 2003); accord, *State v. Whitfield,* 107 S.W.3d 253 (Mo. 2003); *Woldt v. People,* 64 P.3d 256 (Colo.2003); *Johnson v. State,* 59 P.3d 450 (Nev. 2002).[31])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[32] As the high court stated in *Ring, supra,* 122 S.Ct. at pp. 2432, 2443:

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

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[31] 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).

[32] 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 [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 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.

2. *The Due Process and the Cruel and Unusual Punishment Clauses of United States 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* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. 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* (1979) 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 Ca1.3d 306 (same); *People v. Thomas* (1977) 19 Ca1.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Ca1.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

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 v. North Carolina* (1976) 428 U.S. 280, 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's Death Penalty Statute 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, 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 therefore." (*Id.*, 11 Cal.3d at p. 267.)[33] The 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*, *supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra;* 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* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41-42) and "moral" (*People v.*

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[33]A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

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* (*Furman v. Georgia* (1972) 408 U.S. 238) state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a 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 this 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* (1984) 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 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 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 extensive evidence regarding unadjudicated criminal activity allegedly committed by Appellant including the possession of shanks in jail as well as fights in the jail and which the

prosecution devoted a portion of its closing argument to arguing these alleged offenses as factors in aggravation. (RT 4942-4943, 4945-4951,5045-5046.)

The United States 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 a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme. (CT 855; RT 4920.)

E. The California Sentencing Scheme Violates the Equal Protection Cause of the United States Constitution by Denying Procedural Safeguards to Capital Defendants Which are Afforded to Non- Capital Defendants

As noted in the preceding arguments, the United States 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. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. 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*[34] as in *Snow*,[35] 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 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, 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., 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 4.420, subd. (e) provides: "The

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[34]"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 275; emphasis added.)

[35]"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*

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."[36]

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. 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. These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[37] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

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sentence rather than another." (*Snow*, *supra*, 30 Cal.4th at 126, fn. 3; emphasis added.)

[36]In light of the Supreme Court's decision in *Cunningham*, *supra*, in order for the basic structure of the DSL, as it existed at the time of *Cunningham*, to be 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.

[37] 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 609.)

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* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

F. 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., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [plur. opn. of Stevens, J.].) 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.)

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* (1895) 159 U.S. 113, 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,

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, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311]

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. (See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[38]) Categories of criminals that warrant such a

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[38]See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

G. Appellant's Death Sentence Violates the Eighth and Fourteenth Amendments to the United States Constitution Because the Co-Defendants Received LWOP

The United States Supreme Court has long held that the Eighth Amendment prohibits arbitrariness in the imposition of the death penalty (*Furman v. Georgia, supra* 408 U.S. 238) In *Furman*, the Court held that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit such a penalty to be arbitrarily and capriciously imposed. (see *Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) Because "death is different" (*Gregg v. Georgia* (1976) 428 U.S. 153, 188), the imposition of the death penalty requires a greater need for reliability, consistency and fairness. (See e.g., *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Spaziano v. Florida* (1976) 468 U.S. 447, 460 at fn. 7; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Woodson v. North Carolina, supra,* 428 U.S. 280, 305.) Therefore, this Court must "carefully

scrutinize" Appellant's death sentence in order "to minimize the risk that the penalty will be imposed in error or in an arbitrary and capricious manner. There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death." (*Spaziano*, *supra*, at 460, fn. 7.) This means that inconsistent and disproportionate sentences in the same case will violate the prohibition against arbitrariness as set forth in *Furman* and thus violates the Eighth Amendment.

In addition, the Eighth Amendment requires proportionality in the application of the death penalty. (*Enmund v. Florida* (1982) 458 U.S. 782.) Thus, the United States Supreme Court has required the lower courts to evaluate a defendant's culpability not only individually, but in terms of the sentences handed down to co-defendants in the same case. (*Id.*, at 798.) Not only must the defendants' culpability in the actual killing but, in order to meet Eighth Amendment standards, so too must the aggravating factors, which California allows the jury to consider, be compared as well.

Finally, the Supreme Court has found that inconsistent verdicts are unfair and "constitute arbitrariness that would undermine confidence in the quality of the [jury's] conclusion." (*Harris v. Rivera* (1981) 454 U.S. 339, 346.) This principle applies to capital sentencing procedures as well.

(*Getsy v. Mitchell* (2007) ___ F.3d ___.) [2007 U.S.App. LEXIS 17620; 2007 FED 0281P (6th Cir.), diss opns. of J. Merritt, Martin, Moore]

In this case, these rules were violated because co-defendants Flagg and Higgins had far worse aggravating factors than Appellant. Flagg had been previously convicted of three robberies, two of them at gunpoint. (RT 3914-3916, 3934-3935, 3950-3954, 3983, 3990, 4014-4015, 4061,4073-4076, 4309, 4316, 4320-4321.) Higgins, a documented gang member, had not only been found in possession of a shank, he had also been convicted of two counts of voluntary manslaughter, which had been reduced from the original charges of murder. These crimes involved the stomping and shooting death of one victim, and the shooting death of another. (RT 4112, 4115, 4207-4210, 4212-4217, 4268, 4245-4248, 4251, 4377-4379.)

Appellant's background, however, consisted of no felony convictions. While it is true that the aggravating evidence against Appellant consisted of possession of a shank and fighting while in jail, these pale in significance to the crimes committed by the co-defendants, especially co-defendant Higgins. Appellant's death sentence was applied in an arbitrary manner, was disproportionate considering the prior crimes of the co-defendants and was inconsistent with their receiving sentences of

LWOP. Appellant's death sentence violated the Eighth Amendment and must be reversed.

XIII.

THE CUMULATIVE EFFECT OF THE GUILT AND PENALTY PHASE ERRORS REQUIRES REVERSAL OF THE JUDGMENT OF DEATH

A. Introduction

Appellant has raised several serious constitutional errors that occurred in both the guilt and penalty phase of the trial. As set forth in the preceding arguments, each error was sufficiently prejudicial to warrant reversal of either the guilt or penalty determination. However, even if these errors individually were not sufficiently prejudicial to warrant reversal of the death judgment, their cumulative impact requires such reversal.

This Court must assess the combined effect of all the errors, because the jury's consideration of all of the factors bearing on penalty results in a single general verdict of death or LWOP. Multiple errors, each of which might be harmless had it been the only error, can contribute to create prejudice and compel reversal. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Buffum* (1953)

40 Cal.2d 709, 726, overruled on other grounds in *People v. Morante* (1999) 20 Cal.4th 403; *People v. Zerillo* (1950) 36 Cal.2d 222, 233.

B. Prejudicial Errors Under State Law

The errors in this case also compel reversal of the penalty on the basis of the state-law prejudice test for non-constitutional errors at penalty phase. As previously noted, in *People v. Brown* (1988) 46 Cal.3d 432, 446-448, this Court held that the standard for penalty phase error "the same in substance and effect" as the *Chapman* "reasonable doubt" standard. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965; see *People v. Brown*, *supra*, 46 Cal.3d at 467 (conc. opn. of Mosk, J.).) It is a "more exacting standard" than the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, used for assessing state law guilt phase error. (*People v. Brown*, *supra*, 46 Cal. 3d at 447.)

The reason for imposing this high standard is due to the nature of the decision entrusted to the jury at the penalty phase. This decision is different not in degree but in kind from the decision whether or not the defendant has been proven guilty. This difference significantly undermines any predicate for a reasoned appellate judgment about the effect of errors. "Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." (*Caldwell v. Mississippi* (1985) 472

U.S. 320, 330.) "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* (1987) 481 U.S. 279, 311, internal citation omitted.) At that same time the need for reliability is heightened because of the consequences of a judgment of death.

In assessing prejudice, errors must be viewed through a juror's eyes. A reasonable possibility that an error my have affected any single juror's view of the case compels reversal. (See *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 669; *Mak v. Blodgett*, *supra*, 970 F.2d at 620-621.) The decision to be made at the penalty phase requires the personal moral judgment of each juror. (*People v. Brown* (1985) 40 Cal.3d 512, 541.) The United States Supreme Court's decisions in *McKoy v. North Carolina* (1990) 494 U.S. 433, 442-443, and *Mills v. Maryland* (1988), 486 U.S. 367, 382-383, are predicated on the fact that different jurors will assign different weights to the same evidence. (See also *Stone v. United States* (6th Cir. 1940) 113 F.2d 70, 77 ["If a single juror is improperly influenced, the verdict is as unfair as if all were."], quoted in *United States v. Shapiro* (9th Cir. 1982) 669 F.2d 593, 603.)

Intrusion of improper considerations into a discretionary sentencing decision usually requires reversal of the sentence, even in non-capital sentencing by a judge. (See e.g., *People v. Morton* (1953) 41 Cal.2d 536, 545; see also *United States v. Tucker* (1972) 404 U.S. 443, 447-449; *People v. Brown* (1980) 110 Cal.App.3d 24, 41.) These cases recognize that determining whether improper considerations affected the sentencing decision is extremely difficult, and that the resulting uncertainty should require reversal. Therefore, a conclusion of harmlessness is far less appropriate, and less likely, than in a capital case in which the jury imposes the sentence.

C. Prejudicial Federal Constitutional Errors

Penalty phase errors generally implicate a defendant's federal constitutional rights. For example, the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment require reliability and an absence of arbitrariness in the death sentencing process, both in the abstract and in each individual case. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 [Eighth Amendment]; *Zant v. Stephens* (1983) 462 U.S. 862, 885 [Fourteenth Amendment due process].)

The Due Process Clause of the Fourteenth Amendment also protects a defendant's interest in the proper operation of the procedural sentencing

mechanisms established by state statutory and decisional law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) *Hicks* refers to a state-created "liberty interest" (*Ibid.*), but in death penalty cases an even more compelling interest is at stake: the right not to be deprived of life without due process.

Moreover, a violation of the *Hicks* rule in a capital case necessarily manifests a violation of the Eighth Amendment. Just as the rule of *Hicks* guards against arbitrary deprivation 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, citing other cases.)

Separate from any consideration of state law, the Fourteenth Amendment Due Process Clause is also violated by errors which taint the fairness of the trial and present an "unacceptable risk . . . of impermissible factors coming into play." (*Estelle v. Williams* (1976) 425 U.S. 501, 505; *accord*, *Holbrook v. Flynn* (1986) 475 U.S. 560; *Norris v. Risley* (9th Cir. 1990) 918 F.2d 828.)

The test for prejudice from federal constitutional errors is familiar: reversal is required unless the prosecution is able to demonstrate "beyond a reasonable doubt that the error [or errors] complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24;

see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 754 [state appellate courts are not required to consider the possibility that penalty phase error may be harmless, and harmless-error analysis will in some cases be "extremely speculative or impossible."].)

If any one of the errors constitutes a federal constitutional violation, an appellate court must reverse unless it is satisfied beyond a reasonable doubt that the combined effect of all of the errors, constitutional and otherwise, was harmless. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

D. The Court's Assessment of the Strength of the Evidence in Aggravation Cannot be Relied Upon to Conclude that Penalty Phase Error is Harmless

A conclusion by this Court that the strength of the evidence in aggravation renders the penalty phase errors harmless is tantamount to a mandatory death penalty: It would amount to a conclusion that any trier-of-fact presented with this aggravating evidence would necessarily return a verdict of death.

Moreover, in Appellant's case the strength of such evidence was not particularly strong. This was a close case at the penalty phase. There was only one homicide, and the prosecution's case in aggravation relied almost entirely on the circumstances of the offense. Appellant had a minimal

criminal record and the jury clearly struggled with the issue of penalty as it announced that it was hopelessly deadlocked after several ballots had been taken.

In *Mak v. Blodgett*, *supra*, 970 F.2d at 620-622, the Ninth Circuit affirmed the grant of habeas relief to a defendant who had been sentenced to death for 13 murders. The prosecution argued that penalty phase error was harmless in the face of such a strong case in aggravation, even though the error prevented the jury from learning about significant facts in mitigation. The district court and the Ninth Circuit disagreed. They concluded that there was reasonable probability that the mitigating evidence might have prevented a unanimous death verdict. *Mak* shows that strong evidence in aggravation is not an appropriate basis on which to conclude that penalty phase error was harmless.

The numerous guilt and penalty phase errors that occurred during Appellant's trial cannot be considered harmless. The improper finding of the arson-murder special circumstance, dismissal of an unbiased juror, admission of improper hearsay, and defective jury instructions all contributed to the guilt verdict. In addition, the trial court's failure to declare a mistrial after the jury deadlocked as to penalty, the failure to declare a mistrial after the prosecutor committed misconduct, and the

failure to answer the jury's question of what would happen if they deadlocked all contributed to a violation of Appellant's right to a fair trial, to due process and to a reliable sentence under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution. The cumulative prejudicial effect of all these errors requires reversal of the penalty judgment.

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DECLARATION OF SERVICE BY MAIL

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DECLARATION OF SERVICE

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is 615 C Street, No. 232, San Diego, California 92101. I served the APPELLANT'S OPENING BRIEF of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectfully as follows:

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

Executed on August 24, 2007, at San Diego, California.

RICHARD P. SIREF