IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

KEVIN BOYCE,

Defendant and Appellant.

No. S092240

Orange County Superior Court
No. 97NF2316

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Orange
Honorable Frank F. Fasel, Judge

MICHAEL J. HERSEK
State Public Defender

DOUGLAS WARD
Deputy State Public Defender
Cal. State Bar No. 133360

221 Main Street, Suite 1000
San Francisco, California 94105
Phone (415) 904-5600

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

Federal Cases

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

State Cases

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

STATUTES

Pen. Code

Evid. Code

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Texts & Law Reviews

TABLE OF AUTHORITIES

Page(s)

Cal. Rules of Court

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KEVIN BOYCE, Defendant and Appellant.	No. S092240 Orange County Superior Court No. 97NF2316

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a death sentence. (Pen. Code, § 1239, subd. (b).)

INTRODUCTION

Mr. Boyce (appellant herein), a 40-year-old African-American man, is mentally retarded, organically brain damaged, episodically psychotic, and severely mentally ill. The evidence that he is brain damage conceded by the prosecution:

> [A]lthough we are not contesting the fact that Mr. Boyce has certain problems, and that are well documented . . . regarding his mental abilities, and from whatever source. If it is organic brain disease or whatever, and we are not fighting that.

(11 RT 3807.)

In August 1997, appellant (then age 27) and Andre Willis (then age 30), were charged with crimes relating to an armed robbery at a hair salon in Buena

Park, Orange County, on August 14, 1997, during which an off-duty, Los Angeles County Sheriff's Deputy -- Shayne York -- was shot and killed; and with crimes relating to an armed robbery committed at a pizza restaurant in Yorba Linda later that evening.

Willis, after four changes of counsel, was ultimately represented by experienced defense attorney Milton Grimes, who not only recognized that appellant was severely brain damaged, but feared the adverse effect that such a fact would have on Willis's case:

> I can see the prosecution or even the other defense saying, you know, "Who was the shooter? Who was the brains behind this case[.]" And it is going to fall on Mr. Willis because Mr. Boyce is about as puddin-head puddin-head as one can get.

(4 Pretrial RT 1107 [sealed].) Ultimately, Willis's case was severed from appellant's.[1]

Willis was found guilty of first degree murder, but the special circumstance allegations were not found to be true. Thus, Willis's life was spared. (See *post*, fn. 5.)

Appellant, mentally retarded, brain damaged and psychotic, was sentenced to death.

//

---

1. Appellant filed with this Court a motion to unseal limited portions of the record on appeal. The Court granted the relevant portions of the motion.

STATEMENT OF THE CASE

On August 18, 1997, the Orange County District Attorney filed a complaint in the Orange County Municipal Court charging appellant and Andre Willis with four counts relating to a commercial robbery on August 14, 1997, at the DeCut Salon in Buena Park. Count 1 alleged the murder of Shayne York, an off-duty Los Angeles County Sheriff's deputy. (Pen. Code, § 187.) [2] Three special circumstances were alleged, including the killing of a peace officer in the performance of his duties; killing while engaged in the commission of robbery; and killing while engaged in the commission of second degree burglary. (§ 190.2, subds. (a)(7), (a)(17)(1) & (a)(17)(7).) Counts 2 and 3 alleged the second degree robbery of Jennifer Parish and Amy Parish. (§§ 211, 212.5, subd. (b), & 213, subd. (a)(2).) Count 4 alleged the second degree commercial burglary of the DeCut Salon. (§§ 459, 460, subd. (b), & 461.2.)

The complaint also charged the defendants with seven counts relating to a commercial robbery that occurred later that evening at the Lamppost Pizza in Yorba Linda. Counts 5, 6, 7 and 8 alleged the second degree robbery of Rodney Tamparong, Edward Tharp, Mark Cook, and Christopher Pierce. (§§ 211, 212.5, subd. (b), & 213, subd. (a)(2).) Counts 9 and 10 alleged the

---

2. All further statutory references made herein are to the Penal Code, unless otherwise stated. In the Reporter's Transcript, the salon is spelled both as "De Cut" and as "DeCut." Appellant follows the latter appellation.

The record on appeal is designated herein as follows: "RT" refers to the Reporter's Transcript on Appeal; "CT" refers to the Clerk's Transcript on Appeal; "Pretrial RT" refers to four volumes of proceedings that occurred before trial; "MCT" refers to the municipal court Clerk's Transcript; "MRT" refers to the municipal court Reporter's Transcript; and "QCT" refers to volumes of the Clerk's Transcript containing juror questionnaires and other documents.

attempted second degree robbery of Ernest Zuniga and Sean Gillette. (§§ 664, 211, 212.5, subd. (b), & 213, subd. (a)(2).) Count 11 alleged the second degree commercial burglary of Lamppost Pizza. (§§ 459, 460, subd. (b), & 461.2.)

The complaint also alleged that the offenses were serious felonies within the meaning of section 1192.7, subdivision (c)(1); that both defendants personally used a firearm (§§ 1203.06, subd. (a)(1) & 12022.5, subd. (a)); and that both defendants had suffered several prior convictions. (Supp. CT 234-238.)

On August 18, 1997, the defendants made their first appearance in the Orange County Municipal Court. The Orange County Public Defender was appointed as counsel for appellant; private attorney Barry Post appeared in court to represent Willis. (MCT 1-2, 13; MRT 1-10.) [3] On November 7, 1997, not guilty pleas were entered to all counts, and the special allegations were denied. (MRT 50-77; MRT 4.)

On June 5, 1998, appellant and Willis waived a preliminary hearing, and were bound over to superior court. (MCT 8; MRT 141-150; 3 CT 690-691.) On that date, the prosecution filed an information in the Orange County Superior Court charging them with the same counts alleged in the complaint, including the two felony-murder special circumstance allegations; however, the special circumstance of killing a peace officer in the performance of his duties (§ 190.2, subd. (a)(7)) was not alleged in the information. (3 CT 683-689.)

---

3. In the course of the proceedings, Willis was represented by five different attorneys: Barry Post (August 18, 1997, until February 20, 1998); Peter Larkin (February 20, 1998, until June 15, 1998); the Orange County Associate Defender (June 15, 1998, until March 30, 1999); Duane Folke (March 30, 1999, until December 23, 1999); and Milton Grimes and Early Hawkins (December 27, 1999, until Willis's case was severed from appellant's case in July 2000).

On October 22, 1998, the defendants were arraigned on the information. (1 Pretrial RT 142-155; 3 CT 758-759.) As appellant personally objected to a continuance, the superior court denied defense counsel's motion to continue the arraignment, and his counsel entered a not guilty plea. (1 Pretrial RT 144-147.)

On November 16, 1998, the prosecution informed appellant and Willis of its intent to seek the death penalty. (5 CT 1275-1276.) On April 8, 1999, the prosecution filed a Notice of Aggravation. (5 CT 1442-1445.) An amended Notice of Aggravation was filed on June 29, 1999. (6 CT 1684.)

On July 30, 1999, the prosecution filed an amended information, adding the special circumstance allegation of killing a peace officer in the performance of his duties (§ 190.2, subd. (a)(7)). (7 CT 2098.) [4]

The procedural history of this case is marked by numerous requests for a continuance, mostly made by Willis, by Willis's several change of counsel, and by appellant's motions to sever his case from Willis's case. Ultimately, on July 24, 2000, the trial court granted Willis's motion to continue, and granted appellant's motion to sever his case from Willis's. (4 Pretrial RT 1114-1131.) [5]

Appellant's trial began on July 25, 2000, before the Honorable Frank F. Fasel, of the Orange County Superior Court. Appellant was represented by Ronald Klar and Mark Davis of the Orange County Public Defender's Office. [6] The People were represented by Orange County Deputy District Attorney

---

4. At trial, count 7 of the amended information, alleging the robbery of Mark Cook, was amended to allege an attempted robbery. (7 CT 2100.)

5. Willis was subsequently found guilty of first degree murder. The two charged felony-murder special circumstance allegations, however, were found to be not true. (*People v. Andre Willis* (Aug. 29, 2002, G029110) [nonpub. opn.].) Appellant has filed a motion to take judicial notice of the nonpublished opinion in Mr. Willis's case.

6. Mr. Klar is now a Commissioner of the Orange County Superior Court.

David Brent.

On August 7, 2000, the guilt phase began. (4 RT 1761; 9 CT 2924-2927.) On August 22, 2000, following eleven and one-half hours of deliberations over three days, the jury returned verdicts finding appellant guilty on all counts alleged in the amended information, and finding the special circumstances and the personal use of a firearm allegations to be true. (8 RT 2930-2944; 10 CT 3251-3275.)

The penalty phase began on August 28, 2000. (9 RT 3016.) On September 7, 2000, after deliberating for four and one-half hours over two days, the jury determined that the penalty of death should be imposed. (12 RT 4056-4057; 10 CT 3508.) The trial court granted the prosecution's motion to dismiss the prior conviction allegations. (12 RT 4059-4060; 10 CT 3572-3573.)

On September 29, 2000, the trial court denied appellant's motion to reduce the sentence to life without the possibility of parole. (12 RT 4064-4127; 11 CT 3648.) The court sentenced appellant to death on count 1. On count 2, the robbery of Jennifer Parish, appellant was sentenced to the upper term of 5 years, and to the upper term of 10 years for the gun-use enhancement associated with that count. On counts 3-11, appellant was sentenced to one-third of the middle term for each count; and to 16 months for each of the associated* gun-use enhancements. (12 RT 4120-4123; 11 CT 3653-3656.) The total sentence for the noncapital counts and enhancements was 34 years, 4 months. The court ordered these terms "to be served consecutive[ly]" (12 RT 4120-4125; 11 CT 3653-3601, 3655-3601), and ordered that "the service of the additional years of imprisonment" on those counts "be stayed[.]" (12 RT 4123.)

//

STATEMENT OF FACTS

A. The Guilt Phase

1. The Prosecution Case

Jennifer Parish testified that, in August 1997, she was a Los Angeles County Deputy Sheriff, and was engaged to marry fellow Los Angeles County Deputy Sheriff Shayne York. Both worked at the Peter Pitchess Detention Center, colloquially known as "Wayside," in Los Angeles. On August 14, 1997, a Thursday, they had plans to travel to Las Vegas for Parish's birthday. After work, York withdrew $200 from a Wells Fargo ATM machine. Jennifer Parish and he then returned home, packed, and drove to a hair cutting salon -- the DeCut Salon -- in Buena Park, where Jennifer Parish's sister, Amy Parish, worked. [7] York and Jennifer arrived at the salon at approximately 7:30 p.m. (4 RT 1803-1806; 6 RT 2285-2286.)

At 8:00 p.m., the salon was empty except for Jennifer, her sister Amy, and York. York was seated at Amy's work station having his hair cut, and Jennifer was in the process of having her hair colored, and was standing next to York, when she saw Amy's facial expression change to fear. (4 RT 1807-1811, 1843-1844.) Jennifer then saw a tall, Black man, wearing green, khaki pants and a black sweatshirt pulled up over his head, holding a gun in his right hand, pointed at Amy's stomach. The gun was a semi-automatic, not a revolver, with a square barrel, and appeared to be "black to like a dark gray." (4 RT 1812-1814, 1842, 1844, 1846.) [8] As the gunman moved around, Jennifer saw that he was wearing black leather boots, and that he was not

---

7. To avoid confusion, appellant refers to Jennifer and Amy Parish by their given names.

8. The gun was similar to Exhibit 2, a gun that was subsequently recovered from the white Mustang that Willis was driving and in which appellant was a passenger when arrested. (4 RT 1814-1815.)

wearing gloves. (4 RT 1821-1822, 1860-1861.)

The man yelled, "get the fuck on the ground, Whiteys." On the floor, Jennifer's head was within arm's reach of Amy's feet; York's head crossed the lower portion of Jennifer's body. (4 RT 1815-1818, 1854.)

After a second man entered the salon, the first man told Amy to get to the ground; the second asked for the location of the cash register. On cross-examination, however, Jennifer stated that the first man asked for the money; and that the second man also ordered them to the ground. Amy responded that the money was in the drawer at the front of the store. Jennifer heard two voices from the perpetrators; she never heard a third voice. (4 RT 1818-1819, 1834, 1855-1856.)

The first man stood within several feet of Jennifer's head; he paced around throughout the incident and remained within her "eye range." (4 RT 1819-1820, 1853.) She could not see any part of the second man, nor his movements, but could hear his voice. (4 RT 1820-1821, 1849.)

Jennifer did not know, but believed, that the second man went to the cash drawer. (4 RT 1857.) He became agitated when he discovered that there was no money in the cash drawer, and demanded, "Where is the fucking money?" (4 RT 1821, 1823, 1858.) Amy had some cash on her person, but not very much, so the second man shifted his attention to York, while the first man kept his attention on Jennifer and Amy. (4 RT 1824, 1862-1863.)

Jennifer could feel the second man's presence over York. (4 RT 1860-1862.) When the second man demanded York's wallet, York complied and said "Here you go, sir." York did nothing to provoke the men and was polite throughout the ordeal. When the second man demanded more money, York said that he had $100 in his front pocket; he also offered his watch, although it was not taken. York generally carried his sheriff's badge in his left rear pocket, and his wallet in his right rear pocket. (4 RT 1824-1827, 1869.)

The second man next asked for York's ATM card, then demanded the personal identification number (PIN). York apparently did not understand the request, and did not respond. The next thing Jennifer heard was the second man saying, "Whitey is a mother fucking pig." (4 RT 1827-1828, 1869-1870.) Jennifer did not see the second man take out York's sheriff's badge, but assumed that he had. (4 RT 1828-1829.) The second man asked: "Where the fuck you work at, Whitey?" York responded that he worked at the East Facility at "Wayside." The man then asked York if "he liked to treat nigger Crips like shit in jail." York responded, "No, sir." The man replied, "No, I know you like to treat us nigger Crips like shit in jail." York again responded, "No, sir." (4 RT 1829-1831, 1875-1876.) Jennifer heard the man kick York four or five times. (4 RT 1837-1838, 1861.) [9]

The man again asked for York's PIN number, and again York did not understand. Jennifer explained that he wanted the access code for York's ATM card, and York said that it was "5545." (4 RT 1830-1831, 1867-1870.) Jennifer testified that the man then made a "derogatory remark, 'fuck the Whitey,' and the gun went off." Jennifer felt York collapse, and felt his blood pouring on her legs. The second man then said something to the effect that he had always wanted to kill a cop. (4 RT 1831-1832.) However, in her prior interviews by law enforcement, Jennifer had never mentioned such a statement. (4 RT 1877-1878.)

The first man told Jennifer to remove her engagement ring; she did so and he took the ring. At the time of trial, it had not been recovered. He also told her to remove her watch; she complied and gave it to him. (4 RT 1832-

---

9. The parties stipulated that appellant had been incarcerated at Wayside for several months in 1994; and that Willis was booked at the Los Angeles County Jail on miscellaneous dates, but that there was no record that he had been incarcerated at Wayside. (8 RT 2885.)

1833, 1864-1866, 1871, 1888.) He went through Jennifer's purse, found her badge, and said, "We've got another mother fucking pig in here." He asked which one of the women was "the other fucking White pig." Jennifer raised her hand and said, "I am." The first man replied, "Don't worry, bitch. We're not going to shoot you. You're a fucking woman." (4 RT 1834-1835, 1883-1884.) She directed the first man to her Kaiser Credit Union ATM card in her purse; she could not remember her PIN number, but it was written on the sleeve of the envelope containing the card. At trial, she identified her Kaiser card, her Wells Fargo ATM card, and a Ford Citibank card issued to Shayne York. (4 RT 1835-1837, 1880-1881.) [10] The parties stipulated that York's ATM card was used to withdraw $200 from a California Federal bank in Yorba Linda at 9:41 p.m. on August 14th, 1997. (6 RT 2285.)

The two men then told the women not to get up, and left the salon. Jennifer checked the front door to ensure that the men had left, then returned to York, who was bleeding from his nose, ears, mouth and neck. (4 RT 1837-1839, 1884.) She did not see the perpetrators' vehicle. (4 RT 1885.) After Amy called 911, Jennifer placed a 911 call. A tape-recording of Jennifer's 911 call was played for the jury. (4 RT 1839-1840; Exh. 11.) [11]

On cross-examination, Jennifer admitted that during a prior interview with law enforcement, she stated that she could not tell who fired the shot; and that the second man did not appear to care about the money after discovering that York was an officer. (4 RT 1873-1877.) She also

---

10. According to subsequent testimony, those cards were recovered from the white Mustang which Willis was driving, and in which appellant was a passenger, when arrested. (5 RT 1975-1977, 1986-1988.)

11. A transcript of Jennifer's 911 call, Exhibit 10, is present in the record on appeal at QCT 3768-3771, and was provided to the jurors at trial. (4 RT 1839-1840.)

acknowledged that when she was interviewed by law enforcement after the shooting, she described the gun held by the first man as a "Glock or a Smith & Wesson," that was either blue steel or black in color, and as having a square barrel. (4 RT 1845-1847.) She could not tell whether Exhibit 2 was the same gun used in the salon incident. (4 RT 1847-1848.)

Amy Parish testified that on the evening of August 14, 1997, she was working as a beautician at the DeCut Salon, and had plans to cut Jennifer's and York's hair. Jennifer and York arrived at the salon shortly before 8:00 p.m. As Amy was finishing cutting York's hair, she saw two people in the parking lot, then saw two Black men carrying guns enter the salon. (6 RT 2149-2150.) The first man was over six feet tall, perhaps 220 pounds, wearing khaki green pants, a black knit hat, a black sweatshirt pulled around his face, and thick lace-up boots. He was carrying what she assumed to be a semi-automatic gun that was "silver steel gray" with a square barrel. The gun was similar to Exhibit 2. (6 RT 2150-2151, 2197, 2199.) Amy did not see the second man as clearly; he was smaller than the first, perhaps with lighter gray pants and a darker shirt, and was carrying a gun. (6 RT 2152, 2199-2200.) [12]

Both men yelled "get on the fucking ground." Amy got to her knees and put her head down; Jennifer and York immediately lay down on the floor next to her. (6 RT 2152-2153.) Amy heard a voice ask for money and the location of the "box." She replied that they had no box. One of the men approached her and asked where the money was; she took between $20 and $30 from her pocket and gave it to him. The men became angrier, and again asked where the box was. Amy referred them to the front desk area. (6 RT 2155-2156.) She could not distinguish between the two voices; she did not

---

12. At the time of the crime, Willis was three years older than appellant, and was larger than appellant. (6 RT 2152; 7 RT 2634.)

have much experience "listening to Black males speaking slang[.]" (6 RT 2156, 2191-2192.) Nor did she know to whom she handed her money. She then lay on the floor, while one of the men went to the front-desk area and retrieved the cash drawer. He became angry because it contained only $11. (6 RT 2156-2157.)

One of the men continued to demand money, and York offered the money in his pocket, saying "Here's $100, sir." The man near Amy's hip leaned over York and removed his wallet. One of the men said, "Oh, we have us a pig here." (6 RT 2158.) Whoever was speaking to York asked where he worked, and York replied, "Wayside." When asked where at Wayside, York replied, "East." The man then asked: "[I]s this how you talk to the fucking niggers in jail? Is this how you treat the nigger Crips?" York was polite throughout the ordeal. (6 RT 2159.) The gun went off once, and the man said, "Good, I hope this one dies." Amy could smell the blood and hear it pumping out of York's body. (6 RT 2160.)

At this point, Jennifer was crying and one of the men was demanding her wallet, ATM card, and PIN number. He asked Jennifer how much money she had in the bank, and she replied $300 or $400. (6 RT 2160-2162.) One of the men found her badge and asked "who the other pig was." Jennifer immediately raised her hand and said, "I am." Jennifer was crying hard; the man told her to calm down, that they were not going to kill any women, "just the White man." The men told them to stay down, then left. (6 RT 2162-2163.) After the men left, Amy called 911. A tape-recording of the call was played for the jury. (6 RT 2166-2167; Exh. 71.) [13]

Later that evening, Amy was taken to Highway 91 for a "field show-

---

13. A transcript of Amy's 911 call, Exhibit 70, is present in the record on appeal at QCT 3772-3776, and was provided to the jurors at trial. (6 RT 2166.)

up." She could not positively identify the subject as the first man in the salon, although she felt that it was him. He had been wearing a knit cap, and his shirt had covered his face. In December 1997, she attended a lineup at the jail, and identified Willis as one of the perpetrators. (6 RT 2163-2165, 2176.)

On cross-examination, Amy testified that she did not know whether the second man had a gun; and that the first man's gun had a slide that was darker than the rest of the gun. (6 RT 2195-2196, 2198-2199.)

Amy was also cross-examined on several prior interviews she gave to law enforcement. During those interviews, she stated that, on the evening of the incident, the second suspect was dressed similarly to the first, wearing dark pants and a dark shirt; several days later, she again told law enforcement that the second suspect was wearing dark clothing. (6 RT 2201-2103.)

On August 16, 1997, several days after the incident, she told law enforcement that she did not know for sure whether the shooter was the first or second man; the first man "did everything"; she felt that the first man was responsible for the shooting; and, the second man was more in the front of the salon or roaming around. (6 RT 2177-2182, 2186-2189, 2190-2191.) Except for the initial entry into the salon, she heard the same voice the entire time; only one person was speaking. (6 RT 2191-2192.)

On May 5, 1998, Amy was interviewed by Orange County District Attorney Investigator Douglas Kennedy. (6 RT 2167-2169, 2201.) She was given police reports to review, and made markings on a crime scene diagram, although the diagram was not an accurate representation of the salon. Her markings represented the positions of the persons in the salon at the time that the gun went off. The second man was behind her head when the gun went off. (6 RT 2170-2176, 2185.) [14]

---

14. The parties stipulated that the diagram of the DeCut Salon made by

Footnote continued on next page . . .

On redirect examination, Amy agreed that the color of the pants and shirt taken from appellant at the jail after his arrest (Exhibits 24 and 25) was not inconsistent with her statements to law enforcement that the clothing was dark. On the evening of the crime, she described the first man's gun as "being a gray dull-finished semi-automatic handgun, possibly a nine millimeter, .45 millimeter with a four-inch barrel," and confirmed that Exhibit 2 looked like the gun. (6 RT 2215-2216.) At the August 16 interview, she was in the hospital, sad and exhausted; and York was still on life-support. (6 RT 2217-2218.) At the May 5, 1998, interview, she felt that the second man fired the gun based on her analysis of the first-aid given to York and the placement of the entry wound at the back of his head. (6 RT 2218-2220.) On recross-examination, she confirmed having told law enforcement on August 16 that she could not tell for certain who had fired the shot. (6 RT 2220-2222.)

Several witnesses testified regarding an armed robbery at the Lamppost Pizza in Yorba Linda which occurred two hours after the salon incident.

Edward Tharp testified that, on the evening of August 14, 1997, he and several other members of a rugby team were at the Lamppost Pizza. At approximately 10:00 p.m., Tharp saw the manager -- Rodney Tamparong -- go outside to empty the trash, then saw Tamparong come back through the door in a hurry, trying to push it shut. (5 RT 2055-2058.) A man pushed through the door, was agitated, and had his hands under his shirt; he yelled, "Get on the floor, mother fuckers." (5 RT 2058-2061, 2070-2071.) The man was approximately six feet tall, 180-200 pounds, wearing dark clothing, dark shoes or boots, and gloves. (5 RT 2061, 2073-2075, 2088.)

The first man opened the door and a second man entered, wearing a

---

Amy Parish during her interview with Investigator Kennedy on May 5, 1998, was "representative of the way the people were situated at the time a shot was fired." (7 RT 2407-2408; Exh. K [diagram].)

dark sweatshirt with a tee shirt underneath, light blue pants, and dirty white sneakers. (5 RT 2060, 2063, 2072-2073, 2088-2089.) [15] The first man left the immediate room with a store employee to check the cash drawer and open the safe. (5 RT 2066, 2077-2078)

The second man remained with Tharp and the others. He was not shouting orders and was not particularly agitated. Instead, he sat on a bench and was mumbling to himself. He initially tried to cover his face with his sweatshirt, but then let the shirt drop. He mumbled something and said, "Gotcha boys." Tharp testified that the man seemed to be talking to himself, seemed like he was trying to work himself up into a state where he could get agitated or be that way." The man was carrying a gun in his pants, which he removed and brandished. Tharp testified that the gun was similar to Exhibit 2. Several days after the crime, Tharp described the gun as a semi-automatic with a "stainless steel chrome silver type finish[.]" (5 RT 2063-2065, 2074-2076, 2078-2079, 2081-2082.)

After sitting on a bench, the second man jumped up, and asked them to empty their pockets. (5 RT 2079-2080, 2086) Tharp testified that "instead of barking out orders to everyone in general, it was more personal. He come talk to us in somewhat low tones, each individual person." (5 RT 2068.) For no apparent reason that Tharp could see, however, the second man kicked him hard between and on the legs. (5 RT 2066-2067.) He took Tharp's wallet, which had $80 in cash and a number of credit cards. Tharp was not asked for his PIN number. (5 RT 2067-2069, 2080-2081.) Towards the end of the robbery, the second man asked whether any of the people in the

---

15. Later that evening, Tharp was taken to a location on Highway 91 and identified Willis as the first man and appellant as the second. In December 1997, at two jail lineups, he again identified Willis and appellant. (5 RT 2061-2064.)

restaurant were "cops." Mark Cook quickly answered that they were teachers, and said that he taught Special Education. At that point the tension lessened. (5 RT 2068-2069, 2083.)

Rugby team member Mark Cook testified that he saw Tamparong come back through the door, with his hands up, followed by a man who told everyone to get down on the floor and not look at him. A second man entered carrying a gun similar to Exhibit 2. The second man used profanities ("get down on the floor mother fuckers"), and said "look at all the White boys that we got on the floor." (5 RT 2089-2091.)

The first man was nervous and agitated, and started barking out orders. He wanted to know who the manager was, and the location of the safe. (5 RT 2097-2098.) While the first man was with a store employee, the second man told the others to take out their wallets and cash, and turn their pockets out. He kicked Cook in the ribs, kicked Chris Pierce, and put the gun to Sean Gillette's head. (5 RT 2091-2092.) The second man was "kind of like mean and a real bully, and he seemed to be trying to test us to get something out of us." Yet, when interviewed by the police, Cook said that the second man "didn't seem to be really, really mad. He seemed to be like acting tough." (5 RT 2096, 2099-2100.)

While the second man was not looking, Cook took the money from his wallet and put it down his pants; thus, no property was taken from him. (5 RT 2092.) The man then asked if any of them were "cops." Cook said, "No, we're teachers." The man asked what he taught, and Cook responded "Special Ed." The man responded, "Really? I was in Special Ed class." (5 RT 2093, 2102.) At that point, Cook felt, "the whole place was deflated. Everything was kind of, I knew right then that everything was going to be okay." (5 RT 2095, 2102-2103.) As the two robbers were leaving, the second man also asked what they were doing there so late, and Cook said that they had rugby

practice. The second man responded, "that European sport that White guys play?" (5 RT 2100-2102.)

Rugby team member Sean Gillette testified that one of the Lamppost Pizza managers took out the trash, then came back through the door, followed by a Black man. A second man entered and told everyone to get down on the floor and to pull out their wallets. Gillette did not have his wallet with him. (5 RT 2104-2107.) The second man asked what they were doing there so late and whether any of them were "cops." Cook said that they were teachers. The second man asked what they taught, and Cook said Special Education. The second responded that "he was in Special Ed." (5 RT 2107.) After that, the second man walked around, asking for their wallets, and said, "Empty your pockets, mother fucker." The man pushed the gun to Gillette's cheek, causing an injury. Gillette had a backpack, and told the man that he only had paperwork in it. No property was taken from Gillette. (5 RT 2108-2110.)

On cross-examination, Gillette testified that the first man quickly took over the situation, yelling "hit the deck" or "get on the ground, mother fuckers," and told them not to look at him. The second man entered after everyone was on the floor (5 RT 2118-2120), and carried a gun in his right hand. Gillette was somewhat familiar with guns, and described the gun as a semi-automatic. The finish on the gun was not black, and was not dull: it was "shiny" like steel or chrome. (5 RT 2111-2114.) The first man was taller than the second, and had his hand beneath his shirt or jacket. He went with a manager and asked about the register and the safe. (5 RT 2114-2117.)

The two Lamppost Pizza employees who were present at the crime also testified at trial. Ernest Zuniga testified that, on August 14, 1997, he was a manager of the restaurant, and at approximately 10:00 p.m. that evening, he was in the restaurant with fellow employee Rodney Tamparong. (5 RT 2122-2123.) Zuniga saw Tamparong take out the trash, then come backpedaling

fast, his hands in the air "kind of going 'whoa, whoa.'" A first man entered and stated "get on the ground, mother fucker. This is a stickup." A second man entered about 20 or 30 seconds later, and asked whether any of them were "cops." (5 RT 2123-2125.) One of the rugby players said, "No, we're teachers." The first man, after identifying Zuniga as the manager, took him to the cash register, and removed approximately $60. (5 RT 2125-2126, 2132, 2135.) He then directed Zuniga to the "back office" area, and had Zuniga open the store safe. The man removed approximately $400 from the safe. Zuniga was then returned to the eating area. No money was taken from Zuniga personally. A later accounting showed that the total loss to the restaurant was $483. (5 RT 2127-2128, 2133-2136.)

Rodney Tamparong testified that he was a manager of Lamppost Pizza on August 14, 1997. At approximately 10:00 p.m., he took the trash out the back door and noticed a white Mustang backed up in the parking stall, with two Black men standing by it. One of the men beckoned Tamparong over. The situation did not feel right, so Tamparong said "no," and threw out the trash. When the man standing at the driver's door ran after him, Tamparong backpedaled through the door, with his hands up, saying "whoa, whoa." The man grabbed the door and walked in, then said "everybody on the ground." (5 RT 2137-2140, 2144.) After a second man entered the restaurant, the first man asked who was the manager. Zuniga said that he was, and was taken to the register and the back of the restaurant. (5 RT 2140-2142.) The second man asked if any of the others were "cops," and one of the customers replied, "No, we are teachers." Tamparong was a park ranger at the time, and removed his wallet containing his identification from his pants, and hid it underneath the table. When the first man returned, he asked Tamparong where his wallet was. When Tamparong said he did not have one, the first man searched him, then moved on. No personal property was taken from

Tamparong. That evening, Tamparong was taken to Highway 91 for an in-field lineup, where he identified Willis as the first man who entered the restaurant. (5 RT 2142-2144.)

Fullerton Police Officer Nathan Marple testified that on August 14, 1997, at approximately 10:40 p.m., he was on duty and heard a radio broadcast to be on the lookout for a white, convertible Mustang possibly involved in an armed robbery. (4 RT 1894, 1911.) He saw that make of car heading northbound on Harbor Boulevard, then head westbound on Highway 91, and gave pursuit. After radioing for assistance, and he made a "felony stop" of the car. (4 RT 1894-1897, 1907-1913, 1916.) The parties stipulated that Willis was driving the Mustang. (4 RT 1897.) After the stop, Willis and appellant were removed from the car, handcuffed, and taken into custody. (4 RT 1902-1903, 1915-1916, 1918-1919.) Marple and another officer looked in the car but saw no weapons. (4 RT 1903-1906.)

Buena Park Police Officer Roger Powell testified that, on the evening of August 14, 1997, he also participated in the felony stop of the white Mustang driven by Willis. (5 RT 1960-1961, 1965-1966.) Willis and appellant were handcuffed and placed in the back seat of his patrol car, and transported to the Buena Park Police Department. (5 RT 1966-1970.) At trial, Powell authenticated photographs of Willis and appellant taken the night of their arrest. (5 RT 1961; Exhs. 19 & 20.) He also participated in the seizure of Willis's and appellant's clothing: Willis was wearing a black shirt, black boots, green pants, and a belt; appellant was wearing a sweatshirt and gray pants, white leather tennis shoes, and a belt. (5 RT 1962-1964.)

Buena Park Police Department Officer Michael Quam testified that, on August 14, 1997, while working at the Buena Park Jail, he searched Willis and appellant and seized the following items. Willis had $557 in his left sock; $51 in his right sock; $48.40 in currency and coin, and a pager in his right front

pocket; $100.26 in currency and coin, and keys in his left pants pocket; and a Guess watch in his left rear pants pocket. Appellant had $200 in his left sock; a blue bandana, and a right-hand, green glove in his right rear pocket; a left-hand, green glove in his left rear pocket; $53.25 in currency and coin, lipstick, cigarettes, and a plastic bag in his right front pants pocket; and keys in his right shoe; and a single brown right-hand glove in his left rear pants pocket. (5 RT 1995-2003.) Willis had a total of $756.66; appellant had $253.25. (5 RT 2000-2001.)

Buena Park Police Officer Gregory Pelton testified that the day after the homicide, he searched the white Mustang and seized a number of items, including a black sweatshirt, a baseball cap, gray knit gloves, and a black watch cap. (5 RT 1970-1975, 1985-1986.) He also found a small Phillips screwdriver in the center console area by the emergency brake and, after removing the ashtray and the center console, a Kaiser Permanente Federal Credit Union card in the name of Jennifer Parish with the PIN number written on its sleeve, a Wells Fargo Express card in the name of Jennifer Parish, and a Ford Citibank Visa card in the name of Shayne York. (5 RT 1975-1977, 1986-1988.)

After finding a long screw on the back seat, Pelton used the Phillips screwdriver to remove the remaining screws from the speaker at the back-seat passenger area. He found and removed two handguns behind the passenger-side speaker. One handgun, a semi-automatic, had the hammer cocked back and was loaded with a clip in the magazine. (5 RT 1977-1979, 1988-1989, 1992; Exh. 2.) The other was a revolver, and was loaded with rounds in the cylinder, and one expended round lined up with the barrel. (5 RT 1979-1980, 1992-1993; Exh. 37.) He did not recall which he removed first, nor whether he wore gloves when he seized the handguns. (5 RT 1989-1992.)

Buena Park Police Officer Richard Nunez testified that he also

searched the white Mustang. Secreted in the lining of the trunk, he found papers indicating that the car was registered to Willis; and a black address book containing a DeCut Salon business card, an ATM card belonging to Shayne York, and Willis's driver's license. The business card had the numbers "5545" written on the back. Nunez did not find a ring, either in the car or during a search of the shopping center adjacent to the ATM machine, nor did he find a Glock semi-automatic handgun in the car. (4 RT 1924-1929, 1930-1931),

Dr. David Katsuyama, a pathologist in private practice (5 RT 2046), testified that he performed an autopsy on the victim, and recovered "a fairly large gray metal piece of [a] somewhat distorted bullet," as well as a distorted portion "of a thin copper base jacketing of the bullet," and "several tiny particles of metal fragments." (5 RT 2050.) It was difficult to determine the entry wound due to efforts by the surgeons to save the victim's life, but Dr. Katsuyama found remnants of a rounded opening on the back of the scalp. He found no evidence of charring or powder marks which might indicate the relative closeness of the weapon; there was no evidence of a contact or near-contact wound. He could not determine the positions of the shooter or the victim, although the bullet pathway was consistent with a person standing over and firing straight down into the skull. The gunshot was the cause of death. (5 RT 2051-2054.)

Buena Park Police Department Criminalist Kenneth Patrick testified that he took photographs at the DeCut Salon crime scene, and found two badges on the floor. (5 RT 2016-2019.) He took possession of the cash drawer and tray from the salon; although latent fingerprints were found on the drawer, those fingerprints did not match either Willis or appellant. (5 RT

2019-2020, 2029.) [16]

With regard to the revolver found in the Mustang, Patrick found a single latent fingerprint on the side of the weapon that he positively identified as appellant's fingerprint. (5 RT 2021-2025, 2030-2032; Exhs. 37 & 52.) On the Ford Citibank card in the name of Shayne York, he found a latent fingerprint that positively matched Willis's fingerprint. (5 RT 2025-2028, 2030; Exhs. 54 & 55.) [17]

Sheriff's Department Criminalist Loren Sugarman testified that she examined the revolver that had been located in the Mustang, and determined that the spent casing found in the revolver had been fired by the revolver. (5 RT 2035-2038) Sugarman test-fired the revolver into a tank of water and examined the test bullets to look for marks that might be useful for identification. She compared the test bullets to the projectile fragments removed from the victim's brain: a piece of lead; a piece of copper; and two smaller pieces of lead. The copper fragment was sufficiently intact for her to opine that it had been fired from the revolver found in the Mustang. (5 RT 2038-2045.)

Orange County District Attorney Investigator Cecil Reece testified and authenticated a videotape that was taken at a Shell gas station near the Lamppost Pizza. (6 RT 2288-2291.) [18] He also monitored a conversation

---

16. The parties stipulated that the comparison of known fingerprints by Patrick were the actual fingerprints of Willis and appellant. (8 RT 2885.)

17. California Highway Patrol (CHP) Officer Irene Portillo testified that, on August 19, 1997, she was working on the truck scales on Highway 91 when a trucker turned in Edward Tharp's wallet. After searching along the freeway near Buena Park, she found other items belonging to Tharp, and gave them to Patrick. (4 RT 1920-1922.)

18. The parties stipulated that Exhibit 75 was a video of the interior of the Shell station, taken between 9:19 and 9:20 p.m. (8 RT 2885.) The videotape

Footnote continued on next page . . .

between appellant and Willis that occurred at the jail after their arrest and that was covertly audiotaped. Appellant and Willis whispered at times, and used gestures. (6 RT 2291-2293.) Reece later had a laboratory remove "some of the background noise and the things that made it more difficult to hear" and prepared a transcript of the conversation. The audiotape was played for the jury. (6 RT 2293-2294; Exh. 80.) [19]

During the conversation, Willis informed appellant that the police were testing the guns, had witnesses who identified them in the crimes, and found property belonging to the victims in the Mustang. (QCT 3882; see also QCT 3886.) When appellant asked what they could do, Willis told him to "[f]ight this motherfucker." (QCT 3883.) Willis continued:

> We ain't gonna say nothing, we're gonna ride this shit out man, but (***) shit man, it's over, man. ¶ But, uh, when the mother fuckers come and talk, I'll put it on a third person. Some body they don't need to (***) I ain't going down for no mother fucking watch coward. I'll put it on a third person.

(QCT 3884.) [20] When appellant asked who the third person was, Willis responded:

> I already know who was the driver. I already know there was two people that went in. (***) whoop de whoop whoop (***) the gun, gonna show who had, when they come back with the gun, who did the shooting, whoop, whoop, whoop. Uh ... damn.

(QCT 3884.) The following exchange then occurred:

> Boyce: Do you know what this crime is, or something?

---

apparently shows appellant purchasing cigarettes. (4 RT 1767-1768.)

19. Exhibit 79 -- Reece's transcript of the covert taping -- is present in the record on appeal at QCT 3881-3889, and was provided to the jurors at trial. (6 RT 2296.)

20. The asterisks appear in the transcript and apparently represent incomprehensible portions of the conversation. Ellipses shown as "..." also appear in the transcript.

> Willis: Huh?
>
> Boyce: What this crime is?. (***) (***) I ain't doing (***) I sure ain't doing it for no mother fuckin' watch coward.
>
> Willis: Both of us. ¶ (***) watch coward. Attempted murder. (***) mother fuckin' (***). Think again. How do I know what crime it is; your [*sic*] a real nigger. What I'm askin' you, I'm gonna ride it out, man. ¶ I'm telling you this, I'm gonna ride it out, ok. But, in the end result in trial time (***) both of us don't need to go to hell for this shit.
>
> Boyce: Keep it down. Popo is sittin' right there. Man, two strikes, that's 25 anyway. We're totally fucked. ¶ I ain't done shit. (***) So far as we know (***) goddamn witnesses (***) what with that shit.

(QCT 3885-3886.) Willis stated: "Now I'm just saying, Cuzz (***) I don't see no mother fuckin' way to get the hell out of this shit. You know what I'm saying?" He continued: "(***) I mean, you know (***) both of us ... you know what I'm saying (***)." (QCT 3867.) Appellant replied that "[t]hey can't prove nothing," and repeated, "I still don't see what's going on." (QCT 3887.)

After stating "I'm gonna try to fight this shit," appellant reiterated that he did not understand "this shit." (QCT 3888.) Willis responded:

> Yo, yo, yo mama, yo what are your feelings cuzz? I mean, being real. When we ride this shit out as long as we can. When we see this shit ain't going away, you know. Don't take it wrong, man. But what I'm speaking is what's on my mind. I'm not saying these people's are (***). I'm gonna ride this all the way out, Cuzz. I'm gonna see if there's any changes ... they got evidence. Know what I'm saying? (***) Cuzz, you know what I'm saying? Gonna let both of us take this attempt murder charge?
>
> [. . . ¶ . . .] After we ride this shit out, you still ain't gonna say anything. We both real niggers. I want to know yo ... yo opinion, Cuzz.

(QCT 3888.) Appellant asked: "how can they put this shit on somebody, though? Who the nigga supposed to attempted murder anyway?" Willis

responded: "Some mother fuckin' male, police." Appellant exclaimed: "Male police? What mother fucker that bold? I didn't kill no police." (QCT 3888.) Willis finished by stating:

> Nah, you know what I'm saying, I'm trying to talk to you man. We might not get a chance to talk in a while. You know what I'm saying? I also know that, you know what I'm saying? How, nigger, if, how I would do it, how niggers, all niggers don't do it like that. We're true niggers, Cuzz. I'll come at you real. In your ... in your head full of lead, two mother fuckers. (***) You know that, you know that cold.

(QCT 3889.) Appellant replied, "This shit's all fucked up." (QCT 3889.)

Buena Park Police Officer Daniel Binyon testified that he was African-American and worked in the "gang detail." Based on his upbringing, he was familiar with "street slang that's used among African American males." (6 RT 2263-2264.) Binyon listened to the covertly audiotaped conversation between Willis and appellant at the jail, and noted several slang words and phrases. (6 RT 2264.) He testified that the term "watch coward" is slang for a correctional officer; the phrase "take out" may refer to a handgun or hurting someone (6 RT 2264-2265); the phrase "peep out" is used to direct someone to look at something; "popo" is slang for a police officer; the phrase "whoop, dewhoop, whoop" is a sentence filler similar to "et cetera, et cetera, et cetera"; and the term "cuz" refers to fellow Crip gang members (6 RT 2269-2270). [21]

Orange County District Attorney Investigator Douglas Kennedy testified that an investigator named Gomez interrogated appellant on August 15, 1997, but that evidence of that interrogation had been destroyed or lost.

---

21. During Binyon's testimony, appellant spoke out and called Binyon a "traitor," and said, "You don't know, you lyin." The trial court admonished the jury "not to consider any statements made by anybody in the courtroom. Your job is still to listen to the evidence, following the law, make your own decisions." (6 RT 2265-2266.)

On August 17, 1997, Kennedy and Buena Park Homicide Investigator Ruben Gomez interrogated appellant at the Buena Park Police Department. The later interrogation was tape-recorded, and the recording was played for the jury. (6 RT 2223-2230; Exh. 72.) [22]

During the interrogation, appellant initially maintained his innocence, but acknowledged that, as a general matter, he would "take the rap" for Willis. (QCT 3783-3801.) Appellant then asked what he had to do "to get up outta this?" (QCT 3802.) He then stated: "I tell, I tell ya what happened. Lemme smoke one cigarette." (QCT 3802.) Kennedy replied that he could not smoke in the room, but agreed to provide him with a cigarette later. (QCT 3802-3803.)

Appellant then said: "I tell you everything that happen. See I got a split personalities." (QCT 3804.) He said that his true name was Osiris, "King of the Underworld, Lord of the Dead." (QCT 3804.) When asked why Osiris would rob a hair salon, appellant responded: "Guess Osiris musta had too much, um, the devil juice or as alcohol, his drugs." He followed: "I can't tell ya exactly what happened. All I remember is a pow ya and I was like, damn." (QCT 3805.) He thought the shot "missed" and recalled that everyone was on the floor. (QCT 3806.) He proceeded to claim full responsibility and sought to absolve Willis: "But I, I did everything. Robbed the pizza place by myself. Did everything. Mr. Willis didn't do nothin'. He had nothin' to do with it." (QCT 3806.) He admitted to the salon and restaurant robberies, but the details he gave did not match or were often inconsistent with the crime scene facts or the witness statements. (QCT 3806-3880.)

---

22. A transcript of the interrogation, Exhibit 74, is present in the record on appeal at QCT 3777-3880, and was provided to the jurors at trial.

2. The Defense Case

Defense counsel, in his opening statement, conceded that appellant was involved in the DeCut Salon and Lamppost Pizza incidents, and that appellant was guilty of first degree felony murder for his involvement in the salon incident. However, counsel did not concede that appellant fired the fatal shot that killed York. Instead, counsel suggested that a third person was involved. With regard to the special circumstance allegations, counsel stated that York was killed not to further the goals of the burglary and robbery, but rather because he was a peace officer. (4 RT 1781-1783.)

The defense first called Buena Park Police Officer Kenneth Coovert, who testified that, in August 1997, he was assigned to "press information" and was also responsible for the department's volunteer program. Approximately one week after the salon incident, he helped coordinate 65-70 volunteers who searched several different areas, including Highway 91, for Jennifer Parish's missing engagement ring. No ring was found. (7 RT 2409-2414.)[23] Buena Park Police Department Officer Robin Sells testified that, in August 1997, she was in charge of coordinating the investigation into the salon incident. As with Officer Coovert, Sells searched different locations for the engagement ring. No ring was found; nor was any property found belonging to the pizza incident victims. (7 RT 2415-2420.)

Christopher Pierce, another rugby team player who was present at the pizza restaurant robbery, testified essentially the same as the other team player witnesses. (7 RT 2421-2438.) During the robbery, Pierce was not asked for his PIN number; his wallet was never recovered. (7 RT 2432-2433, 2436-2437.)

---

23. Defense counsel introduced testimony that the ring was never located in, an effort to show that a third person was involved in the crimes.

Kara Cross, Ph.D., testified that she was a licensed clinical psychologist with a doctorate in clinical psychology, and that she often performed neuropsychological examinations both in the forensic and clinical settings. Neuropsychology is a specialized branch of psychology that employs a number of tests from which a clinician can measure brain damage, and the degree of problems that an individual with brain damage has in everyday functioning. (7 RT 2485-2491, 2494-2495.)

Dr. Cross reviewed appellant's records and met with him 6 times totaling 10 hours. (7 RT 2504-2506, 2518-2521, 2535.) The records showed that, at age 7, appellant was administered the Peabody Picture Vocabulary Test, from which an intelligence quotient (IQ) of 83 was derived. Also at age 7, appellant was administered the Slosson Intelligence Test, and scored a derived IQ of 114. (7 RT 2506-2508.) The discrepancy between those two test results indicate that something was errant in either the administration of the test or in the scoring. (7 RT 2509-2510.)

The errancy was in the scoring. In 1979, the Slosson test was found to be "over-inflating IQ's quite dramatically." (7 RT 2508.) Around 1980, the Peabody test was found to be inflating IQ's slightly. (7 RT 2512-2513.) After the tests were "renormed," they were again administered to appellant (he was nearly age 13). At that time, his IQ on the Slosson test was 80; on the Peabody test, it was 70. He was diagnosed as borderline retarded. (7 RT 2511-2512.)

Dr. Cross also administered six different neuropsychological tests on appellant, and received the following results. On the Stroop Test, a screening device that measures how well an individual is able to filter out outside input and focus on a task, appellant's results placed him in the bottom 2 percent of the population, with a 98-percent probability of brain damage to the front part of the brain. (7 RT 2523-2528.) On the Wisconsin Card Sorting Test, a

screening device that evaluates a person's problem-solving ability and is highly sensitive to frontal lobe brain damage, appellant was in the bottom 1 percent of the population. This, too, indicated organic brain damage in appellant's frontal lobes. (7 RT 2530-2534.) A working memory test placed appellant in the bottom .2 percent of the population. (7 RT 2547-2549.) His "processing speed" placed him in the bottom 2 percent. (7 RT 2549-2550.) During the tests, in addition to loose associations, appellant demonstrated "tangential thinking" and an "odd personalization of questions." (7 RT 2521-2523.)

Dr. Cross administered the Wechsler Adult Intelligence Scale, a test which measures global intellectual functioning. Appellant's full scale IQ measured at 69, which is in the mentally retarded range. (7 RT 2543-2544.) [24]

She also administered the Luria-Nebraska Test, which consists of a battery of items, and localizes brain dysfunction. (7 RT 2563-2564, 2577-2578.) The results on this test showed significant damage to the right side of appellant's brain, and mild brain damage to the left side of his brain. (7 RT 2550-2553, 2570-2572.) She concluded that the results of her testing were consistent with appellant's prior test results, and that his brain damage had existed since early childhood. (7 RT 2506, 2554-2560.)

On cross-examination, Dr. Cross acknowledged, as she had on direct examination (7 RT 2517-2518), that appellant is able to know the difference between right and wrong, and to understand cause and effect. When asked whether she agreed that appellant was able to make choices, she responded, "Not as a global statement. As a qualified, yes." (7 RT 2578-2580.)

The defense also presented the testimony of Richard Leo, Ph.D., a professor of criminology and psychology at the University of California at

---

24. Appellant scored a verbal IQ of 80, which is close to the borderline range; and a performance IQ of 68, which is in the mentally retarded range. (7 RT 2538-2543.)

Irvine, and an expert on police interrogation practices, and the statements, admissions, and confessions that result from police interrogation. He had testified as an expert in these areas in over 30 cases. (7 RT 2444-2446, 2454.)

Dr. Leo described in general the different interrogation techniques used by law enforcement. He testified that interrogations can and sometimes do result in false statements or false confessions being made; certain interrogation techniques, such as those that "contain[ ] an implicit suggestion or promise of leniency or implicit threat of harsher punishment . . . can induce false statements or admissions." (7 RT 2457-2462, 2470-2474.) Researchers are able to evaluate the reliability of statements elicited during an interrogation. (7 RT 2463-2464, 2477-2480.)

Dr. Leo was hired by the defense to review the interrogation of appellant by Investigator Kennedy. (7 RT 2463-2465.) He observed that Kennedy used several different interrogation techniques on appellant, including confronting him with proof of his guilt, and inventing a different scenario for how the underlying act occurred to make appellant either feel less morally culpable or less legally culpable. (7 RT 2466-2468.) It is possible for these techniques to transform an interrogation into an inducement of sorts. (7 RT 2476-2477.) There is a correlation between the corroboration of facts during the interrogation and the reliability of the statements elicited. If the suspect's knowledge of the crime facts fits the actual facts, that is an indicium of reliability; if it does not fit, it is indicium of unreliability. (7 RT 2478-2480.)

On cross-examination, the prosecutor asked about the effect of a suspect's experience with law enforcement on the possibility of a false confession. Dr. Leo testified that such persons are less likely to waive their rights, but that even people with such experience have made "false statements or false confessions." (7 RT 2482-2484.)

Orange County Public Defender Investigator Cathy Clausen testified

that she had worked on appellant's case and, in response to a request by counsel, went to the jail and obtained writing samples from appellant, without informing him that she was doing so. (7 RT 2597-2599.) Several weeks later, she obtained a second set of handwriting samples from appellant, again without informing appellant that she was doing so. She sent those samples to Terrence Pascoe. (7 RT 2600-2603.)

Terrence Pascoe testified that he had been a forensic document examiner and handwriting expert for 35 years at the Department of Justice. (7 RT 2607-2611.) In this case, the "questioned document" was the business card with the numbers "5455" written on it. Pascoe compared that document to the numbers written by appellant and obtained by Clausen. (7 RT 2615-2616.) He concluded that it was highly probable that the writer of the numbers "5455" on the back of the business card was not the author of the sample (appellant). (7 RT 2618-2621, 2624-2625.) He was not provided with a handwriting sample from Willis. (7 RT 2633.)

During deliberations, the jury sent three requests to the trial court. First, it asked to have the first half of Jennifer Parish's testimony reread. (9 CT 3163; 8 RT 2911.) Second, with regard to the peace officer special circumstance, it asked:

> Clarification/Interpretation on page 51 and 52 of the jury instructions dealing with the retaliation specifics and on page 53. ¶ Does the peace officer have to perform a duty at the time of the crime[?]

(9 CT 3175; 8 RT 2911.) [25] In discussing the matter with counsel, the trial court proposed to answer in the negative. (8 RT 2912.) The defense objected.

---

25. Page 51 of the instructions refers to CALJIC No. 8.81.7; page 52 refers to CALJIC No. 8.81.8; page 53 to CALJIC No. 8.81.17. (9 CT 3136-3138.)

(8 RT 2912-2914.) The court nonetheless instructed the jury that the answer to its question was "No." (8 RT 2916.) The court also informed the jury that page 53 of the instructions was not related to the peace officer special circumstance. (8 RT 2916.)

The following day, the jury asked its third question:

> Re: Page 53, Part 2 of the jury instructions. Question: If first degree murder is committed as a consequence of or results from the intent or commission of armed robbery and/or burglary, is this sufficient to establish the special circumstance cited?

(9 CT 3164.) Defense counsel initially argued that the correct response was, "No." (8 RT 2918-2919.) Counsel then agreed with the court that "the question that they are asking is begging an interpretation of what the facts really mean." (8 RT 2921.) With counsel's concurrence, the trial court answered the question as follows: "[I]t depends upon what the jury finds to be the facts[.]" (8 RT 2924.) The court then reread CALJIC No. 8.81.17 regarding the felony-murder special circumstance. (8 RT 2924-2925.)

The jury returned a general verdict finding appellant guilty of first degree murder; and returned guilty verdicts on all the other counts in the amended information. It also found true the three special circumstance allegations and the personal use of a firearm allegations. (8 RT 2930-2944; 10 CT 3251-3275.)

B. The Penalty Phase

1. The Prosecution's Case

Damani Gray testified for the prosecution that in 1987, when he was 12-years old, he was waiting at a bus stop in Los Angeles, when a person approached and asked what "set" or gang he was from. Gray said that he was not from any gang, and the person asked whether he wanted to be part of the "Rollin' 60's" crip gang. When Gray said no, the person started punching him on the face and knocked him unconscious. When Gray awoke, the "school

police" were arresting the person. Several months before the capital trial, Gray was shown a set of photos, and selected appellant as the person who had assaulted him. (9 RT 3064-3066.) Appellant was 16- or 17-years old at the time. (9 RT 3018.)

On cross-examination, Gray was impeached with evidence that, in 1995, he assaulted his wife, Kamille Flores, and lied about that assault in statements to law enforcement. (9 RT 3074-3084.) He also admitted that in 1994, he was arrested for making a telephone call to someone during which he stated: "I have your dog and you will see your dog again if you pay me 500 bucks[.]" (9 RT 3084-3086.) On redirect examination, Gray testified that he was still married to Ms. Flores; over appellant's objection, he testified that he worked full time at a hospital, and was a full-time engineering student. (9 RT 3086-3088.)

Robert Jones testified that, on November 11, 1987, he was a police officer working for the Los Angeles Unified School District, and wrote a report regarding the incident between appellant and Damani Gray. He authenticated that report at trial, but had little recollection of the incident. He recalled that Gray was the victim and that appellant was arrested. (9 RT 3089-3090.) Over defense objection (9 RT 3091-3092), Jones read a quote from his report, allegedly made by appellant, "that he is going to fuck up the punk who had him arrested when he gets out of jail[.]" (9 RT 3092.) On cross-examination, Jones admitted that his report attributed the quote to Gray. (9 RT 3093-3094.) On redirect examination, Jones agreed that he meant to write "subject Boyce" instead of "subject Gray." (9 RT 3094-3095.)

The prosecution offered documentary evidence that appellant had suffered two prior convictions: the first, for robbery, in January 1989; the second, for being a felon in possession of a firearm, in 1994. Both exhibits were admitted without objection. (9 RT 3097-3098; Exhs. 81-82.)

The prosecution presented victim-impact testimony from four witnesses. Brandon York, Shayne York's younger brother, testified that they grew up doing things together, and had a great relationship. His brother was his best friend, enjoyed sports, especially baseball, and always did his best to help someone out. Brandon was notified by telephone that his brother had been shot. When asked how his brother's death had affected him, Brandon stated that "one of the biggest parts of my life is gone." They had planned on watching their children grow up. What he missed most was "just being able to talk to him." (9 RT 3098-3103.)

Jennifer Parish testified that she was to be married to York in June of the year following the crime. She described their relationship:

> We woke together every morning, we worked side by side for eight hours, and we went home together. He was my best friend. He made my sun rise in the morning and my moon go down at night. And there is nothing I wouldn't have done for him and him for me.

(9 RT 3104.) She thought about him every day, "what he looked like that night and what somebody did to him and put him through." She wore York's badge number. (9 RT 3105.)

> I just miss him. I miss his touch. I miss combing his hair every day for him because he didn't know how to do the new style my sister had gave him. And he would stand on his knees and -- every morning, and hold my waist and I would comb his hair for him. ¶ And his smile. Everybody loved his smile so much. It is just his mere presence. I wish he was there.

(9 RT 3105-3106.)

York's father, Daniel York, testified that he had a great relationship with his sons, and did everything with them as they grew up. Shayne was loving and caring. He was in Las Vegas when he found out that Shayne had been shot. His son's death affected him deeply: "Half of my life is gone. My life surrounded my sons." He had been a Los Angeles County Sheriff's

Deputy for 18 years, and had worked at the same facility as his son; his son would often call and ask questions about work. He missed his son's smile and love for others. His son never judged anybody by their color or nationality, but only by their person; he often helped the inmates. His son taught him to care for others. (9 RT 3107-3109.)

York's mother, Patricia Steele, testified that her son was 26-years old when he was killed. They had a very close bond. She divorced York's father when her sons were young, and for ten years they were her entire life. (9 RT 3110-3111.) His death affected her deeply:

> It's left such a void. I mean, it just rips your heart out. He -- it's left such an impact on everything. It's -- one thing -- it's just like a stone that drops and it just spreads. It affects every aspect of your life from -- most of the time, I just feel like I go through the motions of living from one day to the next.

(9 RT 3111.) Her son wanted to be a police officer from a young age. She had looked forward to trips together, and regretted that her son Brandon's child would never know Shayne. (9 RT 3111-3112.) She concluded:

> And I know that I will never ever be the same. There is a part of you that -- it just has this void. In my mind, I know this has happened. But, in my heart, I just don't want to believe that he is not going to be there to share all these things with us.

(9 RT 3112-3113.)

2. <u>The Defense Case</u>

Appellant presented two witnesses regarding Damani Gray's credibility. Los Angeles Police Officer Maria Gholizadeh testified that, in April 1995, she was told by Gray's wife that Gray had punched her in the face, choked her, dragged her outside, and threatened to kill her if she called the police. (9 RT 3123-3128.) Los Angeles Police Officer Andrew Monsue testified that, in April 1995, he spoke to Gray's wife regarding her spousal abuse complaint, and reviewed Officer Gholizadeh's report of the incident. Gray's wife confirmed the details of the report. That same day, Gray called Officer

Monsue and was very angry; he denied striking his wife, admitting only that he pushed her. (9 RT 3198-3203.)

Trudith Bell testified that she had lived and been a school teacher in Gaston County, North Carolina for 30 years. In the late 1970's, she taught at Rhyne Elementary School in the small, rural town of Gastonia, North Carolina, when appellant was a student there. Before trial, defense counsel went to North Carolina and showed Bell a photograph of appellant. She recognized him as having been in her first grade class, and as one of her most challenged students "educable-wise." (9 RT 3203-3209.)

Appellant repeated kindergarten, something that was quite unusual. He was placed in a program for delayed language acquisition and stuttering. (9 RT 3210-3213-3214, 3225, 3241.) The records also noted that, although he failed a vision test, no referral to an optometrist was made. (9 RT 3241-3242.) Bell conferred with an employee at the mental health department about appellant and his mother. In February 1978, she met with his mother, and explained appellant's problems at school. (9 RT 3228-3230.) He was "in over his head" in first grade. Bell feared that appellant's mother would not approve requiring appellant to repeat the first grade. (9 RT 3231-3232.)

Appellant's mother, Vertis Boyce, [26] began her testimony by denying that she drank alcohol before appearing in court. She denied not wanting to cooperate with the defense in this case, and denied testifying by a subpoena. [27]

---

26. To avoid confusion, appellant refers to Vertis Boyce and other family members by their given names.

27. In his penalty phase opening statement, defense counsel informed the jurors that if appellant's parents appeared in court, "they will be here largely for one reason and one reason alone and that's because we subpoenaed them and they have been ordered to be here." (9 RT 3029.) The prosecutor subsequently stipulated that Vertis Boyce "was brought to court under a subpoena." (11 RT 3756-3757.)

She first testified that she did not love her son, then stated that she did love him. (9 RT 3131-3132, 3134-3136.)

Vertis testified that appellant was born in 1970, in Grand Rapids, Michigan, and that her daughter Michelle was born in 1972. (9 RT 3128-3130, 3133-3134.) When asked the identity of appellant's biological father, she replied: "You said it wasn't Terry, so you tell me who his father is." She then stated that Terry Boyce was his biological father. She denied telling relatives that Terry was not the father: "They all lying on me because they all hate me." (9 RT 3136.) She denied that Cleveland Moore was appellant's biological father. She denied having a relationship with Cleveland Moore or even knowing him. (9 RT 3136-3137.) When defense counsel asked again whether she knew Moore, she replied: "I can't recall. I can't recall 30 years. I can't recall. I am an alcoholic, remember? I had a nervous breakdown. I can't recall 30 years ago. I can't recall. Ali he came from, Ali he will return to." (9 RT 3137.) She acknowledged having once lived in Grand Rapids, but could not recall when. She repeated: "It has been 30 years. I can't remember. Ali he came from, Ali he return to." (9 RT 3138.)

Vertis was born in Clayton, Louisiana. At one point she exclaimed: "Shit. Get the shit straight." After appellant was born, she returned to Louisiana, then moved to Mississippi. (9 RT 3138-3139.) Her sister Evelyn and her mother were living in Louisiana at the time. She asked defense counsel: "You know all this, why you asking me." After defense counsel explained, she replied: "I am acting ugly, aren't I, Kevin? I am sorry." Appellant then stated "You know my name," and Vertis replied "Osiris." Appellant then said, "Hum de la." (9 RT 3139.) Vertis then stated: "I am acting ugly, I know. I am letting the White folks destroy me." (9 RT 3140.)

In Louisiana, her mother took care of appellant while Vertis worked. She married Terry Boyce in 1971, after appellant was born. They first lived in

Berlin, Germany; after a year, they returned to Louisiana and lived with Vertis's family. As of that time, appellant had not had seizures or fevers. (9 RT 3142-3144.) When appellant was about two-years old, he moved with Vertis and Terry to Gastonia, North Carolina. In both Clayton, Louisiana, and Gastonia, North Carolina, the family lived in a rural, slow-paced, quiet neighborhood. (9 RT 3145-3147.)

Vertis did not recall appellant ever having seizures. He did have fevers, however, including one incident when his skin peeled as a result. (9 RT 3147-3148.) She did not take him to the doctor because "we hadn't paid the bill and the doctor say he couldn't see it." (9 RT 3149.) She did not recall saying that she believed in "Dr. Jesus." She repeated that "Ali brought him here and he is going back to Ali." (9 RT 3150.) She did not recall appellant having a 105-degree fever. (9 RT 3150-3151.) [28] She denied that appellant stopped talking at two years of age; denied telling defense counsel that he had speech problems from ages two to four; and denied that he had a stuttering problem later in childhood. She then testified that everyone in Clayton, Louisiana stuttered, and that appellant had stuttered his entire life. (9 RT 3151-3153, 3176.)

As a child in North Carolina,

> Kevin was a very loving person. He cared about everybody. He loved his mother, he loved his father, he loved his sister, he loved his cousins. He was a very loving, caring person. I don't know why you all putting me through this. He was a very loving person. He loved his dog, he loved the cat, he loved everybody.

---

28. When defense counsel pressed, Vertis blurted out: "Yeah, do you take your kids -- I forgot. You are a faggot, right, so you don't got no kids." That "answer" was ordered stricken by the court. (9 RT 3151.) Shortly after that, she stated, "Yeah, yeah, I am looking at all you all," and that statement, too, was stricken by the court. (9 RT 3152.)

(9 RT 3154.) Appellant "would give life, he don't take life." (9 RT 3154.)

At one point, when counsel tried to clarify Vertis's family history and apologized for making a mistake, she exclaimed: "Yeah, you are full of them. You are one big mistake." As the trial court asked the jury to go the jury room, she stated: "I am just listening to this man. You all get the fuck out of my face." The court then addressed her outside the presence of the jury, reminding her that the rules require that she answer counsel's questions and not volunteer information; and directing her not to attack the lawyers. (9 RT 3156-3158.) She then asked the court:

> Why do you people have all the false information? You don't know me. [. . . ¶ . . .] You don't know my child. What are you people -- you had three years. [. . . ¶ . . .] Why do you have this false information?

(9 RT 3158.) [29]

Vertis could not recall whether appellant attended first grade at Rhyne Elementary. Appellant was held back in kindergarten, but that was because he was immature. In her opinion, he was singled out at Rhyne because he was Black, and because the teacher did not like him. Vertis did not think that he had learning problems. (9 RT 3166-3169.)

Vertis could not recall whether appellant had been quiet and reserved his entire life: "I can't remember. Like you say, it is 30 years ago and I had a nervous breakdown and you say I am an alcoholic, so I really can't remember

---

29. Following a break, the prosecutor placed on the record that Vertis Boyce "looked at me and called me a fucking asshole. I was going to let that go. Then, she looked straight over, about a minute later, at Jennifer Parish sitting in the first row and called her a lying bitch." (9 RT 3159-3160.) The defense asked the court to exclude Ms. Boyce from the courtroom after her testimony because "[w]e can't have her here when other family members testify. They are intimidated and she is going to spout off." (9 RT 3160-3161, 3197.)

stuff." (9 RT 3169-3170.) Appellant had a few friends at Rhyne Elementary, but generally kept to himself. When asked if appellant was a leader or a follower, she stated: "Kevin is Vertis' child. He is a leader." (9 RT 3171.) She did not recall any school conferences in North Carolina regarding her son's problems. (9 RT 3172-3173.) She denied that her sister Evelyn took care of appellant in North Carolina. (9 RT 3155.)

Vertis moved the children to South Central Los Angeles in 1978, when appellant was seven-years old. Her husband Terry moved there in 1979. (9 RT 3166, 3173.) The new school referred appellant to special education services. The family then moved to Huntington Beach. (9 RT 3175.) The defense introduced a card written by appellant when he was a student in Huntington Beach: "Good boy, like a human being, sleepy, tired, Kevin." (9 RT 3164.) Vertis explained why he wrote that:

> Because those people at the school, they made him feel incompetent. That's not the word he used. Those White folks, they did it to him. And they told him he was a bad boy. He said, "I am a good boy, treat me like I am a human being, I am sleepy and I am tired."

(9 RT 3164.) Appellant was upset with the predominantly White school at Huntington Beach, where the children sometimes called appellant racial slurs. Vertis told him that if he could not adjust to "those White folks at Huntington Beach," she would take him to South Central Los Angeles. (9 RT 3164-3165.)

After Huntington Beach, the family moved back to South Central because her husband lost his job. They first lived with Vertis's mother, then got their own place. At some point, they lived with her sister Evelyn, who helped with the children. Because both Vertis and her husband worked, there were times when appellant would arrive home from school and no one was there to watch him. (9 RT 3177-3179.)

Appellant had a close relationship with his grandmother and great-grandmother. He was loving and respectful towards them, and cared for them

when they were ill. He hurt when they died, and was particularly affected by the death of his grandmother, who died at a young age and suffered before her death. (9 RT 3179-3182.)

Vertis admitted that appellant was in a special education program, but she had never heard the schools refer to him as retarded. She thought that appellant had left the special education program when he attended Horace Mann Junior High School in Los Angeles. (9 RT 3182-3184.) He attended a number of different schools in Los Angeles. (9 RT 3185-3187.)

Vertis denied knowing that appellant was becoming involved with gangs. He wore baggy pants because "his butt was too big so he wanted to dip his pants." (9 RT 3187.) He did not go out "gang banging" with his friends. (9 RT 3187-3188.) She denied that her brother "Rusty" was in a gang, and denied that he had a negative influence on appellant. (9 RT 3188.) Appellant never had a job ("Why should he? His parents could take care of him.") In his mother's view, he had everything he needed. (9 RT 3191-3192.)

After being sent to prison, appellant began referring to himself as "Osiris," the Greek mythological god. Vertis continued: "But, he really didn't know what it meant. You know who Osiris was? Osiris was killed by his brothers because he slept with his sister and they caught him." (9 RT 3192-3193.)

Appellant has a daughter named Kevonna, who was six-years old at the time of trial. He had cared for her when she was a baby. She visited appellant in jail. She loves him and he loves her. (9 RT 3193-3195.)

Vertis was asked to recall her fondest memories of her son: "He loved me. I love him. Remember the dog? You took care of the dog. You took care of Snyder. He is a wonderful, loving, caring person and he would never ever kill anybody." (9 RT 3195.) When asked how his death would affect her, she stated:

> We will be hurt. We will be empty. I can never touch my son again. I love him more than I loved anybody in the whole wide world. I can't ever touch him again. And he told me not to cry. He say, "Don't you cry, McCraney, don't you cry." [30]

(9 RT 3195-3196.)

Tony Boyce, appellant's older, first cousin, testified that he lived in Kings Mountain, North Carolina. When appellant was in the first grade in North Carolina, Tony often saw him. He described appellant as a quiet and shy child, who seemed distant and kept to himself. (9 RT 3248-3256.) When appellant was young, his mother moved him to Los Angeles: Vertis just "up and left" suddenly. (9 RT 3252-3253.) Years later, in 1983, when appellant was 13-years old, Tony visited the family at their residence on 4th Avenue in Los Angeles. Appellant was wearing baggy pants. (9 RT 3257-3259.)

In late 1986, when appellant was approximately 15-years old, Tony lived with appellant's family for over a year, and shared a room with appellant. Appellant was still quiet, polite, and respectful to his elders, and did not go out much at night. The family lived in a Crip neighborhood, and appellant was beginning to be involved with gangs. When Tony asked why, appellant responded that "it is like something to do. I mean, it is like, you know, family." (9 RT 3261-3266.)

According to Tony, appellant's Uncle Rusty was close in age to appellant and was involved with gangs. Appellant looked up to and followed him. Several times a month, appellant and Rusty would "hit the streets." When Tony returned to North Carolina, he asked appellant to join him. Los Angeles was full of helicopters and gunshots; North Carolina was slower and safer. (9 RT 3266-3271.)

Tony testified that Vertis was drinking alcohol every day in Los

---

30. Vertis Boyce's maiden name was McCraney. (9 RT 3029.)

Angeles. (9 RT 3260-3261, 3271, 3273.) She had mood swings: when sober, she was "hell"; when drinking, she was happier. (9 RT 3275-3276.)

In Tony's opinion, appellant's sister Michelle was spoiled. Terry was very close to Michelle, and appellant's parents had greater expectations of her than they did of him. (9 RT 3273-3277.) Tony testified that appellant's death would "hurt him inside." (9 RT 3280-3281.)

On cross-examination, Tony testified that, although Vertis did not lay a hand on appellant, she would hit Michelle. (9 RT 3282.) Appellant told Tony that he was a member of the Rollin' 60's gang. (9 RT 3282.)

Appellant's aunt, Brenda Boyce, testified that she had been a school teacher for 33 years and lived in Gastonia, North Carolina. She was married to Jerry Boyce, Terry Boyce's twin brother, and had known appellant's mother since 1972, when appellant was two-years old. When Brenda met her husband Jerry, Terry was in the military in Germany. (9 RT 3284-3287.)

When appellant was young, in Gastonia, he was quiet, shy, and "not very expressive," but "was a delightful, rambunctious young boy [who] did things that other kids, normal kids, would do at his age." (9 RT 3289, 3294-3295.) However, in Brenda's opinion, he had obvious learning problems. In kindergarten, he stuttered, mumbled his words, and did not use complete sentences. Vertis was concerned that he had repeated kindergarten, and wanted Brenda's opinion as to whether he should repeat first grade. Vertis did not want him labeled as a slow learner, and did not want him to repeat first grade. (9 RT 3290-3291, 3294-3295.) Brenda noticed that appellant's younger sister, Michelle, began reading before he did, and seemed to be a "star pupil." Vertis never accepted that appellant had learning handicaps, and was in denial over his problems. Before appellant could repeat the first grade, Vertis suddenly left Terry and moved with the children to Los Angeles. (9 RT 3292-3293, 3296-3298.)

Terry Boyce was shocked and devastated when Vertis moved to Los Angeles. (9 RT 3299-3300.) Eventually, he met another woman, Hazeline Smith. Some time later, after appellant visited North Carolina in the summer, Vertis came to get him and Terry returned to California with her. (9 RT 3301-3303.)

In 1980, Brenda visited Vertis at her apartment in Huntington Beach. Appellant, who was nine-years old, was still quiet and subdued, but played with the other children. (9 RT 3303.) In 1985, Brenda saw Vertis and the children at a family reunion in Texas. Appellant was polite, but was quiet and kept to himself, wore baggy pants, and seemed afraid to go outside. Shortly thereafter, Brenda was told by her nephews that baggy pants were worn by gang members. (9 RT 3304-3305.) That was the last time that she saw appellant before the trial. (9 RT 3312.)

Terry had disputes with Vertis over disciplining appellant. Vertis protected appellant. Terry went to church frequently; Vertis did not go as much. Appellant did not like church, but Terry would take him. (9 RT 3307-3310.) Brenda described Gastonia as slow and laid-back, with wide streets and yards to play in. She would prefer to raise a child there, as opposed to Los Angeles. (9 RT 3309-3310.)

When asked what effect the death of appellant would have on her, Brenda stated: "It is like a light would be gone out. It is a light that has been flickering for a long time, and no one bothered to see why that light was flickering. Once it goes out, no one really know why it flicker." (9 RT 3312.)

Hazeline Smith testified that, in the late 1970's, she was living in Gastonia, North Carolina, when she met and became involved with appellant's father, Terry Boyce, who was separated from Vertis at the time. (9 RT 3313-3315.) In 1979, Terry's children, Michelle and appellant (then eight-years old), spent the summer in North Carolina, and Smith saw them several times a

week. (9 RT 3316-3318.) Michelle quickly adjusted to Smith and her children, and was expressive. Appellant, however, stayed close to his father, and was not outgoing, but rather stayed "in his shell, or to himself." (9 RT 3318-3320.) He was quiet, and stuttered when he spoke; the other children made fun of him. Terry treated appellant differently; he would yell at Michelle, but not at appellant. Over time, appellant warmed to Smith and began to cling to her. At the end of the summer, Terry took the children to California without telling Smith. (9 RT 3321-3325.) Smith recalled appellant as:

> a little boy that was actually -- seemed like he was scared, or within himself. You know, he wasn't self-confident. You know, he didn't have that confidence to speak out or play with the other kids or do, you know, things like that.

(9 RT 3325.)

Ann Moore testified that in 1969, she met Vertis in Grand Rapids, Michigan. Vertis was in her twenties, and was highly opinionated, very judgmental, and very religious; she did not like bad language, drinking, or playing cards. (9 RT 3325-3330.) Ann introduced Vertis to her husband's brother, Cleveland Moore. Vertis and Cleveland Moore had a romantic relationship for several months. Vertis became pregnant and told Ann that Cleveland was the father. Vertis had the baby and named him Kevin. When the baby was six-weeks old, Vertis told Moore that she planned on leaving Grand Rapids to marry someone else. Moore begged her not to do so, but Vertis said she was returning to Clayton, Louisiana. (9 RT 3330-3335.)

Years later, when appellant was 13-years old, Vertis brought him to Michigan. He spent a week with Moore and her husband; then several weeks with Cleveland Moore in Lansing, Michigan. Cleveland Moore was married, had five boys, and lived in a nice area of Lansing. (9 RT 3335-3338.)

There had been talk of appellant remaining with his biological father in Michigan for a year. However, Vertis had an "attitude" about Cleveland's

wife, whom she did not want disciplining appellant. After a few weeks, appellant left. (9 RT 3341-3343.) Several years later, Vertis called Moore and said that she was concerned with appellant's behavior and that he was involved with gangs and the wrong people. Later, when Vertis visited Michigan, Ann expected to see the church-going woman she had known. Instead, Vertis was drinking brandy and beer. (9 RT 3344-3346.)

Cleveland Moore testified that he was appellant's biological father. He met Vertis in the fall of 1969, in Grand Rapids, Michigan. She was in her twenties, was very smart, very religious, and opinionated, and did not use alcohol. (9 RT 3347-3349.) They were romantically involved for about a month and a half. When Vertis told Moore that she was pregnant with his child, he wanted to marry her. She agreed to marry, but said that they would have the marriage annulled after six months because her fiancé (Terry Boyce) was in the service and she was waiting on him. Before the baby was born, Moore moved to Lansing and married another woman. Subsequently, he heard from Vertis by phone, several times a year. (9 RT 3349-3354.)

Until 1983, Moore had no contact, either personal or by phone, with appellant. He did not want to get involved in appellant's life, and thought that Terry Boyce had married Vertis. In 1983, when appellant was thirteen-years old, he came to Michigan and stayed with Moore and his family for two weeks. Appellant was quiet and kept to himself, but got along fine with the family. Before leaving, appellant told Moore that he wanted to stay and did not want to return to his mother. (9 RT 3354-3358.)

In 1986, Vertis telephoned and said that she was having problems with appellant getting involved with gangs. She asked Moore to take appellant back to Michigan, and Moore agreed. But he heard nothing from Vertis after that telephone call. (9 RT 3358-3359.)

Orange County Public Defender Investigator John Depko testified that

he was assigned to appellant's case and, in July 1998, interviewed Vertis and Terry Boyce in Compton for several hours. (9 RT 3361, 3366.) Depko described Vertis as extremely controlling and cantankerous, and as one of the most difficult parents of a defendant that he had worked with in 24 years. (9 RT 3366-3367.)

Vertis refused to tell Depko where appellant was born; she did not want appellant's lawyers digging up her past. She did disclose that, when appellant was two- or three-years old, he had a fever so bad that it blistered his skin. She failed to notice the fever for several days, until she saw him "padding back and forth to the bathroom to get drinks of water[.]" She did not seek medical attention, in part because she did not believe in doctors. The fever occurred at about the time when appellant was beginning to speak. Afterward, he stopped speaking for two years, and did not start again until he was four- or five-years old. At that time, he developed a stutter. Vertis she insisted that appellant repeat the first grade because he had not "mastered" that grade. (9 RT 3362-3367.)

School records showed that appellant seemed to be confident when playing sports, particularly basketball. (10 RT 3512-3513, 3530, 3542, 3554.) However, Vertis told Depko that she refused to allow appellant to play organized sports because she was afraid that he might be injured, and thereby exacerbate his "mental development." (9 RT 3362-3367.)

At some point, appellant began to wear baggy pants and began having troubles with the law. Vertis told Depko that she did not think that her son was in a gang, however; nor did she think that he was taking drugs. (9 RT 3367-3368.) Vertis also told Depko that, at one point, after appellant came home from being in custody, "he started yelling that he was Osiris," a mythological Egyptian figure who was "Lord of the Underworld." He then slept for several days. From that point on, appellant continued to make

statements proclaiming himself to be Osiris. (9 RT 3368-3369.)

Reverend Jeff Barber testified that he was associated with the House of Family First Baptist Church in Los Angeles. Since the early 1970's, he had known Vertis Boyce's grandmother in Louisiana and her mother in Los Angeles. He met Terry Boyce at the church in the early 1980's, and became familiar with appellant and Michelle. As a child, appellant attended church with his grandmother and his father. Reverend Barber described appellant as a well-behaved, and quiet child, who did not participate much with the other children and seemed sad. Vertis did not attend church except for "special occasions" and was "standoffish." (10 RT 3566-3573.)

Evelyn Collier Dixon, Vertis's sister, testified she had known appellant his entire life. Dixon was a registered nurse, and Director of Surgical Services at St. Bernard Hospital in Chicago. Her daughter La Rhonda, with whom appellant was close growing up, has mental infirmities and is developmentally retarded. Appellant was somewhat shy and quiet, but would open up with his cousin. He had compassion for her, and would protect her; she was fond of appellant, and would laugh at the things that he did. (11 RT 3591-3598, 3629-3630.)

Appellant was born in Michigan and was brought to Louisiana in August 1971, when he was six-weeks old. Vertis had a job 75 miles away, in Mississippi, and left appellant in Louisiana in the care of her mother and Dixon. In December of that year, Dixon moved to California. When appellant was eight-months old, his mother moved him to Germany, where Terry Boyce was in the military. (11 RT 3599-3600, 3604-3605.)

In Louisiana, appellant was an average infant. When he was three to four-months old, he had an upper respiratory illness, including a fever that led to a seizure. He was taken by Dixon's mother to a doctor. Their grandmother Hattie raised Dixon and Vertis with the belief that, whenever

they had a medical problem, they did not have to go to a medical doctor because "we had Dr. Jesus as our doctor." Vertis was strong in this belief. She was also overly protective with her family, especially with appellant. (11 RT 3607-3610.)

Vertis was extremely puritanical: she did not like the night life, did not drink and did not smoke. However, shortly before Michelle was born, Vertis became more aggressive, outgoing, and dominating, and began drinking more alcohol. She attended church in North Carolina. By the time that she moved to Los Angeles, however, she did not attend church. (11 RT 3600-3603.)

After Germany, Vertis and the children moved to Gastonia, North Carolina. Dixon lived in Louisiana but visited North Carolina often. For a month, Dixon became appellant's caretaker while his parents were working. Appellant was less than two-years old, was quiet, reserved, and affectionate, and always clung to his mother. (11 RT 3611-3614.) He also had a speech impediment. While Vertis thought that appellant was just imitating an uncle who stuttered, appellant's speech impediment continued when the uncle was not around. Appellant was hyperactive from an early age: Vertis had him in a harness on a "leash." (11 RT 3615-3618.)

When appellant was a child, he developed a fever of 104 degrees. Vertis did not want to take him to the doctor because they did not have medical coverage. Dixon was covered, so she took appellant to the doctor under the name of her child, Sean. Appellant developed a rash due to an allergic reaction to penicillin. (11 RT 3619-3621.)

Vertis told Dixon that Cleveland Moore, not Terry Boyce, was appellant's biological father. Appellant was not told about his biological father until 1984, when, at age 13, he went to Michigan to meet Terry. He could not accept that Terry was not his father. (11 RT 3630-3632, 3634-3635.)

Shortly after Dixon moved to California in 1977, Vertis moved from

North Carolina to California, where she and the children stayed with Hattie in Compton and with their grandmother Nellie in Watts. (11 RT 3636-3638.)

Later in life, appellant looked up to and wanted to be around his uncles, Rusty, Greg, and Terry. Dixon was naive about gangs, but noticed that Rusty was wearing baggy clothes; at some point, appellant did as well. Vertis was aware that there was an issue about appellant and gangs. (11 RT 3624-3625.) At one point, Vertis's mother told her that appellant needed psychiatric care. Vertis replied: "No, because nothing is wrong with my child[.]" (11 RT 3634.) Inwardly, however, Vertis was disappointed in appellant's slowness. (11 RT 3636.)

Appellant got along well with his sister, Michelle, and was protective of her. Dixon related that, in August 1993, during a boating trip on the ocean, Michelle fell overboard and appellant risked his life by jumping in after her, and bringing her back to the boat. (11 RT 3626-3628.)

Appellant was very fond of his grandmother Nellie and his great-grandmother Hattie, who also lived in the house. In the late 1980's, he took care of Hattie when she became ill: he washed her clothes and made sure that she had food. He cared for her until the month before her death. (11 RT 3638-3640.) Appellant also had a close relationship with his grandmother, Nellie, and helped her with chores. When Hattie died in 1994, appellant was a pallbearer at the funeral. He was devastated by her death, and became more withdrawn. Seven months later, Nellie died at age 63. Appellant may have been in jail at the time. (11 RT 3640-3643.) Dixon spoke to Vertis about appellant's incarceration. Vertis was devastated by the fact that she was losing the people she loved the most. From around 1985, Vertis began drinking more. Later in life, she admitted that she had a problem, but she never got help. (11 RT 3645-3648.)

Dixon saw appellant on August 4, 1997, 10 days before the crimes,

when she was visiting California. She noted that every time he would go out, "even though he was fully grown and I am the visitor, he would always let me know where he was going." He was still polite and respectful, and stayed at home many of the evenings. (11 RT 3621-3622.)

When asked what appellant's death would mean to her, Dixon stated: "Oh, please, Jesus. Please don't do that to me. He is -- please don't ask me that." (11 RT 3649.)

Walter White testified that he had known appellant since 1992, when appellant began dating White's daughter, Chavon. When they met, Chavon had a child named Charday who was five-years old. Chavon and appellant also had a daughter together, Kevonna. (11 RT 3708-3711, 3718.) White testified that appellant was different from the other men that Chavon dated: he showed a great deal of respect to older people, never used profanity, and was "very good with the kids[.]" (11 RT 3711-3713.) Chavon and appellant were involved with each other for several years, including living together, until 1994. Appellant treated Chavon well and was respectful towards her. The only complaint Chavon had was that appellant seemed unrealistic and aimless, and would not get a job. He liked to watch cartoons and wrestling. While Chavon worked, appellant watched and played with the children, and took care of the house. He was a good father, kind and gentle to both children. At the time of trial, appellant's daughter was seven-years old, and lived with White because Chavon was in jail. (11 RT 3713-3723.)

As set forth above, Dr. Kara Cross testified for the defense at the guilt phase regarding appellant's brain damage and mental retardation. Several experts testified for the defense at the penalty phase.

Samuel Benson, M.D., testified that he was a physician specializing in psychiatry, and also had a Ph.D. in physiology and pharmacology. (10 RT 3439-3442, 3785-3786.) He had testified for both the prosecution and the

defense in a number of cases, and had consulted with the California Department of Corrections. (10 RT 3442-3446.) Dr. Benson was contracted by the defense in this case to perform an evaluation of appellant. He was provided with and reviewed numerous records relating to appellant's history, including a neurological report by Dr. Kenneth Nudleman, the neuropsychological report by Dr. Cross, school records, a residence history, and interview reports from numerous witnesses. (10 RT 3447-3452, 3549-3550.) He met with appellant 6 different times, for 90 minutes each time, and prepared a report. (10 RT 3449, 3454, 3550, 3560-3561; 11 RT 3803-3804.) [31]

In 1997, Dr. Nudleman administered to appellant a type of electroencephalogram (EEG) that tests for brain damage. The results were abnormal. Dr. Benson concluded that appellant had brain damage, a conclusion that was consistent with the findings reported by Drs. Nudleman and Cross. (10 RT 3460-3464.) Appellant's history of speech difficulties, stuttering, and learning disabilities is symptomatic of and consistent with organic brain damage. (10 RT 3483-3485.)

School records from Clayton, Louisiana in 1977 indicated that appellant repeated first grade. (10 RT 3523-3524.) North Carolina school records from 1978 showed that appellant was evaluated by a child psychiatrist, who found problems in communication and that his intellectual functioning was in the borderline range of mental retardation. Huntington Beach school records from 1980, when appellant was 9-years old and in the fourth grade, indicated that he was withdrawn and immature, and had difficulty adjusting and keeping up with his peers. (10 RT 3520-3523.) In 1982, in the fifth grade, Los Angeles school records showed that appellant's fine motor skills were

---

31. Dr. Benson's report is in the record on appeal at Clerk's Transcript pages 3398-3429, but was not introduced in evidence.

delayed; that he had visual perceptual problems; and that he had a vocabulary well below what was normal for his chronological age. (10 RT 3524-3526.) In 1983, a "psychoeducational case study" on appellant indicated that he "experienced great frustration due to his low academic functioning," was passive and withdrawn, and was sensitive to being labeled "retarded." He showed significant delays in intellectual functioning, delayed speech development, delayed gross and fine-motor skills, and learning disabilities. (10 RT 3529-3530.) The school records consistently indicated reading and learning dysfunction. (10 RT 3526, 3531.)

Dr. Benson diagnosed appellant as follows: psychosis from organic brain damage; learning disabilities, secondary to organic brain disease; schizotypal personality disorder; and substance abuse disorder, including phencyclidine. (10 RT 3468-3470, 3480.) [32] Appellant's history showed hallucinations and delusions, including the belief that he was the mythical figure "Osiris." (10 RT 3501-3504, 3507.) The most likely cause of the brain damage was the "high fevers, the seizures, inadequate medical care" from when appellant was two-years old. Fevers and seizures are associated with brain damage; if not appropriately treated, the damage to the brain can be exacerbated. (10 RT 3472-3475, 3516-3518, 3545-3547.)

With regard to the diagnosis of schizotypal personality disorder, a disorder that affects a person's perception of the world, appellant demonstrated odd beliefs or magical thinking, odd perceptual experiences, odd thinking and speech that did not make sense, and paranoid ideation. (10 RT 3535-3539, 3471, 3563-3564.)

---

32. Dr. Benson testified that phencyclidine was originally designed as a large animal tranquilizer, caused hallucinations in humans, and can exacerbate pre-existing psychiatric conditions, in particular schizotypal personality disorder. (11 RT 3786-3788.)

Appellant related to Dr. Benson a psychotic episode he had when he was 10-years old, that included a "trance-like state in which he headed or commanded God's army against evil[.]" (11 RT 3793-3794.) The hallucinatory experiences appeared to be real to appellant. Vertis Boyce reported that appellant began making bizarre comments about his special position in the afterlife concerning Osiris. In Dr. Benson's opinion, these hallucinations and delusions originated in appellant's brain damage. (11 RT 3794-3796.)

On cross-examination, Dr. Benson acknowledged that appellant's school records showed some positive comments regarding, inter alia, sports. (10 RT 3540-3542.) The prosecution also elicited that the incidence of antisocial personality disorder in the United States ranges from three to ten percent of the population; schizotypal personality disorder affects from one to three percent of the population. (10 RT 3561.)

On redirect examination, Dr. Benson testified that appellant did not have antisocial personality disorder. (10 RT 3564-3565; see also 10 RT 3480-3483.) Nor was there evidence that appellant was malingering during the psychological testing. The EEG and the neuropsychological tests establish that appellant suffered from "abnormal brain activity or organic brain psychosis[.]" (10 RT 3563.)

Dr. Benson was subsequently recalled and testified that during the examination, appellant "appear[ed] to be internally preoccupied by auditory hallucinations causing him to demonstrate some paranoia and suspicion[.]" (11 RT 3788.) People with brain damage often develop delusions. Appellant's "Osiris" delusion began in 1986, after he spent time in juvenile hall: he claimed that he was a reincarnation of the Egyptian god Osiris, Lord of the Dead, and had been firm in that belief ever since. Chavon White, the mother of appellant's child, indicated in an interview that appellant often referred to

himself as Osiris, and referred to her as his queen. (11 RT 3788-3791.) When Dr. Benson interviewed him, appellant stated that he first began hearing voices at the age of three or four. Appellant interpreted the voices as "the power of special forces[.]" (11 RT 3792-3793, 3806.) The hallucinations were related to the damage to appellant's brain. (10 RT 3518-3519.)

On recross-examination, Dr. Benson affirmed that appellant told him of joining a gang at age 15. He also told Dr. Benson that he was sent to a high security prison in Pelican Bay for assaulting a police officer while he was in custody. (11 RT 3801-3802.)

According to Dr. Benson, most people with antisocial personality disorder do not have brain damage, and are usually "smarter, trickier, more intellectual, capable" than appellant. (11 RT 3797.) Moreover, a diagnosis of antisocial personality disorder requires a diagnosis of a conduct disorder by the age of 15. That diagnosis was not made in appellant's case. (11 RT 3799.)

Clinical psychologist and Professor Joseph Cervantes, Ph.D., testified that he was trained and had practiced for many years as a child psychologist, and specialized in child and adolescent development. He testified generally about human development issues. Human development encompasses developmental milestones such as speech and language, fine gross motor issues, intellectual functioning, and interpersonal functioning. These early milestones are interrelated and have ramifications for future development. (11 RT 3724-3733.) With regard to speech, first words typically occur by the first year, sentences by 15 months, and "meaningful dialogue" by two years. By age four, children begin to develop peer relationships and are ready for socialization and school challenges. A developmental deviation at this early stage suggests possible retardation or learning disabilities. (11 RT 3737-3740.) Seizures or febrile activity at an early age "can compromise the brain and can be a precursor to later problems." Dr. Cervantes noted that:

> There tends to be a strong relationship between febrile seizures activities in young infants and young children and later difficulties with academic functioning, with learning disabilities, and with attention deficit disorder are some of the primary outcomes.

(11 RT 3741.)

A damaged neurological system may "skew" how a child perceives the world, and set a pattern for future development. (11 RT 3741-3742.) A developmental deviation results in a domino effect which makes it more difficult for a child to "catch up" to the next milestone. (11 RT 3734, 3750-3751.) "Someone being shy, being a loner, quiet, withdrawn, reserved, stand-offish can be a symptom of milestone issues." (11 RT 3736.) Compromised speech and language functioning skews the way a person perceives the world, and changes how the world affects that person. (11 RT 3745-3746.)

Family stability is important to child development. Children who have a developmental difficulty are more challenged by family instability, which will have "a significant impact in one child's ability to be able to stabilize" and feel normal. (11 RT 3749-3750.) When speech or intellectual functioning is compromised, impulsivity or aggression may be present. (11 RT 3746-3747.)

James Johnson, Jr., Ph.D., testified that he held a doctorate in urban social geography and taught at the University of North Carolina, Chapel Hill. His research focused on understanding human behavior and family dynamics in inner-city communities. (11 RT 3650-3653, 3666-3667.) Dr. Johnson had grown up in rural North Carolina, and had studied communities in Los Angeles for 14 years. (11 RT 3695-3696.) He had testified as an expert several dozen times. (11 RT 3654-3658.)

Dr. Johnson's studies had focused on the experiences of young African-American males in South Central Los Angeles, and the effect of adverse economic changes in the 1980's on families. Plant closings and job losses during that period led to disruption and dissolution of families. (11 RT

3659-3661.) His research had shown that when there was a stable labor market for manufacturing jobs, African-American males in South Central Los Angeles would "grow out of gangs" and focus on work and forming families. In the 1980's, however, jobs that enabled young persons to form and maintain stable families did not exist in their communities. As a result, there were higher rates of unemployment and idleness, and young males did not "grow out" of the gangs. In turn, the idleness and unemployment caused family problems. At the same time, community resources to support youth disappeared. The timing of those events "devastated those communities." Thus, gangs became an institution in the community. (11 RT 3661-3663, 3694-3695.)

Based on his review of appellant's school and other records, Dr. Johnson made several findings and formed an opinion as to how appellant's family dynamics and situation reflected the events that had occurred in South Central Los Angeles during the time when he grew up. (11 RT 3663-3664, 3667-3668.) The prosecution objected that Dr. Johnson was not qualified to give such opinions. The court indicated that it "tend[ed] to agree" and that a different expert was needed for such opinions. (11 RT 3664-3666.)

Dr. Johnson testified that children are less likely to succeed in their development if their parents do not have the proper parenting skills. Even if the parents do have good skills, however, living in a community bereft of "mediating institutions," that is, institutions that encourage children to pursue mainstream avenues of social and economic mobility and discourage them from engaging in dysfunctional and antisocial behaviors, is a factor in whether a child will succeed in life. Chronic residential moves and school moves are particularly detrimental because the children cannot "place down roots and build up a dense network of institutional resources and key individuals that can make a difference" in their lives. (11 RT 3669-3671.)

Dr. Johnson saw this disruptive process in appellant's frequent residential and school moves. Between his birth and age 17, appellant moved residences 17 times; the average family moves 5 times in its entire lifetime. He went to 23 different schools through grade 10. (11 RT 3671, 3700-3701.)

Dr. Johnson described the importance of "bridging social networks": in economically devastated communities with few resources, some parents would connect their children with institutions outside of the community. That action leads to success for the children. (11 RT 3687-3688.) "[C]hild-rearing is not solely a family responsibility, but it is a community responsibility." (11 RT 3689.) Strong and consistent emotional support from parents is a necessary prerequisite for raising a healthy child. (11 RT 3690-3691.)

Dr. Johnson had researched high school and junior high school completion and dropout rates in South Central Los Angeles in the 1980's. That research showed that for all individuals who entered predominantly Black high schools in South Central Los Angeles in 1984, between 60 percent and 79 percent did not graduate in 1988, when appellant was 17-years old. (11 RT 3691-3693.) He had also studied gangs in South Central Los Angeles. (11 RT 3693-3694.) The role models for children in the 1980's were the idle men, some of whom were connected with gangs. (11 RT 3698.)

Alex Alonso, a doctoral student in human geography at the University of Southern California, testified regarding the history of, and territoriality among, African-American street gangs in Los Angeles. (10 RT 3376-3381.) The defense provided Alonso with information concerning appellant's residential addresses and schools, from which Alonso created several maps overlaid with gang territories. (10 RT 3416-3417.)

Gang activity in Los Angeles began in the late 1960's. Between 1972 and 1996, there was a rise in African-American gang activity and gang membership, and in gang rivalries. (10 RT 3393-3399.) In 1972, there were

18 African-American gangs in Los Angeles; by 1978, that number had more than tripled to 60; by 1982, that number had swelled to 155; by 1996, the total number of gangs was 274 (200 Crip gangs, including the Rollin' 60's, and approximately 74 Blood gangs). (10 RT 3399-3404, 3410-3412.)

Gang territories include playgrounds, parks and schools. Children that live in such areas have "mental maps" about the gang boundaries: "[J]ust going to school, walking in a neighborhood for several years, you learn the boundaries and you learn where to go, where not to go, and that just becomes part of what we call in geography your mental map." (10 RT 3391-3392, 3408-3410.) The phrase "you got to be from somewhere" means that a person has to be a member of or associated with a gang to be accepted in the neighborhood and at school. (10 RT 3415.)

In 1979, when appellant was 8-years old, he lived at East 75th street, an area that was controlled by several different gangs. There was gang activity at the Parmelee Avenue Elementary School in that neighborhood. (10 RT 3418-3420.) In 1981, when appellant was 10-years old, the 96th Street Elementary School was in a gang territory. (10 RT 3421.) In the mid-1980's, the Horace Mann School was dominated by the Rollin' 60's gang; the Foshay Middle School was dominated by the Rollin' 30's gang. Audubon Middle School was dominated by the Rollin 40's crip gang in 1985. When appellant lived on 4th Avenue, he had to cross numerous rival gang territories to reach those schools; taking public transportation was no guarantee of safety. (10 RT 3424-3427.)

On cross-examination, Alonso acknowledged that young people may be motivated to join a gang for protection, to earn money, or for status. A person motivated by status may commit a more serious crime to increase his status. (10 RT 3433-3435.) Although gangs do not get along with the police, only a small minority would be willing to kill a police officer. Such a crime

would "perhaps" confer great status to a gang member. (10 RT 3436-3438.)

The defense completed its case with the testimony of Hattie Wilson, appellant's aunt. She first met appellant in Los Angeles, when he was 5 or 6-years old when her mother, her sisters, including Vertis Boyce and her children (appellant and Michelle), moved from Louisiana to Los Angeles. Terry Boyce was not with them at the time. Vertis and the children stayed with Wilson for several months. (11 RT 3819-3822.)

As a child, appellant was quiet, shy, respectful, and obedient. He stuttered "all the time." Michelle was outgoing and studious. Wilson took appellant and Michelle under her wing because she had no children at that time. (11 RT 3823-3824.) When appellant was approximately 10-years old, he had a fever and her sister Jean checked him in to the hospital. He had an allergic reaction to penicillin and went into a coma. (11 RT 3826-3827.)

Vertis and Hattie have two brothers: Jesse James Henry Washington, nicknamed "Rusty"; and Greg Washington. Rusty is two or three years older than appellant; Greg is about eight years older. They lived in Los Angeles in 1978 when Vertis and the children moved there. The family saw each other on a regular basis until Vertis moved with the children to Huntington Beach. (11 RT 3825-3826.)

In 1988, when appellant was 17-years old, Wilson had more contact with him. He was still quiet and respectful, and loved his aunt. Rusty and Greg had become involved in gangs, and appellant was very close with his Uncle Rusty. Rusty was charismatic, outgoing, and confident; appellant was none of those things. (11 RT 3827-3829.) Appellant started drinking alcohol and taking drugs; in particular, he was smoking phencyclidine, which was common in South Central Los Angeles at the time. Wilson would see appellant spaced out, staring off into space, and having a "conversation with objects," such as talking to trees and walls; he started referring to himself as

Osiris. (11 RT 3830-3833.)

Wilson's mother, Nellie, moved to Los Angeles in 1977. Appellant had a "beautiful relationship" with his grandmother; he loved her, and she loved him. He ran errands for her; at times, they went downtown to help feed the homeless. Appellant also had a close relationship to his great-grandmother, Hattie, who moved to Los Angeles in 1982, and was sick with cancer. Appellant took care of her, helped her to the bathroom, cleaned, and fixed meals. At Hattie's funeral, he was a pallbearer. (11 RT 3836-3839)

Wilson described appellant as "[q]uiet, respectful, loving." She recalled that, in 1986, after she had surgery, he saw her in the hospital and "told me I was going to be okay, just go ahead and handle it, and he was praying for me." (11 RT 3839-3840.) Appellant helped Wilson with her own drug addiction by being supportive and loving, and discouraging her from using drugs. (11 RT 3833-3835.)

When asked the effect on her life not to have appellant around, Wilson testified:

> It would be devastating. Devastating to not having a life. It is just -- it just would hurt me so bad. Don't take my nephew. Please don't take him from me, please. Please don't take my nephew, please. Just don't take him from me, please. Please don't take him from me, please. [¶ . . . ¶] I love Kevin as my child. I love you so much, Kevin. I love you.

(11 RT 3840-3841.) As the court called a recess, Wilson cried out: "Please don't take him from me. Please don't take him from me." (11 RT 3841.)

//

1. IN LIGHT OF APPELLANT'S SIGNIFICANTLY IMPAIRED INTELLECTUAL FUNCTIONING, BRAIN DAMAGE, AND SEVERE MENTAL ILLNESS, THE DEATH SENTENCE IS CRUEL AND UNUSUAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION AND THE PARALLEL PROVISIONS OF THE STATE CONSTITUTION, AND VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS

A. Introduction

In *Atkins v. Virginia* (2002) 536 U.S. 304, 321, decided after appellant's trial, the high court held that the Eighth and Fourteenth Amendments bar the execution of the mentally retarded. In this case, there is clear and convincing evidence in the record on appeal that appellant is mentally retarded within the meaning of *Atkins*. He has significant impairments in intellectual functioning (a full-scale IQ of 69), and significant limitations in adaptive functioning, and has been so impaired from a very early age. (See § B, *post*; *Atkins*, at pp. 309, fn. 3, 318; see also § 1376, subd. (a).)

This Court has held that postconviction *Atkins* claims, meaning cases in which the death penalty has already been imposed, should be raised by petition for writ of habeas corpus. (*In re Hawthorne* (2005) 35 Cal.4th 40, 47; *People v. Jackson* (2009) 45 Cal.4th 662, 679-680.) Pursuant to *Hawthorne* and *Jackson*, appellant's *Atkins* claim is not raised herein on direct appeal.[33]

However, the record on appeal also shows clear and convincing evidence that appellant is significantly brain damaged and severely mentally ill, and that the impairments resulting from those conditions, and from his

---

33. Appellant is currently unrepresented for purposes of habeas corpus/postconviction claims. (See *Marks v. Superior Court* (2002) 27 Cal.4th 176, 183-184 [discussing this Court's capital case policies on the appointment of separate counsel for purposes of habeas corpus proceedings].)

impaired intellectual functioning, are severe and longstanding. That evidence, unrefuted and for the most part conceded by the prosecution, establishes that appellant's culpability for the capital offense is substantially diminished, and that executing him would make no measurable contribution to retribution and deterrence, the only acceptable goals of capital punishment. Thus, the record on appeal establishes that the death sentence meted out to appellant violates the Eighth and Fourteenth Amendments.

B. Appellant Is Mentally Retarded, Brain Damaged, and Severely Mentally Ill

The defense presented evidence of appellant's significantly impaired intellectual functioning, brain damage, and severe mental illness at both the guilt and penalty phases.

At the guilt phase, neuropsychologist Dr. Kara Cross testified that appellant has a full-scale IQ of 69. (7 RT 2543-2544.) Although two IQ tests administered to appellant when he was young showed higher numbers, the tests used in those cases were subsequently found to overstate IQ and were "re-normed." (7 RT 2506-2509, 2512-2513.) Once re-normed, the results on the prior tests are consistent with the full-scale IQ measurement of 69 obtained by Dr. Cross. (7 RT 2558-2560.)

Dr. Cross also testified that appellant suffers from organic brain damage to his frontal lobes, parietal occipital lobes, and temporal lobes. (7 RT 2534, 2570-2572.) The amount of impairment resulting from that damage is "significant." (7 RT 2571-2573.) Appellant scored in the bottom one or two percent on most of the tests that she administered. (7 RT 2533-2534, 2557.) His intellectual processing, logic, problem-solving, and reasoning abilities are all impaired. (7 RT 2575-2576.) His brain damage has existed since early childhood. (7 RT 2506, 2554-2561.) There was no sign that he was malingering. (7 RT 2561-2563.)

The prosecutor's cross-examination of Dr. Cross was exceptionally

brief, and did not attack her findings and conclusions regarding appellant's IQ and brain damage. Dr. Cross acknowledged that appellant knew right from wrong. When asked whether he had the ability to make choices, she opined: "Not as a global statement. As a qualified, yes." (7 RT 2578-2580.)

In his guilt phase closing argument, the prosecutor essentially conceded the correctness of Dr. Cross's conclusions:

> [T]here is no point in challenging her results, especially in light of the fact that the defendant had similar results from the time he was very young, okay? I have seen those records. I don't challenge those. I didn't get up there and say, "You made those up. That's baloney. He didn't have them." [¶] I didn't say that those aren't real words. He performed better when he was younger. And she criticized some of the tests as not having been given correctly. And, frankly, I don't know that they were. I don't know if the criticism is valid or not, but I will accept it. She knows more about it than I do.

(8 RT 2729.)

At the penalty phase, psychiatrist Dr. Samuel Benson testified and confirmed that appellant suffers from organic brain damage. (10 RT 3463, 3472-3473.) An E.E.G. performed on appellant before trial was abnormal, consistent with brain damage; the neuropsychological testing administered by Dr. Cross was also consistent with brain damage. (10 RT 3460-3464.) Appellant has been brain-damaged for most of his life. (10 RT 3473.)

Dr. Benson also diagnosed appellant as psychotic. Appellant's psychosis results from his brain damage, is episodic, and includes auditory and visual hallucinations and delusions, including his belief that he is Osiris, an Egyptian god. (10 RT 3468-3469, 3480, 3502-3504, 3519, 3564; 11 RT 3788, 3792-3793, 3795-3796.)

Dr. Benson also diagnosed appellant as having schizotypal personality disorder, a mental disorder characterized by ideas of reference, odd beliefs, magical thinking, unusual perceptions, perceptual experiences, odd thinking

and speech, suspiciousness or paranoid ideation, inappropriate or restricted affect, and odd behavior. (10 RT 3468, 3470-3471.) Appellant exhibited each of these symptoms. (10 RT 3533-3539.)

Appellant also has learning disabilities and speech defects, secondary to his brain damage. (10 RT 3472, 3485.) He does not meet the criteria for antisocial personality disorder. (10 RT 3480-3483.) There was no evidence that he was malingering. (10 RT 3562-3563.)

Dr. Benson's report, present in the record at Clerk's Transcript pages 3398-3428, further illuminates appellant's brain damage and severe mental illness. The report states that appellant is "sane with periods of episodic psychosis," and has "symptoms of auditory and visual hallucinations, delusions of grandeur and persecution, illogical and magical thinking, poor vision, and limited reality testing." (10 CT 3398-3399.) His thought processes are "grossly distorted," paranoid, and delusional. (10 CT 3399, 3419.) "His mental state fluctuates at times and he appears to be internally preoccupied at times by auditory hallucinations causing him to demonstrate paranoia and suspicion." (10 CT 3399.) His speech was "mainly coherent, but overtime [*sic*] loses its logic and coherence." (10 CT 3399.)

The report also noted that appellant's "impaired mental state has fluctuated and deteriorated further" during the 15 months that Dr. Benson saw him. (10 CT 3422.) During that period, appellant demonstrated:

> paranoia, delusional and grandiose thinking with auditory hallucinations which have compromised his ability to adequately test reality on a consistent basis. His psychosis appears to have both thought process (sequencing and association) and thought content (fantasy and delusion) components.

(10 CT 3422.)

The prosecutor's cross-examination of Dr. Benson did not attack the doctor's conclusions, but rather focused on some positive aspects shown in appellant's records (10 RT 3539-3542), and on certain of the interviews and

records that formed the bases for the doctor's conclusions (10 RT 3542-3561; 11 RT 3799-3807, 3817-3818). Dr. Benson acknowledged that he had not reviewed the police reports or appellant's statements concerning the crime, and that appellant did not wish to discuss the circumstances of the capital offense. (10 RT 3555-3557; 11 RT 3803.) The prosecutor also questioned whether appellant met the criteria for an antisocial personality disorder; Dr. Benson again testified that appellant did not. (10 RT 3554-3558; see also 10 RT 3563-3565.)

Appellant's impairments were clearly evident to his early school teachers. School records show that at age seven, he was diagnosed as "borderline retarded." (7 RT 2511; 10 RT 3520-3521.) A teacher testified at the penalty phase that appellant repeated kindergarten and was in "over his head" in first grade. (9 RT 3231-3232.) At age 13, a psychoeducational case study showed that he had significant delays in intellectual functioning, delayed speech development, delayed gross and fine-motor skills, and learning disabilities. (10 RT 3527-3531.)

Appellant's impairments were evident to the experienced defense attorney for co-defendant Willis: "Mr. Boyce is about as puddin-head puddin-head as one can get." (4 Pretrial RT 1107 [sealed].)

At the penalty phase, the prosecution in effect conceded that appellant was brain-damaged and mentally impaired. The prosecution presented no mental health experts either at guilt or penalty. (Cf. *People v. Smithey* (1999) 20 Cal.4th 936, 1015; *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1008-1009, 1030.) Thus, there were no "dueling experts" or divergent opinions regarding appellant's significantly impaired intellectual functioning, brain damage, and mental illness. During a sidebar conference, the prosecutor made clear that:

> [W]e are not contesting the fact that Mr. Boyce has certain problems, and that are well documented relying -- regarding his mental abilities, and from whatever source. If it is organic brain

disease or whatever, and we are not fighting that.

(11 RT 3807-3808.) In his penalty phase closing argument, the prosecutor again conceded that the records and testimony showed that appellant had "problems with learning and problems on I.Q. tests[.]" (12 RT 3918-3919.) But, he argued that appellant had the ability to choose and knew right from wrong. (12 RT 3915.) He also argued at length that the criteria for antisocial personality disorder were present and that the jury could "fit" that with appellant. (12 RT 3935-3937.) As noted, Dr. Benson testified several times to the contrary. (10 RT 3564-3565, 3480-3483.) Finally, the prosecutor addressed the problem of appellant's "organic brain syndrome." (12 RT 3940.) He once again rejoined that appellant was not incapable of choice, but rather chose to be violent. (12 RT 3941.)

In its ruling on the automatic motion to modify the verdict, the trial court stated that it had considered and weighed the opinions of Drs. Cross and Benson regarding appellant's "brain defect." (12 RT 4075.) But, while tracking the sentencing factors set forth in section 190.3, the court stated that:

> Despite the evidence presented in mitigation, this court does not find that this offense was committed while the defendant was under the influence of extensive or nonextensive mental or emotional disturbance.
>
> Further, this court finds that the defendant did not have such a mental disease or defect to such a degree that the time -- that at the time the offense was committed he didn't appreciate the criminality of his conduct or wasn't able to conform his conduct to the requirements of the law. Nothing affected the defendant's ability to choose a course of action.

(12 RT 4077-4078.) [34]

---

34. These statements track imperfectly two of the sentencing factors set forth in section 190.3:

> In determining the penalty, the trier of fact shall take into

Footnote continued on next page . . .

C. The Death Sentence Meted Out to Appellant Violates the Eighth and Fourteenth Amendments

The evidence set forth above clearly and convincingly establishes that appellant is significantly impaired intellectually (that is, mentally retarded), brain-damaged, and severely mentally ill. That evidence was unrefuted and for the most part conceded by the prosecution.

The trial court's statements made during its ruling on the automatic motion to modify the verdict are not inconsistent with that evidence. [35] The court's initial statement, regarding whether or not appellant was under the influence of extreme mental disturbance at the time of the offense, is unclear: "this court does not find that this offense was committed while the defendant was under the influence of *extensive or nonextensive* mental or emotional disturbance." (Emphasis added.) Assuming, however, that the court meant that appellant was not under the influence of an extensive mental disturbance at the time of the capital offense, that statement was consistent with the evidence showing that appellant is episodically psychotic and that his damaged mental state "fluctuates." (10 RT 3564; 11 RT 3788; see also 10 CT 3398-3399, 3406.) The effects of severe mental illness are often intermittent.

> account any of the following factors if relevant: [¶ . . .]
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. [¶ . . .]
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.

35. The trial court made no credibility findings regarding the testimony of Drs. Cross and Benson. Indeed, it relied, in part, on Dr. Cross's testimony to deny appellant's pre-penalty phase motion to proceed without counsel. (8 RT 2960-2961.)

(Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier* (2009) 50 B.C. L.Rev. 785, 788, fn. 35.) The court's statement may have simply recognized that, notwithstanding appellant's severe mental impairments, he was not psychotic at the time of the capital offense. Nonetheless, evidence of appellant's brain damage and retardation was proper mitigating evidence even if those conditions did not cause the capital crime. (See *Tennard v. Dretke* (2004) 542 U.S. 274, 283-287; *People v. Smith* (2005) 35 Cal.4th 334, 359.)

The trial court's second statement, that appellant knew right from wrong and was able to choose his behavior at the time of the offense, was acknowledged by the defense at both the guilt and penalty phases and was consistent with the defense's case. (7 RT 2578-2579; 12 RT 3965.) That statement, and the defense, were consistent with the fact that a person can be mentally retarded or mentally ill, and still know the difference between right and wrong. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 318; *People v. Coddington* (2000) 23 Cal.4th 529, 608, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

In reality, the trial court's statements were directed at holding appellant responsible for his actions at the time of the capital offense. (Cf. *Atkins v. Virginia*, *supra*, 536 U.S. at p. 306 ["mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes"].) Neither statement, however, is inconsistent with the clear and unrefuted evidence that appellant is significantly impaired intellectually, brain damaged, and severely mentally ill.

The evidence of appellant's severe brain impairments establishes that the death sentence imposed in this case violates the state and federal

constitutions. [36] The Eighth Amendment forbids a punishment that is disproportionate to a defendant's "personal responsibility and moral guilt." (*Enmund v. Florida* (1982) 458 U.S. 782, 801; see also *Roper v. Simmons* (2005) 543 U.S. 551, 560; *Atkins v. Virginia*, *supra*, 536 U.S. at p. 311; *Solem v. Helm* (1983) 463 U.S. 277, 286-292, 303). Capital punishment must "be limited to those offenders . . . whose extreme culpability makes them 'the most deserving of execution.'" (*Ibid.*, quoting *Atkins*, at p. 319.) The Eighth Amendment applies with "special force" to capital cases. (*Roper*, at p. 568.)

The high court has not addressed whether the Eighth and Fourteenth Amendments bar the execution of a person, such as appellant, who is significantly impaired intellectually, significantly brain-damaged and severely mentally ill. [37] However, two decisions from the high court, issued after appellant's case was tried -- *Atkins v. Virginia*, *supra*, 536 U.S. 304, and *Roper v. Simmons*, *supra*, 543 U.S. 551 -- establish that the death sentence in his case violates the federal Constitution.

In *Atkins*, the high court concluded that the Eighth and Fourteenth Amendments bar the execution of mentally retarded persons. (*Atkins v. Virginia*, *supra*, 536 U.S. 304 at p. 321.) The Court found that a national

---

36. The following arguments also apply to appellant's claim that his execution would violate the prohibition against cruel or unusual punishment found in article I, section 17 of the California Constitution. (Cf. *People v. Bean* (1988) 46 Cal.3d 919, 957-958.)

37. A number of courts have thus far refused to extend *Atkins* to the mentally ill. (See *In re Neville* (5th Cir. 2006) 440 F.3d 220, 223; *Diaz v. State* (Fla. 2006) 945 So.2d 1136, 1150-1151; *Lewis v. State* (Ga. 2005) 620 S.E.2d 778, 786; *State v. Johnson* (Mo. 2006) 207 S.W.3d 24, 51; *State v. Hancock* (Ohio 2006) 840 N.E.2d 1032, 1059-1060.) None of those cases involved a defendant, such as appellant, who presented clear, convincing, and unrefuted evidence of brain damage, significant impairments in intellectual functioning, and severe mental illness.

consensus existed against the execution of the mentally retarded. (*Id.* at pp. 311-317.) It also examined the moral culpability of mentally retarded persons and determined that, because of their impairments in reasoning, judgment, and control of their impulses, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. (*Id.* at pp. 317-320.) The Court also examined the acceptable goals served by the death penalty -- retribution and deterrence -- and concluded that, in light of the impairments and resultant diminished culpability of mentally retarded persons, a serious question exists as to whether the execution of such persons would measurably further those goals. (*Id.* at pp. 318-320.) The Court concluded that the lesser culpability of the mentally retarded "does not merit" a death sentence. (*Id.* at p. 319.)

In *Roper*, the Court applied a similar analysis and concluded that the Eighth and Fourteenth Amendments bar the execution of persons who were juveniles at the time of their crimes. (*Roper v. Simmons*, *supra*, 543 U.S. 551 at p. 578.) In addition to finding a national consensus against the execution of juveniles (*id.* at pp. 564-567), the Court noted that juveniles are generally less mature and have an underdeveloped sense of responsibility and, as a result, tend to act impulsively and may make decisions without considering the consequences. They also tend to be more vulnerable to outside influences and negative pressures, including peer pressure, because they have less control, or less experience with control, over their surrounding environment. (*Id.* at pp. 569-570.) Based on those differences, and others, the Court concluded that the irresponsible behavior of juveniles could not be considered as "'morally reprehensible as that of an adult.'" (*Id.* at p. 569.) The Court further concluded, as it had in *Atkins*, that in light of the diminished culpability of juveniles, "the penological justifications for the death penalty apply to them

with lesser force than to adults." (*Id.* at p. 571.) [38]

Applying the principles set forth in *Atkins* and *Roper* to this case, the following conclusions must be reached: the death sentence meted out to appellant -- brain-damaged, significantly impaired intellectually, and severely mentally ill -- is incompatible with this nation's evolved standards of decency, is excessive and disproportionate to appellant's diminished culpability, and makes no measurable contribution to any acceptable goals of capital punishment.

First, the death sentence imposed on appellant is incompatible with this nation's evolved standards of decency. Both *Atkins* and *Roper* stressed that the meaning of the Eighth Amendment's prohibition on excessive or disproportionate punishment is not static: rather, it "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Atkins v. Virginia*, *supra*, 536 U.S. at pp. 311-312, internal quotation marks omitted.) The Court ascertains those standards, in part, by assessing whether a national consensus exists against the execution of certain individuals. (*Id.* at pp. 311-317; *Roper v. Simmons*, *supra*, 543 U.S. at pp. 563-567.)

Appellant's impaired intellectual functioning, a full-scale IQ of 69, is significant and has existed since he was a child. Atkins recognized that a national consensus exists against the execution of such defendants. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.)

He is also significantly brain-damaged and severely mentally ill. There

---

38. In *Kennedy v. Louisiana* (2008) __ U.S. __, 128 S.Ct. 2641, the Supreme Court followed the principles set forth in *Atkins* and *Roper*, and held that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim. (*Id.* at pp. 2649-2651, 2664.)

is no legislative consensus against the execution of the severely mentally ill. Only one state that utilizes the death penalty (Connecticut) categorically bars the execution of such persons. (See Note, *Applying Atkins v. Virginia To Capital Defendants With Severe Mental Illness* (2005) 70 Brook. L.Rev. 995, 1005.)

However, legislative action is not the sole evidence of the nation's evolving standards of decency; evidence of a professional consensus against the execution of certain persons is also relevant. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21; *Roper v. Simmons*, *supra*, 543 U.S. at pp. 575-578.) In this regard, subsequent to the high court's decision in *Atkins*, the American Bar Association (ABA) Section of Individual Rights and Responsibilities (IRR) established a Task Force on Mental Disability and the Death Penalty. The Task Force ultimately recommended exempting those with severe mental illness from capital punishment in certain circumstances. (See *Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty* (2005) 54 Cath. U. L.Rev. 1115.) Those recommendations have been adopted in whole or in part by a number of professional organizations. (*The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier* (2009) 50 B.C. L.Rev. 785, 789-790, fn. 37.; see also *State v. Ketterer* (Ohio 2006) 855 N.E.2d 48, 86-87, 106 (conc. opn. of Lundberg Stratton, J.).)

Other indicia of a national consensus against the execution of the severely mentally ill include a 2002 Gallup poll, where 75% of those surveyed opposed executing such persons. (See *State v. Ketterer*, *supra*, 855 N.E.2d at p. 85 (conc. opn. of Lundberg Stratton, J.) [providing Gallup poll data].) That poll is consistent with the actions of sentencing juries, another indicium of this nation's evolved standards of decency: In *State v. Nelson* (N.J. 2002) 803 A.2d 1, Justice Zazzali, in a concurring opinion, observed that an examination of jury verdicts in New Jersey capital sentencing trials showed a "growing

reluctance to execute those whose mental disease . . . contributes to their difficulty in reasoning about what they are doing." (*Id.* at pp. 42-43 (conc. opn. of Zazzali, J.).) A broader social consensus against the execution of defendants with severe mental illness is evidenced by the fact that international human rights norms condemn, and customary international law prohibits, the death penalty for such persons. (See Winick, *supra*, 50 B.C. L.Rev. at pp. 818-819; Note, *Is The Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants* (2007) 76 Ford. L.Rev. 465, 505-507.) International law provides "significant confirmation" of a social consensus against the execution of a person who is brain-damaged and severely mentally ill. (*Roper v. Simmons*, *supra*, 543 U.S. at p. 578; *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21.)

Thus, not only does a national consensus exist against the execution of the mentally retarded, it also exists against the execution of the severely mentally ill. Appellant is both.

Second, *Atkins* and *Roper* clearly establish that the presence or absence of consensus is not dispositive; ultimately, the Court must bring its own judgment to bear on the issue. (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 313; *Roper v. Simmons*, *supra*, 543 U.S. at p. 563; see also *Kennedy v. Louisiana* (2008) __ U.S. __, 128 S.Ct. 2641, 2650-2651, 2658-2660.) When that judgment is brought to bear on appellant's case, only one reasonable conclusion can be reached: the impairments caused by appellant's brain damage, significantly impaired intellectual functioning, and severe mental illness are, for Eighth Amendment purposes, either identical to or more severe than the impairments associated with the mentally retarded and juveniles.

The impairments resulting from appellant's impaired intellectual functioning -- a full scale IQ of 69 -- are identical to those found in the mentally retarded, including impairments in the areas of reasoning, judgment,

communication, control of impulses, and the ability to understand and process information. (See *Atkins v. Virginia*, *supra*, 536 U.S. at pp. 309, 315-320.) The impairments resulting from appellant's brain damage are similar to those suffered by mentally retarded persons. (See *id.* at pp. 306-307, 317-320; see generally Snodgrass & Justice, *"Death Is Different": Limits On The Imposition Of The Death Penalty to Traumatic Brain Injuries* (2007) 26 Dev. Mental Health L. 81.) The impairments from appellant's severe mental illness are similar to, if not worse than, those found in the mentally retarded. Appellant is episodically psychotic, and suffers symptoms of hallucinations and delusions. His thought processes are grossly distorted and impaired, and are paranoid, delusional and not reality-based. His diagnosis of schizotypal personality disorder is a severe mental disorder. (See *United States v. Long* (5th Cir. 2009) 562 F.3d 325, 334-336; *Overstreet v. State* (Ind. 2007) 877 N.E.2d 144, 172-174.) [39]

Given that the impairments from which appellant suffers are identical to or worse than the impairments suffered by the mentally retarded and juveniles, his culpability for the capital offense is diminished to the same extent as, if not more than, those persons.

Third, both *Atkins* and *Roper* stressed that a death sentence is excessive under the Eighth and Fourteenth Amendments if it makes no "measurable contribution" to either of the acceptable goals of capital punishment: retribution and deterrence of capital crimes. (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 319; see also *Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2661.) Neither goal is measurably furthered in appellant's case. Retribution is inappropriate and

---

39. The American Psychiatric Association defines "severe mental illness" as including "disorders with psychotic features that are accompanied by some functional impairment and for which medication or hospitalization is often required." (Note, *supra*, 76 Ford. L.Rev. at p. 488 & fn. 187.) Appellant clearly meets this definition.

deterrence would be ineffective for a person such as appellant, who suffers from impairments in intellect, reasoning, judgment, and control, is episodically psychotic, suffers symptoms of hallucinations and delusions, and possesses thought processes that are grossly distorted, paranoid, delusional, and not reality-based. (See *Atkins v. Virginia*, *supra*, 536 U.S. at pp. 318-320; *Simmons v. Roper*, *supra*, 543 U.S. at pp. 571-572; see also *State v. Ketterer*, *supra*, 855 N.E.2d at pp. 84-85 (conc. opn. of Lundberg Stratton, J.).)

The Eighth and Fourteenth Amendments provide an additional justification for precluding the state from executing appellant. Because death is qualitatively different from any other kind of punishment, both the state and federal constitutions require a heightened degree of reliability "in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135.) Concomitantly, the federal Constitution does not tolerate a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty[.]" (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 320, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 605 (plur. opn.); see also *People v. Benson* (1990) 52 Cal.3d 754, 801 [the Eighth Amendment bars "the use of procedures that create a constitutionally unacceptable risk" of disproportionate penalties].)

In *Atkins*, the high court considered the risks inherent when the state seeks the death penalty against the mentally retarded. Such defendants "may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." (*Atkins v. Virginia*, *supra*, 536 U.S. at pp. 320-321.) Mental retardation can also be "a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." (*Id.* at p. 321.)

These same risks exist here due to appellant's impairments. As in *Atkins*, his significantly impaired intellectual functioning, although raised as a mitigating factor, risked being considered by the jurors as aggravation; in particular, as evidence of future dangerousness and lack of remorse. The same is true of his brain damage: many of the symptoms resulting from frontal-lobe brain damage are consistent with the symptoms of antisocial personality disorder, a strong aggravating factor. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 310; *Satterwhite v. Texas* (1988) 486 U.S. 249, 252-253; see also Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century* (2006) 56 Am. U. L.Rev. 51, 73.) Indeed, the prosecutor here argued, in the face of Dr. Benson's contrary diagnosis, that appellant "fit" the diagnosis of antisocial personality disorder, including a lack of remorse. (12 RT 3935-3937.) If prosecutors are susceptible to mistaking brain damage and severe mental illness for sociopathy, then capital sentencing jurors, particularly when urged to do so by the prosecutor, are at risk of making the same mistake. (See *Atkins v. Virginia*, *supra*, 536 U.S. at pp. 320-321; *Roper v. Simmons*, *supra*, 543 U.S. at pp. 572-573; see also Winick, *supra*, 50 B.C. L.Rev. at p. 816 & fn. 227.)

In *Atkins*, the high court also noted the risk that even a persuasive showing of mental retardation would not be able to overcome the aggravating factors in a capital case. (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 320.) Similarly, in *Roper*, the Court concluded that a "likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth[.]" (*Roper v. Simmons*, *supra*, 543 U.S. at p. 573.) That same risk exists here. The circumstances of the capital offense for which appellant was convicted were, as the trial court stated, horrific and brutal. (12 RT 4078-4079.) In the face of such aggravating circumstances, a substantial risk exists that the aggravating factors overpowered appellant's case

for life.

The question under the Eighth Amendment claim raised herein is whether, apart from the brutality of the crime, appellant's culpability for the capital offense is sufficiently reduced due to the fact that he is brain-damaged, significantly impaired intellectually, and severely mental ill. (See *State v. Nelson*, *supra*, 803 A.2d at pp. 41, 49 (conc. opn. of Zazzali, J.) ["in some instances a defendant's diminished cognitive or reasoning capacities may bar the weighing of aggravating and mitigating factors because the defendant's diminished culpability, by itself, removes execution as a possible punishment"].) As in *Atkins* and *Roper*, appellant's culpability for the capital offense is so limited by his brain damage, significantly impaired intellectual functioning, and severe mental illness, that the death sentence is disproportionate and excessive, and makes no measurable contribution to the acceptable goals of capital punishment. That sentence violates the Eighth and Fourteenth Amendments.

D. The Death Sentence Violates Appellant's Rights under the Due Process and Equal Protection Clauses of the State and Federal Constitutions

The death sentence meted out to appellant also violates appellant's rights to due process and equal protection under the state and federal constitutions.

The Equal Protection Clause of the Fourteenth Amendment essentially requires that like cases be considered alike. (See *Vacco v. Quill* (1997) 521 U.S. 793, 799; *City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 439; *Plyler v. Doe* (1982) 457 U.S. 202, 216.) Classifications by state actors are not prohibited by that clause, but the state is forbidden from "treating differently persons who are in all relevant respects alike." (*Nordlinger v. Hahn* (1992) 505 U.S. 1, 10.)

The Due Process Clause of the Fourteenth Amendment contains, in addition to a procedural component, a substantive component that protects

fundamental rights from infringement by the states no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. (See *Reno v. Flores* (1993) 507 U.S. 292, 301-302; *Planned Parenthood of Southeastern Pa. v. Casey* (1992) 505 U.S. 833, 846-850.) The California Constitution provides similar protections. (Cal. Const., art. I, §§ 7, 15 & 24.)

This Court has held that the federal and state guarantees of equal protection are substantially equivalent and are analyzed in a similar fashion. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571-572.) In addition, the analysis of substantive due process claims is substantially similar to the analysis applied to equal protection claims. (See *Zablocki v. Redhail* (1978) 434 U.S. 374, 395 (conc. opn. of Stewart, J.); *People v. Jenkins* (2000) 22 Cal.4th 900, 1053.) Therefore, the following analysis applies to both claims.

When state action burdens a fundamental right or targets a suspect class, that action receives heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause. (*Romer v. Evans* (1996) 517 U.S. 620, 631; see also *Washington v. Glucksberg* (1997) 521 U.S. 702, 720-721 [Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests"]; *In re Smith* (2008) 42 Cal.4th 1251, 1262-1263.) In this case, the interest or right involved is fundamental: appellant's life. (U.S. Const., 8th & 14th Amends.; see *Ohio Adult Parole Auth. v. Woodard* (1998) 523 U.S. 272, 288 (conc. opn. of O'Connor, J.); *Tennessee v. Garner* (1985) 471 U.S. 1, 9.) [40]

---

40. In *Cleburne v. Cleburne Living Center, Inc.*, *supra*, 473 U.S. at pages 442 through 447, the high court concluded that mentally retarded persons were not a quasi-suspect class for equal protection purposes. In *Heller v. Doe* (1993) 509 U.S. 312, 319-321, the Court rejected an equal protection attack on a statute that allows commitment of persons with mental retardation on a lesser

Footnote continued on next page . . .

To succeed on an equal protection claim, a person must show that "the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530, emphasis in original; see also *City of Cleburne v. Cleburne Living Center, Inc.*, *supra*, 473 U.S. at p. 439.) In this case, the classification involves eligibility for the death penalty. A person such as appellant who is brain-damaged and severely mentally ill is eligible to be sentenced to death; a mentally retarded person or a juvenile is not, both by statute and by judicial decision. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 321; *Roper v. Simmons*, *supra*, 543 U.S. at pp. 578-579; §§ 190.5, subd. (a), 1376.)

For purposes of equal protection and due process, this unequal treatment cannot survive any standard of review because it is not rationally based: as argued above, a person with brain damage and severe mental illness, particularly when diagnosed as psychotic, has the same or worse impairments than a mentally retarded person or juvenile. (See Slobogin, *What Atkins Could Mean for People With Mental Illness* (2003) 33 N.M. L.Rev. 293, 303-306.) "Although . . . there are psychological differences between people with mental retardation and people with mental illness, there are no significant, legally relevant differences between these two groups, or between them and children." (Slobogin, *Mental Illness and the Death Penalty* (2000) 1 Cal. Crim. L.Rev. 3, 7.) The culpability and deterrability of all three groups is equally diminished. Thus, there is no rational, legitimate, or compelling interest advanced by the state's disparate death-eligibility treatment of defendants who are brain-damaged and severely mentally ill. Permitting the state to execute a brain-damaged and severely mentally ill person, such as appellant, while barring the state from executing the mentally retarded and juveniles, violates

---

standard of proof than persons with mental illness.

appellant's right to equal protection and due process under the state and federal constitutions. (See *Cleburne v. Cleburne Living Center, Inc.*, *supra*, 473 U.S. at p. 439; *Washington v. Glucksberg*, *supra*, 521 U.S. at pp. 720-721; *Wolff v. McDonnell* (1974) 418 U.S. 539, 558 ["The touchstone of due process is protection of the individual against arbitrary action of government"].)

E. Appellant's Death Sentence Must Be Reversed

The death sentence meted out to appellant is excessive, disproportionate to his culpability, and makes no measurable contribution to retribution and deterrence. It also violates appellant's rights to due process and equal protection. That sentence must be reversed, and the judgment modified to life imprisonment without possibility of parole. (See §§ 1181, subd. 7, & 1260.)

//

2. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE PROSECUTION TO PLAY FOR THE JURY TAPE-RECORDINGS OF THE 911 CALLS MADE BY THE TWO SURVIVING VICTIMS OF THE SALON INCIDENT

A. Procedural and Factual Background

After the two perpetrators left the DeCut Salon, as Shayne York lay bleeding from a gunshot to the head, Amy Parish and Jennifer Parish each telephoned 911 for help. Both calls were at least partially tape-recorded. [41] The audiotapes, while brief, are emotionally devastating. (Exhs. 11 & 71.)

Amy, in her 911 call, informed the dispatcher that the victim had been shot in the back of the head, but was still breathing, and that "there's stuff coming out of his nose." She stated: "It's two black men. They each have a gun." There followed a series of questions and answers concerning care for the victim. (Exh. 71; see 11 CT 3773-3776.) Jennifer, clearly distraught and frantic, yelled that her "husband's been shot in the head" and cried for help. (Exh. 11; see 11 CT 3769.)

Appellant filed a motion in limine seeking to exclude the tape-recordings of the 911 calls at both the guilt and penalty phases. That motion cited both statutory and constitutional grounds in arguing that the 911 tape-recordings were irrelevant and unduly prejudicial. (6 CT 2374-2378.)

The prosecution filed an opposition, arguing that the tape-recording of Jennifer Parish's 911 call [42] was relevant because it showed that she was present at the scene of the crime, contained a "first hand description" of the shooting and events that followed, showed malice by indicating that the victim

---

41. The transcript of Jennifer Parish's 911 call indicates that there was an "unknown technical difficulty with the tape." (11 CT 3771.)

42. Although appellant's motion was clearly directed at both 911 calls, the prosecution's initial opposition was limited to Jennifer Parish's call.

was shot in the back of the head, and provided a description of the killers and their mode of transportation. (7 CT 2564-2567.) The opposition conceded that the tape-recording of Jennifer's 911 call was "unpleasant to listen to because it conveys so much human suffering," but argued that "human suffering is an inherent part of this trial," and that the jurors would learn of Jennifer's suffering, in any case, through her testimony. (7 CT 2567.) The opposition also claimed that the tape-recording should be admitted at the penalty phase under section 190.3, factor (a), "regardless of prejudice to the defendant." (7 CT 2567-2568.)

The trial court initially heard argument on the motion on December 17, 1999. (3 Pretrial RT 810-815.) Defense counsel urged that the 911 tape-recordings were not relevant to any disputed factual issue (3 Pretrial RT 810-811), and described the contents as follows:

> It is the most emotional thing I have ever heard in my life. I am not going to pull any punches there. It is clear. The prosecutor by his own language may sink his own ship -- and maybe I should have said this first. The language -- the tape shows, quote, so much human suffering, unquote.

(3 Pretrial RT 812.) The prosecutor argued that the tape-recordings were "valuable, first, for their immediacy," and that:

> They show the truth and fresh recollection of the witness. And, also, I think they are going to draw the juror's attention in that they are so immediate and they are something that actually happened the day of the crime, rather than something that's been later recounted.

(3 Pretrial RT 814.) After a recess, the court informed the prosecutor that the audiotapes did not match the transcript provided to the court by the prosecution. (3 Pretrial RT 868.) On June 29, 2000, the prosecution filed corrected transcripts of the two 911 calls. (8 CT 2770-2777.)

On July 14, 2000, the trial court again heard argument on the admissibility of the 911 tape-recordings. (4 Pretrial RT 1021-1028.) Defense

counsel reiterated that the tape-recordings had no relevance or probative value, and were prejudicial. (4 Pretrial RT 1024-1025.) The prosecutor argued:

> What you have is you have [Jennifer and Amy] talking about two black men with guns. These are issues that the prosecution has to prove. They go to I.D. They go to their credibility as having that impression fresh in their mind, contemporaneous with the murder and robbery.

(4 Pretrial RT 1025-1026.) Defense counsel replied that the defense was not disputing those facts, and that, in light of the fact that the witnesses were going to testify that the two men were Black and had guns, the tape-recordings were "further removed and we have more prejudice and no value at all." (4 Pretrial RT 1026.) The prosecutor retorted that, unless the tape-recordings were more prejudicial than probative, "I ought to be able to prove it the way I want to prove it." (4 Pretrial RT 1026-1027.)

The trial court observed that while there did not appear to be an issue as to the location of the wound, there did appear to be an issue as to the identification of the perpetrators:

> I know we don't have location of the wound issues, but there certainly is some statements made by one of the defendants regarding accidental shooting. ¶ There appears to be an issue as to whether there is one defendant or two -- one person or two persons inside this salon when this killing occurs. That impacts a whole slew of issues, it would appear to this court, regarding identification, guilt, assuming the people sustain their burden as relates to issues --

(4 Pretrial RT 1027.) Defense counsel interjected that there was no issue as to identification:

> There is no issue that I can see that involves whether there is one person or two people in the salon. There is no issue as to whether there is two -- they are African Americans. There is no issue like that. So that's what the tape addresses, two male blacks, I think it says, or two blacks with guns. It is not in dispute. ¶ That's all I can address. There isn't an I.D. issue with

respect to that at all.

(4 Pretrial RT 1027-1028.) The court denied appellant's motion:

> I don't know, I -- the court is going to overrule the objection. I do see some credibility/believability issues. I see some classic 2.20 CALJIC issues [43] that go to these people's, what I am going to assume is going to be proffered testimony. And I think the people have a right to put that on, put that evidence on out front, so to speak, as opposed to reserving and waiting and seeing whether you can rehabilitate somebody.

(4 Pretrial RT 1028.) The court stated that it had "done the weighing process, and the probative value outweighs any prejudicial effect[.]" (4 Pretrial RT 1028.)

In his guilt-phase opening statement, the prosecutor previewed the admission of the 911 tape-recordings:

> The two killers, the robbers, the cowards, at that point left the salon, and actually both sisters ended up calling 911. You're going to hear the 911 tape. We will give you a little transcript to follow along with when we get to those points of their call in to 911. The evidence will show they held Shayne and just sat there and watched him die.

(4 RT 1766.) At the guilt phase, both 911 tape-recordings were played for the jury, and the jurors were provided with transcripts of those recordings. (4 RT 1839-1840; 6 RT 2166-2167; Exhs. 11 & 71; QCT 3768-3771, 3772-3776). At the penalty phase, the jury was instructed to consider "all the evidence which has been received during any part of the trial of this case." (12 RT 4039.)

---

43. CALJIC No. 2.20 informs the jury that it is the sole judge of the credibility of a witness, and lists factors that the jury may consider in determining credibility. The jury here was given that instruction at both the guilt and penalty phases. (9 CT 3097; 8 RT 2872-2783; 10 CT 3434-3435; 12 RT 4034-4035.)

B. The Trial Court Erred in Permitting the Prosecution to Introduce the 911 Tape-Recordings into Evidence at the Guilt Phase

1. The 911 Recordings Were Not Relevant to Any Disputed Fact at the Guilt Phase

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" (Evid. Code, § 210), [44] and is admissible "unless excluded under the federal or California Constitution or by statute" (*People v. Scheid* (1997) 16 Cal.4th 1, 13; see also Cal. Const., art. I, § 28, subd. (d); § 351). "The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive." (*Scheid*, at p. 13, internal quotation marks omitted.) A trial court has broad discretion in determining the relevance of evidence. (*Id.* at p. 14.) On appeal, a trial court's ruling on relevance is reviewed under the abuse-of-discretion standard. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1057-1058.)

The 911 tape-recordings were not relevant to any disputed or material fact of consequence at the guilt phase. First, as the trial court correctly concluded, most of the theories offered by the prosecution did not establish relevance. There was no disputed fact regarding the location of the fatal gunshot wound to the victim. (4 Pretrial RT 1025-1027.) Similarly, although unstated by the court, there was no dispute that Jennifer and Amy Parish were "present at the scene of the crime." (7 CT 2565.)

Second, the theory of relevance relied upon by the trial court -- that the tape-recordings were relevant to an identification issue -- was erroneous. There was no question that two African-American men with guns committed

---

44. All further statutory references made in this argument are to the Evidence Code, unless otherwise stated.

the salon robbery and killing. The defense conceded in its opening statement that appellant was involved in both incidents: "There is no question that Kevin Boyce was involved in the robbery at the salon. There is no question he was involved in the robbery at the pizza establishment. We concede that." (4 RT 1781-1782.) Both Amy and Jennifer Parish testified that two African-American men with guns committed the salon offenses. (4 RT 1812-1813, 1843, 1855, 1893; 5 RT 2097, 2199.) Neither 911 call purported to identify anyone. Thus, neither tape-recording was relevant to an identification issue.

The facts that were in dispute in this case involved whether appellant was the shooter, and whether the special circumstance allegations were proved beyond a reasonable doubt. On those factual issues, the 911 tape-recordings had nothing to say.

In its written opposition to the defense motion, the prosecution cited to this Court's opinion in *People v. Roybal* (1998) 19 Cal.4th 481, where this Court addressed whether a trial court erred in admitting a tape-recording of a 911 call by the victim's husband after discovering her body. (*Id.* at p. 515.) The lower court concluded, and this Court agreed, that the tape-recording was relevant to show the husband's "initial reaction to the discovery of his wife's body and dispel any suggestion that he was involved in the murder; [it] also described the scene of the crime." (*Id.* at pp. 516-517.) Neither of those theories of relevance is present in the instant case: there was no suggestion that the victims were involved in the crime; and, the tape-recordings do not describe the scene of the crime. [45]

---

45. Several other cases involving 911 calls are also inapposite. In *People v. Snow* (2003) 30 Cal.4th 43, the defendant sought to introduce a 911 tape-recording in an attempt to show the existence of a police conspiracy to manufacture evidence against him. The trial court concluded, and this Court agreed, that the tape-recording was irrelevant because it had "no tendency in

Footnote continued on next page . . .

A trial court has *no* discretion to admit irrelevant evidence. (*People v. Riggs* (2008) 44 Cal.4th 248, 289.) Because the 911 tape-recordings here were irrelevant to any disputed or material fact at the guilt phase, the court erred in admitting those recordings.

2. Even If Marginally Relevant, the 911 Tape-Recordings Should Have Been Excluded As More Prejudicial Than Probative

Even if the 911 tape-recordings were marginally relevant to a disputed or material fact, the trial court clearly erred in concluding that their probative value outweighed "any prejudicial effect." (4 Pretrial RT 1028.)

Under section 352, a trial court should exclude otherwise relevant evidence when its probative value is substantially outweighed by the danger of undue prejudice. (See *People v. Riggs*, *supra*, 44 Cal.4th at pp. 289-290; *People v. Richardson* (2008) 43 Cal.4th 959, 1001.) A trial court's ruling under section 352 is reviewed for an abuse of discretion. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

Here, as argued above, the 911 tape-recordings were irrelevant to any disputed or material fact in the case; by definition, irrelevant evidence has no probative value. (See § 210.) If marginally relevant to the identification of appellant as a perpetrator, any such probative value was minimal. Factors affecting the probative value of evidence include whether that evidence is "unnecessary because it was offered on an undisputed issue" (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193), or whether it is cumulative to an issue that

---

reason" to show such a conspiracy. (*Id.* at pp. 90-92, quoting § 210.) In *People v. Noguera* (1992) 4 Cal.4th 599, this Court concluded that statements made by a coconspirator during a 911 call were properly admitted for a nonhearsay purpose: to establish the existence of a conspiracy. (*Id.* at pp. 624-625.) In this case, by contrast, the tape-recordings were admitted for the truth of the statements made during the 911 call. (See 4 Pretrial RT 1027-1028.)

was not reasonably subject to dispute (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405-406; see also *People v. Cardenas* (1982) 31 Cal.3d 897, 904 (plur. opn.)). In addition, the probative value of evidence is diminished by the availability of alternative means of proof. (See *Old Chief v. United States* (1997) 519 U.S. 172, 184 [discussing federal rules of evidence]; *People v. Farmer* (1989) 47 Cal.3d 888, 903-904.)

In this case, the only statement on the 911 tape-recordings that was even arguably relevant -- describing the perpetrators as "black men" with guns -- was unnecessary since that fact was undisputed and was cumulative to the testimony by Jennifer and Amy Parish. Moreover, other means of proof, in particular, a transcript of the 911 tape-recordings, were readily available.

On the other hand, the danger of undue prejudice from the admission of the 911 tape-recordings was a near certainty. Prejudice in the section 352 context refers to evidence which is "likely to engender sympathy for the victim . . . [or] to arouse the emotions of the jurors" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1016) or which "uniquely tends to evoke an emotional bias against the defendant" (*People v. Doolin* (2009) 45 Cal.4th 390, 439, internal quotation marks omitted). The prosecution here conceded that the tape-recordings were "unpleasant" because they conveyed "so much human suffering." (7 CT 2567.) But they were much more than that. An experienced defense attorney described them as "the most emotional thing I have ever heard in my life." (3 Pretrial RT 812.) They are a distraught, frantic and devastating depiction of the surviving victims' cries and pleas for help. (Exhs. 11 & 71.)

By filling the courtroom with the surviving victims' frantic and distraught pleas for help, the tape-recordings clearly engendered sympathy for the victims, and could only have inflamed the jurors' emotions. (See *People v. Edelbacher, supra*, 47 Cal.3d at p. 1016; *People v. Love* (1960) 53 Cal.2d 843, 856-857.) Indeed, the prosecutor here revealed his true intent when he argued that

"Ms. Parish will testify during the trial and the jury will necessarily learn of her suffering: they will learn what she went through as her fiancee [*sic*] lay dying on the floor of the hair salon." (7 CT 2567.) In other words, the tape-recording was offered to show Jennifer Parish's suffering. Her suffering, however, was not at issue at the guilt phase. At the same time, the tape-recordings created a clear danger that "the jurors' desire to see someone brought to justice for this crime might interfere with their duty to meticulously appraise the evidence." (*People v. Farmer*, *supra*, 47 Cal.3d at p. 907; see also *People v. Doolin*, *supra*, 45 Cal.4th at p. 439.) Here, that someone was appellant.

The 911 tape-recordings were neither "neutral" nor dispassionate. (Cf. *People v. Riggs*, *supra*, 44 Cal.4th at p. 291; *People v. Bolin* (1998) 18 Cal.4th 297, 320.) They were inherently and patently inflammatory, and served no legitimate purpose other than to inflame the passions of the jurors deciding appellant's fate. The admission of those tape-recordings "pose[d] an intolerable risk to the fairness of the proceedings or the reliability of the outcome." (*Riggs*, at p. 290, internal quotation marks omitted.) The trial court erred in not excluding those tape-recordings at the guilt phase.

C. The Trial Court Erred in Permitting the Jurors to Consider the 911 Tape-Recordings at the Penalty Phase As Aggravation

As noted above, at the penalty phase, the jury was instructed to consider "all the evidence which has been received during any part of the trial of this case." (12 RT 4039.) Thus, the jury presumably considered the 911 tape-recordings in making its penalty determination.

In its opposition to the defense motion, the prosecution argued that "the undue prejudice aspect of Evidence Code Section 352 does not apply to

Penal Code Section 190.3 (a) evidence[.]" (7 CT 2568.) [46] That argument is clearly wrong. In *People v. Smith* (2005) 35 Cal.4th 334, this Court observed that it has "rejected the Attorney General's contention that Evidence Code section 352 did not apply to evidence offered under factor (a)[.]" (*Id.* at p. 357, citing *People v. Box* (2000) 23 Cal.4th 1153, 1201; see also *People v. Salcido* (2008) 44 Cal.4th 93, 158.) [47]

The prosecution also argued that the Jennifer Parish 911 tape-recording "demonstrate[d] the circumstances of the crime by describing the scene shortly after the shooting," and showed "the specific harm done by appellant "by displaying Jennifer Parish's suffering at the death of her fiancee [*sic*]." (7 CT 2568.) It is true that the Eighth Amendment erects no per se bar to the admission of certain victim impact evidence, and that, under California law, such evidence is admissible at the penalty phase under Penal Code section 190.3, factor (a), as a circumstance of the crime. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 825-827; *People v. Edwards* (1991) 54 Cal.3d 787, 835-836.) However, both the United States Supreme Court and this Court have cautioned that the admission of such evidence may be "so unduly prejudicial that it renders the trial fundamentally unfair," in violation of due process. (*Payne*, *supra*, at p. 825; see also *People v. Pollack* (2004) 32 Cal.4th 1153, 1180 [victim impact evidence may not be "so inflammatory as to elicit from the jury

---

46. Penal Code section 190.3, factor (a) provides that, in making its sentencing decision at the penalty phase of a capital trial, the jury must take into account the circumstances of the crime and the existence of any special circumstances found to be true.

47. This Court has cautioned, however, that a trial court's "discretion to exclude evidence regarding the circumstances of the crime as unduly prejudicial is more circumscribed at the penalty phase than at the guilt phase of a capital murder trial, because the sentencer is expected to weigh the evidence subjectively." (*People v. Salcido*, *supra*, 44 Cal.4th at p. 158.)

an irrational or emotional response untethered to the facts of the case"].)

This Court addressed the admissibility of a tape-recording of a 911 call from a surviving victim at the scene of a killing in *People v. Hawthorne* (2009) 46 Cal.4th 67. This Court concluded that the tape-recording was relevant as showing the immediate impact and harm caused by defendant's criminal conduct on the surviving victim. (*Id.* at p. 102.)

There can be no gainsaying the fact that a tape-recording of a 911 call from a surviving victim at the scene of a killing is a unique form of victim-impact evidence. The aggravating weight of such evidence is enormous. The potential for that evidence to overwhelm the jurors' emotions is patent. The potential for that evidence to blunt or nullify the jurors' reasoned consideration of the mitigating evidence is patent.

In *Hawthorne*, the jury was cautioned not to allow its emotional response to the 911 tape-recordings to "subvert their reasoned evaluation of the evidence." (*Id.* at p. 103.) Here, however, the jury was merely instructed in general terms that:

> Sympathy for the family of the victim is not a matter you may consider in aggravation. Evidence, if any, of the impact of the victim's death on family members should be disregarded unless it illuminates some positive quality of the victim's background and character.

(10 CT 3445; 12 RT 4043) It is not clear that this instruction refers to victim-impact evidence related to Jennifer or Amy Parish; Jennifer was the victim's fiancée, not technically a family member. Nor is it clear that the instruction refers to the 911 calls as opposed to their testimony. In any case, the jurors here were not given a specific, explicit admonition, as in *Hawthorne*, to constrain their emotional response to the 911 tape-recordings.

The tape-recordings introduced in this case were so inflammatory as to have posed a risk that the jury's attention was diverted from its proper role and invited an irrational response. (See *People v. Pollack*, *supra*, 32 Cal.4th at p.

1180.) In short, that evidence was "so unduly prejudicial that it renders the trial fundamentally unfair," in violation of due process. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) In these circumstances, those recordings should not have been introduced and considered in aggravation at the penalty phase.

D. The Error Violated Appellant's State and Federal Constitutional Rights

The admission of evidence that is "so prejudicial as to render the defendant's trial fundamentally unfair" violates due process. (*People v. Falsetta* (1999) 21 Cal.4th 903, 913; see also U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *People v. Partida* (2005) 37 Cal.4th 428, 439; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-1385.)

Here, the 911 tape-recordings were emotionally devastating, and filled the courtroom with the victims' frantic cries and pleas for help. (See Exhs. 11 & 71.) They were inherently and patently inflammatory, and served no legitimate purpose other than to inflame the passions of the jurors against appellant. Their admission rendered appellant's trial fundamentally unfair. (See *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.)

For similar reasons, the admission of the 911 tape-recordings also violated appellant's right to a reliable, individualized, and nonarbitrary guilt and penalty determination under the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17; *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135.) The tape-recordings had minimal, if any, probative value at the guilt phase, and served no purpose other than to inflame the passions of the jurors against appellant. At penalty, the tape-recordings were so inflammatory that they diverted the jury from a "reasoned moral response to the defendant's background, character, and crime." (*Penry v. Lynaugh* (1984) 492 U.S. 302, 328.) They served to unfairly enhance the prosecution's aggravating evidence, and to

improperly diminish the defense's mitigation.

Further, to the extent that state law was violated, appellant's rights to due process, equal protection, a fair trial by an impartial jury, and a reliable death judgment were violated by the arbitrary withholding of a right provided by state law. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16; see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 344-347.) He also had a life interest under the Eighth and Fourteenth Amendments (see *Ohio Adult Parole Auth. v. Woodard* (1998) 523 U.S. 272, 288-289 (conc. opn. of O'Connor, J.)), and the parallel provisions of the state Constitution, in having unduly prejudicial and irrelevant evidence excluded from his capital trial.

E. The Trial Court's Erroneous Admission in Evidence of the 911 Tape-Recordings Requires Reversal of the Special Circumstance Findings and of the Ensuing Death Judgment

Although defense counsel here conceded that appellant was guilty of first degree felony murder, he did not concede that the special circumstance allegations were true. For the following reasons, the trial court's erroneous admission in evidence of the 911 tape-recordings requires reversal of the special circumstance findings.

The showing required to find a violation of due process -- that the evidence was so prejudicial as to render the defendant's trial fundamentally unfair -- necessarily subsumes any test for prejudice. (See *Dey v. Scully* (E.D.N.Y. 1997) 952 F.Supp. 957, 975-976.) Under any standard, however, the special circumstance findings must be reversed. The truth of those findings was not a foregone conclusion. The jury sent out two questions with respect to the special circumstance allegations. [48]

---

48. During deliberations, the jury sent a note specifically directed to the peace-officer-killing special circumstance:

Footnote continued on next page . . .

The 911 tape-recordings created a dangerous likelihood that the jurors' desire to see someone brought to justice would interfere with their duty to carefully assess the evidence in determining whether the special circumstance allegations were true. Had the error not occurred, it is at least reasonably probable that one or more of the jurors would not have found the special circumstance allegations to be true. (See *People v. Partida*, *supra*, 37 Cal.4th at p. 439; see also *People v. Salcido*, *supra*, 44 Cal.4th at p. 159.) Accordingly, the special circumstance findings must be reversed. In the absence of a valid special circumstance, the death judgment must be reversed. (Pen. Code, § 190.2, subd. (a); *People v. Marshall* (1997) 15 Cal.4th 1, 44.)

With regard to the effect of the error at the penalty phase, the state cannot show, as it must, that the error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 448.) The mitigating evidence in this case was undeniably strong. Most significantly, the defense presented clear, convincing, and unrebutted evidence of appellant's mental retardation, brain damage, and severe mental illness. The evidence also showed that appellant had speech and learning disabilities from a very early age. He was raised by an alcoholic

---

> Clarification/Interpretation on page 51 and 52 of the jury instructions dealing with the retaliation specifics and on page 53. Does the peace officer have to perform a duty at the time of the crime[?]

(9 CT 3175; 8 RT 2911; see Arg. 4, *post.*) It also sent a note regarding the felony-murder special circumstance allegations:

> Re: Page 53, Part 2 of the jury instructions. Question: If first degree murder is committed as a consequence of or results from the intent or commission of armed robbery and/or burglary, is this sufficient to establish the special circumstance cited?

(9 CT 3164; ; see Arg. 5, *post.*)

mother who did not believe in and neglected appellant's medical needs, did not inform appellant that his stepfather was not his biological father until appellant was approximately 13-years old, and withheld him from organized sports because of a fear of injury. Moreover, as a child, appellant's family changed residences numerous times, and he was ultimately raised in gang-infested, south central Los Angeles.

Under these circumstances, it is at least reasonably possible that one or more jurors would have voted for life without parole absent the error. The death judgment must be reversed.

//

3. THE SPECIAL CIRCUMSTANCE FINDINGS AND THE ENSUING DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY INSTRUCTED THE JURY TO CONSIDER APPELLANT'S PUTATIVE FLIGHT IN DECIDING HIS CULPABILITY

A. Factual Background

At the guilt phase, appellant admitted his identity as one of the perpetrators (4 RT 1781-1782), and disputed only the special circumstance allegations (8 RT 2831-2833). At the guilt phase instructional conference, the prosecution requested the trial court to instruct the jury with CALJIC No. 2.52, regarding "flight after crime." (9 CT 2880.) After appellant objected that the instruction was not applicable, the prosecutor argued that there were "two flights" (from the hair salon and from the pizza restaurant). He stated: "I don't think 'flight' means they aren't found for a day or two. It means they don't stick around and own up to the crime." (7 RT 2640-2641.) The defense countered that "[e]very crime has flight, assuming they are not caught inside the business or inside the place that they are doing something in," and that "it's acts over and above the commission of the crime and leaving the scene that the police aren't involved that's really reflective of a guilty state of mind." (7 RT 2642.) The prosecutor reiterated his argument that the instruction applies whenever a person "who does an act, who rather than calling the police or rendering aid or doing any of those things which would show a non-guilty state of mind does something that shows a guilty state of mind by leaving the scene, by not sticking around, by not rendering aid . . . ." (7 RT 2642-2643.)

The court took the matter under submission (7 RT 2643) and, the following day, overruled the defense objection (8 RT 2657). Accordingly, the jury was instructed that:

> The flight of a person immediately after the commission of a

> crime or after he is accused of a crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all the other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(9 CT 3105; 8 RT 2875.)

B. The Trial Court Erred in Instructing the Jury to Consider Appellant's Putative Flight in Deciding His Culpability

1. There Was No Factual Basis for the Flight Instruction

Under state law, a flight instruction is proper where the jury could reasonably infer that the defendant's flight reflected consciousness of guilt. (§ 1127c; see *People v. Howard* (2008) 42 Cal.4th 1000, 1020-1021; *People v. Abilez* (2007) 41 Cal.4th 472, 521-522.) However, "[e]vidence that a defendant left the scene is not alone sufficient; instead, the circumstances of departure must suggest 'a purpose to avoid being observed or arrested.' [Citation.]" (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

In this case, the evidence showed only that appellant left the scene of the crimes. That evidence was insufficient to show that appellant's decision to leave was motivated by a desire to avoid detection or apprehension for the murder. (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 328.) Accordingly, the trial court erred in giving the flight instruction because there was no factual basis for that instruction. (*Ibid.*)

2. The Flight Instruction Unduly Favored the Prosecution, and Was Argumentative and Unnecessary

The flight instruction given here unduly favored the prosecution by highlighting and emphasizing the weight of a single piece of the prosecution's circumstantial evidence; i.e., the instruction was an improper "pinpoint" instruction. This Court has rejected this claim. (See *People v. Howard*, *supra*, 42 Cal.4th at p. 1021; *People v. Morgan* (2007) 42 Cal.4th 593, 621; *People v. Mendoza* (2000) 24 Cal.4th 130, 180.) Pursuant to *People v. Schmeck* (2005) 37 Cal.4th

240, 303-304, appellant respectfully urges this Court to reconsider that holding, and conclude that the flight instruction is an improper pinpoint instruction.

Moreover, the instruction was argumentative. A trial court must refuse to deliver argumentative instructions (*People v. Panah* (2005) 35 Cal.4th 395, 486; *People v. Sanders* (1995) 11 Cal.4th 475, 560), defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if neutrally phrased, an instruction is argumentative if it "ask[s] the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871) or "impl[ies] a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9).

Judged by this standard, the flight instruction was impermissibly argumentative. Except for the party benefited by the instructions, there is no discernible difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC No. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"], vacated on other grounds, *Bacigalupo v. California* (1992) 506 U.S. 802) and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence" (*People v. Wright* (1988) 45 Cal.3d 1126, 1137). Accordingly, appellant respectfully urges this Court to reconsider its prior decisions, and conclude that the flight instruction was impermissibly argumentative. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

In *People v. Nakahara*, *supra*, 30 Cal.4th 705, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *Mincey*, *supra*, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have

invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" (*Id.* at p. 713.) However, this holding does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not. To ensure fairness and equal treatment (see *Wardius v. Oregon* (1973) 412 U.S. 470, 474 [the Due Process Clause is meant to protect the balance of forces between the accused and the state]), this Court should reconsider its decisions and hold that the flight instruction given here was impermissibly argumentative.

Moreover, the instruction on flight was unnecessary. This Court has held that specific instructions relating to the consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed should not be given. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455, disapproved on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 263; *People v. Lewis* (2001) 26 Cal.4th 334, 362-363.) In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01, 2.02, and 8.83. (9 CT 3092-3094, 3139; 8 RT 2869-2871, 2890.) These instructions informed the jury that it may draw appropriate inferences from the circumstantial evidence. There was no need to repeat this general principle in the guise of a permissive inference of consciousness of guilt.

3. The Flight Instruction Should Not Be Given When, As Here, Identity Is Conceded

The flight instruction was also improper because appellant admitted his identity as one of the perpetrators (4 RT 1781-1782), and disputed only the special circumstance allegations (8 RT 2831-2833). Because any putative flight by appellant following the crimes had no logical tendency to resolve those issues, the instruction allowed the jury to infer, on an arbitrary basis, that the special circumstance allegations were true.

This Court has repeatedly rejected this claim. (See *People v. Thornton* (2007) 41 Cal.4th 391, 438; *People v. Smithey* (1999) 20 Cal.4th 936, 982; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1245.) Appellant respectfully urges this Court to reconsider its prior decisions, and conclude that the flight instruction should not be given when identity is conceded. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

4. The Flight Instruction Permitted the Jury to Draw an Impermissible Inference Concerning Appellant's Culpability

The flight instruction suffers from an additional defect: by permitting the jury to infer one fact, appellant's guilt, from another fact, flight, it created an improper permissive inference.

The Due Process Clause of the Fourteenth Amendment "demands that even inferences -- not just presumptions -- be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313; see also *People v. Roder* (1983) 33 Cal.3d 491, 503-504.) For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.) A rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Id.* at pp. 165-167 & fn. 28.) This test is applied to judge the inference as it operates under the facts of each specific case. (*Id.* at pp. 156, 162-163.)

In this case, the defense conceded that appellant was guilty of first degree felony murder; the sole issues at the guilt phase were whether the special circumstance allegations were true. (4 RT 1781-1782; 8 RT 2745-2746.) Although consciousness-of-guilt evidence, such as flight, may bear on a defendant's state of mind after a killing, such evidence is *not* probative of his state of mind immediately prior to or during the killing. (See *People v. Anderson*

(1968) 70 Cal.2d 15, 32-33.) In particular, "[c]onduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time and not before or during the killing." (2 LaFave, Substantive Criminal Law (2d ed. 2003), § 14.7(a), pp. 481-482, emphasis in original; see also *Wong Sun v. United States* (1963) 371 U.S. 471, 483, fn. 10 ["we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime"].)

This Court has previously rejected the claim that the flight instruction creates unconstitutional permissive inferences concerning the defendant's mental state. (E.g., *People v. Loker* (2008) 44 Cal.4th 691, 705-707; *People v. Howard*, *supra*, 42 Cal.4th at p. 1021; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439.) Appellant respectfully asks this Court to reconsider those cases and hold that the flight instruction given here permitted the jury to draw an impermissible inference, and thereby violated his state and federal constitutional rights. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

C. The Error Violated Appellant's State and Federal Constitutional Rights

The flight instruction given here deprived appellant of his rights to due process, equal protection, a fair jury trial, and a fair and reliable jury determination of the special circumstance allegations and penalty. (U.S. Const., 6th, 8th & 14th Amends. ; Cal. Const., art. I, §§ 7, 15, 16, & 17.) The instruction violated state law by presenting the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright*, *supra*, 45 Cal.3d at pp. 1135-1137.) The instruction unduly favored the prosecution by highlighting and emphasizing the weight of a single piece of the prosecution's circumstantial evidence. This unnecessary instructional benefit to the prosecution violated both the Due Process and Equal

Protection Clauses of the Fourteenth Amendment, and the parallel provisions of the California Constitution. (See *Wardius v. Oregon*, *supra*, 412 U.S. at p. 479 [holding that state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [holding that arbitrary preference to particular litigants violates equal protection]; *People v. Moore* (1954) 43 Cal.2d 517, 526-527 ["There should be absolute impartiality as between the People and defendant in the matter of instructions"].) The error also constituted an arbitrary and unfair deprivation of appellant's state-created liberty interest in legally-correct and applicable jury instructions, in violation of the Due Process Clause of the Fourteenth Amendment. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 969-970.)

By creating an impermissible inference, the instructional error lessened the prosecution's burden of proof with regard to the special circumstance allegations and, as a result, violated appellant's rights under the state and federal constitutions, which "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; see also *Ulster County Court v. Allen*, *supra*, 442 U.S. at p. 157; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Roder*, *supra*, 33 Cal.3d at pp. 503-504; *United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 298-300 (en banc); Cal. Const., art. I, §§ 7, 15 & 16; § 1096.)

Further, the instructional error violated appellant's rights under the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution, which require that the procedures that lead to a death sentence must aim for a heightened degree of reliability. (U.S. Const., 8th &

14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17; *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135.) By instructing the jury with an unfairly partisan and argumentative instruction that permitted the jury to draw an irrational permissive inference about the truth of the special circumstance allegations, the trial court diminished the reliability of the deliberations and the special circumstance findings, and created a substantial risk that those findings were unfair and unreliable. Neither is acceptable when life is at stake. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (conc. opn. of O'Connor, J.).)

D. Reversal of the Special Circumstance Findings and the Ensuing Death Judgment Is Required

Because the erroneous instruction permitted conviction on a standard of proof less than proof beyond a reasonable doubt, the error was structural and requires reversal of the special circumstance findings. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 280-282.) Even if the error is not reversible per se, because the instruction violated appellant's federal constitutional rights, reversal of the special circumstance findings is required unless the state can show that the error was harmless beyond a reasonable doubt. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 6; *Chapman v. California* (1967) 386 U.S. 18, 24.)

The state cannot make that showing in this case. It is virtually certain that the jury found the prosecution-favored flight instruction to be applicable. Under these circumstances, the instructional error, whether considered alone or in conjunction with the other instructional errors set forth in this brief, was not harmless beyond a reasonable doubt. Accordingly, the special circumstance findings must be reversed.

In the absence of a valid special circumstance finding, the ensuing death judgment must also be reversed. (§ 190.2, subd. (a); *People v. Marshall* (1997) 15 Cal.4th 1, 44.)

//

4. THE KILLING OF A PEACE OFFICER IN RETALIATION FOR THE PERFORMANCE OF HIS OFFICIAL DUTIES SPECIAL CIRCUMSTANCE FINDING MUST BE SET ASIDE BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THAT ALLEGATION AND BECAUSE THAT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE, AND, AS A RESULT, THE DEATH JUDGMENT MUST BE REVERSED

A. Procedural and Factual Background

The complaint filed on August 18, 1997, alleged three special circumstances, including that the victim was a peace officer who was intentionally killed either while engaged in the performance of his duties, or in retaliation for the performance of his official duties. (§ 190.2, subd. (a)(7); 1 CT 234.) In the information, filed in June 1998, the killing-of-a-peace-officer special circumstance allegation was not alleged. (2 CT 586.)

On June 29, 1999, the defense, aware that the prosecution intended to allege the peace-officer-killing special circumstance in an amended information, filed a "demurrer and/or nonstatutory motion" arguing, inter alia, that section 190.2, subdivision (a)(7) failed to give adequate notice of the nature and cause of the accusation, violated an accused's right to a unanimous jury verdict, and was unconstitutional on its face. (6 CT 1654-1670.) [49] In its amended information on July 30, 1999, the prosecution alleged the peace-officer-killing special circumstance, but modified it to include only the retaliation clause: "[the victim] was a peace officer who was intentionally killed in retaliation for the performance of his duties. . . ." (7 CT 2098-2099.)

---

49. The defense motion presented state and federal legal bases for its claims, including "all such rights being guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 13, 15, 16, 17 and 22 of the California Constitution." (5 CT 1555.)

On August 12, 1999, the prosecution filed a response to appellant's motion. It confirmed that it was "proceeding only on that portion of the special circumstance that applies to a peace officer being intentionally killed in retaliation for the performance of his official duties" (7 CT 2170), and argued that the retaliation portion of the special circumstance was not constitutionally infirm (7 CT 2170-2176).

At a pretrial hearing on the defense motion, defense counsel argued that the peace-officer-killing special circumstance allegation should still be stricken, notwithstanding the fact that the prosecution was proceeding solely on the "retaliation" portion of section 190.2, subdivision (a)(7). (2 Pretrial RT 568) Counsel continued:

> So nothing is delineated out in the CALJIC instructions that shows that retaliation applies to just killing a police officer simply because that individual is a police officer over the years or was a retired one.
>
> What I am actually saying is: In other words, the retaliation for performance of his duties must be something in the past that that person has done to this particular individual, has to relate to this particular instance or the performance of his duties on that particular date that he is killed by this individual. But, something related in both instances to this individual either past or present. Not just because he is a police officer.

(2 Pretrial RT 569-570.) The prosecution countered that the defense was attempting to artificially limit the concept of retaliation:

> [B]ut there is really nothing in the language of the statute nor is there anything logically that would place limitations on this concept. Retaliation is merely a matter of getting back at someone. ¶ And whether it is getting back at them because in the case of an officer they put him in prison for ten years because they investigated a case and made a case against him, or whether it is because they were just one of a bunch of officers who happened to be responding to a riot or something, but they were involved with and they were upset that this was one of the officers that appeared, or whether they are just doing it in retaliation because -- for the fact that this person is an officer and

> has performed the duties of an officer, it really shouldn't and doesn't matter under the language of the statute.
>
> The statute simply covers the situation where a person is killed in retaliation for doing their duties as a police officer. And there is no reason to believe that that has to be limited to any specific duty or any specific time. It makes no logical sense to limit it that way, and no court has ever limited it that way.

(2 Pretrial RT 572-573.) The court overruled the motion without explanation. (2 Pretrial RT 575.)

At trial, both Jennifer and Amy Parish testified regarding statements and actions purportedly made by appellant during the salon incident. Jennifer Parish testified that the second man said, "Whitey is a mother fucking pig" (4 RT 1827-1828, 1869-1870), and asked: "Where the fuck you work at, Whitey?" Shayne York responded that he worked at the "Wayside." [50] The man then asked York if "he liked to treat nigger Crips like shit in jail." York responded, "No, sir." The man replied, "No, I know you like to treat us nigger Crips like shit in jail." York again responded, "No, sir." (4 RT 1829-1831, 1875-1876.) According to Jennifer, the man then made a "derogatory remark, 'fuck the Whitey,' and the gun went off." The second man then said something to the effect that he had always wanted to kill a cop. (4 RT 1831-1832.) However, in her numerous prior interviews by law enforcement, Jennifer had never mentioned this statement. (4 RT 1877-1878.)

Amy Parish testified that the man near to her hip leaned over York and removed York's wallet. One of the men said, "Oh, we have us a pig here." (6 RT 2158.) Whoever was speaking to York asked where he worked, and York replied, "Wayside." When asked where at Wayside, York replied, "East." Then, there was talk of "is this how you talk to the fucking niggers in jail? Is

---

50. "Wayside" is the colloquial term for the East Facility compound of the Peter Pitchess Honor Farm in Los Angeles. (4 RT 1804.)

this how you treat the nigger Crips?" (6 RT 2159.) The gun went off once, and the man said, "Good, I hope this one dies." (6 RT 2160.)

At the instructional conference, the prosecutor requested that the jury be instructed with CALJIC Nos. 8.81.7 [defining the killing-of-a-peace-officer special circumstance], and 8.81.8 [defining "performance of official duties"]. (9 CT 2880.) With regard to CALJIC No. 8.81.7, the pattern instruction was redacted to refer solely to the retaliation portion of section 190.2, subdivision (a)(7):

> To find that the special circumstance referred to in these instructions as murder of a peace officer is true, each of the following facts must be proved:
>
> 1. The person murdered was a peace officer; and
>
> 2. The person murdered was intentionally killed in retaliation for the performance of his duties.

(9 CT 3136; 8 RT 2889.) With regard to CALJIC No. 8.81.8, the pattern instruction was redacted to define "in the performance of his duties" as including two possibilities:

> Any lawful act or conduct while engaged in the maintenance of the peace and security of the community or in the investigation or prevention of crime;
>
> Guarding or transporting any person lawfully under arrest or undergoing imprisonment in any city or county jail or in any prison or institution under the jurisdiction of the California Department of Corrections or California Youth Authority.

(9 CT 3137; 8 RT 2889-2890.)

At closing argument, the prosecutor read aloud CALJIC No. 8.81.8, then argued:

> [T]he bottom line is that although Shayne York was not on duty as a peace officer at the time that the murder took place, it was because Mr. Boyce was angry at the fact that he found out that Shayne York had -- was a guard at Wayside, a place where Mr. Boyce had been incarcerated. And I am going to talk about that a

little bit later. So it is in retaliation for that, and that's the lawful performance.

(8 RT 2683-2684.)

Defense counsel's closing argument stressed that York was killed simply because he was a police officer, not because of his duties at Wayside:

> Deputy York was killed for one reason and one reason alone. He was killed because he was a police officer. He wasn't killed because he worked at Wayside. He wasn't killed for any of those reasons. He was killed strictly because he was a police officer.

(8 RT 2831.)

During deliberations, the jury sent a note specifically directed to the peace-officer-killing special circumstance:

> Clarification/Interpretation on page 51 and 52 of the jury instructions dealing with the retaliation specifics and on page 53. Does the peace officer have to perform a duty at the time of the crime[?]

(9 CT 3175; 8 RT 2911) The trial court, during discussion with counsel, proposed to answer the question in the negative. (8 RT 2912.) The defense objected. (8 RT 2912-2913.) The court nonetheless instructed the jury that the answer to its question was "No." (8 RT 2916.) [51] The jury then returned a verdict finding that the victim "was intentionally killed in retaliation for the performance of his duties." (10 CT 3275; 8 RT 2944.)

B. The Evidence Was Legally Insufficient to Establish That the Killing Was in Retaliation for the Performance of the Victim's Official Duties

Section 190.2 sets forth "special circumstances" which, if found true, make a defendant eligible for the death penalty. (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 803.) Under California law, special circumstances are

---

51. The court also informed the jury that page 53 of the instructions was not related to the peace officer special circumstance. (8 RT 2916.)

intended to "guide and channel jury discretion by strictly confining the class of offenders eligible for the death penalty" (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 467, internal quotation marks omitted), as required under the Eighth and Fourteenth Amendments to the federal Constitution.

Section 190.2, subdivision (a)(7) provides for death eligibility where the victim was a "peace officer" who:

> while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer . . . or a former peace officer . . . , and was intentionally killed in retaliation for the performance of his or her official duties.

The purpose of this special circumstance is "to afford special protection to officers who risk their lives to protect the community[.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1021, citing *People v. Rodriguez* (1986) 42 Cal.3d 730, 781.)

There is no issue in this case regarding the first clause of section 190.2, subdivision (a)(7), the killing of an officer who was "engaged in the course of the performance of" his duties. The victim here was clearly not engaged in the performance of his duties at the time of the killing, as the prosecutor conceded both in its opposition to the defense motion (7 CT 2170) and at argument: "Shayne York was not on duty as a peace officer at the time that the murder took place[.]" (8 RT 2683-2684.) Accordingly, the jury was not instructed on that portion of section 190.2, subdivision (a)(7). (9 CT 3136; 8 RT 2889.)

The instant case involves the "retaliation" clause of section 190.2, subdivision (a)(7), which requires the prosecution to prove the following elements beyond a reasonable doubt: (1) that the victim was a peace officer; and (2) that the victim was intentionally killed in retaliation for the

performance of his official duties. (§ 190.2, subd. (a)(7).)

It was undisputed in this case that the victim was a deputy sheriff, who had been assigned to the Wayside facility, and that appellant had been incarcerated at that facility for several months in 1994, before the victim had been employed there. (4 RT 1804 [Jennifer Parish testimony; 6 RT 2285-2286 [stipulation].) There was no real dispute that appellant knew or should have known that the victim was a deputy sheriff. (See 8 RT 2745, 2830 [defense counsel's closing argument].)

This Court addressed the retaliation clause of section 190.2, subdivision (a)(7) in *People v. Jenkins*, *supra*, 22 Cal.4th 900. In *Jenkins*, the victim was a peace officer investigating a robbery case against the defendant, and was killed while picking his child up from day-care. While the victim was not "on duty" at the time of the killing, the evidence showed that the killing was clearly in retaliation for the performance of the officer's official duties: his criminal investigation of the defendant. The defendant, on the other hand, presented evidence that the officer was not acting lawfully in his investigation. (*Id.* at pp. 932-935.)

On appeal, the defendant in *Jenkins* argued that the trial court erred in failing to instruct the jury that, to find the special circumstance to be true, it must find that "defendant retaliated against the officer with the subjective intent to exact revenge for the officer's lawful performance of his duties." (*Id.* at pp. 1019-1020.) This Court rejected that argument, noting that the rule cited by the defendant -- that the officer's lawful conduct must be established by objective fact -- does not establish any requirement with respect to the defendant's mental state. (*Id.* at p. 1020.) The Court noted, however, that the special circumstance does require a "subjective purpose to retaliate for

performance of official duties[.]" (*Ibid.*) [52]

Jenkins presented the straightforward case for which the retaliation clause of the special circumstance clearly applies: the peace officer was engaged in an investigation of the defendant himself; and the defendant killed him in retaliation for that investigation. The act of retaliation was both logically and temporally related to the officer's performance of his official duties.

In the present case, by contrast, the victim's official duties were not directly related, either logically or temporally, to appellant. The victim's performance of his duties at Wayside occurred years after appellant had been incarcerated at that facility. It is factually and legally impossible for appellant to have "retaliated" for something that occurred after he was no longer at Wayside. Indeed, in his penalty phase closing argument, the prosecutor argued for death because of the status of the victim: "This man, because of the status of the victim, because of what he was. Not because of anything he did, not because of anything Shayne York said, but of what he was." (12 RT 3945-3946.)

Under these facts, appellant's conduct does not fall within the ambit of the special circumstance set forth in section 190.2, subdivision (7): there was insufficient evidence that appellant's actions were motivated by a subjective

---

52. Alternatively, Jenkins argued that the jury should have been instructed that the officer would not be performing his official duties if he were manufacturing a case against Jenkins in the robbery prosecution. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1020.) With regard to this claim, this Court noted that the jury was instructed that the phrase "performance of duties" meant "any lawful act or conduct while engaged in the maintenance of the peace and security of the community or in the investigation or prevention of crime." This Court concluded that the jury would have understood that "egregious misconduct on the part of an officer" would not constitute a lawful performance of duties. (*Id.* at pp. 1021-1022.)

purpose to retaliate for the victim's performance of his official duties. (Cf. *People v. Bemore* (2000) 22 Cal.4th 809, 843 [torture-murder special circumstance does not apply where there is no connection between the murder and the torture].) Accordingly, the peace officer special circumstance finding must be set aside. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 314-315, 319; *People v. Green* (1980) 27 Cal.3d 1, 62.) Moreover, further proceedings on this allegation are "barred by the double jeopardy clause." (*People v. Weidert* (1985) 39 Cal.3d 836, 842; *Burks v. United States* (1978) 437 U.S. 1, 16-18.)

C. The Peace-Officer-Killing Special Circumstance As Applied Here Is Unconstitutionally Vague and Fails to Provide Adequate Notice

The standards of specificity applicable to criminal statutes also apply to special circumstance allegations. (*People v. Memro* (1985) 38 Cal.3d 658, 703, citing *People v. Superior Court (Engert)*, *supra*, 31 Cal.3d at p. 803; see also *People v. Weidert*, *supra*, 39 Cal.3d at p. 854.) Special circumstances are subject to vagueness challenges under the Eighth and Fourteenth Amendments to the federal Constitution (see *Tuilaepa v. California* (1994) 512 U.S. 967, 972; *People v. Gurule* (2002) 28 Cal.4th 557, 637), and are subject to notice or "fair warning" challenges under the Due Process Clause of the Fourteenth Amendment, and the parallel provision of the state Constitution (see *People v. Wharton* (1991) 53 Cal.3d 522, 586; see also *In re Sheena K.* (2007) 40 Cal.4th 875, 890).

In this case, section 190.2, subdivision (a)(7) provides for death eligibility where a peace officer is killed in retaliation for the performance of his official duties. The statute is unclear as to the meaning of the phrase "in retaliation for the performance of his or her official duties." More specifically, the statute is unclear as to whether the officer's performance of his official duties must relate to the defendant. The average juror would be unable to ascertain and apply the meaning of that phrase. (Cf. *People v. Rodriguez*, *supra*,

42 Cal.3d at pp. 780-783.) That conclusion is borne out here, where the jury asked for further elucidation of the meaning of the statutory language. (9 CT 3175; 8 RT 2911)

"[L]anguage in a penal statute that truly is susceptible of more than one reasonable construction in meaning or application ordinarily is construed in the manner that is more favorable to the defendant." (*People v. Canty* (2004) 32 Cal.4th 1266, 1277.) In other words, questions concerning the ambit of a criminal statute are resolved in favor of lenity. The rule is not simply a maxim of statutory construction, but rather is rooted in fundamental principles of due process. (*Dunn v. United States* (1979) 442 U.S. 100, 112.) As applied here, that rule requires that the retaliation portion of section 190.2, subdivision (7) be interpreted to require some connection or relationship between the defendant and the peace officer's performance of his duties. A failure to so interpret that language here would constitute a forbidden retroactive application of an 'unexpected' or 'unforeseeable judicial enlargement of a criminal statute.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 586, quoting *Bouie v. City of Columbia* (1964) 378 U.S. 347, 353, 354; see also *People v. Hoyos* (2007) 41 Cal.4th 872, 890; *People v. Martinez* (1999) 20 Cal.4th 225, 238.)

D. The Errors Require That the Peace-Officer-Killing Special Circumstance Finding Be Set Aside and That the Ensuing Death Judgment Be Reversed

The errors require that the peace-officer-killing special circumstance finding be set aside. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1180-1181 [financial-gain special circumstance]; *People v. Allen* (1986) 42 Cal.3d 1222, 1273-1274 [witness-killing special circumstance].)

It also requires reversal of the death judgment. Appellant has argued separately herein that the remaining two special circumstances -- felony-murder burglary, and felony-murder robbery -- must be set aside. (See Arg. 5, *post.*) In the absence of a valid special circumstance, the death judgment must

be reversed. (§ 190.2, subd. (a); *People v. Marshall* (1997) 15 Cal.4th 1, 44.)

Even if one or both of the felony-murder special circumstance findings were upheld, the errors raised here require reversal of the death judgment. Assuming that the evidence relevant to the felony-murder special circumstances was relevant under section 190.3, factor (a), the question is whether the invalid special circumstance finding caused distortions "beyond the mere addition of an improper aggravating element." (*Brown v. Sanders* (2006) 546 U.S. 212, 220, fn. 6.)

The prosecutor, in his closing argument, made clear that his case for death was based on the circumstances of the crime and, in particular, the status of the victim as a peace officer:

> Now, am I going to tell you to impose the death penalty on Kevin Boyce because of [factors] b and c? No. I am going to ask you for one reason only. Because he murdered Shayne York. I am going to tell you that right now, that's why he deserves the death penalty, and I am going to get to that.

(12 RT 3903; see also 12 RT 3943-3944.) He continued:

> These are all things that came from the testimony. "Get the fuck on the ground, Whiteys." "Where is the fucking money?" "We have got a mother-fucking pig." "Whitey is a mother-fucking pig." "Where the fuck you work at, Whitey?" "Do you like to treat nigger crips like shit in jail?" "No, I know you like to treat us nigger crips like shit in jail." Right before the gun goes off. "Fuck the Whitey. I always wanted to kill a cop. Good, I hope this one dies." ¶ And so this man in an already highly escalated aggravated robbery. This man, because of the status of the victim, because of what he was. Not because of anything he did, not because of anything Shayne York said, but of what he was.

(12 RT 3945-3946.)

The prosecutor's reliance at closing argument on the existence of the invalid special-circumstance finding caused distortion in the jury's weighing process by arguing in essence that the law attaches special weight to the peace officer special circumstance, and by inviting the jurors to overweigh the

aggravating factors. That distortion -- in effect, an unlawful bias in favor of death -- violated the Eighth and Fourteenth Amendments to the federal Constitution. Moreover, there is a reasonable possibility that one or more of the capital sentencing jurors overweighed the aggravating factors by assuming that the law attaches special importance to the peace-officer-killing special circumstance finding.

Nor is the error harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24; cf. *People v. Brown* (1988) 46 Cal.3d 432, 447-448 [state law error at the penalty phase tested by the "reasonable possibility" test].) Although the capital crime was serious, the mitigating evidence was especially strong. The defense presented substantial, unrebutted evidence of appellant's mental retardation, brain damage, and severe mental illness. He was raised by an alcoholic mother who did not believe in and neglected appellant's medical needs, did not inform appellant that his stepfather was not his biological father until appellant was approximately 13-years old, and withheld him from organized sports because of a fear of injury. As a child, appellant's family changed residences numerous times, and he was ultimately raised in gang-infested, south central Los Angeles. In light of the strong mitigation in this case, the errors identified herein cannot be deemed harmless. The death sentence must be reversed.

//

5. THE TWO FELONY-MURDER SPECIAL CIRCUMSTANCE FINDINGS, AND THE ENSUING DEATH JUDGMENT MUST BE REVERSED DUE TO INSUFFICIENT EVIDENCE AND THE TRIAL COURT'S FAILURE TO CLEAR UP THE JURY'S CONFUSION REGARDING THE ELEMENTS OF THOSE SPECIAL CIRCUMSTANCES, AND BECAUSE THE FELONY-MURDER SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL

A. Procedural and Factual Background

The amended information filed on July 30, 1999, in addition to alleging a special circumstance that a peace officer was killed in retaliation for the performance of his duties (see Arg. 4, *ante*), alleged two felony-murder special circumstances: killing while engaged in the commission of robbery; and killing while engaged in the commission of second degree burglary. (§ 190.2, subd. (a)(17); 7 CT 2098-2099.)

With regard to the felony-murder special circumstance allegations, the jury was instructed in accordance with CALJIC No. 8.81.17:

> To find that the special circumstance, referred to in these instructions as murder in the commission of robbery or burglary, is true, it must be proved:
>
> Number one, the murder was committed while a defendant was engaged in or was an accomplice in the commission or attempted commission of the robbery or burglary; and,
>
> Number two, the murder was committed in order to carry out or advance the commission of the crime of robbery or burglary or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if any robbery or burglary was merely incidental to the commission of the murder.

(9 CT 3138; 8 RT 2890.) [53]

---

53. The jury was also instructed on robbery, attempt, conspiracy, aiding and abetting, and burglary. (9 CT 3118-3119, 3129, 3141-3146; 8 RT 2880-

Footnote continued on next page . . .

At closing argument, both parties focused sharply on the second paragraph of CALJIC No. 8.81.17. Defense counsel conceded that appellant was guilty of first degree felony murder, but denied that the felony-murder special circumstance allegations were true. (8 RT 2832-2833.) He argued that Deputy York was killed "for one reason and one reason alone. He was killed because he was a police officer." (8 RT 2831.) Counsel pointed out that the prosecutor, in his opening argument, had acknowledged that appellant killed the victim out of anger that he was a peace officer. (8 RT 2831-2832.) That acknowledgement, counsel argued, "undercut[]" the prosecution's theory on the felony-murder special circumstances:

> The theory on the other special circumstances is that Deputy York was killed during the commission of a robbery, burglary, and that it was done, I guess, in furtherance of the robbery or the burglary. That's not true. [¶] The D.A. even alluded to you don't get hung up on this. You have a good reason to get hung up on this, because the D.A.'s theory that he was killed strictly

---

2882, 2886, 2891-2894) In addition, the jury was instructed with CALJIC No. 8.80.1, which states, in part:

> Unless an intent to kill is an element of a special circumstance, if you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.
>
> If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor or co-conspirator, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant, with reckless indifference to human life and as a major participant, aided, abetted, counseled, or assisted in the commission of the crime of robbery or burglary which resulted in the death of a human being, namely Shayne Daniel York.

(9 CT 3134; 8 RT 2887-2889)

> because he was a police officer also sort of tends to undercut that he was killed in furtherance.

(8 RT 2832.) Counsel explained that CALJIC No. 8.81.17 required that the killing be "committed in order to carry out or advance the commission of the crime of robbery or burglary." (8 RT 2833.) He then focused on the "merely incidental" portion of the instruction, and argued that insofar as the victim was killed because he was a peace officer, the special circumstance "would not be true." (8 RT 2833-2835.)

The prosecutor, in his closing argument, directly addressed CALJIC No. 8.81.17 and the argument made by defense counsel. After explaining the difference between a burglary and a robbery and arguing that the salon burglary was over the moment the perpetrators entered the establishment (8 RT 2842-2843), the prosecutor directed the jury's attention to the second paragraph of the instruction (8 RT 2842), and subsequently read the instruction:

> the first part of paragraph 2, the first sentence says, "the murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection."

(8 RT 2845.) He then argued that, under that instruction:

> the perpetrator can have two different reasons. He can have -- could have more than two. But in this case could have two different things going on. There is nothing that excludes one from the other.

(8 RT 2845.) The prosecutor then focused on the "merely incidental" language in CALJIC No. 8.81.17:

> That sentence is then, in fact, sentence one of No. 2 is then, in fact, interpreted. We are given what this means, because it says "in other words." "In other words, the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder." Merely incidental, a side thought.

> Mr. Davis [defense counsel] gave an example. I'm going to play on that example. If I know that you're in your house and I hate you, and I want to kill you, and I go into your house with the intent to kill you, and while I'm in your house I see a nice television set and I decide to myself I'm going to take that, I'm going to kill you, but I'm going to take that set, too, that robbery is incidental to the main purpose was [*sic*], isn't it? It's clearly incidental at that point. It's incidental. It's a minor part of what the purpose was here. That's not what we have here.
>
> The primary purpose in this case was robbery. It was a robbery before, and a burglary, and it was before the murder took place, and it didn't end with the murder. It kept on going.

(8 RT 2846-2847.)

On the third day of jury deliberations, the jury asked the following question regarding the second paragraph of CALJIC No. 8.81.17:

> Re: Page 53, Part 2 of the jury instructions. Question: If first degree murder is committed as a consequence of or results from the intent or commission of armed robbery and/or burglary, is this sufficient to establish the special circumstance cited?

(9 CT 3164.) With defense counsel's concurrence, the trial court answered the question as follows: "[I]t depends upon what the jury finds to be the facts[.]" (8 RT 2924.) The court then reread CALJIC No. 8.81.17. (8 RT 2924-2925.) Shortly thereafter, the jury returned guilty verdicts on all counts, and found true the three special circumstance allegations. (8 RT 2930-2944; 10 CT 3251-3275.) [54]

---

54. The felony-murder special circumstance findings refer to a killing "while engaged in the commission of" burglary and robbery, but make no mention of whether the killing was committed "in order to carry out or advance" the commission of the crime of robbery or burglary. (10 CT 3273-3474.)

B. The Two Felony-Murder Special Circumstance Findings Must Be Set Aside

1. The Felony-Murder Special Circumstance Findings Must Be Set Aside Because the Evidence Clearly Shows That the Killing Was Not Committed in Order to Advance the Independent Felonious Purpose of Robbery or Burglary

Section 190.2 sets forth "special circumstances" which, if found true, make a defendant eligible for a death sentence. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 467-468; *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 803.) Section 190.2, subdivision (a)(17), the felony-murder special circumstance, provides for death eligibility where:

> The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies:
>
> (A) Robbery in violation of Section 211 or 212.5.
>
> [¶ . . . ¶]
>
> (G) Burglary in the first or second degree in violation of Section 460.

At the time of the trial in this case, the pattern instruction for the felony-murder special circumstance, CALJIC No. 8.81.17, as read to the jury, required the prosecution to prove beyond a reasonable doubt that: (1) the murder was committed while the defendant was engaged in or was an accomplice in the commission of the applicable felony; and (2) the murder was committed in order to carry out or advance the commission of the applicable felony, or to facilitate the escape therefrom or to avoid detection. As set forth above, the jury was so instructed here. (9 CT 3138; 8 RT 2890.)

The second paragraph of CALJIC No. 8.81.17 is derived from this

Court's decision in *People v. Green* (1980) 27 Cal.3d 1, 59-62, [55] which addressed the meaning of the phrase "during the commission" under the then-current version of section 190.2. This Court concluded that the felony-murder special circumstance could be applied to a person who killed "in order to advance an independent felonious purpose" (*id.* at p. 61), but was not applicable where he intended to kill and only "incidentally committed one of the specified felonies while doing so." (*People v. Clark* (1990) 50 Cal.3d 583, 608; see also *People v. Thompson* (1980) 27 Cal.3d 303, 322-325.) Subsequent to the *Green* decision, CALJIC No. 8.81.17 was revised by the addition of the second paragraph. (*People v. Gates* (1987) 43 Cal.3d 1168, 1193.)

In *People v. Weidert* (1985) 39 Cal.3d 836, this Court, relying on *Green*, affirmed that "where an accused's primary goal was not to kidnap but to kill, and where a kidnapping was merely incidental to a murder *but not committed to advance an independent felonious purpose*, a kidnapping-felony-murder special circumstance finding cannot be sustained." (*Id.* at p. 842, emphasis added.) In *People v. Bonin* (1989) 47 Cal.3d 808, this Court held that a felony-murder special circumstance allegation "requires the trier of fact to find, inter alia, that the defendant committed the act resulting in death in order to *advance an independent felonious purpose*." (*Id.* at p. 850, emphasis added.)

Over the past 20 years, this Court has repeatedly affirmed that the felony-murder special circumstance requires that the defendant must commit the act resulting in death in order to advance an independent felonious purpose. (See, e.g., *People v. Lewis* (2008) 43 Cal.4th 415, 464-465; *People v. Guerra* (2006) 37 Cal.4th 1067, 1133; *People v. Prieto* (2003) 30 Cal.4th 226, 256-257; *People v. Riel* (2000) 22 Cal.4th 1153, 1201; *People v. Davis* (1995) 10 Cal.4th

---

55. *Green* was overruled on other points by *People v. Hall* (1986) 41 Cal.3d 826, 834, footnote 3, and *People v. Martinez* (1999) 20 Cal.4th 225, 241.

463, 519, fn. 17; *People v. Garrison* (1989) 47 Cal.3d 746, 791.) [56]

Here, the evidence affirmatively shows -- and the People below conceded -- that the killing was *not* committed to advance either the burglary or the robbery. As the defense correctly argued at trial, the victim was killed simply because he was a peace officer, and for no other reason. (8 RT 2831-2835.) The prosecutor, in his guilt phase opening statement, averred that the reason for the shooting was that appellant was a racist and a bigot who did not like peace officers. (4 RT 1762.) In his penalty phase closing argument, the prosecutor conceded as much:

> This man, because of the status of the victim, because of what he was. Not because of anything he did, not because of anything Shayne York said, but of what he was.

(12 RT 3945-3946.)

In other words, the prosecution properly conceded that the killing was not committed to advance either the burglary or the robbery. Thus, even when viewed "in the light most favorable to the judgment below," the evidence is insufficient to support the felony-murder special circumstance

---

56. This Court has held that the "second paragraph of the instruction does not set out a separate element of the special circumstance; it merely clarifies the scope of the requirement that the murder must have taken place 'during the commission' of a felony." (*People v. Harris* (2008) 43 Cal.4th 1269, 1299.) However, even if not technically deemed an "element" of the special circumstance, the *Green-Thompson* requirement "is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict" and, as such, must be found true by the jury beyond a reasonable doubt. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494, fn. 19; accord, *Ring v. Arizona* (2002) 536 U.S. 584, 609.) "The fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt." (*Ring, supra*, at p. 610 (conc. opn. of Scalia, J.).)

findings. (See *People v. Kelly* (2007) 42 Cal.4th 763, 787-788; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1022.) The error requires that the two felony-murder special circumstance findings be set aside. (See *People v. Green*, *supra*, 27 Cal.3d at p. 62; *Jackson v. Virginia* (1979) 443 U.S. 307, 314-315, 319.) Moreover, further proceedings on these allegations "are barred by the double jeopardy clause." (*People v. Weidert*, *supra*, 39 Cal.3d at p. 842, citing *Green*, *supra*, at p. 62; *Burks v. United States* (1978) 437 U.S. 1, 16-18.)

2. The Trial Court's Erroneous Response to the Jury's Question Requires That the Felony-Murder Special Circumstance Findings Be Set Aside

As noted above, on the third day of jury deliberations, the jury asked the following question regarding the second paragraph of CALJIC No. 8.81.17:

> Re: Page 53, Part 2 of the jury instructions. Question: If first degree murder is committed as a consequence of or results from the intent or commission of armed robbery and/or burglary, is this sufficient to establish the special circumstance cited?

(9 CT 3164.) Defense counsel initially argued that the correct response was, "[N]o, because you need part two, which is what we argued." (8 RT 2918-2919.) Defense counsel further noted that "the answer really is no unless element two is met. It is an 'and' proposition, that's what we feel." (8 RT 2919.) Counsel then agreed with the court that "the question that they are asking is begging an interpretation of what the facts really mean." (8 RT 2921.) Ultimately, the trial court answered the question as follows: "[I]t depends upon what the jury finds to be the facts[.]" (8 RT 2924.) The court then reread CALJIC No. 8.81.17. (8 RT 2924-2925.)

The trial court's response to the jury was error. The jury here expressed its confusion over the second paragraph of the instruction, the key issue at the guilt phase. The trial court's response -- "it depends upon what the jury finds to be the facts" -- did nothing to alleviate that confusion. Under

both state and federal law, when a jury expresses confusion over the instructions, the trial court has a duty to "clear up" that confusion. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1213; see also *Bollenbach v. United States* (1946) 326 U.S. 607, 612-13; *People v. Gay* (2008) 42 Cal.4th 1195, 1225-1226; *People v. Smithey* (1999) 20 Cal.4th 936, 984-985; *Beardslee v. Woodford* (9th Cir.2004) 358 F.3d 560, 574-575; § 1138.) The court did nothing more than "figuratively throw up its hands and tell the jury it cannot help." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

Moreover, the court's response was misleading, if not legally incorrect. The jury essentially asked the court whether the special circumstance could be found true if only the first paragraph of CALJIC No. 8.81.17 were found true: "If first degree murder is committed as a consequence of or results from the intent or commission of armed robbery and/or burglary, is this sufficient to establish the special circumstance cited?" The answer properly should have been "no" because, as this Court has repeatedly held, the felony-murder special circumstance requires that the defendant must commit the act resulting in death in order to advance an independent felonious purpose.

This Court has held that if the original instructions are complete and accurate, then a trial court has discretion "to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 802.) However, if it becomes apparent to the trial court "that the jury is in need of further definition, then of course such elaboration should be provided." (*People v. Hughes* (2002) 27 Cal.4th 287, 379; see also *Shafer v. South Carolina* (2001) 532 U.S. 36, 53.) Here, the jury's note indicated that it was confused and in need of clarification. The trial court's failure to clear up the jury's confusion was error under state and federal law.

The trial court's failure to clear up the jury's confusion regarding a

contested element of the felony-murder special circumstance allegations, and its misleading response to the jury's question, violated appellant's right to due process, to trial by jury, and to proof beyond a reasonable doubt of each element of the special circumstances, and the right to have the jury reach the requisite findings. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; see *United States v. Gaudin* (1995) 515 U.S. 506, 509-510; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277; *Sandstrom v. Montana* (1979) 442 U.S. 510, 521-526; *People v. Kobrin* (1995) 11 Cal.4th 416, 423-428.) The trial court's error also violated appellant's rights under the Sixth and Fourteenth Amendments to the federal Constitution, and the parallel provisions of the state Constitution, to present a complete defense (See *Holmes v. South Carolina* (2006) 547 U.S. 319, 324; *People v. Lucas* (1995) 12 Cal.4th 415, 456), including the right to complete and accurate instructions that allow the jury to consider the defense (*Mathews v. United States* (1988) 485 U.S. 58, 63; *Clark v. Brown* (9th Cir. 2006) 450 F.3d 898, 916).

In addition, the trial court's failure to clear up the jury's confusion regarding a contested element of the felony-murder special circumstance allegations, and its misleading response to the jury's question, resulted in an arbitrary and unpredictable administration of section 190.2, subdivision (a)(17), in violation of the Eighth and Fourteenth Amendments. (See *California v. Brown* (1987) 479 U.S. 538, 541.) That error, and the subsequent use of the special circumstances at the penalty phase, denied appellant his right to a fair and reliable capital trial, both at guilt and at penalty (see *Beck v. Alabama* (1980) 447 U.S. 625, 638; *People v. Cudjo* (1993) 6 Cal.4th 585, 623); rendered the proceedings fundamentally unfair in violation of the Due Process Clause of the Fourteenth Amendment (see *Estelle v. McGuire* (1991) 502 U.S. 62, 72); and arbitrarily deprived appellant of his state-created liberty interest, and his fundamental life interest under the Eighth and Fourteenth

Amendments, in having a jury that is not confused as to a key instruction in a capital case (see *Ohio Adult Parole Auth. v. Woodard* (1998) 523 U.S. 272, 288-289 (conc. opn. of O'Connor, J.); *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 969-970.)

3. The Felony-Murder Special Circumstance Is Unconstitutional, Both on Its Face and as Applied Here

The Eighth and Fourteenth Amendments to the federal Constitution require that a death penalty scheme must "narrow[] the class of defendants who are eligible for the death penalty" (*People v. Visciotti* (1992) 2 Cal.4th 1, 74), and must provide a principled basis "for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not" (*People v. Green*, *supra*, 27 Cal.3d at p. 61; see also *Lowenfield v. Phelps* (1988) 484 U.S. 231, 244; *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.); *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023).

To the extent that this Court concludes that the felony-murder special circumstance does not require that the killing was committed in order to advance the independent felonious purpose of the underlying felony, then the special circumstance, both facially and as applied here, violates the federal Constitution because, inter alia, it: fails to provide a meaningful basis for narrowing death eligibility, i.e., fails to narrow the class of "death eligible" defendants to a smaller subclass more deserving of the death penalty than those not so included; fails to meet minimal Eighth Amendment death penalty standards; improperly imposes death eligibility on those who kill unintentionally during the commission of a felony; fails to require a finding of premeditation or deliberation or any other morally qualifying intent; and makes a much larger class of murderers -- those who kill with premeditation but not in the commission of a qualifying felony -- not subject to the death penalty. (U.S. Const., 8th & 14th Amends.)

This Court has repeatedly rejected these challenges to the eligibility

process in California's death penalty scheme. (E.g., *People v. Stanley* (2006) 39 Cal.4th 913, 968; *People v. Cook* (2006) 39 Cal.4th 566, 617; *People v. Boyer* (2006) 38 Cal.4th 412, 483; *People v. Cornwell* (2005) 37 Cal.4th 50, 102; *People v. Frye* (1998) 18 Cal.4th 894, 1028-1030; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1265-1266; *People v. Stanley* (1995) 10 Cal.4th 764, 842-843; *People v. Webster* (1991) 54 Cal.3d 411, 455-456; *People v. Anderson* (1987) 43 Cal.3d 1104, 1147.) Appellant respectfully requests this Court to reconsider those decisions and to strike down section 190.2, both facially and as applied here. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

C. Reversal of the Felony-Murder Special Circumstance Findings Requires That the Death Judgment Be Reversed

Reversal of the two felony-murder special circumstances requires reversal of the death judgment. Appellant has argued separately herein that the remaining special circumstance finding -- the killing of a peace officer -- must also be set aside. (See Arg. 4, *ante.*) In the absence of a valid special circumstance, the death judgment must be reversed. (§ 190.2, subd. (a); *People v. Marshall* (1997) 15 Cal.4th 1, 44.)

Even if the peace-officer-killing special circumstance finding were upheld on appeal, the errors related to the felony-murder special circumstance findings -- both the legal insufficiency of the evidence and the trial court's erroneous response to the jury's question -- require reversal of the death judgment. Assuming that the evidence relevant to the felony-murder special circumstances was relevant under section 190.3, factor (a), the question is whether the invalid special circumstance findings caused distortions "beyond the mere addition of an improper aggravating element." (*Brown v. Sanders* (2006) 546 U.S. 212, 220, fn. 6.)

Here, the prosecutor, in his closing argument, made clear that his case for death was based on the circumstances of the crime (12 RT 3903), and stressed the presence of felony-murder special circumstances:

> And you get back then, you come back a little bit to the hair salon. Three special circumstances were committed, three of them. The burglary. That hair salon back by itself, tucked away. Talked about this before. Tucked away, it is dark, it is at night.
>
> That serious felony of entering a building with intent to commit a felony, that's a special circumstance. Why? The risk it puts people at, people who feel -- who are disarmed, who are in the building. It is not a residence. It is not a home, I understand that, but still a structure, a business. You let your guard down. That's what was happening with these people, with Jennifer and Amy and Shayne. They are just there for a haircut. The guard completely down.
>
> The robbery. That's a special circumstance. The manner of this robbery was especially atrocious. Oh, there is a robbery when you run up to somebody that's carrying a purse and rip it off their arm and run. There is a robbery. There are all kinds of robberies.

(12 RT 3943-3944.)

The prosecutor's reliance at closing argument on the existence of the invalid special circumstance findings caused distortion in the jury's weighing process by arguing in essence that the law attaches special weight to the felony-murder special circumstance findings, and by inviting the jurors to overweigh the aggravating factors. That distortion -- in effect, an unlawful bias in favor of death -- violated the Eighth and Fourteenth Amendments to the federal Constitution.

Nor is the error harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24; cf. *People v. Brown* (1988) 46 Cal.3d 432, 447-448 [state law error at the penalty phase tested by the "reasonable possibility" test].) Although the capital and other crimes were serious, the mitigating evidence was especially strong. The defense presented substantial, unrebutted evidence of appellant's mental retardation, brain damage, and severe mental illness. The evidence also showed that appellant had speech and learning disabilities from a very early age. He was raised by an alcoholic mother who

did not believe in and neglected appellant's medical needs, did not inform appellant that his stepfather was not his biological father until appellant was approximately 13-years old, and withheld him from organized sports because of a fear of injury. As a child, appellant's family changed residences numerous times, and he was ultimately raised in gang-infested, south central Los Angeles. In light of the strong mitigation in this case, the errors identified herein cannot be deemed harmless beyond a reasonable doubt. The death sentence must be reversed.

//

6. THE DEATH JUDGMENT MUST BE REVERSED BECAUSE APPELLANT WAS DENIED HIS RIGHT TO SELF-REPRESENTATION AT THE PENALTY PHASE

A. Appellant's Request to Discharge Counsel

Shortly after the jury returned its guilt verdicts on August 22, 2000, the trial court set August 28, 2000, as the start of the penalty phase. (10 CT 3357; 8 RT 2930-2945, 2950.) Defense counsel then informed the trial court that appellant requested a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (8 RT 2952), and an in camera hearing was held with defense counsel and appellant. (8 RT 2953-2962 [sealed].) [57]

At the hearing, appellant initially confirmed that he was seeking substitute counsel, but when asked whether he felt that counsel had not properly represented him, he made clear that he had no complaint about counsel's "job" at the guilt phase. Instead, he wanted counsel "removed" because "I don't want them putting no defense for me on the penalty phase . . . ." He confirmed that he was not seeking substitute counsel: "No, I don't want no other attorney." (8 RT 2953-2954.) However, when the court asked whether appellant wanted to represent himself, appellant responded, "No, I just want the prosecutor to put his little -- what he want to put up." (8 RT 2954.)

The court explained that it had to be one or the other: "[I]t is either a lawyer representing you . . . or you are in pro per; that is, you are representing yourself." It then asked, "It sounds like you are telling me you want to represent yourself. Is that correct?" Appellant responded with a question: "If I represent myself, I could just be quiet then, right?" The court replied, "Well, yeah, you could do pretty much what you feel is appropriate to do with

---

57. Appellant filed with this Court a motion to unseal limited portions of the record on appeal. The Court granted the relevant portions of the motion.

respect to the penalty phase of the trial." (8 RT 2954-2955.)

Appellant again reiterated that he wanted to discharge counsel ("I just want Mr. Davis and Ron Klar moved off my case"), and that he did not want substitute counsel ("I don't want no new lawyers"); but he also twice stated "I don't want to represent myself." He wanted "the prosecutor to do the rest of his little job and I will go on my way." (8 RT 2955.)

The court then turned its attention to counsel, asking: "is this a *Faretta* hearing or *Marsden*?" (8 RT 2955.) Defense counsel Davis responded:

> I don't think that's really what it is. The problem, such as it exists between Mr. Boyce and Mr. Klar and I, is simply that Mr. Boyce does not want us to present any evidence in mitigation. He does not want us to fight whatever the D.A. puts on in aggravation, and he doesn't want us to put on anything in mitigation that might affect a jury's determination that life without possibility of parole is the appropriate sentence.
>
> We have talked about that. I have told Mr. Boyce that I respect his opinion and his position about why he feels the way he does, and honestly I do. But, I have a responsibility, Mr. Klar has a responsibility, and our responsibilities -- I don't know that you would say that they are for higher cause or whatever, but our responsibilities are not to just roll over in a situation like that, and we don't intend to.
>
> So I suppose the real crux of the situation is that Mr. Boyce and Mr. Klar and I are at loggerheads over whether or not any evidence should be produced.
>
> We have witnesses. We want to put that evidence on and Mr. Boyce doesn't want us to do that. It is my understanding of the law, when it comes to that kind of a dilemma, is that essentially it is the attorney's call to make and that I am making a call that Mr. Boyce may not agree with, but that I think is in his best interests in the long run.

(8 RT 2956.)

The trial court, after having the attorneys state their experience in criminal trials (8 RT 2957), observed:

> I recognize the fact that this is a *Marsden* hearing, but I can't help but address some of the court's inquiry as relates to *Faretta.*
>
> What that means, Mr. Boyce, is that -- we have talked about this a few minutes ago, and that is that it is a little bit difficult for the court to figure out whether you want to represent yourself. Think that's what you are saying because you are telling me you don't want another lawyer appointed and you want the court to relieve Mr. Klar and Mr. Davis. So, let me just ask you a couple of questions.

(8 RT 2958-2959.) The court attempted to summarize appellant's desire: "You basically just want to sit there during the penalty phase and let the D.A. put on his evidence without anybody asking those people any questions?" Appellant responded, "You know, your Honor, if I could have it my way, I don't want to be here at all. I want to stay in the jail. You could notify me of the outcome." (8 RT 2959.)

The court then asked appellant about his education level (according to appellant, he stopped going to school in the 10th Grade), his employment history (appellant had never had a job outside of prison), and whether he had represented himself in any criminal proceeding (he had not). Finally, the court inquired, "I don't suppose you know anything about the law, the rules of evidence or anything like that?" Appellant replied, "I sure don't." (8 RT 2959-2960.)

The court ruled as follows:

> With respect to any *Faretta* issues, the court finds that Mr. Boyce is not qualified to represent himself for the reasons of the answers that he just gave to the court regarding his educational background and lack thereof.
>
> And also, with respect to some of the evidence that the court heard during the guilt phase of the trial, specifically [Dr. Cross]. The court considers that as well.
>
> Plus, from a procedural standpoint, the request to go pro per, which in effect the court deems this to be part and parcel of a *Marsden* request, I don't think that portion of it is technically

> timely made. But, just rather than a procedural denial, the court wanted to make inquiry of Mr. Boyce's ability to represent himself. ¶ So his request to go pro per is denied.

(8 RT 2960-2961.) The court also denied the *Marsden* motion, finding that defense counsel "have properly represented you and they will continue to do so." (8 RT 2961.)

B. Appellant's Constitutional Right to Self-Representation at the Penalty Phase Was Violated

Appellant had a right under the Sixth and Fourteenth Amendments to proceed at trial without counsel (*Faretta v. California* (1975) 422 U.S. 806, 835-836), including, according to this Court, at the penalty phase of a capital trial (*People v. Blair* (2005) 36 Cal.4th 686, 736-740; *People v. Bradford* (1997) 15 Cal.4th 1229, 1364-1365; *People v. Clark* (1990) 50 Cal.3d 583, 617-618).

A trial court *must* grant a defendant's request to proceed without counsel if three conditions are met: (1) the defendant is competent and made the request knowingly and intelligently, having been apprised of the dangers of self-representation; (2) the request is made unequivocally; and (3) the request is timely. (*People v. Jackson* (2009) 45 Cal.4th 662, 689; *People v. Stanley* (2006) 39 Cal.4th 913, 931-932.) Each of these conditions was met in this case.

1. The Trial Court Failed to Inquire Into Whether Appellant's Request Was Knowing, Intelligent, and Voluntary

A defendant must be competent to waive the right to counsel. (*People v. Stewart* (2004) 33 Cal.4th 425, 513) Although the trial court here made no findings regarding appellant's competency, the court never expressed a doubt about appellant's competence to stand trial. (See *Drope v. Missouri* (1975) 420 U.S. 162, 180; *People v. Pokovich* (2006) 39 Cal.4th 1240, 1245.)

A defendant's request for self-representation must also be knowing, intelligent, and voluntary. (See *Faretta v. California*, *supra*, 422 U.S. at p. 835; *Patterson v. Illinois* (1988) 487 U.S. 285, 298; *People v. Koontz* (2002) 27 Cal.4th

1041, 1069-1070; *People v. Joseph* (1983) 34 Cal.3d 936, 943.) In this case, the trial court made an inadequate inquiry into whether appellant's request was knowing, intelligent, and voluntary. It simply denied the request because, it concluded, appellant was "not qualified to represent himself[.]" (8 RT 2960.) The court's failure adequately to inquire into whether appellant's request was knowing, intelligent, and voluntary was an abuse of discretion. (See *People v. Lara* (2001) 86 Cal.App.4th 139, 165.) [58]

2. The Trial Court Erred in Concluding That Appellant Was "Not Qualified to Represent Himself"

At the hearing, the trial court questioned appellant about his education level and employment history, and whether he had represented himself in any criminal proceeding. The court also inquired, "I don't suppose you know anything about the law, the rules of evidence or anything like that?" Appellant replied, "I sure don't." (8 RT 2959-2960.) The court found that appellant "[was] not qualified to represent himself for the reasons of the answers that he just gave to the court regarding his educational background and lack thereof." The court also noted that it had considered the testimony given by Dr. Cross at the guilt phase of the trial. (8 RT 2960-2961.)

This inquiry was constitutionally flawed. A trial court errs when it refers to a defendant's educational background in denying a request for self-representation. (*People v. Doolin* (2009) 45 Cal.4th 390, 454.) Nor may a trial court "measure a defendant's competence to waive his right to counsel by

---

58. The trial court appears to have relied upon the testimony by neuropsychologist Dr. Cross in denying appellant's request. This, too, was error. Dr. Cross's testimony did not address appellant's competency. The high court's recent decision in *Indiana v. Edwards* (2008) 554 U.S. 164, 128 S.Ct. 2379 does not alter this conclusion. "While *Edwards* makes clear states may set a higher or different competence standard for self-representation than for trial with counsel, California had not done so at the time of defendant's trial." (*People v. Taylor* (2009) 47 Cal.4th 850, 866.)

evaluating the defendant's technical legal knowledge[.]" (*Ibid*, internal citation and quotation marks omitted; see also *Peters v. Gunn* (9th Cir. 1994) 33 F.3d 1190, 1192 ["Lack of legal qualifications alone cannot be a basis for refusing a defendant's pro se request"].) Similarly, appellant's employment history was irrelevant: "A defendant need not have a certain educational level or particular work experience in order to invoke the right to self-representation." (See *People v. Robinson* (1997) 56 Cal.App.4th 363, 372.)

The trial court here denied appellant's request not because his decision to discharge counsel was unknowing, unintelligent or involuntary, but rather because the court believed that appellant was "not qualified to represent himself[.]" That was in improper basis upon which to deny appellant his right to proceed at the penalty phase without counsel. (See *People v. Koontz*, *supra*, 27 Cal.4th at p. 1070 [a "trial court may not determine a defendant's competency to waive counsel by evaluating his ability to present a defense"].)

3. Appellant's Request Was Not Equivocal

An accused must make an "unequivocal assertion" of the right to self-representation in order to invoke that constitutional right. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1087; see also *People v. Marshall* (1997) 15 Cal.4th 1, 21-25.) In this case, appellant asked to discharge counsel, but he also twice stated that he did not wish to represent himself. Those statements, however, do not establish that the request was equivocal.

Appellant made clear to the trial court that he did not want counsel to put on a defense at the penalty phase. (8 RT 2953-2955.) Trial counsel confirmed that this was appellant's intent, but made clear that counsel was nevertheless intent on presenting mitigating evidence over their client's objection. Given that counsel and appellant were at "loggerheads over whether or not any evidence should be produced," appellant sought to effectuate *his* intent by discharging counsel. (8 RT 2956.) Indeed, that was the

only way that he could have effectuated that intent under the circumstances.

Moreover, the trial court's responses to appellant's request indicate that the request was not equivocal. Although the court observed that "it is a little bit difficult for the court to figure out whether you want to represent yourself," it interpreted appellant's request to be that he did not want different counsel and did want the court to discharge his trial attorneys. It therefore proceeded to conduct an inquiry directed at whether appellant was "qualified to represent himself." (8 RT 2958-2959.) A reviewing court "is not bound by the trial court's apparent understanding that the defendant was making a motion for self-representation" (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1087); but a trial court's understanding or interpretation of the request is certainly relevant to determining whether a request is unequivocal (see *People v. Danks* (2004) 32 Cal.4th 269, 296; *People v. Dent* (2003) 30 Cal.4th 213, 218-219). Here, where the only means by which appellant could have foregone presenting a case at the penalty phase was by discharging counsel, the court correctly interpreted his request as one essentially to represent himself at the penalty phase. Accordingly, appellant's request was not equivocal.

4. <u>Appellant's Request Was Timely</u>

With regard to the timing of the request, the trial court stated: "I don't think that portion of it is technically timely made." But, the court continued, "rather than a procedural denial, the court wanted to make inquiry of Mr. Boyce's ability to represent himself." (8 RT 2960-2961.) This statement makes clear that the trial court did not rely on any putative untimeliness of the request in denying that request.

This Court has concluded that, once trial has commenced, the right to self-representation loses its constitutional basis and is "based on nonconstitutional grounds," subject to the trial court's discretion. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1220; see also *People v. Doolin*, *supra*, 45 Cal.4th at

p. 453; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1365; *People v. Mayfield* (1997) 14 Cal.4th 668, 809; *People v. Windham* (1977) 19 Cal.3d 121, 127-129.) Further, this Court has held that, for purposes of determining whether a request for self-representation is timely in a capital case, the guilt and penalty phases of a capital trial are considered "unitary." (*Doolin*, *supra*, at p. 454; *People v. Pride* (1992) 3 Cal.4th 195, 252, citing § 190.4, subd. (a); *People v. Hardy* (1992) 2 Cal.4th 86, 193-195.) Accordingly, this Court deems a request for self-representation made after the guilt phase verdicts have been returned to be untimely. (*Id.* at pp. 194-195 [request made after the guilt phase, and one week before penalty]; see also *Mayfield*, *supra*, at pp. 809-810 [request made after the penalty verdict]; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1006-1007 [request made near the end of the guilt phase].)

For the following reasons, appellant respectfully requests this Court to reconsider its decisions concluding that, for purposes of the right to self-representation in a capital case, a request made after trial has begun but before the penalty phase is untimely as a matter of law.

First, this Court's conclusion is inconsistent with a defendant's right to exercise actual control over his penalty-phase case, including the right not to present mitigating evidence at the penalty phase. (*People v. Ramirez* (2006) 39 Cal.4th 398, 468; *People v. Blair*, *supra*, 36 Cal.4th at pp. 736-737; *People v. Clark*, *supra*, 50 Cal.3d at pp. 617-618; *People v. Lang* (1989) 49 Cal.3d 991, 1030-1031.) Until the jury returns a verdict of guilty of first degree murder, and finds a special circumstance to be true, there is no certitude that a penalty phase will occur. Moreover, a conflict between the defendant and counsel over the control of the penalty-phase case may not be clear until shortly before the commencement of the penalty phase.

Second, although it is true that the Legislature has evinced a strong legislative preference for a "unitary" jury, use of that legislative preference to

deny a pre-penalty phase request for self-representation as untimely is overbroad and improper. [59] The timeliness requirement exists "'to prevent a defendant from misusing the motion to delay unjustifiably the trial or to obstruct the orderly administration of justice.'" (*People v. Doolin*, *supra*, 45 Cal.4th at p. 454, quoting *People v. Horton* (1995) 11 Cal.4th 1068, 1110; see also *People v. Burton* (1989) 48 Cal.3d 843, 852.) If a trial court is concerned with delay that may result from a request to discharge counsel, then it should inquire into the reason why the request was not made sooner, and whether the request would in fact occasion a delay. The trial court here did not do so.

Third, this Court's conclusion is inconsistent with the right to self-representation itself. Although the United States Supreme Court has not directly addressed the timing of a request to proceed at trial without counsel (see *Marshall v. Taylor* (9th Cir. 2005) 395 F.3d 1058, 1060-1061), the high court has not held that the right loses its constitutional basis if made during trial. [60] The right to counsel may be asserted at any time before or during trial without losing its constitutional basis. (See *United States v. Proctor* (1st Cir. 1999) 166 F.3d 396, 401-402; *Menefield v. Borg* (9th Cir.1989) 881 F.2d 696, 700-701.) The right to self-representation is similar to the right to counsel in

---

59. California's capital-case scheme, and indeed every capital-case scheme upheld by the United States Supreme Court, involves "bifurcated" proceedings -- that is, proceedings that are separated or divided into two. (See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1266-1267.) There can be no denying the fundamental differences between the guilt and penalty phases of a capital trial. (See *People v. Davenport* (1995) 11 Cal.4th 1171, 1224, abrogated on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

60. In *Faretta*, a noncapital case, the request was made weeks before trial. (*Faretta v. California*, *supra*, 422 U.S. at p. 835.) In *Indiana v. Edwards* (2008) 554 U.S. 164, 128 S.Ct. 2379, 2383, another noncapital case, the request was made "just before" a retrial. (*Id.* at p. 2382.) In *Martinez v. Court of Appeal* (2000) 528 U.S. 152, the Court observed simply that "most courts" require a defendant to make the request "in a timely manner." (*Id.* at pp. 161-162.)

that both are fundamental rights. *(People v. Bradford, supra*, 15 Cal.4th at p. 1364.) The right to self-representation should not and cannot lose its constitutional basis if first requested before the penalty phase of a capital case.

5. Even if Appellant's Request Were Untimely, the Trial Court Erred in Denying the Request

Assuming that appellant's request was untimely, the trial court abused its discretion in denying that request. In exercising its discretion, a trial court should consider, inter alia, the following factors: the defendant's prior proclivity to substitute counsel; the reasons for the request; the length and stage of the proceedings; and the disruption or delay which might reasonably be expected to result were the motion to be granted. (See *People v. Windham*, *supra*, 19 Cal.3d at pp. 128-129; see also *People v. Hardy*, *supra*, 2 Cal.4th at p. 195.) [61]

In this case, there was no "prior proclivity to substitute counsel" because the request in issue was the first made by appellant. Nor is there any indication that appellant intended to disrupt the proceedings, or any "reasonable basis" for concluding that granting the request would create disruption. (See *People v. Welch* (2004) 20 Cal.4th 701, 734.) The request was made one week before the penalty phase was set to begin, and there is no indication that granting it would lead to a delay in the penalty phase. To the contrary, appellant wanted to expedite that proceeding.

One *Windham* factor that the trial court did not expressly consider in denying the request is the *reason* for the request. Appellant made clear that the reason for the request was to control his penalty-phase defense. This he had an unequivocal right to do:

---

61. A trial court should also consider the quality of counsel's representation of the defendant. Here, there was no question in the court's mind that defense counsel had adequately represented appellant.

> Notwithstanding the state's significant interest in a reliable penalty determination, a determination best made by a fully informed sentencer, a defendant's fundamental constitutional right to control his defense governs. The defendant has the right to present no defense and to take the stand and both confess guilt and request imposition of the death penalty. It follows that the state's interest in ensuring a reliable penalty determination may not be urged as a basis for denying a capital defendant his fundamental right to control his defense by representing himself at all stages of the trial.

(*People v. Clark*, *supra*, 50 Cal.3d at pp. 617-618, internal citations omitted.)

The trial court erred in not considering the reason for appellant's request, and abused its discretion in denying appellant's request.

C. Appellant's Constitutional Right to Control His Own Defense at the Penalty Phase Was Violated

The core of the *Faretta* right is a defendant's ability to retain "actual control over the case he chooses to present to the jury." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 178-179.)

Concomitantly, the defendant's right to exercise actual control over the case he chooses to present extends to the penalty phase. (*People v. Lang*, *supra*, 49 Cal.3d at pp. 1030-1031.) This control encompasses the decision not to present mitigating evidence at the penalty phase. (*People v. Blair*, *supra*, 36 Cal.4th at pp. 736-737 ["a rule requiring a pro se defendant to present mitigating evidence would be unenforceable and self-defeating"]; *People v. Bloom*, *supra*, 48 Cal.3d at pp. 1221-1224.)

Here, appellant sought to control his own defense by foregoing the presentation of a penalty-phase case. He had a right to do so. The trial court's failure to protect that right by granting appellant's request for self-representation was error.

D. The Error Requires Reversal of the Death Judgment

The erroneous denial of a defendant's request to discharge counsel is reversible per se. (See *McKaskle v. Wiggins*, *supra*, 465 U.S. at p. 177, fn. 8; *People*

v. Dent, *supra*, 30 Cal.4th at pp. 217-222.) Where the erroneous denial of such a request relates to the penalty phase, the death judgment must be reversed. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 434.) Accordingly, the death judgment in this case must be reversed.

//

7. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING A NUMBER OF PENALTY-PHASE JURY INSTRUCTIONS REQUESTED BY THE DEFENSE

A. Factual Background

Appellant requested a number of penalty-phase instructions that were necessary to guide the jury adequately in their consideration of the mitigating and aggravating factors, in their weighing of those factors, and in their making the constitutionally-required, individualized moral assessment of the appropriate penalty to impose. (10 CT 3458-3484.) The trial court instructed the jury with three of those instructions:

> An individual juror may consider something as a mitigating factor even if none of the other jurors considered that fact to be mitigating. There is no need for the jurors to unanimously agree on the presence of a mitigating factor before considering it. What is a mitigating circumstance or not and the weight to be given the existence or nonexistence of any circumstance is up to each individual juror.

(10 CT 3448; 12 RT 4045; Def. proposed instruction no. 5.)

> You are further instructed that you must assume that the sentence you impose will be the sentence that is carried out.

(10 CT 3440; 12 RT 4038; Def. proposed instruction no. 11.)

> In deciding whether death or life imprisonment without the possibility of parole is the appropriate sentence, you may not consider for any reason whatsoever the deterrent or nondeterrent effect of the death penalty on persons other than the defendant, or the monetary cost to the state of execution or maintaining a prisoner for life.

(10 CT 3439; 12 RT 4038; Def. proposed instruction no. 20.)

Appellant also requested the following instruction, regarding sympathy for the family of the victim and of the defendant:

> Sympathy for defendant's family is not a matter that may be considered in mitigation, nor can sympathy for a victim's family be considered in aggravation. However, testimony of a defendant's family members may be considered in mitigation to

> the extent that it illuminates some positive quality of the defendant's background or character or reveals circumstances which extenuate the gravity of the offense.

(10 CT 3484; Def. proposed instruction no. 19.) The court refused that instruction (11 RT 3872), and instead gave the following two instructions:

> Sympathy for the family of the defendant is not a matter that you may consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character.
>
> Sympathy for the family of the victim is not a matter you may consider in aggravation. Evidence, if any, of the impact of the victim's death on family members should be disregarded unless it illuminates some positive quality of the victim's background and character.

(10 CT 3444-3445; 12 RT 4042-4043.)

The court refused the other instructions requested by appellant, and instructed the jury in accordance with CALJIC Nos. 8.85 and 8.88, as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable.
>
> A, the circumstances of the crime of which the defendant was convicted in the present proceeding, and the existence of any special circumstances found to be true; [¶ . . . ¶]
>
> K, any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers for a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(10 CT 3442-3444; 12 RT 4039-4042.)

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without the possibility of parole, shall be imposed on the defendant. After having heard all the evidence and after having heard and

considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider.

In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.

To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(10 CT 3453-3454; 12 RT 4048-4050.)

B. The Trial Court Erred in Refusing the Penalty-Phase Instructions Requested by Appellant

A capital sentencing jury must be free "to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty." (*People v. Brown* (1988) 46 Cal.3d 432, 468, internal quotation marks omitted.) A trial court's penalty-phase instructions must permit the jurors to consider and give full and meaningful effect to any proper evidence or argument that the defendant proffers as a basis for a sentence less

than death. (See *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 246-248, 258-261, 263-265; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plur. opn.).) "Special instructions are necessary when the jury could not otherwise give meaningful effect to a defendant's mitigating evidence." (*Abdul-Kabir, supra*, 550 U.S. at p. 254, fn. 14; see also *Kelly v. South Carolina* (2002) 534 U.S. 246, 256; *Carter v. Kentucky* (1981) 450 U.S. 288, 302-303.)

Under state law, a trial court must instruct the jury at the penalty phase "on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case." (*People v. Benavides* (2005) 35 Cal.4th 69, 111; see also *People v. Stanworth* (1969) 71 Cal.2d 820, 841.) Moreover, a defendant is entitled at the penalty phase "to instructions that pinpoint the theory of the defense case." (*People v. Gurule* (2002) 28 Cal.4th 557, 660; see also *People v. Davenport* (1985) 41 Cal.3d 247, 281-283 (plur. opn.); § 1127.)

A trial court may refuse an instruction that is "an incorrect statement of law, is argumentative, or is duplicative." (*People v. Gurule, supra*, 28 Cal.4th at p. 659; see also *People v. Sanders* (1995) 11 Cal.4th 475, 559-561.) However, the trial court should correct or tailor requested instructions, particularly when a defendant's life is at stake. (See *People v. Whitehorn* (1963) 60 Cal.2d 256, 264-265; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 924; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110; *People v. Hall* (1980) 28 Cal.3d 143, 159.)

The instructions requested by appellant were necessary to guide the jury adequately in their consideration of the mitigating and aggravating factors, in their weighing of those factors, and in their making the constitutionally-required, individualized moral assessment of the appropriate penalty to impose. As none of the requested instructions was an incorrect statement of law, argumentative, or duplicative, the trial court erred by refusing to give

those instructions.

1. The Trial Court Erred in Refusing Appellant's Requested Instructions Regarding the Jurors' Consideration of Compassion and Mercy

At the penalty phase, appellant requested several instructions regarding the jurors' consideration of mercy, compassion, and sympathy. First, the defense requested the following instruction:

> A juror is further permitted to use mercy, sympathy and/or sentiment in deciding what weight to give each mitigating factor.

(10 CT 3465 [Def. proposed instruction no. 2, ¶ 3].) [62] At the instructional conference, the prosecutor argued that "the case law indicates that juries are not required to be instructed in terms of sympathy and mercy. I think sympathy or some version thereof is included in the CALJIC instruction." (11 RT 3860.) The trial court ruled: "For most of those [reasons], the court concurs. It is refused." (11 RT 3861.)

The trial court erred in refusing this instruction. In *People v. Wharton* (1991) 53 Cal.3d 522, 600-601, this Court found that the language in the proposed instruction was "consistent with Eighth Amendment guarantees." A sentencing juror is "permitted to use mercy, sympathy and/or sentiment" in assessing the mitigating evidence, and determining the appropriate sentence. (See *People v. Hughes* (2002) 27 Cal.4th 287, 403 [referring to jurors' "obligation to take into account mercy"]; *People v. Wright* (1990) 52 Cal.3d 367, 442; *People v. Haskett* (1982) 30 Cal.3d. 841, 864.)

The defense also requested that the jury be instructed with the following language:

---

62. The first two paragraphs of defense proposed instruction number 2 relate to the jurors' consideration of mitigating circumstances. (10 CT 3465.) Issues arising from the trial court's refusal to instruct the jurors with those paragraphs are discussed in subsection 4, *post*.

> A mitigating circumstance does not constitute a justification or excuse for the offense in question. A mitigating circumstance is a fact about the offense, or about the defendant which in fairness, sympathy, compassion or mercy may be considered in extenuating or reducing the degree of moral culpability or which justifies a sentence less than death, although it does not justify or excuse the offense.

(10 CT 3466 [Def. proposed instruction no. 3].) The prosecutor objected, arguing that "it is covered by factor k and CALJIC 8.88." The trial court agreed and refused the instruction. (11 RT 3861.)

The trial court erred in refusing this instruction: a similar instruction has been cited with approval by this Court. (See *People v. Osband* (1996) 13 Cal.4th 622, 705-706; *People v. Ray* (1996) 13 Cal.4th 313, 354-355 & fn. 20.) [63]

Third, the defense requested the following instruction:

> If a mitigating circumstance or aspect of the defendant's background or his character arouses mercy, sympathy, empathy or compassion such as to persuade you that death is not the appropriate penalty, you must act in response thereto and impose a sentence of life without possibility of parole.

(10 CT 3467 [Def. proposed instruction no. 4].) The prosecutor argued that the instruction was argumentative and covered by CALJIC No. 8.85. The court agreed and refused the instruction. (11 RT 3861-3862.)

The trial court erred in refusing this instruction, as it is taken nearly verbatim from this Court's opinion in *People v. Lanphear* (1984) 36 Cal.3d 163, 167, describing California's death penalty scheme. That language has been

---

63. In *People v. Carter*, *supra*, 30 Cal.4th at pp. 1229-1230 & fn. 25, where the trial court refused a similar instruction, this Court concluded that:

> Although the trial court would not have erred in giving the requested instruction, its refusal to do so did not constitute error. The pattern instruction adequately defined the concept of mitigation for the jury, and the requested instruction thus would have been largely duplicative.

noted with approval by this Court. (See *People v. Roldan* (2005) 35 Cal.4th 646, 740-741; *People v. Prieto* (2003) 30 Cal.4th 226, 271 & fn. 18.) Nor was the proposed instruction argumentative. In *People v. Brown* (2003) 31 Cal.4th 518, where the trial court refused an instruction substantially similar to those refused here ("Mercy, or compassion you feel based on the evidence is appropriate for you to consider in deciding whether to sentence [the defendant] to death"), this Court concluded that the instruction was not argumentative. (*Id.* at pp. 569-570.)

This Court has concluded that instructions similar to those proposed by appellant are "duplicative" insofar as CALJIC Nos. 8.85 and 8.88 suffice to convey to the jury that it may consider or exercise mercy, sympathy, and compassion. (See *People v. Avila* (2009) 46 Cal.4th 680, 722 & fn. 17; *People v. Davis* (2009) 46 Cal.4th 539, 621-622; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 226; *People v. Brown*, *supra*, 31 Cal.4th at p. 570; *People v. Hughes*, *supra*, 27 Cal.4th at p. 403.) For the following reasons, appellant respectfully requests the Court to reconsider this conclusion.

No instruction given at the penalty phase mentioned the terms "mercy" or "compassion." Instead, the jurors were instructed in the language of CALJIC No. 8.85 to consider, inter alia, "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (10 CT 3442-3444; 12 RT 4039-4040.) The jurors were also instructed in the language of CALJIC No. 8.88, in part, as follows: "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider." (10 CT 3453-3454; 12 RT 4049.) [64]

---

64. Two other instructions mention the concept of "sympathy" in

Footnote continued on next page . . .

Sympathy, mercy, and compassion are separate moral responses to mitigating evidence. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 328; *People v. Taylor* (1990) 52 Cal.3d 719, 746; *People v. Lanphear*, *supra*, 36 Cal.3d at pp. 166-167; *People v. Robertson* (1982) 33 Cal.3d 21, 57-58 (plur. opn.).) Sympathy refers to an understanding of the defendant's suffering aroused by the mitigating evidence. By contrast, compassion and mercy are considerations that jurors superimpose over the balance of statutory factors in aggravation versus those in mitigation in order to determine whether death is an appropriate penalty notwithstanding the defendant's culpability in the commission of the murder (see *People v. Lanphear*, *supra*, 36 Cal.3d at p. 169), and also offer a vehicle for the jury to deliver a just verdict even if they fail to find any mitigating factors as defined by the Legislature and presented by the defendant (see *People* v. *Duncan* (1991) 53 Cal.3d 955, 979 ["The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death"]). [65] Or, as Justice Mosk saw it, mercy "is the power to choose life over death -- whether or not the defendant deserves sympathy -- simply because life is desirable and death is not." (*People* v. *Andrews* (1989) 49 Cal.3d 200, 236 (dis. opn. of Mosk, J.)

Here, instructional guidance on the concepts of compassion and mercy was necessary for the jury to consider and give meaningful effect to appellant's case in mitigation. While much of the mitigating evidence introduced by the

---

negative terms: the jurors were instructed not to consider sympathy for the family of either appellant or the victim. (10 CT 3444-3445; 12 RT 4042-4043.)

65. This Court recently concluded that mercy and compassion "are synonymous in this context[.]" (*People v. Ervine* (2009) 47 Cal.4th 745, 802.) In this case, the jurors were not instructed that they could consider compassion for appellant.

defense here may have evoked sympathy from the jurors, significant aspects of appellant's background and character can be said to have little or no sympathetic value, nor do they extenuate the gravity of the crime: for example, the evidence that he was raised by an alcoholic mother who did not believe in and neglected appellant's medical needs, who did not inform appellant that his stepfather was not his biological father until the defendant was approximately 13-years old, and withheld him from organized sports because of a fear of injury. Moreover, the evidence that, as a child, appellant's family changed residences numerous times, and that he was ultimately raised in gang-infested, south central Los Angeles would not necessarily have been considered by the jurors as sympathetic evidence. Indeed, even the evidence of mental retardation and brain damage may be viewed by sentencing jurors as "a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found[.]" (*Atkins v. Virginia* (2002) 536 U.S. 304, 320-321.) Similarly, many of the symptoms resulting from frontal-lobe brain damage are consistent with the symptoms of antisocial personality disorder, a strong aggravating factor. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 310; *Satterwhite v. Texas* (1988) 486 U.S. 249, 252-253.) Indeed, the prosecutor here argued, in the face of Dr. Benson's contrary diagnosis, that appellant "fit" the diagnosis of antisocial personality disorder, including a lack of remorse. (12 RT 3935-3937.) If prosecutors are susceptible to mistaking brain damage and severe mental illness for sociopathy, then capital sentencing jurors, particularly when urged to do so by the prosecutor, are at risk of making the same mistake. (See *Atkins v. Virginia*, *supra*, 536 U.S. at pp. 320-321; *Roper v. Simmons* (2005) 543 U.S. 551, 572-573.)

Yet, a juror could reasonably have relied on the mitigating evidence to determine that, despite the relative weight of statutory aggravating and mitigating factors, death was not appropriate for appellant. The standard jury

instructions, in which mercy and compassion are conspicuous by their absence, were insufficient for the jurors to give full mitigating effect to evidence not necessarily displaying sympathetic aspects of appellant's background and character but nevertheless warranting the jurors' merciful and compassionate response.

The prosecutor's closing argument exacerbated the error. He warned the jurors that the defense would "ask you to feel sympathy and some amount of mercy for their client" (12 RT 3896), and directed them to answer the following question: "In considering whether or not this defendant deserves sympathy, ask yourself what sympathy did he show Shayne York? What mercy did he show Shayne York?" (12 RT 3897.) [66] This argument, which other courts have described as an improper and unnecessary appeal "to the sympathies of the jurors, calculated to influence their sentence recommendation" (*Rhodes v. State* (Fla. 1989) 547 So.2d 1201, 1206; but see *People v. Leonard* (2007) 40 Cal.4th 1370, 1418; *People v. Ochoa* (1998) 19 Cal.4th 353, 464-465), was clearly intended to eliminate any possibility that the jury would consider and give effect to compassion and mercy.

---

66. Defense counsel, in his closing argument, attempted to respond to the prosecutor's diminishment of mercy:

> Mercy ties in with sympathetic factors and the k factor. But, by the prosecutor's logic, murder -- mercy could never be used or applied in any murder, and that's wrong. That's flawed. ¶ Does the entirety of Kevin's life suggest to you or justify being merciful? Merciful by what? Banishment, a prison number, years and years and years in prison. Constant life of survival. That's mercy.

(12 RT 4030.) Counsel also listed "some things that you can be sympathetic about and merciful about." (12 RT 4030-4031.)

2. The Trial Court Erred in Refusing Appellant's Requested Instructions Regarding the Jurors' Consideration of Lingering Doubt

At the guilt phase, appellant contested whether the evidence showed beyond a reasonable doubt that he was the shooter at the salon. (8 RT 2746 [defense counsel's guilt-phase closing argument].) The jury found appellant guilty of murder and found that he "personally used a firearm" during the commission of the killing. (10 CT 3251, 3262.) With regard to the special circumstance of the killing of a peace officer in the performance of his duties, the jury was instructed that "[i]f you find that the defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer, you cannot find this special circumstance to be true as to the defendant." (9 CT 3136; 8 RT 2889.) The jury found it to be true that "a peace officer was intentionally killed in retaliation for the performance of his duties." (10 CT 3275.)

At the penalty phase, appellant requested four instructions relating to lingering doubt:

> While you may not now acquit Kevin Boyce of either murder or the special, you may evaluate the evidence presented in light of determining which punishment shall be imposed. This includes any doubts you may entertain on the question of guilt or the circumstances of the defendant's involvement and participation in the crimes, including but, not limited to, the issue of the identification of the actual person who shot Mr. York. This is called lingering or residual doubt. The concept of lingering or residual doubt exists somewhere between absolute truth and reasonable doubt.
>
> You were previously required to find each element of the charges and the special circumstances beyond a reasonable doubt. However, as you were instructed previously, reasonable doubt is not a mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. Thus you may have had a doubt as to his guilt or the appropriate participation or involvement and

therefore culpability level in the crimes, but concluded it was not a reasonable doubt.

Before determining the appropriate penalty to be imposed upon Kevin Boyce you may determine if the People have proven the case based upon a higher standard than reasonable doubt. Only you are the judges of what standard of proof must be met before imposing a sentence of death in light of all of the instructions the court has given you. However, you may determine, aside from any other mitigation evidence presented, that there is some doubt, and based upon that finding impose a sentence of life without possibility of parole.

(10 CT 3477 [Def. proposed instruction no. 12].)

The adjudication of guilt is not infallible and any lingering doubts you entertain on the question of guilt or culpability level may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not yet been discovered. [¶] It may be considered as a factor in mitigation if you have a lingering doubt as to the guilt or culpability level of the defendant.

(10 CT 3478 [Def. proposed instruction no. 13].)

The adjudication of guilt is not infallible, and any lingering doubts you entertain on the question of guilt, or level of participation and involvement in the crimes, or the circumstances of defendant's participation and involvement in the crimes may be considered by you in determining the appropriate penalty. The weight such lingering doubts should carry, if any, is for you to determine.

(10 CT 3479 [Def. proposed instruction no. 14].)

Each individual juror may consider as a mitigating factor residual or lingering doubt as to whether defendant intentionally and/or personally killed the victim. Lingering or residual doubt is defined as the state of mind between beyond a reasonable doubt and beyond all possible doubts. [¶] Thus, if any individual juror has a lingering or residual doubt about whether the defendant intentionally and/or personally killed the victim, he or she must consider this as a mitigating factor and assign to it the weight you deem appropriate.

(10 CT 3480 [Def. proposed instruction no. 15].)

At the instructional conference, the prosecutor argued that the trial court was not required to give those instructions. (11 RT 3867.) In particular, the prosecutor argued that, while the defense may argue lingering doubt, case law established that "the language of factor k is sufficient to cover that area." (11 RT 3867.) Defense counsel responded, "Submit it." (11 RT 3868.)

The trial court refused the instructions, stating:

> Well, I think Mr. Mulgrew [the prosecutor] correctly states the law. Although, I note some courts have given the instructions. And in reviewing whether or not this court should give any one of the proposed lingering doubt instructions submitted by the defense, I think some of those cases dealt with circumstantial evidence type of cases where the instructions were given. And I know we don't have a confession of Mr. Boyce here, but we have an admission; although, there was evidence to cast doubt on that.
>
> In any event, I think that the -- you know, as some of the cases indicated the broad definition of factor k evidence, especially delineating it is sufficient, and counsel can argue that in more specifics. So the requested four instructions are refused.

(11 RT 3868.)

In his penalty phase closing argument, the prosecutor argued that the jurors had "found [appellant] is the trigger man. You know that he is the trigger man. He is the trigger man." (12 RT 3912-3913.) Defense counsel argued, however, that there was evidence suggesting that appellant was not the shooter:

> [W]e certainly feel strongly that the evidence regarding Kevin not being the shooter of Mr. York was valid and it was supported. But, if there is some, no matter how little, lingering question or doubt in any of your minds, individually or collectively, relating to that question of who the actual shooter of this gentleman was, if any of you are somewhere beyond a reasonable doubt and beyond all doubt at all, absolute surety, if it is not totally fully resolved for you yet, then that alone is reason to consider life without parole. That is mitigation and that is important.
>
> Because life without parole does go to the issue of what? Of blame. Of involvement. Of role. Of what role was played

> beyond anything I have talked about and will talk about. There has to be something within you as a human being, as a caring and compassionate people, that says it has to be a moral certainty he is the shooter, absolute moral certainty. Something inside of it. Death must be the only moral or just thing, based on that element alone, as well as everything else I have talked about. Moral certainty. It is beyond beyond a reasonable doubt.
>
> Recognize the difference between proof beyond a reasonable doubt and beyond any doubt, surety, moral certainty in that issue of who the shooter was. After -- if after you have heard all the evidence from both phases, you have entertained some lingering doubt, no matter how light, then use that. You are allowed to use that as mitigation. As to the degree of his participation.
>
> Shayne York's memory is not minimized by using that or doing that. We don't suggest it should be. But another death is not the answer here. If we are not totally sure on who the shooter actually was. And we have issues there.
>
> It does not change it in mitigation even if you think without a doubt and you are not even listening to my last comments on lingering doubt. Even if you think absolutely he is the shooter, moral certainty, there isn't even a doubt, it is the most certain thing you have ever been through in your head, can't get any higher. It doesn't change the mitigation we have. It doesn't change the life course and path. It doesn't change that life without parole is appropriate. It just means that if there is any doubt, lingering or whatever from those two hard days of deliberation you must have spent regarding who the shooter is, then you use that individually or collectively.

(12 RT 3966-3967.)

The trial court erred in refusing the defense's proposed lingering doubt instructions. Although there may be no requirement that capital-sentencing jurors be instructed on lingering doubt in every capital case (*Franklin v. Lynaugh* (1988) 487 U.S. 164, 174 (plur. opn.)), a trial court's instructions must permit the jurors to consider and give effect to any proper evidence or argument that the defendant proffers as a basis for a sentence less than death. (See *Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. at pp. 246-248, 258-261, 263-

265.) The high court has concluded that "[s]pecial instructions are necessary when the jury could not otherwise give meaningful effect to a defendant's mitigating evidence." (*Id.* at p. 254, fn. 14.)

This Court has long made clear that evidence and argument relating to lingering or residual doubts about a defendant's guilt are relevant to the jury's sentencing determination. (See *People v. Gay* (2008) 42 Cal.4th 1195, 1218-1221; *People v. Fauber* (1992) 2 Cal.4th 792, 864.) Thus, capital sentencing jurors may not be precluded from considering and giving effect to such considerations. (See *People v. Cox* (1991) 53 Cal.3d 618, 676-677, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

This Court has also recognized that a lingering doubt instruction may be called for by the evidence in any particular case. In *People v. Cox*, *supra*, 53 Cal.3d 618, this Court noted that a trial court "may be required to give a properly formulated lingering doubt instruction when warranted by the evidence." (*Id.* at p. 678, fn. 20; see also *People v. Thompson* (1988) 45 Cal.3d 86, 134; §§ 1127, 1093, subd. (f).) Indeed, in *People v. Morris* (1991) 53 Cal.3d 152, overruled on another point by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, footnote 1, the jury was instructed on lingering doubt in terms nearly identical to those proposed by appellant:

> [t]he adjudication of guilt is not infallible and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not yet been discovered."

(*People v. Morris*, *supra*, 53 Cal.3d pp. 218-219, brackets in original.) This Court characterized that as a "straightforward instruction [that] allowed the jury to consider any remaining uncertainty as to defendant's guilt." (*Id.* at p. 219; see also *People v. Harrison* (2005) 35 Cal.4th 208, 256; *People v. Snow* (2003) 30 Cal.4th 43, 125.)

Nonetheless, this Court has repeatedly held that a lingering doubt

instruction is not constitutionally required at the penalty phase of a capital case. (See *People v. Rogers* (2009) 46 Cal.4th 1136, 1176; *People v. Sanchez* (1995) 12 Cal.4th 1, 77, disapproved on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn 22.) In support of this conclusion, this Court has generally reasoned that factors (a) and (k) in CALJIC No. 8.85 include the concept of lingering doubt, and that, therefore, no separate instruction on the subject is necessary. (E.g., *People v. Page* (2008) 44 Cal.4th 1, 55; *People v. Hines* (1997) 15 Cal.4th 997, 1068; *People v. Osband*, *supra*, 13 Cal.4th at p. 716.)

Appellant acknowledges these holdings, but does not believe that the wording of factors (a) and (k) would lead a reasonable juror to understand that any lingering doubt the juror has as to guilt can be given effect through factors (a) and (k). Factor (a) directs itself to circumstances of the crime. While that factor may be broad enough to include lingering doubt, it encourages a juror to focus on the crime itself, and not on the relative culpability or guilt of the persons who may have committed the crime. In other words, this factor relates to the manner in which the crime itself was effectuated, and not necessarily to the defendant's involvement in the crime. Thus, where a defendant relies on lingering doubt at the penalty phase, the standard instruction on factor (a) does not sufficiently inform the jury that such evidence can be a mitigating circumstance.

In the present case, the trial court refused any lingering doubt instruction based on the theory that the instruction on factor (k) -- any circumstance which extenuates the gravity of the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers -- adequately included lingering doubt. But that language does not clearly relate to lingering doubt of whether appellant was the shooter, as the defense argued. The actual homicide committed here would be no less grave if appellant established a lingering doubt that he was the shooter.

Accordingly, the instruction on factor (k) in this case did not allow the jury to give full effect to appellant's lingering doubt defense.

In light of the foregoing, there is a reasonable likelihood that a juror would not have used factors (a) and (k) to give full effect to lingering doubt. Because of this, appellant's requested instruction, which would have provided a method for the jury to give effect to such lingering doubt, should have been given by the trial court.

3. The Trial Court Erred in Refusing Appellant's Requested Instruction Regarding the Jurors' Consideration of Mental and Emotional Disturbance

The record here shows clear and convincing evidence that appellant is mentally retarded, significantly brain-damaged and severely mentally ill, and that the impairments resulting from those conditions, and from his impaired intellectual functioning, are severe and longstanding. Appellant requested the trial court to instruct the penalty jurors as follows:

> A person may be under the influence of mental or emotional disturbance even though his mental and emotional disturbance was not so strong as to preclude deliberation or premeditation.
>
> Mental and emotional disturbance may result from any cause or may exist without apparent cause.
>
> For this mitigating circumstance to exist, it is sufficient that the defendant's mind or emotions were disturbed, from any cause, whether from consumption of drugs, mental illness, or other cause, and that he was under the influence of that disturbance when he killed. A person would be under the influence of mental or emotional disturbance if a mental or emotional condition existed which influenced his conduct so as to make it different than it otherwise would have been.
>
> So, if you are satisfied from the evidence that defendant was under the influence of mental or emotional disturbance, from any cause, then it would be your duty to find this a mitigating circumstance.

(10 CT 3483; Def. proposed instruction no. 18.)

At the instructional conference, the prosecutor objected to the proposed instruction as duplicative, argumentative and possibly misleading. He argued that the evidence of the circumstances of the crime "[did] not indicate that he was hallucinating at that point." He acknowledged that appellant's "mental or emotional disturbances" would be mitigating evidence, but argued that such evidence was covered by section 190.3, factor (h). (11 RT 3870-3871.) The trial court refused the instruction "for those reasons." (11 RT 3871.)

The court erred in refusing appellant's proposed instruction. The instruction accurately stated the law: a defendant's mental or emotional disturbance is a strong factor in mitigation. (See *Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. at p. 241; *Tennard v. Dretke* (2004) 542 U.S. 274, 288; *Eddings v. Oklahoma*, *supra*, 455 US at pp. 115-116; *People v. Robertson*, *supra*, 33 Cal.3d at pp. 59-60; *Smith v. Mullin* (10th Cir. 2004) 379 F.3d 919, 942-943.) Mental disturbance, although insufficient to negate premeditation, is a mitigating factor, and may result from one or more causes, including drugs, alcohol or mental illness. (See *People v. Marshall* (1996) 13 Cal.4th 799, 857.) Contrary to the prosecutor's argument, that mitigating factor may be present even though the defendant is not hallucinating at the time of the crime. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 145.) In this case, it cannot be doubted that appellant introduced significant evidence of his brain damage and mental illness, both at the guilt and the penalty phases.

Nor was the proposed instruction duplicative of other instructions. The jury was instructed to consider, inter alia:

> D, whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; [. . . ¶ . . .]
>
> H, whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired

> as a result of mental disease or defect or the effects of intoxication[.]

(12 RT 4041.) Neither of those instructions informed the jurors that mental and emotional disturbance "may result from any cause or may exist without apparent cause" or that if appellant "was under the influence of mental or emotional disturbance, from any cause, then it would be your duty to find this a mitigating circumstance."

Nor, contrary to the trial court's conclusion, does factor (k) justify the trial court's refusal to give appellant's proposed instruction. Factor (k) instructs the jurors to consider, inter alia, "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." That instruction's reference to "the defendant's character" does not clearly cover the evidence of brain damage and mental illness introduced by appellant. There is, accordingly, a reasonable likelihood that the jury applied the instruction in a way that prevented the consideration of appellant's constitutionally relevant evidence. (*Boyde v. California* (1990) 494 U.S. 370, 380.)

Appellant acknowledges that in *People v. Williams* (2006) 40 Cal.4th 287, the trial court refused a proposed instruction similar in part to the instruction requested here. (*Id.* at pp. 325-326.) [67] This Court concluded that the trial

---

67. The instruction requested by the defendant in *Williams* provided:

> Mental or emotional disturbance may result [from] any cause or may exist without apparent cause. For this mitigating circumstance to exist, it is sufficient that . . . the defendant's mind or emotions were disturbed, that is, interrupted or interfered with, [from] any cause whether [from] consumption of drugs, mental illness, or other cause, and that he was under the influence of that disturbance when he killed Ms. Breck. A person would be

Footnote continued on next page . . .

court did not err because there was "nothing in the above rather confusing instruction that would have clarified the instruction already given pursuant to section 190.3, factor (h)." (*Id.* at p. 326.) The proposed instruction in *Williams* was confusing to the extent that it utilized the phrase "included his conduct" instead of "influenced his conduct." That confusion was not present in the instruction proposed by appellant. The trial court here erred in refusing the instruction.

4. The Trial Court Erred in Refusing Appellant's Requested Instructions Regarding Mitigating Evidence and Factors and the Weighing Process

Appellant requested several instructions regarding the jurors' consideration of mitigating evidence. First, the defense requested the following instruction:

> "Substantially" as discussed in this instruction means considerably, essentially or materially.

(10 CT 3463 [Def. proposed instruction no. 1].) The prosecutor noted that the term used in CALJIC No 8.88 is "substantial," [68] and not "substantially,"

> under the influence of a mental or emotional disturbance if a mental or emotional condition existed which included [*sic*] his conduct so as to make it different than it otherwise would have been. [¶] So if you are satisfied from the evidence that at the time of the murder of Ms. Breck, the defendant was under the influence of [a] mental or emotional disturbance, from any cause, it would be your duty to find this as a mitigating circumstance.

(*People v. Williams*, *supra*, 40 Cal.4th at pp. 325-326, brackets and ellipses in original.)

68. Defense counsel clarified that the requested definition related to the term "substantial." (11 RT 3859.) CALJIC No. 8.88 provides, in part:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

Footnote continued on next page . . .

and objected to the proposed instruction:

> I think that's just a word of common knowledge that doesn't need amplification. Further, I don't think the amplification that they propose really would be of any assistance to the jury here. [¶] I don't really think what we are talking about in terms of substantial is essential or material. What we are talking about is size considerable, and I think that the word "substantial" conveys that.

(11 RT 3858-3859.) The trial court refused the instruction, stating:

> I think it is a commonly understood term, and I am not real sure this instruction giving some other alternative definitions would assist the jury in translating or forming a definition.

(11 RT 3859-3860.)

The court erred in refusing this instruction. The definition proposed by the defense was accurate. (See *Universal Engineering v. Bd. of Equalization* (1953) 118 Cal.App.2d 36, 42.) Although, as the trial court stated, the term "substantial" may be commonly used, that term is vague, overbroad, and ambiguous, and is capable of multiple meanings. Use of a term with such imprecision and vagueness cannot be countenanced when that term is used to decide life versus death. Appellant recognizes that this Court has repeatedly rejected this claim (e.g., *People v. Salcido* (2008) 44 Cal.4th 93, 163; *People v. Breaux* (1991) 1 Cal.4th 281, 316 & fn. 14), but respectfully requests this Court to reconsider that conclusion. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

Second, the defense requested the following instruction:

> The mitigating circumstances that I have read for your consideration are given merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. A juror should pay careful attention to each of those factors.

(10 CT 3453-3454; 12 RT 4048-4050)

> Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstances to these specific factors. A juror may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty . . . . Any mitigating circumstance may outweigh all the aggravating factors.

(10 CT 3465 [Def. proposed instruction no. 2].) The prosecutor objected:

> Much of it, I think, is argumentative. I would -- well, I can point out numerous examples in there, but I think that the material in there is really covered by 8.88, and is done so in a much more neutral fashion than this instruction.
>
> There is language -- I think the last sentence in particular of paragraph one is overbroad. I think the terminology in paragraph two, where it says "careful attention," "a juror should not limit" is argumentative. The last sentence in paragraph two is argumentative. [¶ . . .]
>
> Then, as to the authority that is cited for this, the *Wharton* case, in that case an instruction similar to this was given by the trial court. The opinion does not approve the instruction or recommend it. The opinion just, interestingly, addresses the issue of whether from a defense standpoint it was error to give it because of a potential misinterpretation of the instruction that the defense came up with on appeal in that case.
>
> So, the most you can say about the *Wharton* case is that it found that from a defense perspective it was not error to give it. The [*Blystone v. Pennsylvania*] case, the U.S. Supreme Court case, doesn't support the giving of this instruction. In fact, it refers to the *Lockett vs. Ohio* type terminology, which is the exact terminology that's covered in the CALJIC instruction. So we are opposed to this instruction for many different reasons.

(11 RT 3860-3861.) The trial court concurred with "most of those" arguments, and refused the instruction. (11 RT 3861.)

Similarly, the defense requested the following instruction:

> The mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the

> factors that you may take into account as reasons for deciding not to impose a death sentence on Mr. Boyce. You should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances presented as reasons for not imposing the death sentence. ¶ This includes, but is not limited to, any other circumstance which extenuates the gravity of the crime even though it is not a [*sic*] excuse for the crime, and any other factor proffered by the defendant as a factor in mitigation of the penalty.

(10 CT 3481 [Def. proposed instruction no. 16].) The prosecutor objected that the instruction was "overbroad in a couple of instances" and was "covered by the CALJIC instructions." (11 RT 3868.) The trial court refused the instruction. (11 RT 3868.)

The trial court erred in refusing these instructions. They are nearly identical to the instruction given in *People v. Wharton*, *supra*, 53 Cal.3d at pages 600-601 and footnote 23, wherein this Court concluded that the instruction was "consistent with Eighth Amendment guarantees." (*Id.* at p. 601.) In *People v. Smith* (2003) 30 Cal.4th 581, 638, this Court concluded that similar language in a proposed instruction ("One mitigating circumstance may outweigh several aggravating circumstances, or one aggravating circumstance may outweigh several mitigating circumstances") was not argumentative.

Although this Court has concluded that such instructions are unnecessary in light of the standard CALJIC instructions (*People v. Smith* (2003) 30 Cal.4th 581, 638; *People v. Bolin* (1998) 18 Cal.4th 297, 343; *People v. Breaux*, *supra*, 1 Cal.4th at p. 317), appellant respectfully requests that it reconsider that conclusion. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.)

C. The Trial Court's Erroneous Refusal to Give the Requested Instructions Violated Appellant's State and Federal Constitutional Rights

The trial court's erroneous refusal to give the requested instructions violated appellant's rights to a fair trial and a reliable, nonarbitrary, and individualized penalty determination under the Eighth and Fourteenth

Amendments, and the parallel provisions of the California Constitution. "'[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 110, quoting *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Any barrier to the sentencer's ability to consider and give full meaningful effect to relevant mitigation, whether by statute, an evidentiary ruling, or instruction by the court, violates the Eighth and Fourteenth Amendments to the United States Constitution. (*Mills v. Maryland* (1988) 486 U.S. 367, 374-376; *Hitchcock v. Dugger*, *supra*, 481 U.S. at pp. 395-399; *Skipper v. South Carolina*, *supra*, 476 U.S. at pp. 4-7; *People v. Mickey*, *supra*, 54 Cal.3d at pp. 692-693.) A penalty phase instruction is unconstitutional if there is a reasonable likelihood that the jury applied the instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.)

As argued above, there is a reasonable likelihood that one or more of the penalty jurors here applied the sentencing factors and instructions in a manner that prevented the full consideration of mitigating evidence relevant to the penalty determination. The instructions requested by appellant were necessary to guide the jury adequately in their consideration of mitigating and aggravating factors, their weighing of those factors, their ability to consider mercy and sympathy in making their life-or-death decision, and their making the constitutionally-required, individualized moral assessment of the appropriate penalty to impose. The instructional errors here resulted in a reasonable likelihood that the jury deliberated without a full understanding of its responsibility for its individualized penalty determination. (U.S. Const., 6th, 8th & 14th Amends. ; Cal. Const., art. I, §§ 7, 15 & 17.) The instructional

errors also resulted in a substantial and unacceptable risk that the death sentence was imposed in spite of factors calling for the lesser sentence, in violation of the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17; *Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. at pp. 264-265; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605; *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135.)

Moreover, the instructional errors violated appellant's right to present a defense under the state and federal constitutions. (U.S. Const., 5th, 6th, 8th & 14th Amends. ; Cal. Const., art. I, §§ 7, 15, 28, subd. (b); *Holmes v. South Carolina* (2006) 547 U.S. 319, 324-327; *People v. Lucas* (1995) 12 Cal.4th 415, 456). Capital sentencing proceedings, too, must "satisfy the dictates of the Due Process Clause." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746.) Accordingly, most of the rights encompassed within the right to present a defense apply at the penalty phase of a capital trial. (See *Simmons v. South Carolina* (1994) 512 U.S. 154, 160-169; *id.* at p. 174 (conc. opn. of Ginsburg, J.); *Green v. Georgia* (1979) 442 U.S. 95, 95-97; *People v. Blair* (2005) 36 Cal.4th 686, 737-738; see generally Douglass, *Confronting Death Sixth Amendment Rights at Capital Sentencing* (2005) 105 Colum. L.Rev. 1967.) These rights are guaranteed by the parallel provisions of the California Constitution (Cal. Const., art. I, §§ 7, 15 & 16; *In re Martin* (1987) 44 Cal.3d 1, 30 [the state constitutional right to present a meaningful and complete defense must be deemed to be at least as broad and fundamental as the federal].)

The right to present a defense includes the right to accurate instructions on the defense theory of the case. (See *Clark v. Brown* (9th Cir. 2006) 450 F.3d 898, 904-905; see also *Mathews v. United States* (1988) 485 U.S. 58, 63.) The errors here deprived appellant of his right to present a defense because, without the requested instructions, there is a reasonable likelihood

that the jury failed to give appropriate weight to appellant's mitigating evidence, gave too much weight to the aggravating evidence, and failed to understand how it was to weigh those factors in arriving at its life-or-death decision.

The refusal of the trial court to give appellant's requested instructions also violated the Due Process Clause of the Fourteenth Amendment because the omission of the instructions rendered the penalty proceedings fundamentally unfair (U.S. Const., 14th Amend.; see *Estelle v. McGuire* (1991) 502 U.S. 62, 72), and arbitrarily deprived appellant of his state-created liberty interest in having correct, nonargumentative instructions given to the jury (see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346). "A defendant has a legitimate interest in the character of the procedure which leads to the imposition of the sentence." (*Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 969-970, citing *Gardner v. Florida* (1977) 430 U.S. 349, 358.) He also had a life interest, under the Eighth and Fourteenth Amendments (see *Ohio Adult Parole Auth. v. Woodard* (1998) 523 U.S. 272, 288-289 (conc. opn. of O'Connor, J.)), in having the jury adequately and accurately instructed as to the meaning and scope of mitigating and aggravating evidence, its consideration and weighing of that evidence, and its ability to consider mercy and sympathy in reaching its life-or-death decision. Further, the denial to appellant of a state-created right granted to other capital defendants violated the Equal Protection Clause of the Fourteenth Amendment. (See *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439 [the Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike"]; *Plyler v. Doe* (1982) 457 U.S. 202, 216; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 425.) This Court has rejected these claims. (See, e.g., *People v. Berryman* (1993) 6 Cal.4th 1048, 1104, fn. 29, overruled on another point by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Appellant respectfully requests this Court to reconsider those

decisions. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

In sum, the trial court's refusal to give the above instructions to the penalty jurors, both individually and cumulatively, violated appellant's right to a decision by a properly-instructed jury, his right to due process and equal protection, his right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

D. The Errors Require Reversal of the Death Judgment

Reversal of the death judgment is required under any standard of review. First, "when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence-because it is forbidden from doing so by statute or a judicial interpretation of a statute-the sentencing process is *fatally flawed*." (*Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. at p. 264, emphasis added.)

Reversal is also required under the standard of review for federal constitutional errors set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, under which reversal is required unless the state proves beyond a reasonable doubt that the error did not contribute to the death verdict (see *People v. Smith* (2005) 35 Cal.4th 334, 367); and under the standard of review for state-law errors at the penalty phase, under which a trial court's erroneous refusal of a defendant's proper instruction requires reversal of the death judgment if there is a reasonable possibility that the failure to give the instruction affected the jury's verdict (see *People v. Brown*, *supra*, 46 Cal.3d at pp. 446-448). Clear, accurate, easily understood jury instructions are "vitally important in assuring that jurors grasp subtle or highly nuanced legal concepts." (*United States v. DeStefano* (1st Cir. 1995) 59 F.3d 1, 4.) Nowhere is this more important than at the penalty phase of a capital trial:

> Though instructions are essential for the jury's fact-finding and law-applying functions in every criminal case, the uniqueness of

> the sentencing jury's task makes it even more important that the jury be instructed at the penalty phase "with entire accuracy."

(Poulos, *The Lucas Court and the Penalty Phase of the Capital Trial: The Original Understanding* (1990) 27 San Diego L.Rev. 521, 627, footnote omitted, quoting *People v. Ah Fung* (1861) 17 Cal. 377, 379.)

The defense's concerns about the jurors' ability to glean the scope of factor (k) have been confirmed in a study of California jurors who had actually served in capital cases. The study found that many of the jurors who were interviewed simply dismissed mitigating evidence that had been presented during the penalty phase because they did not believe it "fit in" with the sentencing formula that they had been given by the judge, or because they did not understand that it was supposed to be considered mitigating. (Haney, et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994) 50 (no. 2) J. of Social Issues 149, 167-168; see also Haney & Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 Law & Hum. Behav. 411, 418-424.)

Appellant's proposed instructions were both necessary and appropriate to guide the jurors adequately in their consideration of mitigating and aggravating factors, their weighing of those factors, their ability to consider mercy and sympathy in making their life-or-death decision, their making the constitutionally-required, individualized moral assessment of the appropriate penalty to impose, and to alleviate confusion engendered by the pattern CALJIC instructions given to the jury. Because there is a reasonable likelihood that the jury applied the penalty-phase instructions in a way that prevented the consideration of constitutionally relevant evidence (see *Boyde v. California*, *supra*, 494 U.S. at p. 380), and because the instructions given contained ambiguities "concerning the factors actually considered by [the sentencing body in imposing a judgment of death]" (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 119 (conc. opn. of O'Connor, J.), to uphold the death sentence

on the instructions given would "risk that the death penalty [was] imposed in spite of factors which [called] for a less severe penalty" (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605; see also *Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. at pp. 256-257). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett*, *supra*, at p. 605.) Accordingly, the judgment of death must be reversed.

//

8. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AT THE PENALTY PHASE BY REFUSING APPELLANT'S PROPOSED INSTRUCTIONS REGARDING THE PROHIBITION ON DOUBLE-COUNTING AGGRAVATING FACTS AND FACTORS

A. The Trial Court Erroneously Refused Appellant's Request to Instruct the Sentencing Jurors Not to Double-Count the Facts Underlying the Special Circumstances

The jury found the three alleged special circumstances to be true: the killing of a peace officer in the performance of his duties; killing while engaged in the commission of a burglary; and killing while engaged in the commission of robbery. (8 RT 2930-2944; 10 CT 3251-3275.) At the penalty phase, the trial court instructed the capital sentencing jurors that:

> In determining which penalty is to be imposed on the defendant, you shall consider all the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable.
>
> A, the circumstances of the crime of which the defendant was convicted in the present proceeding, and the existence of any special circumstances found to be true . . . .

(12 RT 4039-4042; 10 CT 3442-3444; CALJIC No. 8.85.)

In *People v. Melton* (1988) 44 Cal.3d 713, this Court observed that factor (a) poses a risk that the jury might double-count special circumstances since it "tells the penalty jury to consider the 'circumstances' of the capital crime and any attendant statutory 'special circumstances.'" (*Id.* at p. 768; accord, *People v. Ashmus* (1991) 54 Cal.3d 932, 997.) For that reason, this Court has instructed trial courts that, upon a defendant's request, the jury should be admonished not to double-count. (*Melton*, *supra*, at p. 768.)

Appellant made that request here. He submitted a proposed instruction, Defense 17, on the jurors' consideration of facts under factor (a):

> You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts

> of the special circumstance as a circumstance of the crime for which the defendant has been convicted. In other words, do not consider the same factors more than once in determining the presence of aggravating factors.

(10 CT 3482.) The trial court believed the first part of the proposed instruction to be "somewhat misleading," and concluded that:

> I guess for the purpose of the record, the court will refuse it and with the comment that, you know, if you want to resubmit something a little bit more specific as relates to not double counting or overlapping, so to speak, that maybe that works. But, I think it is a semantics issue more than anything else.

(11 RT 3868-3870.)

The court erred because Defense 17 was a correct statement of the law that must be given when requested by the defense. In *People v. Monterroso* (2004) 34 Cal.4th 743, the trial court refused a defense-proposed instruction containing language identical to the one proposed by appellant in this case. [69] This Court concluded that this language correctly stated the law and should have been given. (*Id.* at pp. 789-790; accord, *People v. Ayala* (2000) 24 Cal.4th 243, 289.) The trial court here erred in refusing appellant's requested instruction.

Under state law, a trial court's erroneous refusal of a defendant's proper instruction at a capital penalty trial requires reversal of the death judgment if there is a reasonable possibility that the failure to give the instruction affected the jury's verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 448-449.) When the error is a failure to give a defense-requested

---

69. The instruction at issue in *Monterroso* also contained one sentence regarding the jury's consideration of multiple special circumstances which was held to be an incorrect statement of law. (*People v. Monterroso*, *supra*, 34 Cal.4th at p. 789.) That sentence was not part of appellant's proposed instruction. (10 CT 3482.)

instruction on double-counting, this Court has often concluded that the error is not prejudicial because it is "unlikely" that jurors would actually double-count absent the prosecutor encouraging them to do so in his argument. (E.g., *People v. Chatman* (2006) 38 Cal.4th 344, 409; *People v. Melton*, *supra*, 44 Cal.3d at pp. 768-769.)

In the present case, however, the special circumstances were particularly susceptible to being improperly double-counted by the jury. Reasonable jurors would likely have considered the fact of killing a peace officer, in the course of a robbery and a burglary, as aggravating circumstances of the crime. They would then reasonably have followed the clear language of the instruction and give additional weight to the same fact as a special circumstance. Misleading argument by the prosecutor was not necessary for the jurors to make this mistake. [70] (See *Carter v. Kentucky* (1981) 450 U.S. 288, 304 [arguments of counsel were no substitute for an explicit instruction requested by the defense].) If the trial court had given appellant's proposed instruction, there is at least a reasonable possibility that one or more of the jurors would have returned a verdict of life without the possibility of parole. (See *People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

The error also violated appellant's federal constitutional rights to due process, a fair trial, and a reliable penalty determination under the Sixth, Eighth and Fourteenth Amendments to the federal Constitution. An

---

70. Moreover, when the standard criminal jury instructions were recently rewritten, the phrase "and the existence of" language in CALJIC No. 8.85 was deleted. The new form instruction, CALCRIM No. 763, describes factor (a) as: "The circumstances of the crime[s] that the defendant was convicted of in this case and any special circumstances that were found true." If the Judicial Council's Task Force on Criminal Jury Instructions believed that the phrase "and the existence of any special circumstances" meant "and any special circumstances," then it is likely that capital sentencing jurors would as well.

instruction, such as the one given here, which poses a risk that the capital sentencing jurors will double-count or overweigh aggravating factors may skew the weighing process and thereby "creates the risk that the death penalty will be imposed arbitrarily and thus, unconstitutionally." (*United States v. McCullah* (10th Cir. 1996) 76 F.3d 1087, 1111-1112.) Such a risk is unacceptable in a capital case. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 605 (plur. opn.).) Accordingly, the judgment of death must be reversed.

B. The Trial Court Erroneously Refused Appellant's Requested Instruction Seeking to Limit the Sentencing Jurors' Consideration of the Facts Used to Find First Degree Murder

The trial court also refused a penalty phase instruction proposed by appellant, Defense number 6, which sought to constrain the jurors' consideration and weighing of the facts underlying the first degree murder conviction:

> In deciding whether you should sentence the defendant to life imprisonment without the possibility of parole, or to death, you cannot consider as an aggravating factor any fact which was used by you in finding him guilty of murder in the first degree unless that fact establishes something in addition to an element of the crime of murder in the first degree. ¶ The fact that you have found Kevin Boyce guilty beyond a reasonable doubt of the crime of murder in the first degree and attendant special circumstances is not itself an aggravating circumstance.

(10 CT 3469.) The prosecutor argued that the instruction was confusing, that it conflicted with factor (a), and that "that's all covered by CALJIC [No.] 8.88." (11 RT 3863.) The trial court refused the instruction, stating: "I added vague and seems to conflict with some of the basic instructions." (11 RT 3863.)

The trial court's refusal to give appellant's proposed instruction violated his constitutional rights to a reliable sentencing determination, due process and a fair trial in violation of the Sixth, Eighth, and Fourteenth

Amendments to the federal Constitution.

In *People v. Moon* (2005) 37 Cal.4th 1, the defendant complained that the trial court's rejection of a defense-proposed instruction nearly identical to Defense 6 violated the Eighth and Fourteenth Amendments to the federal Constitution. On appeal, this Court noted that it had rejected the same argument in *People v. Earp* (1999) 20 Cal.4th 826, 900, in which it concluded that "section 190.3, factor (a) expressly permits the jury to consider at the penalty phase the circumstances of the crime and the existence of any special circumstances it finds true." (*Moon*, *supra* at p. 40.)

Pursuant to *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, appellant hereby raises this claim and requests that this Court reconsider the arguments raised in *Moon* and conclude that the failure to instruct the capital-sentencing jurors not to consider as an aggravating factor any fact that was used in finding the defendant guilty of murder in the first degree, unless that fact establishes something in addition to an element of the crime of murder in the first degree, posed a substantial risk that the jurors would double-count or overweigh aggravating circumstances under factor (a). Upon such reconsideration, appellant's death judgment must be reversed.

//

9. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURORS ON THE GENERAL PRINCIPLES OF LAW GOVERNING THE PENALTY PHASE AND ON THE DEFINITION OF "REASONABLE DOUBT" AS IT PERTAINED TO EVIDENCE OF OTHER CRIMES CONSIDERED DURING THE PENALTY PHASE

A. The Penalty Phase and the Trial Court's Instructions

At the penalty phase, the prosecution presented four victim-impact witnesses; documentary evidence of prior convictions (9 RT 3097-3098; Exhs. 81-82); and testimony concerning a prior act of violence (9 RT 3064-3088 [Damani Gray]; 9 RT 3089-3095 [Robert Jones]), an allegation that was vigorously contested by the defense through cross-examination, and by the presentation of two witnesses regarding Damani Gray's credibility. (9 RT 3123-3128 [Maria Gholizadeh]; 9 RT 3198-3203 [Andrew Monsue].) The defense presented testimony from numerous family members and others familiar with appellant's history; appellant's first-grade teacher; an investigator with the public defender's office; a minister; and testimony from an expert on gangs, a psychiatrist, a sociologist, and a psychologist. Several of the family members and the minister were subjected to brief cross-examination. (9 RT 3281-3282 [Tony Boyce]; 9 RT 3312 [Brenda Boyce]; 10 RT 3574-3575 [Reverend Barber].) The public defender investigator was cross-examined regarding an important aspect of appellant's early history. (9 RT 3369-3370 [John Depko].) Two of the experts were extensively cross-examined. (10 RT 3428-3438 [Alex Alonso]; 10 RT 3549-3561, 11 RT 3799-3807, 3817-3818 [Dr. Benson].) Also, the defense introduced a number of documentary exhibits. (E.g., Def. Exhs. NN-HHH.)

In its penalty instructions, the trial court directed the jurors to "[d]isregard all other instructions given to you in other phases of this trial." (10 CT 3441; 12 RT 4038-4039; CALJIC No. 8.84.1.) The court gave one general instruction, CALJIC No. 1.02, regarding statements of counsel,

stricken evidence, and insinuations of questions (10 CT 3433; 12 RT 4033-4034); two instructions regarding the evaluation of evidence, including CALJIC No. 2.20 [believability of witness] (10 CT 3434-3435; 12 RT 4034-4035); CALJIC No. 2.21.1 [discrepancies in testimony] (10 CT 3436; 12 RT 4036); two instructions regarding a defendant's right not to testify, CALJIC No. 2.60 (10 CT 3451; 12 RT 4047) and CALJIC No. 2.61 [defendant may rely on state of evidence] (10 CT 3452; 12 RT 4047-4048); and one instruction regarding expert testimony, CALJIC No. 2.80 (10 CT 3437; 12 RT 4036-4037).

B. The Trial Court Erred By Failing to Instruct the Jurors on All of the Principles of Law Necessary for the Jury's Understanding of the Case and of the Penalty Phase Decision

Under California law, capital sentencing jurors must be instructed on the general principles of law that are closely and openly connected with the facts and necessary for the jury's understanding of the case, even absent a request from the defendant. (*People v. Lewis* (2008) 43 Cal.4th 415, 534.) This sua sponte duty includes a duty to instruct capital sentencing jurors, inter alia, on the general principles relating to the evaluation of evidence. (*People v. Moon* (2005) 37 Cal.4th 1, 35; *People v. Benavides* (2005) 35 Cal.4th 69, 111-112; *People v. Daniels* (1991) 52 Cal.3d 815, 885.) This duty is clearly set forth in the Use Note to CALJIC No. 8.84.1, which states that the instruction "should be followed by all appropriate instructions beginning with CALJIC No. 1.01, concluding with CALJIC [No.] 8.88." (Use Note to CALJIC No. 8.84.1 (6th ed. 1996); see also *People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26.)

Here, at the penalty phase, both the prosecution and the defense presented testimonial and documentary evidence. Lay and expert witnesses were cross-examined and impeached; and, credibility was at issue. Moreover, the jury was instructed to consider all the evidence from the guilt phase. (10

CT 3441-3442; 12 RT 4038-4039.) Accordingly, the trial court was required to instruct the capital sentencing jurors with the following appropriate instructions:

CALJIC No. 1.01 [Instructions considered as a whole];

CALJIC No. 1.03 [Jurors forbidden independent investigation];

CALJIC No. 1.05 [Juror's use of notes];

CALJIC No. 2.00 [Direct and circumstantial evidence];

CALJIC No. 2.01 [Sufficiency of circumstantial evidence];

CALJIC No. 2.02 [Sufficiency of circumstantial evidence to prove specific intent or mental state];

CALJIC No. 2.03 [Consciousness of guilt -- falsehood];

CALJIC No. 2.11 [Production of all available evidence not required];

CALJIC No. 2.13 [Prior consistent or inconsistent statements as evidence];

CALJIC No. 2.21.2 [Witness willfully false];

CALJIC No. 2.22 [Weighing conflicting testimony];

CALJIC No. 2.27 [Sufficiency of testimony of one witness];

CALJIC No. 2.82 [Concerning hypothetical questions]; and

CALJIC No. 2.81 [Opinion testimony of lay witness].

The trial court's failure to give these instructions was error. (See *People v. Lewis*, *supra*, 43 Cal.4th at pp. 534-536 [trial court erred in failing to reinstruct the jury with applicable instructions regarding the evaluation of evidence]; *People v. Moon*, *supra*, 37 Cal.4th at pp. 36-37 [CALJIC Nos. 1.03, 2.00, 2.13, 2.27]; *People v. Carter* (2003) 30 Cal.4th 1166, 1219 [CALJIC No. 2.22]; *People v. Steele* (2002) 27 Cal.4th 1230, 1257.)

Defense counsel did not urge or otherwise cause the court to omit these instructions; thus, the error was not "invited" by the defense. (See *People*

v. Moon, *supra*, 37 Cal.4th at p. 37; *People v. Benavides*, *supra*, 35 Cal.4th at p. 111.)

Although many of these instructions were given at the guilt phase (9 CT 3086-3114), at the penalty phase the trial court explicitly instructed the jurors to "disregard" the guilt phase instructions:

> You will now be instructed as to all the law that applies to the penalty phase of this trial. You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.

(10 CT 3441; 12 RT 4038-4039.) [71] The jurors are presumed to have understood and faithfully followed the direction to disregard the guilt instructions. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1005; *People v. Mendoza* (2007) 42 Cal.4th 686, 699.) The plain meaning of the term "disregard" is to pay no attention. (See *People v. Estrada* (1995) 11 Cal.4th 568, 578 ["the word 'disregard' has been defined as describing the situation in which a lack of attention is 'intentional or willful'"].) Accordingly, the capital sentencing jurors in this case must be presumed to have paid no attention to the guilt phase instructions.

C. The Trial Court Erred by Failing to Instruct the Jurors on the Definition of the Phrase "Reasonable Doubt" As Used in Section 190.3, Factor (b)

Section 190.3, factor (b) sets forth as a capital sentencing factor "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Capital sentencing jurors must be instructed that they can consider evidence of other criminal activity only if they find "beyond a

---

71. Similarly, at the conclusion of the penalty phase instructions, the court stated: "[T]hat concludes the court's reading of the applicable instructions as to this phase of the trial." (12 RT 4050.)

reasonable doubt" that the defendant had engaged in such activity. (*People v. Benavides*, *supra*, 35 Cal.4th at pp. 112-113; *People v. Phillips* (1985) 41 Cal.3d 29, 65; *People v. Robertson* (1981) 33 Cal.3d 21, 53.)

Here, the prosecution's aggravating evidence under factor (b) included the evidence relating to the Lamppost Pizza robberies and the alleged assault on Damani Gray. (9 RT 3017-3019 [prosecution opening statement]; 12 RT 3899-3901 [prosecution closing argument].) The capital sentencing jurors were expressly instructed that evidence had been introduced for the purpose of showing that appellant committed those criminal acts, and were instructed that they could not consider evidence of other criminal activity unless proven beyond a reasonable doubt. (10 CT 3447; 12 RT 4043-4044; see also 10 CT 3452; 12 RT 4047-4048 [CALJIC No. 2.61].) However, the jurors were not instructed at the penalty phase on the definition of reasonable doubt, or the presumption of innocence. This was error: a trial court should instruct the jury on the definition of reasonable doubt at the penalty phase. (See *People v. Loker* (2008) 44 Cal.4th 691, 745; see also *People v. Howard* (2008) 42 Cal.4th 1000, 1026; *People v. Chatman* (2006) 38 Cal.4th 344, 407-408; § 1096.) [72]

D. The Trial Court's Errors Violated Appellant's Constitutional Rights

The trial court's errors violated appellant's rights under the federal and state constitutions. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.) Capital sentencing jurors must "be properly instructed

---

72. In *People v. Payton* (1992) 3 Cal.4th 1050, this Court held that failure to define reasonable doubt during the penalty phase of a trial was not error because the trial court instructed the jury that most of the guilt phase instructions continued to apply. (*Id.* at pp. 1068-1069; see also *People v. Rogers* (2006) 39 Cal.4th 826, 904-905.) In this case, however, as noted above, the jurors were specifically told that the instructions given in the guilt phase of the trial did not apply and to disregard those instructions.

regarding all facets of the sentencing process." (*People v. Visciotti* (1992) 2 Cal.4th 1, 74, quoting *Walton v. Arizona* (1990) 497 U.S. 639, 653; cf. *People v. Holt* (1997) 15 Cal.4th 619, 683.) Complete and accurate jury instructions are as critical at the penalty phase as they are at guilt: "It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (*Gregg v. Georgia* (1976) 428 U.S. 153, 193 (plur. opn. of Stewart, Powell & Stevens, JJ.).) States are free to "shape and structure" the jurors' consideration of mitigating evidence, so long as the jurors are not precluded from considering and giving effect to that evidence. (*Buchanan v. Angelone* (1998) 522 U.S. 269, 276.) But a state cannot utilize confusing instructions which insert "an element of capriciousness" into the jurors' deliberations and sentencing decision. (See *Penry v. Johnson* (2001) 532 U.S. 782, 800.) The Eighth and Fourteenth Amendments, and the analogous provisions of the California Constitution, require "procedural safeguards protecting against arbitrary and capricious impositions of the death sentence" (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341), and require that the procedures leading to a determination that death is the appropriate punishment in a specific case -- including jury instructions -- meet a heightened standard for reliability (see *Mills v. Maryland* (1988) 486 U.S. 367, 383-384; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305).

Here, the trial court's failure to fully instruct the jury on how to evaluate the evidence when determining whether appellant lived or died, and its failure to instruct on the meaning of beyond a reasonable doubt as used in factor (b), inserted an element of capriciousness into the jurors' deliberations and sentencing decision, failed to provide adequate procedural safeguards protecting against the arbitrary and capricious imposition of the death sentence, and failed to meet the constitutionally-required heightened standard for reliability in the procedures that led to the death determination. Those

errors denied appellant a fair and reliable capital sentencing determination, in violation of appellant's Eighth and Fourteenth Amendment rights, and the parallel provisions of the California Constitution.

Further, the trial court's failure to instruct the capital sentencing jurors on the definition of beyond a reasonable doubt violated appellant's right to a trial by jury under the state and federal constitutions. (*Apprendi v. New Jersey* (2000) 530 U.S. 466; 490; *Ring v. Arizona* (2002) 536 U.S. 584.) This Court has repeatedly rejected similar claims, concluding that *Apprendi* and its progeny have no application to the penalty phase procedures under California capital sentencing statutes. (See *People v. Loker*, *supra*, 44 Cal.4th at p. 744; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731.) Appellant respectfully requests that this Court reconsider those decisions. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.)

Finally, under California law, a defendant has a liberty interest under the Due Process Clause of the Fourteenth Amendment (see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 344-347; *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 969-970; *People v. Webster* (1991) 54 Cal.3d 411, 439), and a life interest under the Eighth and Fourteenth Amendments (see *Ohio Adult Parole Auth. v. Woodard* (1998) 523 U.S. 272, 288-289 (conc. opn. of O'Connor, J.)), in having the capital sentencing jurors accurately instructed on how to evaluate the evidence and on the consideration of aggravating factors, when determining whether the defendant lives or dies. The trial court's failure to do so violated appellant's rights to due process, as well as his rights to equal protection, a fair trial by an impartial jury, and a reliable death judgment. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 1, 7, 15, 16.)

E. <u>The Death Sentence Must Be Reversed</u>

Under the federal standard of review of constitutional error, the trial court's errors are prejudicial unless the state proves beyond a reasonable doubt

that the assumed error did not contribute to the death verdict; under state law, a failure to reinstruct the jury with evidentiary instructions in the penalty phase is prejudicial if there is a reasonable possibility that the error affected the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Carter*, *supra*, 30 Cal.4th at pp. 1221-122.)

In *People v. Moon*, *supra*, 37 Cal.4th 1, this Court examined "the nature of the evidence presented to determine whether it was likely that omitted instructions affected the jury's evaluation of the evidence." (*Id.* at p. 38.) In reaching its conclusion that the failure to reinstruct the jury with any applicable guilt phase instructions was harmless, this Court found significant that the prosecution called no witnesses and relied principally on the circumstances of the crime as shown by the guilt phase evidence, that the defense case in mitigation consisted of only six lay witnesses who attested generally to the defendant's good nature and lack of prior acts of violence, and that none of these six witnesses was vigorously cross-examined by the prosecutor. No defense witness was impeached, and all spoke from personal knowledge of the defendant. Neither side presented any circumstantial evidence, and no evidence was admitted for a limited purpose. (*Id.* at pp. 38-39.)

This case bears little resemblance to *Moon*. The prosecution here called witnesses to substantiate the Damani Gray incident; cross-examined numerous witnesses; and called into question the credibility and reliability of testimony by defense expert and lay witnesses. The omitted instructions -- particularly those regarding circumstantial evidence, the weighing of conflicting testimony, and hypothetical questions -- were necessary for the jury's full understanding of the evidence and the defense's case for life.

With regard to the failure to instruct on the definition of beyond a reasonable doubt, under California law the jury must determine the truth of

"other crime" evidence brought under factor (b) beyond a reasonable doubt. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54.) This determination is required by due process and is especially important in the penalty phase of a capital trial in order to guarantee that the Eighth Amendment's requirement for heightened reliability has been met. (See *Ford v. Wainwright* (1986) 477 U.S. 399, 411, 414.)

The definition of reasonable doubt is a term of art that can be easily misunderstood by jurors. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 23 (conc. opn. of Kennedy, J.); *People v. Brigham* (1979) 25 Cal.3d 283, 315 (conc. opn. of Mosk, J.).) The trial court here failed to ensure that the jurors understood the definition of reasonable doubt or would apply it to their penalty deliberations. In such circumstances, this Court cannot assume that each and every one of the capital sentencing jurors decided aggravating factor (b) based upon the correct standard of proof.

Although the capital crime was serious, the mitigating evidence was especially strong. The defense presented clear, convincing, and unrebutted evidence of appellant's mental retardation, brain damage, and severe mental illness. The evidence showed that appellant had speech and learning disabilities from a very early age. He was raised by an alcoholic mother who did not believe in and neglected appellant's medical needs, did not inform appellant that his stepfather was not his biological father until appellant was approximately 13-years old, and withheld him from organized sports because of a fear of injury. As a child, appellant's family changed residences numerous times, and he was ultimately raised in gang-infested, south central Los Angeles. In these circumstances, there is at least a reasonable possibility that the errors identified above affected at least one juror's consideration and weighing of the evidence. Accordingly, appellant's death sentence must be reversed.

//

10. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS SENTENCING OF APPELLANT ON THE NONCAPITAL COUNTS AND THE GUN-USE ENHANCEMENTS

A. Procedural and Factual Background

At sentencing, the trial court denied appellant's motion to modify the death verdict, reviewed the probation report, and heard victim impact statements (12 RT 4071-4115). The probation report lists one "circumstance in aggravation" regarding the crimes (that they "involved great violence, great bodily harm, threat of great bodily harm and other acts disclosing a high degree of cruelty, viciousness or callousness"); and several circumstances in aggravation regarding appellant (he had engaged in violent conduct which "indicated a serious danger to society"; his prior convictions were "numerous and of increasing seriousness"; he had served three prior prison terms, and was on parole when the capital crime was committed; and, his "prior performance on probation and parole was unsatisfactory").

The trial court sentenced appellant to death on count 1. (12 RT 4078-4079, 4120-4121) With respect to counts 2-11, the noncapital counts, and the gun- use enhancements associated with each of those counts, the court sentenced appellant as follows. With respect to count 2, a conviction for the second degree robbery of Jennifer Parish, the court sentenced appellant to the upper term of five years. The sole reason given by the court for the selection of that term was the "vulnerability of the victims [*sic*]." (12 RT 4121; see also 11 CT 3659 [abstract of judgment].) With respect to the gun-use enhancement found true as to count 2, the court also imposed the upper term of ten years. [73] The sole reason for the selection of the upper term on the

---

73. The sentencing minute order prepared by the clerk is inconsistent with the trial court's oral pronouncement of judgment on this point. The former states that the upper term for the gun-use enhancement was imposed with

Footnote continued on next page . . .

enhancement was, again, the vulnerability of the victims." (12 RT 4121.)

On counts 3-11, the court imposed one-third of the mid-term for the substantive counts, and one-third of the mid-term for each associated gun-use enhancement. (12 RT 4121-4123.) [74] The court calculated the total determinate sentencing term "to be served consecutive" as 34 years, four months. (12 RT 4123; see also 11 CT 3659-3661 [abstract of judgment].)

At the conclusion of the sentencing, the trial court stayed the "additional years of imprisonment":

> [T]he court specifically orders that the service of the additional years of imprisonment on counts II through XI be stayed and not served by the defendant because of the fact that the court relied on the facts underlying these offenses to deny the motion to modify the death penalty. Said stay shall be during the pendency of the appeal on count I and shall become permanent when the sentence on count I is completed.

(12 RT 4123.) The abstract of judgment shows that all of the gun-use enhancements were stayed, but does not reflect that the substantive counts were stayed. (11 CT 3659-3661.)

---

regard to the enhancement associated with count 1. (11 CT 3653.) The latter controls, however: Where a discrepancy exists between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

74. The court summarized its sentencing on counts 3-11:

> With respect to counts III through XI all being subordinate to count II, one-third of the three-year midterm of the robberies, an additional one year. One-third of the gun enhancement of four years is an additional one year four months, all to be served consecutive to count II.

(12 RT 4121-4122.)

B. The Trial Court's Imposition of the Upper Term for Count 2 and the Upper Term for the Gun-use Enhancement Associated with That Count Violated Appellant's Constitutional Rights

The noncapital sentences imposed on appellant -- for robbery, attempted robbery, burglary, and the gun-use enhancements -- were each subject to determinate sentencing under California law. (See §§ 213, subd. (a); 461; 1170, subds. (a) & (b); 12022.5, subd. (a).) [75] At the time of appellant's sentencing in 2000, the determinate sentencing scheme prescribed three terms of imprisonment. That scheme directed a trial court "to start with the middle term, and to move from that term only when the court finds itself and places on the record facts-whether related to the offense or the offender-beyond the elements of the charged offense." (*People v. Black* (2007) 41 Cal.4th 799, 808, quoting *Cunningham v. California* (2007) 549 U.S. 270, 279.) Those sentencing facts "need be proved only by a preponderance of the evidence." (*People v. Sandoval* (2007) 41 Cal.4th 825, 836.)

That scheme, by permitting a judge to impose an elevated "upper term" sentence on a preponderance of the evidence standard, violates the Sixth and Fourteenth Amendments. Any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Ring v. Arizona* (2002) 536 U.S. 584, 588-589, 602; *Blakely v. Washington* (2004) 542 US. 296, 301-305; *United States v. Booker* (2005) 543 U.S.

---

75. In response to the high court's decision in *Cunningham v. California* (2007) 549 U.S. 270, discussed *post*, the Legislature amended section 1170, subdivision (b), effective March 30, 2007. (See *People v. Sandoval*, *supra*, 41 Cal.4th at p. 836, fn. 2.) Unless otherwise noted, all references herein are to the statutes and rules in effect under the former determinate sentencing scheme.

220, 230-232.) In *Cunningham v. California*, *supra*, 549 U.S. 270, the high court applied that rule to California's then-operative determinate sentencing scheme, and concluded that the facts permitting imposition of an elevated "upper term" sentence for a particular crime fell within the jury's province. (*Id.* at p. 292.) Accordingly, the high court held, that scheme "cannot withstand measurement against our Sixth Amendment precedent." (*Id.* at p. 293.) [76]

Thus, appellant had a right under the Sixth and Fourteenth Amendments to have a jury determine beyond a reasonable doubt any aggravating fact or factor used to impose an upper term. That right was violated when the trial court imposed the upper term on count 2 and the upper term on the associated gun-use enhancement, based on a fact not found unanimously by a jury and not subject to the beyond a reasonable doubt standard (that the victim was vulnerable). (*Cunningham v. California*, *supra*, 549 U.S. at pp. 292-293; see also *People v. Miller* (2008) 164 Cal.App.4th 653, 669 [upper term sentence based on particular vulnerability of the victim violated *Cunningham*].)

Shortly after *Cunningham* was decided, this Court, in *People v. Black*, *supra*, 41 Cal.4th 799, held that the imposition of an upper term does not violate a defendant's Sixth Amendment rights "so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Id.* at p. 816.)

Appellant does not concede that this Court's decision in *People v. Black* sufficed to bring California's prior determinate sentencing scheme into compliance with *Cunningham*. (See generally Note, *California's Determinate*

---

76. *Cunningham* "applies retroactively to any case in which the judgment was not final at the time the decision in *Blakely* was issued." (*In re Gomez* (2009) 45 Cal.4th 650, 658.)

Sentencing Law: How California Got It Wrong . . . Twice (2008) 12 Chap. L.Rev. 87.) But even assuming that it did, the exceptions identified in *Black* do not apply here. First, the trial court relied solely upon the vulnerability of the victim in imposing the upper term; it did not refer to or rely upon any other determinate sentencing aggravating circumstance. Possible aggravating circumstances that are neither mentioned nor relied upon by the trial court cannot be relied upon by a reviewing court to "save" a constitutionally defective sentence. (See *People v. Cardenas* (2007) 155 Cal.App.4th 1468, 1480-1481.) Second, the defense made no specific admission that the victim was "particularly vulnerable." Indeed, the probation report in this case does not list the particular vulnerability of the victim as a circumstance in aggravation. (11 CT 3650-3651.) Third, no independent, valid, and applicable determinate sentencing aggravating circumstance was found unanimously and beyond a reasonable doubt by the jury. [77]

Accordingly, the trial court's imposition of the upper term for count 2 and the upper term for the gun-use enhancement associated with that count violated appellant's constitutional rights.

C. The Trial Court's Reliance on the Vulnerability of the Victim to Impose the Upper Term for Count 2 and the Upper Term for the Gun-use Enhancement Associated with that Count Was Improper

The trial court relied on a single aggravating circumstance -- the vulnerability of the victims -- to justify both the upper term for the conviction for robbery in count 2, and for the imposition of the upper term for the gun-use enhancement related to that count. The court's reliance on that

---

77. The amended information alleged that appellant had suffered several prior convictions. (7 CT 2102.) However, the prosecution moved to dismiss those allegations, and that motion was granted. (12 RT 4059-4060; 10 CT 3572-3573.)

sentencing factor was improper.

First, a trial court may not use the same putative fact both to impose an upper term on a base count and an upper term on the enhancement. (See *People v. Coleman* (1989) 48 Cal.3d 112, 164-165; *People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1516, fn. 12.)

Second, the trial court's reliance on the "vulnerability of the victims" was improper. California Rules of Court, rule 4.421(a)(3) provides that, as a circumstance in aggravation, the fact that the victim was "particularly vulnerable" can support the imposition of an upper term. (See *People v. Clark* (1990) 50 Cal.3d 583, 637; *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1007.) [78] To support this sentencing factor, it is not sufficient that the victim be simply "vulnerable," meaning "defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act." (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1314, internal quotation marks omitted.) Instead, the victim must be "particularly" vulnerable, meaning that he is vulnerable to a "'special or unusual degree, to an extent greater than in other cases.'" (*People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1007, quoting *People v. Smith* (1979) 94 Cal.App.3d 433, 436; see also *Butler v. Curry* (9th Cir. 2008) 528 F.3d 624, 649-650.)

The victim of the robbery alleged and found true in count 2, Jennifer Parish, was undoubtedly vulnerable. But there was no evidence that she was "particularly" so in the sense intended by the determinate sentencing aggravating circumstance. Nor did the court cite to any such evidence. Therefore, the trial court's reliance on that aggravating circumstance to impose the upper term for count 2 and the upper term for the gun-use

---

78. The California Rules of Court related to sentencing were amended subsequent to the Legislature's amendment of the determinate sentencing scheme in March 2007. (See *People v. Black*, *supra*, 41 Cal.4th at p. 808, fn. 2.)

enhancement associated with that count was improper.

D. The Trial Court Erred in Imposing Consecutive Sentences

In *Oregon v. Ice* (2009) __ U.S. __, 129 S.Ct. 711, the high court addressed whether the Sixth Amendment prohibits the assignment to judges, rather than to juries, the finding of facts necessary for the imposition of consecutive sentences for multiple offenses. Under the Oregon sentencing scheme under review in *Ice*, the trial court is granted the discretion to impose consecutive sentences once it has made "certain predicate fact findings" (e.g., that two burglaries constituted separate incidents resulting in separate harm). (*Id.* at p. 715.) The high court, in a 5-4 decision, held that "the Sixth Amendment does not exclude Oregon's choice." (*Id.* at pp. 714-715.) [79]

Prior to *Ice*, in *People v. Black*, *supra*, 41 Cal.4th 799, this Court held that the imposition of consecutive terms did not implicate the Sixth Amendment because:

> In deciding whether to impose consecutive terms, the trial court may consider aggravating and mitigating factors, but there is no requirement that, in order to justify the imposition of consecutive terms, the court find that an aggravating circumstance exists. [Citations.] Factual findings are not required.

(*Id.* at p. 822.) However, the imposition of consecutive sentences is subject to limitations under California law. In particular, a trial court must give adequate reasons for its sentencing choices, including the decision to impose consecutive sentences. (See *People v. Belmontes* (1983) 34 Cal.3d 335, 346-349; *People v. Tillotson* (2007) 157 Cal.App.4th 517, 545 see also § 1170, subd. (c); Cal. Rules of Court, rule 4.406(b)(5).) In this case, the trial court gave no reason for its decision to impose consecutive sentences. The trial court erred

---

79. Justice Scalia, dissenting in *Ice*, trenchantly decried the majority's flawed reasoning and "its repeated exhumation of arguments dead and buried by prior cases[.]" (*Oregon v. Ice*, *supra*, 129 S.Ct. at pp. 722-723.)

in failing to do so.

To the extent that the trial court may have relied on the vulnerability of the victims to impose consecutive sentences, it also erred. A trial court "cannot rely on the same fact to impose both the upper term and a consecutive sentence." (*People v. Scott* (1994) 9 Cal.4th 331, 350, fn. 12; see also *People v. Stitely* (2005) 35 Cal.4th 514, 575; *People v. Osband* (1996) 13 Cal.4th 622, 728; Cal. Rules of Court, rule 4.425(b).)

The trial court's failure to articulate valid reasons for its decision to impose consecutive sentences was error.

E. The Abstract of Judgment Must Be Amended to Reflect that the Court Stayed the Substantive Counts

As noted above, in its oral pronouncement of judgment, the trial court ordered that the "additional years of imprisonment on counts II through XI" be stayed "because of the fact that the court relied on the facts underlying these offenses to deny the motion to modify the death penalty." (12 RT 4123.) The clerk's sentencing minute order is consistent with the court's oral pronouncement: it provides that each of the substantive counts and the associated gun-use enhancements is "stayed pending successful completion of sentence on count 1, then permanently stayed." (11 CT 3653-3656.) The abstract of judgment, however, shows that each of the gun-use enhancements was stayed, but does not reflect that the substantive counts were stayed. (11 CT 3659-3661.) The abstract must be corrected to conform to the court's oral pronouncement of judgment.

F. The Errors Were Prejudicial and Require a Remand for Resentencing

The United States Supreme Court has held that the failure to submit a sentencing factor to the jury is not structural error, but instead is subject to the standard of review for federal constitutional error set forth in *Chapman v. California* (1967) 386 U.S. 18. (*Washington v. Recuenco* (2006) 548 U.S. 212, 218,

222.) Under that standard, the state bears the burden of proving beyond a reasonable doubt that the error was harmless. (*Chapman*, at p. 24.)

In *People v. Sandoval*, *supra*, 41 Cal.4th 825, this Court stated that *Cunningham* error may be harmless if the reviewing court concludes "that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury . . . ." (*Id.* at p. 839; see also; *People v. Wilson* (2008) 44 Cal.4th 758, 812-813; *People v. French* (2008) 43 Cal.4th 36, 53.) Assuming, without conceding, that this view of federal law is correct, the error is not harmless. As set forth above, the probation report lists a number of other possible aggravating circumstances under the determinate sentencing scheme. As argued above, however, the errors cannot be rendered harmless thereby because the trial court did not refer to or rely upon those other possible aggravating circumstances. As stated by the court in *People v. Cardenas*, *supra*, 155 Cal.App.4th 1468:

> It is not for the appellate court to conjure the reasons the trial court could have recited to support its sentencing decision from the many options listed in the statutes and court rules. We review the trial court's reasons-we don't make them up.

(*Id.* at p. 1483.)

Nor can the defective sentences be saved by reference to Evidence Code section 664 ("It is presumed that official duty has been regularly performed") combined with California Rules of Court, rule 4.409 ("Relevant criteria enumerated in these rules must be considered by the sentencing judge, and will be deemed to have been considered unless the record affirmatively reflects otherwise."). The question here is not whether the trial court "considered" other aggravating circumstances that might be present in the probation report. Instead, the question is whether the court "relied" on any of those other circumstances in making its sentencing decision. The record

here shows that the court relied solely upon one aggravating circumstance: the vulnerability of the victim.

Appellant had a state-created liberty interest in being sentenced in conformity with state law. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346). "A defendant has a legitimate interest in the character of the procedure which leads to the imposition of the sentence." (*Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 969-970, citing *Gardner v. Florida* (1977) 430 U.S. 349, 358.) The errors identified herein violated that right and, accordingly, violated appellant's right to due process.

In these circumstances, this Court cannot conclude beyond a reasonable doubt that the errors were harmless. Accordingly, as in *People v. Sandoval*, *supra*, 41 Cal.4th at pages 843-846, the imposition of the upper term sentence on count two and the associated gun-use enhancement, and the imposition of consecutive sentences, must be reversed, and the case remanded to the trial court for resentencing in a manner consistent with state and federal law.

//

11. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital-sentencing scheme violate the United States Constitution. Appellant requested modified instructions to remedy some of these defects, but most of his requests were denied. (10 CT 3458-3484; 11 RT 3848-3884).) This Court consistently has rejected cogently-phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing. [80]

A. Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn.

---

80. These claims of error are cognizable on appeal under section 1259, even when appellant did not seek the specific instruction or raise the precise claim asserted here.

of White, J.).) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offenses charged against appellant, section 190.2 contained approximately 21 special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider Stanley and strike down section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3, Subdivision (a) Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 10 CT 3442-3444; 12 RT 4039-4042).) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts that cover the entire spectrum of circumstances inevitably present in every homicide: facts such as the victim's age, defendant's age, motive for the killing, and method, time, and location of the killing. In this case, the prosecutor relied on the method of killing and appellant's alleged motive as aggravating factors. (12 RT 3943-3947.)

This Court has never applied any limiting construction to factor (a).

(*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death on no basis other than that the particular set of circumstances surrounding the crime were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant urges the court to reconsider this holding. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not

"susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (CALJIC No. 8.88; 10 CT 3453-3454; 12 RT 4048-4050.) Indeed, the prosecutor, at his penalty phase closing argument, categorically informed the jurors that "[i]n the penalty phase, there is no burden of proof." (12 RT 3899.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Ring v. Arizona* (2002) 536 U.S. 584, 604, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Cunningham v. California* (2007) 549 U.S. 270, now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. To impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 10 CT 3453-3454; 12 RT 4048-4050).) Because these additional findings were required before the jury could impose the death sentence, *Apprendi*, *Ring*, *Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) The Court has rejected the argument that *Apprendi* and *Ring* impose a reasonable

doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has previously rejected appellant's claim that the Due Process Clause and the Eighth Amendment each requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

2. <u>Some burden of proof is required, or the jury should have been instructed that there was no burden of proof</u>

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state law expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the state had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an

appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (10 CT 3442-3444; 12 RT 4039-4042; 10 CT 3453-3454; 12 RT 4048-4050), fail to provide the jury with the guidance required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's death verdict was not premised on unanimous jury findings

a. Aggravating factors

To impose a death sentence, when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty, violates the Sixth, Eighth, and Fourteenth Amendments. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by

statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) This Court reaffirmed this holding after the high court's decision in *Ring v. Arizona*, *supra*. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal

Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

b. Unadjudicated criminal activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required (CALJIC No. 8.87; 10 CT 3447; 12 RT 4044-4045), and the prosecutor, at closing argument, stressed that "[y]ou don't have to all agree on [factor (b)]." (12 RT 3900.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-586, 590 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 584-585.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant, the Damini Gray incident (9 RT 3064-3066, 3086-3088, 3089-3095), and devoted a considerable portion of its closing argument to the alleged offense (12 RT 3899-3902).

The United States Supreme Court's recent decisions in *Cunningham v. California*, *supra*, 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and

the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

4. The instructions caused the penalty determination to turn on an impermissibly vague and ambiguous standard

Whether to impose the death penalty on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; 10 CT 3453-3454; 12 RT 4048-4050.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362; see also Arg. 7, *ante*.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The instructions failed to inform the jury that the central determination is whether death is the appropriate punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence

"warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

6. The instructions failed to inform the jurors that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole

Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is

unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. <u>The penalty jury should be instructed on the presumption of life</u>

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See generally Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272, 278-280.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and his right to the equal protection of the laws. (U.S. Const. 14th Amend.)

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an

instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) Nevertheless, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require that the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The use of restrictive adjectives in the list of potential mitigating factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see CALJIC No. 8.85; § 190.3, factors (d) and (g); 10 CT 3442-3444; 12 RT 4040-4041) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio*, *supra*,

438 U.S. at p. 604; see also Arg. 7, *ante*.) Appellant is aware that the Court has rejected this argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The failure to delete inapplicable sentencing factors

Several of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case: factors (e), (f) and (g). The trial court failed to omit those factors from the jury instructions (CALJIC No. 8.85; 10 CT 3442-3444; 12 RT 4040-4042), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

3. The failure to instruct that statutory mitigating factors were relevant solely as potential mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending on the jury's appraisal of the evidence. (10 CT 3442-3444; 12 RT 4039-4042.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.)

As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 -- factors (d), (e), (f), (g), (h), and (j) -- were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital

sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

F. The Prohibition Against Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the court to reconsider its failure to require inter-case proportionality review in capital cases. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence,

and the sentencer must set forth reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.406.) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any findings to justify the defendant's sentence. Appellant acknowledges that the court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the court to reconsider that conclusion. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the court to reconsider its previous decisions.

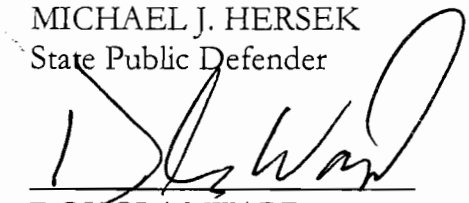
//

CONCLUSION

For all of the reasons stated above and in appellant's opening brief, the convictions and death sentence in this case must be reversed.

DATED: May 17, 2010.

MICHAEL J. HERSEK
State Public Defender



DOUGLAS WARD
Deputy State Public Defender
Cal. State Bar No. 133360

221 Main Street, Suite 1000
San Francisco, California 94105
Phone (415) 904-5600

Attorneys for Appellant
KEVIN BOYCE

CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to California Rules of Court, rule 8.630(b)(2), I hereby certify that I have verified, through the use of our word processing software, that this brief, excluding the tables, contains approximately 66,000 words.

DATED: May 17, 2010.

DOUGLAS WARD
Deputy State Public Defender

Attorney for Appellant
KEVIN BOYCE

DECLARATION OF SERVICE

Re: People v. Boyce, No. S092240

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

APPELLANT'S OPENING BRIEF

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

The Honorable Edmund G. Brown
Attorney General of the State of California
110 W. "A" Street, Suite 1100
San Diego, California 92101

Mr. Kevin Boyce
P.O. Box J-43178
Tamal, California 94974

Orange County District Attorney
Attn: David Brent, Esq.
401 Civic Center Drive
Santa Ana, California 92701

Clerk of Court
Orange County Superior Court
Department C-35
700 Civic Center Drive West
Santa Ana, California 92702

Each said envelope was then, on May 17, 2010, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on May 17, 2010, at San Francisco, California.

Neva Wandersee