IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSEPH ANDREW PEREZ, JR. Defendant and Appellant.	**S104144** **Automatic Appeal** **(Capital case)** **Contra Costa Co.** **Superior Court** **No. 990453-3**

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Contra Costa

HONORABLE PETER L. SPINETTA, JUDGE

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DEATH PENALTY

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death made directly to this Court pursuant to Penal Code Section 1239.[1]

STATEMENT OF THE CASE

This case arises from a homicide that occurred on March 24, 1998 in Lafayette, California, in which the victim Janet Daher was killed in the course of an alleged residential burglary. Grand jury proceedings against appellant

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

and co-defendants Lee Snyder and Maury O'Brien commenced on March 23, 1999. (1 RT 100.)[2] There were four charges in the initial draft indictment: murder; residential robbery; residential burglary; and the theft of the victim's vehicle. (1 RT 431; 3 CT 768-769.) The grand jury voted to indite appellant, Snyder and O'Brien on these charges and it was found to be a True Bill. (1 RT 478-480.) Prosecutor Paul Sequeira amended the indictment to add a prior enhancement, a prior strike under Penal Code Section 1170.12, and a prison prior for appellant. (1 RT 480; 3 CT 774-775.) Contra Costa Superior Court proceedings commenced on March 26, 1999. (3 RT 487.) Appellant Perez, Lee Snyder and Maury O'Brien were charged by the grand jury indictment with murder, a violation of Penal Code Section 187, that on or about March 24, 1998 they murdered Janet Daher. (9 RT 2027.) The special circumstances allegations, pursuant to Penal Code Section 190.2(A)(17), were that the murder was committed while they were engaged in the commission of robbery and a burglary. (9 RT 2028.) Count Two charged a violation of Penal Code Section 211/212.5(A), first degree residential robbery, by taking personal property from Ms. Daher. (*Id.*) Count Three charged a violation of Penal Code Section 459/460(A), first degree residential burglary, by entering an inhabited building

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[2] "RT" designates the Reporter's Transcript in these proceedings, "CT" designates the Clerk's Transcript, and "JQ" the Juror Questionnaires, with the volume number preceding the page number.

at 1253 Rose Lane in Lafayette, California, with the intent to commit larceny and a felony. (9 RT 2029.) Count Four charged them with a violation of Vehicle Code Section 10851(A), the unlawful driving or taking of a vehicle belonging to the victim. (*Id.*) The indictment was signed by the foreman of the grand jury and Paul Sequeira, prosecuting deputy district attorney, and dated March 24, 1999. (9 RT 2030; 3 CT 768-769.)

Appellant was found to be indigent. Representing him at trial were appointed counsel William Egan of the Contra Costa County Public Defender's Office and appointed private counsel Linda Epley as second chair. (*Id.*) Paul Sequeira of the Contra Costa County District Attorney's Office represented the State. Appellant entered a plea of not guilty. (3 RT 488-489.) The cases of Snyder, O'Brien and appellant were later severed. (3 RT 584.)

Jury selection began on September 12, 2001. (6 RT 1195.) Testimony in appellant's trial began on September 20, 2001, in Contra Costa County Superior Court, Hon. Peter L. Spinetta presiding. (9 RT 2007.) On October 16, 2001, appellant was found guilty on all counts: Count 1, murder, in violation of Penal Code Section 187; Count 2, the murder was committed while engaged in a robbery, a violation of Penal Code Section 211; Count 3, first degree burglary, a violation of Penal Code Section 459 and 460; and Count 4, taking of a vehicle in violation of Vehicle Code Section 10851. (15

RT 3688-3689.)

The penalty phase commenced on October 29, 2001 (16 RT 3813) and on November 16, 2001, the jury reached a verdict of death. (24 RT 5540; 5 CT 1920-1922.) On January 25, 2002, a motion for a new trial was denied. (24 RT 5586.) A defense application for modification of the death sentence was also denied. (24 RT 5595.) The court found that the aggravating factors outweighed the mitigating ones and the defendant had shown "no sense of wrongdoing or remorse." (24 RT 5596.)

Appellant was sentenced on Count 1, murder in the commission of robbery; Count 2, first degree residential burglary; Count 3, residential burglary; Count 4, vehicle theft. (24 RT 5601.) The sentences were stayed on Counts 2 and 3; six years were imposed for burglary, four years on robbery, which was stayed, two years on vehicle theft, also stayed; and death was imposed for the Count 1 murder. (24 RT 5605.) Appellant was then formally sentenced to death on January 25, 2002. (24 RT 5618.)

On February 9, 2007, undersigned counsel was appointed by the Supreme Court of California to represent appellant in his automatic direct appeal proceedings. The certified record on appeal was filed in this Court on February 27, 2007 and, after record correction and augmentation proceedings, the record was certified as accurate on August 13, 2009 by the superior court.

On May 28, 2010, portions of the record were returned to the superior court for corrections. The superior court returned the corrected record to this Court but certain transcripts were again returned to the superior court for further corrections on July 12, 2010. Those corrections were made and these portions of the record were then returned to this Court on July 26, 2010. Portions of the record were again returned to the superior court for additional corrections on September 8, 2010. The corrected portion of the record on appeal was then returned to this Court on September 29, 2010. On October 6, 2010, a portion of the record was once again returned to the superior court for further corrections. The corrected portion of the record on appeal was returned to this Court on October 14, 2010.

The final record on appeal was filed in this Court on October 15, 2010.

STATEMENT OF FACTS

1) Guilt-innocence phase of the trial: the State's case.

a) The crime.

Testimony in appellant's trial began on September 20, 2001, in Contra Costa County Superior Court. (9 RT 2007.)

Joe Daher, the husband of the victim, lived at 1253 Rose Lane in Lafayette, California in March of 1998, with his wife Janet and two daughters, Lauren and Annie. (9 RT 2059.)[3] On March 24, 1998, he was called for jury duty in Walnut Creek and was released about 9:30 or 10 a.m. He returned home, where his wife was in the kitchen, and went upstairs to his home office. (9 RT 2061.) Mr. Daher ate lunch and then left around 2 p.m. to attend his daughter Lauren's softball game at Grenada High School in Livermore. (9 RT 2062.)

He returned from the game around dinnertime and on the way home he received a call from his other daughter Annie. She was concerned because she

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[3] Before trial, the prosecution revealed that Mr. Daher was having an affair with another woman at the time of his wife's murder. (5 RT 1185.) Although this woman was an initial suspect, nothing allegedly came of the investigation and the prosecutor represented to the court that it was "pretty clear" that neither this woman nor Mr. Daher were involved in the murder. (5 RT 1185-1186.) The court ordered no references be made to this relationship at trial without the parties first approaching the bench. (5 RT 1186.)

had not been picked up from school, had found her mother's purse on the floor of their house, and didn't know where she was. (9 RT 2064-2065.) Annie had called the police. (*Id.*) When Mr. Daher arrived at his house, policemen were present and he was not allowed to enter. (9 RT 2066.)

Three days later, Mr. Daher attended a walk-through of the house and supplied the police with a list of missing items. (9 RT 2068.) His wife owned a Mercedes SUV which was not in the garage. (9 RT 2073.) Janet Daher's purse was on the floor of the family room and the upstairs office had been ransacked and things were also strewn about in the master bedroom upstairs. (9 RT 2073-2076.) One of the stereo pieces had been removed from the armoire, the cords were pulled out, and one of the speakers had been ripped from the wall. (9 RT 2079.) The less valuable jewelry was kept in the master bedroom closet. (9 RT 2078, 2081-2089.) Most of the Daher's valuable jewelry was kept in the kitchen pantry in a plastic lunch pail which was recovered and identified. (9 RT 2084, 2108.) A diamond ring worth about $20,000 and anniversary rings worth several thousand dollars were missing. (9 RT 2090-2091.) All together, the missing items were worth $40,000 or more. (9 RT 2092, 2097.)

Annie Daher, the 16-year-old daughter of the victim, testified that she lived at 1253 Rose Lane in Lafayette on March 24, 1998. (9 RT 2100.)

Usually she was picked up after school by her mother at a restaurant, where she was to be met at 3 p.m. that day. (9 RT 2101.) When Annie arrived at the restaurant, her mother was not there so she called home between 3:15 and 3:30 and left a message. (9 RT 2102.) At about 4:30 p.m., she decided to walk home, which took between a half hour and forty-five minutes. (9 RT 2103.) She made herself a snack and then watched TV and did a little homework. (9 RT 2104.) She eventually called the police and they said they had found her mother's car in Fairfield. (9 RT 2107.) The police arrived after 6 p.m. and went upstairs. (9 RT 2107.)

Dr. Brian Peterson, a forensic pathologist, testified regarding the autopsy performed on Janet Daher on March 26, 1998. (13 RT 3001.) There was evidence of ligature strangulation accomplished by a phone cord. (13 RT 3007.) In his opinion, death was caused by a combination of ligature strangulation and stabbing. (13 RT 3021.) There was no way to tell if Mrs. Daher was conscious or unconscious when she was stabbed. (13 RT 3025.)

b) Aftermath of the crime, recovery of the victim's vehicle, and the investigation.

Richard Solback was an employee of Solano County Roofing Company in Fairfield and on March 24, 1998, he was at work. (10 RT 2268-2270.) Around 4:30 or 5 p.m. he noticed a car in the yard up against the fence as if someone was trying to conceal it. (10 RT 2271.) Mr. Solback called the

police and they eventually arrived. (10 RT 2272.) Later, the police found out that the owner, a lady, was dead. (10 RT 2274.) As he left the yard, Mr. Solback saw three people, who he could not identify, walking toward Cordelia Road. (10 RT 2277.)

Officer Martin Randal Kauffman, of the Fairfield Police Department, was working on March 24, 1998, patrolling the Cordelia Road area. (10 RT 2286.) He was flagged down by Mr. Solback near the Solano County Roofing Company lot. (10 RT 2287.) The officer was shown the Mercedes which was parked near a fence where it couldn't be seen from the road. (10 RT 2288.) Later, contact was made with the owner's daughter and information was received that the vehicle may have been stolen in a homicide. (10 RT 2290.)

Sgt. Michael Fisher, an officer with the Contra Costa Sheriff's Department, testified that on March 24, 1998 at 6:41 p.m. he was asked to do a welfare check on the owner of a vehicle. (9 RT 2185.) A Mercedes SUV had been found near a roofing business, the keys were in the ignition and the doors were open. (9 RT 2185.) The officer was asked to check with the registered owner, the Dahers, and he arrived at their residence at 6:56 p.m. (9 RT 2186.) The garage door was open. (*Id.*)

The victim's daughter, Annie Daher, had earlier called the police, as she did not know where her mother was and she had found her purse in the home.

(9 RT 2187.) The officer noticed that the purse looked like it had been forced open and the contents were strewn about. (9 RT 2187.) The officer went up the main staircase and searched upstairs. (9 RT 2190.) In every room, the closets were open, drawers were pulled out and clothes were strewn on the floor. (*Id.*) In the master bedroom, he found Mrs. Daher lying on the floor face down with her hands tied behind her back with a phone cord. (9 RT 2191.)

John Nelson, a criminologist with the Contra Costa Sheriff's Department, responded to the crime scene at the Solano County Roofing Company and arrived at about 9:45 p.m. on March 24, 1998. (10 RT 2299.) He attempted to obtain fingerprint evidence from various items in the vehicle: a soda can, a wallet-sized photo of a white male juvenile, a plastic bag with a syringe. (10 RT 2300-2305.) Several areas in the front seat, on the glove box, the console and the steering wheel tested positive for blood and there was also a blood stain in the middle of the back seat. (10 RT 2310.) The garage door opener also tested positively for blood, as did some breath mints. (10 RT 2311.)

Over two months later, on June 6, 1998, Mr. Nelson also assisted when the murder weapon was located. (10 RT 2317.) He responded to a Shell gas station at Cordelia and Pitman Road where a knife was found in the grass at

the highway interchange where Suisun Valley Road crosses Highway 80. (10 RT 2318.)

c) The identification and mis-identification of appellant.

There was conflicting testimony regarding the identification of appellant near the scene of the crime on the day in question. Several witnesses failed to pick him out of lineups. One witness mistakenly identified another person in a lineup containing appellant.

Kathleen Burke, an interior designer friend of Janet Daher, testified that she drove onto Rose Lane that afternoon and noticed three kids or young men walking away from her. (9 RT 2115.) They attracted her attention because they were dressed in heavy winter clothing although it was warm (*Id.*); they looked at her "in a very mean way" (9 RT 2118); and they seemed out of place in the affluent neighborhood. (*Id.*)

Ms. Burke then called the police about the men and asked that an officer be sent to the area. (9 RT 2120.) Her description to the 911 operator was "three men, dark clothing, walking down Rose Lane." (9 RT 2136).[4] She

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[4] Her description of one was a "white male, blond hair, fair complexion, clean haircut, five eight to five nine, 175, wearing a green jacket..." Two had baseball caps on and one had a black knit hat. Another male was described as "a white male, 18 to 21 years, six-feet one to six-foot two, 180, darker hair, darker skin, wearing a dark colored knot cap." And the other was "a white male, 18 to 21 years, brown hair, same build as number one..." (9 RT 2137-2139.)

said that one of the men was taller than the others and he wore a black stocking hat and the other two were shorter. (9 RT 2122.) The men were all white and somewhat unkempt; one was thinner and the other two were more heavy-set. (9 RT 2123.) They all looked about 18 to 21 years old and they were wearing dark pants. (9 RT 2124.) When Ms. Burke got to the Daher's house on a dead-end street she did not see them. (9 RT 2120.)

On June 7, 1998 Ms. Burke attended a lineup at the Martinez jail. (9 RT 2126.) She failed to pick out appellant even though he was in the lineup; she mistakenly identified another person. (9 RT 2127-2128; 2144.) She later learned that the person she identified was not appellant and that person was not involved in the crime. (9 RT 2147, 2151.)

Another witness similarly failed to identify appellant. **Roger Parkinson,** of the Lafayette School District maintenance department, testified that on March 24, 1998 he left the school about 2:15. p.m. (9 RT 2155.) He was headed south on Happy Valley Road and saw three males walking north. (9 RT 2157.) They attracted his attention because they seemed out of place and weren't part of the normal neighborhood pedestrian traffic. (9 RT 2159.) He focused on one man, the closest one, who had a tattoo on the left side of his neck. (9 RT 2162.) Mr. Parkinson got to within 20 or 25 feet of them. (9

RT 2160.) He thought they were between 19 and 28 years old and the man with the tattoo was the oldest. (9 RT 2162.) Two of them were about the same height, one was taller. (9 RT 2163.) They wore dark clothing, blue jeans, and probably a blue jacket. (9 RT 2164.) The man with the tattoo was white, the others were probably Hispanic, and the tattoo looked like a lightning bolt. (9 RT 2166.) He was shown a photo lineup but he never made a positive identification. (*Id.*) Mr. Parkinson was asked in court to identify appellant but he could not, nor could he say whether appellant's tattoo was similar to the one he saw on March 24, 1998. (9 RT 2168.)

Nathan Bunting testified that he was working on a telephone construction job on Happy Valley Road in Lafayette on March 24, 1998. (10 RT 2235.) He saw three males walking toward him "that looked kind of punky." (10 RT 2237.) They didn't seem to fit in with the neighborhood. (10 RT 2238.) Two were Hispanic and one was white and they were walking side-by-side. (10 RT 2238.) The youngest two were 17 or 18 and one was in his mid-20s. (10 RT 2239.) The men were headed toward Rose Lane and as they passed, the white male said something like "how are you doing?" (10 RT 2242.) This person had a tattoo on his neck. (10 RT 2243.)

On June 8, 1998, Mr. Bunting viewed a photo lineup and picked out appellant. (10 RT 2244-2245.) In court, he identified appellant as the man he

saw on the road and in the lineup. (10 RT 2246.)[5] However, when appellant was asked to say "what's up" in the courtroom, the witness was unsure: "I can't be exact, but yes, he looks a lot like him." (10 RT 2266.) Additionally, the witness did not recall telling the officer the tattoo was shaped like a shooting fireball or a lightning bolt. (10 RT 2255.)

d) The forensic investigation did not connect appellant to the crime.

No forensic evidence connected appellant to the crime, either at the victim's house, in the victim's vehicle, or on the alleged murder weapon. **Richard Schorr,** a criminalist with the Contra Costa Sheriff's Department, was called to 1253 Rose Lane in Lafayette on the evening of March 24, 1998. (13 RT 2875.) There was no sign of forced entry into the house. (13 RT 2881.) In the garage, about eight partial shoe-prints were revealed by the static dust print lifter. (13 RT 2882.) More partial shoe-prints were found in the laundry room. (*Id.*) In the family room, a woman's purse had been dumped on the floor. (13 RT 2886.)

In the master bedroom, clothes and VHS tapes were strewn on the floor

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[5] However, the lineup identification was far from certain. **Ted Anderson**, a detective with the Contra Costa County Sheriff's Department, testified that Nathan Bunting did pick appellant from a photo lineup on June 8, 1998 (12 RT 2794-2799.) Mr. Bunting actually said "he's the closest" but that qualification was not written in the detective's report. (12 RT 2798.)

and some were broken. (13 RT 2892.) Clothes had been pulled out of the drawers and a speaker near the entertainment center had been ripped out of the ceiling. (*Id.*) Another speaker had been taken down. The telephone cord was missing. (13 RT 2893.) There was a clump of head hair in the middle of the room. (*Id.*) The victim was lying toward the west wall. (13 RT 2894.) Her hands were tied behind her back and the telephone cord was wrapped around her neck. (*Id.*) There were bloodstain splatter marks below the light switch and on the wall. (13 RT 2900.)

Steven Ojena testified that he used to work in the Contra Costa County Sheriff's crime laboratory. (13 RT 2916-2919.) On March 24, 1998 he responded to a crime scene in the Fairfield/Cordelia area at about 9:15 p.m. (13 RT 2919.) He attended the victim's autopsy and identified photos of the victim. (13 RT 2922-2930.) She had stab wounds and ligature marks where the telephone cord had been stretched around her neck. (13 RT 2921-2930.) One shoe print could be connected to one suspect, Mr. Snyder, but Mr. Ojena was not able to say it was the exact shoe. (13 RT 2937-2938.)

e) The police connect Maury O'Brien and Lee Snyder to the crime.

On the day of the homicide, police officers received a lead that Maury O'Brien may have been involved in the crime, but they did not immediately follow up on it. On March 24, 1998, **Justin Gregory**, a Contra Costa

Sheriff's Department detective, was called to the Solano Roofing Company in Fairfield. (12 RT 2805.) The officer investigated nearby motels and at one of them, the Overnighter Motel, he was shown the registration book. (12 RT 2815-2819.) He copied down the names of guests on March 24th, and among them was Maury O'Brien. (12 RT 2819, 2837.)[6] The Overnighter Motel was four-tenths of a mile from where the car was recovered. (12 RT 2820.)[7]

Almost three months elapsed before there was a follow-up on this lead. **Sgt. Rich Dussell**, of the Contra Costa Sheriff's, testified that he received information from a woman named Nancy Wager around June 5, 1998. (14 RT 3152.) Her son's girlfriend knew a person who had some information on the case. (*Id.*) As a result of this information, Sgt. Dussell met with Nancy Wager in Cordelia on June 5, 1998. (14 RT 3156.) Lacy Harpe, the girlfriend (14 RT 3157), gave the officer the name Maury O'Brien. (14 RT 3160.)[8] As Mr.

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[6] This was how Maury O'Brien's name first came up as a possible suspect. (12 RT 2837.)

[7] Additionally, **Kuldip S. Goraya,** testified that in March of 1998 he was the part owner of the Overnighter in Fairfield. (10 RT 2328.) The police came by at the end of March and requested all hotel receipts. (10 RT 2329.) A person (later identified as Maury O'Brien) registered at the motel on March 24 at 3:31 p.m. The room cost $24.15, with an additional $5.00 for the key deposit and $5.00 for the phone deposit. The full amount was $34.15. (10 RT 2330-2331.)

[8] After the initial interview with Nancy Wager, the officer re-interviewed her and obtained some jewelry from her. (14 RT 3175.) Ms. Wager had obtained it from her son's girlfriend Lacy Harpe. (14 RT 3176.)

O'Brien's name appeared on the previously-obtained list of people who stayed at the Overnighter Motel on March 24, he was now a prime suspect. Until talking to Ms. Harpe, the officers had no information about Mr. O'Brien, Mr. Snyder, or Mr. Perez. (14 RT 3210.)

Sgt. Dussell then went to the Solano County Jail and interviewed Mr. O'Brien that night, June 5, 1998. (14 RT 3161.) Initially, Mr. O'Brien denied the homicide, but not for long. (14 RT 3162.)[9] The officers then took Mr. O'Brien out of the jail and he directed them to the recovery of a knife which was the alleged murder weapon. (*Id.*) As a result of that interview, the police obtained a search warrant for an address on Guttenberg Avenue in San Francisco whose occupant was Lee Snyder. (14 RT 3165.)

The police also obtained information about Jason Hart and they went to talk to him. (14 RT 3168.) Mr. Hart lied to them at first. (*Id.*) The officers told Mr. Hart that he was facing the death penalty. (14 RT 3194.) They said they wanted to talk to him about a homicide that occurred in Lafayette about three months prior. (14 RT 3198.) Mr. Hart was also told he could be charged as an accessory after the fact to the murder. (14 RT 3200.) During the

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[9] In this first interview, O'Brien told the police that, in addition to himself, Snyder and a person O'Brien knew as "Rock" were responsible for the murder. O'Brien also told the police to find a person named Jason Hart, as he would know who "Rock" was. (11 RT 2520.)

questioning, the officers mentioned that "Rockhead was involved" and Mr. Hart told the officer that appellant was known as "Joe Rockhead." (14 RT 3207.) Until that time, the officers did not know who "Rockhead" or "Rock" was. (14 RT 3214.)[10] Until the time they talked to Mr. Hart, all their information had come from Mr. O'Brien. (14 RT 3210.) Mr. Hart was eventually arrested (14 RT 3179) as an accessory to the crime. (14 RT 3189.)

Justin Mabra, a 21-year old resident of Fairfield, was the boyfriend of Megan McPhee who also knew Maury O'Brien. (10 RT 2334-2335.) Mr. Mabra and Mr. O'Brien attended the same middle school and went to Armijo High School together. (10 RT 2336.) In late March 1998, Mr. Mabra saw Mr. O'Brien by chance. (10 RT 2339.) O'Brien was in a car outside Ms. McPhee's house with two other people, one of whom was Mr. Snyder, whom Mr. O'Brien had not seen in about two years. (10 RT 2340.) As it was cold, they all got in Mr. Mabra's girlfriend's car. The three others were seated in the back seat. (10 RT 2343.) Mr. Mabra did not know who the third person was and was not introduced to him. (*Id.*) This third person was later tentatively identified by Mr. Mabra as appellant at a live lineup at the Contra Costa

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[10] Appellant was arrested two days later, on June 7, 1998. (14 RT 3335.)

County Jail. (10 RT 2346-2350.)[11] Maury O'Brien asked for a ride either to San Francisco or to Cordelia. (10 RT 2344.) Mr. Mabra denied knowing about plans to rob a drug dealer or that he went into the house to make phone calls to reach the dealer the night he met with O'Brien and Snyder. (10 RT 2359.)

Megan McPhee, a 23-year-old student, testified that Justin Mabra was her boyfriend. (10 RT 2386.) She also knew Maury O'Brien and Lee Snyder. (*Id.*) In March 1998, she was living with Justin Mabra in his parent's house. (10 RT 2388.) That month, she saw Mr. O'Brien and Mr. Snyder with a third person outside her mother's house. (10 RT 2389.) They all got in the car and talked, Justin and Ms. McPhee in the front and the other three in the back. (10 RT 2391.) She was pretty sure everyone in the car ingested a line of cocaine. (10 RT 2394.) After the cocaine, Maury O'Brien asked for a ride to somewhere far away, but Ms. McPhee had to work the next day and they declined. (10 RT 2397.) That night, the three men were eventually picked up by someone in a Cutlass. (10 RT 2410.)

Ms. McPhee was interviewed by the police in June of 1998. She was asked to make an identification and she picked O'Brien and Snyder out of a live lineup. (10 RT 2401.)

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[11] Mr. Mabra was somewhat unsure of the identification as appellant was wearing a hat and his face was in darkness, so Mabra put a question mark next to appellant's photo. (10 RT 2369.)

f) The testimony of co-defendant Maury O'Brien.

With the lack of any forensic evidence tying appellant to the crime, the prosecution's case rested heavily on the testimony of co-defendant **Maury O'Brien,** who was also charged with the murder of Mrs. Daher. (11 RT 2430.) Mr. O'Brien denied stabbing Mrs. Daher to death on March 24, 1998 but he admitted going into her house with the intent to rob the occupants and also admitted responsibility for her death. (11 RT 2431.) He knew he was facing capital murder charges and possible execution, and by testifying, he was asking for consideration not to be executed. (11 RT 2432.)

Mr. O'Brien testified that he knew Lee Snyder from the Fairfield neighborhood where both were living with their mothers. (11 RT 2433.) By March 1998, they were living together and they devised a plot to rob a drug dealer. (11 RT 2444, 2528.) The dealer lived in Davis but they were going to meet him in Fairfield. (*Id.*) His name was Sonny Sandu[12] and he was known to carry a large amount of money and drugs on his person. (11 RT 2444-2445.) A mutual friend, Jason Hart, was to purchase the drugs after the robbery but not participate in the robbery itself. (11 RT 2446.)

Two or three days before the murder, Jason Hart introduced appellant

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[12] O'Brien later gave the dealer's name as Sandeep Sandu. (11 RT 2527.)

to O'Brien as someone who might be interested in the robbery. (*Id.*) At this time, O'Brien knew him only as "Rock." (11 RT 2447.) O'Brien saw "Rock" every day in the two or three days before the murder. (11 RT 2448.) They would buy at least $100 to $150 worth of cocaine every day.

On March 24, 1998, when he awoke, O'Brien initially did not plan to rob the dealer. (11 RT 2448.) But Jason Hart and "Rock" showed up unexpectedly and it was decided they would do it that day. (11 RT 2449.) They all had some cocaine that morning. (11 RT 2453.) The others were eager to rob the dealer, but Hart would not give them a ride because he did not want to be involved in the robbery. (11 RT 2451.)

No one else had a car so they decided to take the BART train to Fairfield. (11 RT 2452.) Jason Hart dropped them off at the Balboa BART station. (*Id.*) They planned to get off in Pleasant Hill or Walnut Creek but they first got off at Orinda to smoke cigarettes. (11 RT 2454.) Snyder and "Rock" were looking out into the hills and everyone decided to rob a house instead of continuing on to Fairfield. (11 RT 2454.) From the BART train, they saw that the houses were big and figured they would have some valuables. (11 RT 2459.) O'Brien had previously robbed houses and taken TVs, VCRs and stereo equipment. (*Id.*) He assumed they would choose a house where no one was home. (11 RT 2460.) They consumed some more dope at the

Orinda BART station, got back on, and then off again at the Lafayette station. They started walking toward the hills. (11 RT 2454, 2458.)

O'Brien had several knives on him and Snyder had a P-38, a 9-millimeter pistol. (11 RT 2461.) "Rock" was not armed and had no weapons. (11 RT 2462.) They walked shoulder to shoulder down the middle of the street. (11 RT 2463.) A lady tried to talk to them and was on her cell phone; O'Brien cussed her out and told her to "get out of here." (11 RT 2464.) The lady drove around and stopped her car in the middle of the street, looking at them. This made O'Brien want to get out of the road. (11 RT 2464.)

They turned off Happy Valley Road and saw a house with the garage door open. (11 RT 2466.) They went in and "Rock" shut the garage door with a button. (*Id.*) Lee Snyder took out his gun and O'Brien entered the house through a door in the garage. (11 RT 2267.) Snyder gave O'Brien the gun as he was too scared to enter with it. (*Id.*)

The first thing they saw was the victim in the kitchen. (11 RT 2469.) O'Brien said that this was a robbery. The lady turned around and started to say something but "Rock" put his hand over her mouth, hit her on the head, and she went down on the floor. (*Id.*) He punched her on the side of the head and she curled up in a ball. (*Id.*)

O'Brien went through the house to make sure no one else was there

while Snyder and "Rock" stayed with the lady. (11 RT 2470.) O'Brien then came back downstairs and held the gun on her while "Rock" and Snyder went through the rooms. (11 RT 2471.) They found a blue laundry bag that they filled with various items. (*Id.*) All three were wearing gloves. (*Id.*) Snyder was "tweaking" or freaking out from the effect of the drugs. (11 RT 2474.) When they had been in the house for fifteen minutes, O'Brien called out to the others that they should leave, and he accidentally used Lee Snyder's name. (11 RT 2474.) "Rock" then said that O'Brien would have to kill the victim because O'Brien had revealed Snyder's name. (11 RT 2475.) "Rock" came downstairs and asked the lady where the good jewelry was, and she led them to a jewelry box in the closet. (11 RT 2476.)

At some point the victim was taken upstairs by Snyder and "Rock." (11 RT 2478.) O'Brien stayed downstairs as a lookout. (11 RT 2479.) He heard noises and went upstairs to the large master bedroom. (11 RT 2480.) Snyder was pulling out a telephone cord and "Rock" was kneeling on the other side of the bed "maybe holding the victim down." (11 RT 2481.) But Snyder could not see the victim from his vantage. (*Id.*)

O'Brien went back downstairs looking for more things to steal and to keep a lookout. (11 RT 2482.) He then went back upstairs and saw Snyder throw a speaker at the victim and come over and get on top of her. (*Id.*)

O'Brien could see the victim's legs sticking out from under the bed; she was lying on her stomach and not moving. (11 RT 2483.) The telephone cord was wrapped around the victim and Snyder and "Rock" were both pulling on it. (*Id.*) Snyder had his foot on the victim and "Rock" was pulling on the cord; the victim's neck was bent backwards. (11 RT 2484.)

O'Brien walked into the bathroom looking for more things to steal. (11 RT 2486.) He was told to get a knife from the kitchen; "Rock" took it and stabbed the victim many times. (11 RT 2489.) Snyder ripped up a videotape as he thought they were being taped. (11 RT 2490.)

Then they went downstairs and drove away in the victim's car, a Mercedes sports utility vehicle. (*Id.*; 11 RT 2491.) "Rock" handed O'Brien the knife and he folded it and put it in his pocket. (*Id.*) "Rock" drove, O'Brien was in the front seat and Snyder was in the rear. (11 RT 2492.) They headed towards Fairfield as all three still wanted to rob the drug dealer. (11 RT 2493.) They exited the freeway in Cordelia and went to a cheap, raunchy motel called the Overnighter. (11 RT 2494.)

O'Brien registered for the room. (11 RT 2495.) Then Snyder and "Rock" left to ditch the Mercedes. (*Id.*) They were gone 15 or 20 minutes and when they returned, they all had a beer. O'Brien and Snyder consumed some cocaine and then they tried to contact the drug dealer "Sonny." (11 RT 2496.)

The bag taken from the house was dumped on the bed and the loot divided up. (*Id.*)[13]

They were unable to reach the drug dealer so they decided to walk to Fairfield. On the way, O'Brien threw the knife in the bushes as he crossed an overpass. (11 RT 2501.) They bought some sandwiches and walked to Mancus Park. (11 RT 2501.) There they met Justin Mabra and went to his house, which was on the same street as the park. O'Brien went inside and used the phone to try to contact the dealer Sonny but was not successful. (11 RT 2503.) Justin's girlfriend Megan McPhee was there too. (11 RT 2504.) They consumed some cocaine outside the house in Megan's car. However, 'Rock" did not use any cocaine. (*Id.*) They were at Justin Mabra's house for about an hour. (11 RT 2506.) O'Brien asked Megan for a ride to San Francisco but she couldn't comply because she had to work the next day. (11 RT 2505.)

After leaving Justin Mabra's house, they tried to retrieve the Mercedes SUV and headed to where "Rock" and Snyder had left it. (11 RT 2508.) They saw police cars with spotlights surrounding the vehicle, so they jumped a fence and ran back to the hotel. (11 RT 2509.) "Rock" called Jason Hart who came

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[13] Some of the stolen goods were later located. **Edward Griffith,** of the Contra Costa Sheriff's Department, on June 7, 1998 participated in a search warrant of Lee Snyder's house in San Francisco. (12 RT 2806.) In the kitchen, they found a bag of jewelry and a Nintendo game taken from the victim's house. (12 RT 2808.)

and picked them up.(*Id.*) Jason was with an African-American rapper whose name was "Mac Shaun." (11 RT 2510.) "Rock" told Jason about the murder and "Mac Shaun" was upset because he was now an accomplice to murder or an accessory after the fact. (11 RT 2511.) All three were trying to sell Jason Hart the jewelry on the way back. (11 RT 2512.)[14]

On June 5, 1998, O'Brien was interviewed at the Solano County jail, where he was incarcerated for petty theft and a probation violation. (11 RT 2517.) He had been arrested for stealing a charity jar next to a cash register in a store. (11 RT 2556.) Someone had told the police that O'Brien was involved in the murder. (11 RT 2518.) Initially, O'Brien denied his and Snyder's involvement. (*Id.*) But the more he was interviewed, the more information he revealed. (11 RT 2519.) He knew appellant only as "Rock" at that time. (*Id.*) O'Brien told the police to talk to Andrea Torres and to find Jason Hart as he would know who "Rock" was. (11 RT 2520.) In the first interview, O'Brien told the police that Snyder, "Rock" and himself were responsible for the murder. (*Id.*) O'Brien was arrested on June 5th for his involvement in this case. (11 RT 2521.)

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[14] O'Brien later told Lacy Harpe about what had happened and that he was involved in a murder. (11 RT 2516.) O'Brien also told some of his friends, Rob, Jason and "Little Jay," that he was involved in something serious that had been bothering him badly. (11 RT 2517.)

O'Brien admitted that the transcript of his interviews differed from his trial testimony. (11 RT 2522.) He also admitted that his drug use has had permanent effects on his memory and personality, and that "sometimes my mind is confused and thinks unclearly." (11 RT 2524.) O'Brien fancied himself a con artist and a manipulator. (11 RT 2532-2535.) Snyder and O'Brien's combined criminal activities brought in more than $5000 per month; about the same amount was also going out. (11 RT 2540-2548.) O'Brien admitted the robbery was his plan: "It was part of...my plan. I was making plans to go and rob people. That's true." (11 RT 2573.) O'Brien also admitted he told many lies to the police. (11 RT 2583.) He admitted that the State had given him a deal that he might not be given the death penalty. (11 RT 2593-2594.) He also claimed appellant had threatened him. (11 RT 2605-2607.)

A transcript of Mr. O'Brien's police interrogation was discussed and played for the jury. (13 RT 2989, 3034 *et. seq.*) In the tape recording, Mr. O'Brien changed from saying that "Rock" was strangling her to saying that Mr. Snyder was strangling her and said that Mr. Snyder played a greater part in it, that he was "pulling back the victim's head and neck." (13 RT 2990.) On another transcript, O'Brien said he is as guilty as the others. (13 RT 3116.)

g) Other testimony.

Jason Hart was granted transactional immunity for his testimony if he testified "fully and truthfully." (12 RT 2637.) Hart had known appellant his entire life, since they were kids. (12 RT 2662.) Appellant's nickname was "Joe Rockhead" and Hart had sold him drugs in the past. (12 RT 2665-2667, 2702.)

On March 23, 1998, Hart went to Lee Snyder's house with appellant. (12 RT 2665.) Snyder and O'Brien wanted to go to Fairfield and rob someone Hart thought was a drug dealer. (12 RT 2668, 2705.) Hart just wanted to buy the stolen goods, not to be involved in the robbery. (12 RT 2669, 2727.) O'Brien and Snyder had not met appellant before this and Hart introduced him as Joe. (12 RT 2670.) Appellant volunteered for the plan to rob the drug dealer as he was broke and needed some money. (12 RT 2671.)

The next morning, March 24, 1998, Hart picked up appellant and they went to Snyder's house at about 11 or 12. (12 RT 2674.) They sat around and smoked dope and talked about the plan to rob the drug dealer. (12 RT 2676.) Hart was again asked for a ride to Fairfield and again he refused. (*Id.*) Hart and appellant drove around to find someone to give them a ride but they were unsuccessful. (12 RT 2678.) They returned and Hart dropped them off at the Balboa BART station. (*Id.*)

Later that day, appellant called Hart and asked to be picked up in Fairfield. (12 RT 2681.) Hart and his friend Shawn drove to the Overnighter Motel in Fairfield. (12 RT 2681.) Hart pulled into the parking lot and saw appellant with O'Brien and Snyder. (12 RT 2683.) Appellant said that instead of Fairfield they had gone to Lafayette and robbed a lady. (12 RT 2686.) They also said that they tied her up and strangled her with a phone cord and that she was dead. Shawn said they were crazy and wanted to kick them out of the car. (*Id.*) Hart knew they had murdered someone but he still wanted the jewelry. (12 RT 2688.) Hart eventually bought two rings from appellant. (12 RT 2690, 2692.) Hart then dropped appellant off at his cousin's house. (12 RT 2691.)

The police arrested Hart at his house on June 9, 1998. (12 RT 2706.) They said he was facing the death penalty. (12 RT 2713, 2741.) Hart admitted he did not know if he told the police the truth, he just told them what they wanted to hear. (12 RT 2717.)

Deshawn Dawson, ("Mac Shaun") an African-American rapper and entertainer, testified that was with Jason Hart when he picked up three white guys in Fairfield. (12 RT 2647.) The two youngest ones were talking and bragging about stealing and robbing. (12 RT 2651.) Dawson got mad and yelled at them. (12 RT 2653.)

Andrea Torres, age 22, testified she first met Lee Snyder in mid-1996 and was his girlfriend. (12 RT 2756.) She had met Maury O'Brien once and she knew Jason Hart through her family. (12 RT 2762-2763.) She also knew someone named "Joseph Perez." Torres had met him when she was 12 or 13, and heard him called "Joe Rock." (12 RT 2764.)

She saw Lee Snyder on March 27 when he pulled out a very large diamond ring and tried to give it to her. (12 RT 2770-2773.) Torres asked him where he had gotten it and Snyder said "you don't need to worry about that." (12 RT 2775.) An argument and fight ensued. (12 RT 2776-2779.) She never saw Snyder after that because he was arrested. (12 RT 2780.)

Dennis Sweeney, a sergeant with the Contra Costa County Sheriff's Department, testified that on June 7, 1998, he conducted a live lineup involving appellant. (13 RT 2960.) The police officers could not find five other inmates with tattoos on their neck, so they made everyone wear towels around their neck. (13 RT 2961.) They showed the lineup to three persons. Ms. McPhee made an identification and selected appellant.(*Id.*) Mr. Mabra put a question mark by appellant's photo. (13 RT 2962.) Kathleen Burke was also present at the lineup but identified someone who was not appellant. (13 RT 2966.)

On June 11, 1998, Sgt. Sweeny took Lee Snyder out of custody in

juvenile hall where he had been incarcerated since March 27, 1988. (13 RT 2962.) In searching his clothing, a gold necklace was found, as were several rings which were identified as coming from the Daher family. (13 RT 2963.) On June 15, Maury O'Brien was picked up from the Solano County Jail. (*Id.*)

2) The defense case at the guilt/innocence phase.

Lacy Harpe, Maury O'Brien's girlfriend, was called as a defense witness. (14 RT 3340.) O'Brien had talked to her about a murder case before he was arrested. (14 RT 3344.) When she talked to the police, James Wager was her current boyfriend whose mother was Nancy Wager. (14 RT 3345, 3354.) At that time, Ms. Harpe gave Nancy Wager some jewelry and Ms. Wager later gave it to the police. Ms. Harpe had received the jewelry from Mr. O'Brien. (*Id.*)

A couple of days after he gave her the jewelry, O'Brien said that he and Lee Snyder and another guy had gone inside an open garage into a lady's house and killed her for her car and $20. (14 RT 3346.) O'Brien said Harpe did not know the third person involved. O'Brien said that he was telling her so that she would know what happened when he went to jail. (14 RT 3347.) Ms. Harpe was not sure who O'Brien said strangled the victim but he said that Lee Snyder stabbed the woman many times. (14 RT 3348.) O'Brien kept

changing his story. (*Id.*) Harpe was uncomfortable talking to the police and did not tell them that O'Brien had said Lee Snyder stabbed the lady. (14 RT 3350.)

About nine months or a year later, a defense investigator talked to her. (14 RT 3351.) Harpe told the investigator that O'Brien had said that Lee Snyder stabbed the lady. (14 RT 3353.) O'Brien said that he was downstairs in the house and then went upstairs to give Lee Snyder the knife. (14 RT 3358.) The only difference between what Harpe told the police and what she told the investigator was that O'Brien said Snyder asked for a knife and that he watched Snyder stab the victim. (14 RT 3377.) O'Brien said that Snyder and the other person killed her. (14 RT 3379.) When Harpe heard O'Brien's story, she did not want to have anything more to do with him. (*Id.*)

Sgt. Ken Whitlatch, of the Contra Costa County Sheriff's office, wrote a report about Nathan Bunting. (14 RT 3401.) There was a stipulation that the officer interviewed Nathan Bunting on March 26, 1998, and he drew a picture of a suspect with a tattoo on the right rear side of the subject's neck. (14 RT 3401.)

On October 16, 2001, the jury found appellant guilty on all counts: Count 1, murder, in violation of Penal Code Section 187; Count 2, the murder was committed while engaged in a robbery, a violation of Penal Code Section

211; Count 3, first degree burglary, a violation of Penal Code Section 459 and 460; and Count 4, taking of a vehicle in violation of Vehicle Code Section 10851. (15 RT 3688-3689.)

3) The punishment phase of the trial: the State's case.

The State's case at the punishment phase relied on five prior events: a) a 1992 robbery; b) an alleged rape incident that occurred in 1992 or 1993 involving another girlfriend of appellant; c) a street fight in 1994 involving appellant's girlfriend; d) 1994 prison incidents; and e) a 1999 incident in the Contra Costa Jail that involved no physical injuries to the jail personnel. Only one of these events involved a prior arrest. Victim impact testimony was also presented.

a) The 1992 robbery.

Regarding the 1992 robbery, **Apolinario Campo,** age 77 and a resident of the Philippines, testified that in 1992 he was living in San Francisco, on Geneva Street. (16 RT 3887.) On August 15, 1992, he was taking clothes to the Salvation Army. (16 RT 3912.) A man came up, asked for money, and mugged Campo when he said he didn't have any. (16 RT 3913.) The man, whom he identified as appellant, hit him with a piece of wood and broke his nose. (16 RT 3913-14.) Campo lost consciousness and his money was taken.

(16 RT 3915.) He got his wallet back that day, as it had been thrown on the ground. (16 RT 3920.) **Ed Collins,** a San Francisco police officer in 1992 also gave details of the crime. (17 RT 3936.) He received a call about an injured person on Geneva on August 15, 1992; he responded and saw Mr. Campo who said he had been robbed. (17 RT 3937.)

b) The alleged rape incident in 1992 or 1993.

Andrea Torres testified that she first met appellant when she was 12 or 13 and living on Geneva with her parents. (17 RT 4044.) He came to pick her up from school one day when she was in the 7th Grade. (17 RT 4045.) Appellant had an ID that said he was 18 or 19. (17 RT 4046.) After they had met, one night he called and asked to come over. (17 RT 4047.) It was late at night and Torres' father was working and her mother was asleep. (17 RT 4047.) Torres let him in the back door. (17 RT 4048.)

At first they watched TV and then moved toward her dad's bedroom. (17 RT 4049.) They were kissing and fondling and she took her pants off. (17 RT 4049, 4066.) They were "almost engaging in intercourse, but we had not reached that point." (17 RT 4050.) Torres told appellant she did not want to have sex. (17 RT 4051.) The defendant pinned her arms back and penetrated her. (17 RT 4052, 4068.) At some point he stopped and by then Torres was crying. (17 RT 4052.) Eventually, she told her parents. (17 RT 4053.)

After that night, she got together with appellant again. He called to ask to come over. Her friends were there, hanging out. Then they went into another room and he raped her again. (17 RT 4053.) Even though they had sex against her will, she still liked him. (*Id.*) Appellant and Torres got together another time, but they did not have sex that night. (17 RT 4055.) This happened in May of 1992 or 1993 when she was only 12. (17 RT 4058.) At that time, the police asked her to look at a line-up and she picked out appellant's picture and her family wanted to prosecute. (17 RT 4058.) But she did not want to testify as she had mixed feelings about the situation. "First of all, I didn't want to deal with it." (17 RT 4074.)

One other time she voluntarily had sex with appellant. (17 RT 4087.) This third time, which occurred at her house, was the last time she saw him. (17 RT 4101.)

c) The 1994 street fight involving appellant's girlfriend.

Andrea Salcedo, appellant's girlfriend and later wife, testified that she first met appellant when she was 11 or 12. She was 27 at the time of the trial. (17 RT 3993.) She married appellant when she was 20. (17 RT 3994.)

On February 12, 1994, appellant showed up at her house. (17 RT 3998.) She knew that he had escaped from prison. (17 RT 3996.) Salcedo had forgotten she had invited another friend, Anthony Sandoval, over for

lunch. (*Id.*) Appellant answered the door when Sandoval arrived. (17 RT 4000.) Appellant and Salcedo asked Sandoval to leave but he wouldn't. Appellant attacked Sandoval and chased him outside. (17 RT 4001.) Appellant then looked around her house and came back outside carrying a rifle. (17 RT 4002.)

Appellant pointed the rifle at Sandoval and chased him around a car. (17 RT 4004.) Salcedo told Sandoval there were no bullets in the rifle. She tried to drive away but appellant caught up with her car and tried to drag her out. (17 RT 4007-4010.) Appellant threw her to the ground and tried to get the keys. (17 RT 4011.) Then the police arrived and appellant was arrested. (17 RT 4019.)

Anthony Sandoval was a friend of Andrea Salcedo. (16 RT 3892.) They went out one night and she asked him to come back the next day. He visited her at lunchtime. (16 RT 3893.) Sandoval knocked on her door, appellant answered, and said Andrea did not want to see him. (*Id.*) Appellant told Sandoval to leave. (*Id.*) Sandoval told appellant to get her so that she could tell him herself. (16 RT 3894.) Appellant came back with a rifle and told Sandoval to "get out of here." He chased Sandoval around a car, pointing the rifle at him. (16 RT 3895.) Appellant ran at him with the gun, using it as a club. (16 RT 3897.) When appellant rushed him, Sandoval beat him up. (16

RT 3908.) The police arrived and appellant was arrested. (16 RT 3898.) Sandoval admitted to having been convicted of a prior felony. (16 RT 3900.)

Rick Voss, a San Mateo police officer in February of 1994, responded to an incident of a man carrying a rifle. (17 RT 4110.) He arrested appellant for the incident involving Salcedo and Sandoval. (17 RT 4111.) Salcedo told the officer that appellant had threatened to kill Sandoval. (17 RT 4111.) The officer ran a record check on appellant and found out that he had two no-bail warrants out for his arrest. (17 RT 4112.)

People's Exhibit 8, a copy of a conviction of appellant in San Mateo County for a felon in possession of a firearm, was admitted into evidence. (18 RT 4192.) People's Exhibit 11, a prison commitment for robbery and another for felon in possession of a firearm, was also admitted into evidence. (18 RT 4193.)

d) The 1994 prison incidents.

Robert Kramer was a correctional officer at California Correctional Center in Susanville in May of 1994. (17 RT 3945.) He was watching a general population yard when he saw three individuals fighting: inmate Armenta, appellant and inmate Contreras. (17 RT 3947.) Appellant and Contraras were striking inmate Armenta. (17 RT 3948.) All three were throwing blows. (17 RT 3952.) He had no recollection of any injuries. (17

RT 3955.)[15]

Michael Mesa, a correctional officer at High Desert Prison, testified about an incident he observed on September 24, 1994. (19 RT 3958.) He was administering showers and went to the cell of an inmate named Aragon. (17 RT 3959.) Appellant was his cellmate. (*Id.*) Aragon was cuffed through the door and then appellant started to hit Aragon with closed fists. (17 RT 3960.) Aragon went down and fell face down on the bunk and appellant kicked him. (17 RT 3961.) Appellant stopped the assault and was then cuffed. (17 RT 3962.) To assist the officers, appellant came to the door and voluntarily knelt down. (17 RT 3965.)

Harold Wagner, a correctional counselor with the California Department of Corrections testified that in September of 1994 he was working at the California Correctional Center at Susanville, in the Lassen Unit. (17 RT 3970.) On September 24, 1994, the officer also observed the assault on inmate Aragon. (17 RT 3971-3972.) The officers were not injured and appellant did not hit them. (17 RT 3975.) Officer Wagner was not aware of what precipitated the altercation. After the incident, both inmates were

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[15] **Edward Herrera,** another correctional officer at Susanville, also testified about this incident. (17 RT 3990.) Appellant was interviewed and he said "Armenta hit Contreras...Contreras is my little homey and was scared, so I dealt with him." (17 RT 3992.)

medically cleared and neither were taken to the infirmary. (17 RT 3976.)

Officer Ricky Stone, a correctional officer at the California Correctional Center at Susanville, testified that on November 11, 1994, he was working the "ad-seg" (administrative segregation) yard on a catwalk. (17 RT 3980.) The officer observed a fight at 9:20 a.m. (17 RT 3982.) He saw inmate John Lira assaulted by appellant, who walked over and punched him. (17 RT 3983.) Stone yelled at appellant to stop but he didn't. (*Id.*) However, it was not unusual for fights to occur at this prison. (17 RT 3988.)

e) The 1999 Contra Costa Jail incident.

Ken Westermann, a Contra Costa County deputy sheriff, was working as a jailer on October 12, 1999. (17 RT 4113.) Appellant was an inmate (17 RT 4114) who asked to see a mental health specialist. (17 RT 4115.) He was told he would have to wait. (*Id.*) The officer went up to appellant's cell and asked him if he had a written request. (17 RT 4117.) Appellant was again told he would have to wait and he then began kicking the door. (17 RT 4117-4118.) The custody sergeant was called and told appellant he had to be taken out of his cell. (17 RT 4119.) Deputy Allen went into the cell and appellant said he was not "cuffing up." (17 RT 4120.) Appellant struck the officer in the face with his left hand in a closed fist and then hit him again. Westermann then hit appellant in the mouth several times. (17 RT 4122.) Officer Allen

intervened and they were able to subdue appellant. (17 RT 4124.) Appellant was hit 3 or 4 times in the face which caused some superficial bruising. (17 RT 4135.) Although Westermann was kicked by appellant, the officer did not remember if he was wearing shoes or soft rubber sandals. (17 RT 4145.)

f) Victim impact testimony.

The victim's daughters offered evidence regarding the loss of their mother. **Lauren Daher**, daughter of the victim, testified that she was 15 when her mother died. (18 RT 4181.) She "was the kindest and most gentle and caring person I think I've ever met. The kind that would do anything for anyone." (18 RT 4183.) They fought a lot, but still had a great relationship. (18 RT 4184.) Since her mother has been gone "It's been the hardest thing I think I could ever even imagined. I have turned into the mom of the family." (18 RT 4184.) **Annie Daher,** the victim's younger daughter, was 12 when her mother died. (18 RT 4187.) She felt bad because she never appreciated her mother as much as she should have. Her mother was a strong role model and they loved each other a lot. (18 RT 4189.) Her mom never missed a game or a horse show. (*Id.*)

The State rested. (18 RT 4194.)

4) The defense case at the punishment phase.

a) Rebuttal evidence regarding the 1999 Contra Costa Jail incident.

Carla Wilson, a nurse at the Contra Costa County Jail, testified she was working there on October 12, 1999. (18 RT 4196.) She observed appellant with scrapes on his face and redness to his right wrist. (18 RT 4202.) He was given ice packs for his right wrist and right shoulder. (18 RT 4205.)

Larry Pasley, an inmate of the Contra Costa Jail, testified he was housed in D Module, C side in October of 1999. (18 RT 4212.) He remembered hearing a commotion on the afternoon of October 12, 1999. (18 RT 4213.) Pasley was in cell DC8 and appellant was in cell C1. (18 RT 4214.) Officer Westermann had been purposely taunting several inmates. (18 RT 4221.) Pasley pressed the call button 4 or 5 times asking the officers to assist appellant. (*Id.*) A couple of other cells also called and said that appellant needed to speak with the officers. (*Id.*)

Pasley could see the whole module from his cell window. (18 RT 4222.) Several deputies went to appellant's cell and told him to "cuff up." (18 RT 4223.) Then about 7 or 8 of them rushed into his cell and Pasley heard loud thumping sounds. Westermann was the first in. Appellant said "[q]uit. You're hurting me." (*Id.*) Pasley heard sounds of a scuffle and then heard appellant scream. (18 RT 4226.) Appellant was taken out, and there was a little blood on him and he was loud and upset. (18 RT 4227.) Pasley heard Westermann say "Next time I will put you in the hospital." (18 RT 4229.)

Later, Deputy Westermann asked Pasley to "shit bomb" appellant, which meant throwing feces on him. (18 RT 4226.) Westermann had a reputation for violence. (18 RT 4229.) Once, Westermann and another deputy hit Pasley on the head with handcuffs. (*Id.*) They also once "maced" Pasley and beat him badly after he said he was not going to cuff up. (18 RT 4230.)

Timothy Allen testified he was working at the detention facility in the Contra Costa County jail on October 12, 1999. (18 RT 4254.) Appellant requested to see mental health personnel that day. (18 RT 4259.) Allen's report stated the request was made at 4:40 p.m. Appellant started kicking the cell door. (18 RT 4266.) The officers wanted him to calm down and perhaps have mental health personnel talk to him. (18 RT 4271.) But at no time that day did Allen make a call to mental health. (18 RT 4272.)

Deputy Schiro unlocked the door to appellant's cell. (18 RT 4273.) Appellant refused to cuff up. (*Id.*) Deputy Westermann asked appellant to cuff up two or three times and then appellant stood up and slugged him in the face. (18 RT 4274.) Then Westermann pushed him back towards the bed and "started going at [appellant]...I intervened and also started throwing punches too." (18 RT 4275.) However, the deputies are not authorized to hit an inmate who has refused to "cuff up." (18 RT 4285.)

When shown pictures of the bruised appellant, Allen denied kicking

him in the head. But Allen admitted he may have caused some of the injuries in trying to subdue him. (18 RT 4286.) Allen admitted he hit appellant once in the face and in the legs or shoulder. (18 RT 4287.) This witness has had inmates file complaints against him for injuries, including an elderly inmate named Garcia. (18 RT 4288.)

Dr. Walter Carr, a physician for County Health Services, testified that he was treating medical patients at the Contra Costa Jail on October 21, 1999. (18 RT 4307.) On that date, he examined appellant. (18 RT 4308.) The doctor observed ecchymosis, bruising in the shoulder and lower back areas, which could be consistent with appellant having received an injury nine days previously. (18 RT 4310.) **Bud Hazelkorn,** a defense investigator, testified he went to the county jail and photographed appellant, who had bruises on his temple, forehead and cheekbone as a result of the cell extraction incident. (20 RT 4712-4715.)

Phillip Kendrick was an inmate in the Martinez jail in October of 1999, on the C side of D module. (18 RT 4336.) He remembered appellant asking to talk to mental health personnel on October 12. (18 RT 4338.) When Kendrick told the deputy that appellant needed assistance, he was told it was not his business. (18 RT 4341.) The first time the officers responded, Officer Westermann told appellant he would not get help until he calmed

down, "[s]o Joey calmed down." (18 RT 4343.) Then Westermann came back and told appellant to cuff up but he would not. (*Id.*) The guards that responded were Westermann, Allen and Schwind. (*Id.*) The deputies told appellant to cuff up at the door of the cell but he refused. (18 RT 4344.) Appellant was talking to them respectfully, but he refused to cuff up. (18 RT 4346.)

The officers yelled down to the control room to open the door, they went in, and Kendrick heard "scuffling." (18 RT 4346.) He saw appellant's legs go up and saw Allen doing something that looked like kicking. (*Id.*) Appellant screamed "I'm down, I'm down," and when they brought him out of the cell, he was all swollen up. (18 RT 4347.) Kendrick did not see either officer actually hit appellant. (18 RT 4348.) The witness remembered telling the defense investigator that Westermann said "I'm going to fuck you up." (18 RT 4349.) Kendrick had previously seen Officers Allen and Westermann beat inmates. (18 RT 4350.)[16]

b) Mitigating evidence regarding appellant's family and background.

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[16] **Irino Garcia** testified regarding an incident in March of 2001 when he was arrested on for drinking in Pittsburgh, California, and brought to the Martinez jail. (18 RT 4369.) When he was being processed into the jail, the officers pushed him to the floor and he hit his forehead and lost consciousness. (18 RT 4371.) This was in Pittsburgh, California, and not at the Martinez jail. (18 RT 4375.)

Frank Perez, appellant's uncle,[17] was the brother of appellant's father, Joseph Perez Sr.("Big Joey"). (19 RT 4382.) Frank's parents were Joseph Alouishes Perez and Elvira LaVerne, also known as BeeBee. (19 RT 4383.) Frank also had a sister named Debbie. (19 RT 4384.) Frank worked at the Golden Gate Fields race track and also as a longshoreman and a member of the Service Employees Union. (19 RT 4387.)

His father, Joseph Alousihes Perez, was also a longshoreman in San Francisco who worked on the docks until he retired in 1976. (19 RT 4388.) Joseph Alousihes loved appellant, his grandson, but was not an honest man. (19 RT 4390.) At the age of 14, Frank worked as a "fence" for his father. (19 RT 4391.) Drug addicts would come to the house and sell stuff they had stolen from stores and from the docks. (*Id.*)

Appellant's father, "Big Joey," was involved with drugs. (19 RT 4392.) When appellant was a baby, Big Joey was selling drugs, pills and marijuana. (19 RT 4406.) "There was always drug activity going on." "It seemed to be a steady flow of people." (19 RT 4407.) Big Joey became involved with heroin and used it until about six years prior to the trial. (19 RT 4393.) According to Frank Perez, appellant's father was "a very bad person" who

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[17] Frank Perez will be referred to herein as "Frank" to avoid confusion with other members of the Perez family.

"did a lot of...things that I didn't approve of," he was a "terrible father," and "never disciplined" appellant or taught him any morals. (19 RT 4393; 4401.) Once, in 1971 or 1972, Big Joey and Dolores left appellant sleeping in a hot car while the family went to the beach at Santa Cruz. (19 RT 4402-4404.) Frank tried to rescue his brother Big Joey from drugs and begged him not to take heroin. (19 RT 4424.) Big Joey basically abandoned appellant. (19 RT 4424.) Although appellant played baseball, Big Joey was never around for the games. (19 RT 4445.) Big Joey owed child support after he left Dolores, who was always telling him he had to pay it. (*Id.*)

Appellant's mother, Dolores Bassillio, got pregnant with him when she and Big Joey were young. (19 RT 4399, 4414.) During her pregnancy, Dolores smoked marijuana and cigarettes. (19 RT 4400.) Dolores and Big Joey were not together for long and separated shortly after appellant was born. (19 RT 4401.) Dolores was not a very good mother. (19 RT 4423.) There was often no food in the house and she smoked cigarettes a lot. (*Id.*)

Appellant's grandmother, BeeBee, was violent. At Christmas time, she would take her children shoplifting and hide the stolen items in appellant's stroller. (19 RT 4394.) They lived in the Excelsior District, a working class neighborhood in San Francisco. (19 RT 4395.) Appellant lived with BeeBee and his mother as a baby. (19 RT 4398.) When appellant was still a young

child, Big Joey and Dolores moved out of BeeBee's house and relocated to South San Francisco. (19 RT 4405.)

When appellant was 8, in 1983, he returned to live with his uncle Frank Perez and his grandmother BeeBee who shared a house. (19 RT 4445.) Dolores brought appellant over and asked Frank's mother if she could look after him for a week. (*Id.*) However, appellant stayed there until BeeBee died. (*Id.*) Dolores had a second child by another father and essentially rejected appellant. (19 RT 4429-4431.) Appellant wanted to be with his mother and used to make excuses for her to Frank. (*Id.*)

Big Joey was in and out of jail while Frank was living with appellant and BeeBee. (19 RT 4432.) Big Joey did not support his son and was a drain on BeeBee. (*Id.*) Dolores also did not financially support her son even though Frank's mother was not working and was on a fixed income. (19 RT 4433.) BeeBee loved appellant and gave him security. (*Id.*) Appellant also helped BeeBee because she was disabled and losing her eyesight. (19 RT 4434.)

Appellant did well in school. He was a very smart boy and regularly played baseball and basketball. (19 RT 4435.) Frank and BeeBee would attend appellant's games, but not his father or his mother. (19 RT 4436.) However, when BeeBee disciplined appellant, she was violent. She would pull his ear

or spank him. (19 RT 4438.) BeeBee would also verbally abuse him. (*Id.*) "He was like her little slave..." (19 RT 4339.)

BeeBee was 54 when she died of a massive stroke. (19 RT 4441.) Her death greatly affected Appellant: "...it was like having a carpet pulled out from underneath you." "He was crying and showing emotion." (19 RT 4443-4444.) Frank asked his wife if they could take appellant, but she said she couldn't do it as they had a new baby. (19 RT 4445.) After his grandmother died, appellant's life changed and he stopped playing sports. (19 RT 4437.) Appellant then lived with Frank's sister Lolita in Daly City. (19 RT 4449.) Soon, appellant's mother came and stole him from Lolita. (19 RT 4450.) After this, Frank lost contact with appellant for several years. (19 RT 4451.) For a time after that, appellant was in foster homes in various places. (19 RT 4453.)

Frank knew that appellant was sent to the California Youth Authority. (19 RT 4454.) Appellant wrote Frank from Stockton saying he wanted to change his life. Frank responded and picked him up from the Sacramento detention center and took him home. (*Id.*) It was the first time Frank had seen appellant in a long time. (19 RT 4456.) Appellant lived with Frank for four months. He had his own room and Frank bought him clothes. (*Id.*) Appellant had changed a lot, he was now very organized, very neat, showed appreciation

and told Frank he loved him. (19 RT 4457.) Appellant went to work at the race track with Frank. (19 RT 4458.) At the track, appellant obtained a job as a janitor and had to be at work at 3:00 a.m. which meant they had to get up at 1:45 a.m. (19 RT 4459.) Appellant started going out at night and would be exhausted when it was time to go to work. (19 RT 4460.) Frank tried to teach him how to do the job well, but appellant was dragging on the job. Soon appellant began to fail to show up for work. (19 RT 4461.)

Appellant eventually quit the job at the race track and stopped living with his uncle and aunt. (19 RT 4462.) Later, Frank found out that appellant would sleep in the garage and then go in the house and shower and sleep after Frank's wife left. Appellant had no place to live. (19 RT 4462.) He had problems accepting limits. (19 RT 4473.)

Frank again lost contact with appellant. (19 RT 4463.) Appellant later went to prison. (19 RT 4464.) Frank knew appellant was taking crack cocaine and "his name was Rockhead" because he was using rock cocaine. (19 RT 4464.)

After appellant was released from prison, Frank got him a job but did not let appellant live with Frank's family. (19 RT 4465.) This job involved taking inventory. Frank also bought appellant a car. (*Id.*) Frank was the boss but appellant "wasn't doing what he was supposed to be doing." (*Id.*)

Eventually, he lost that job too. Frank thought his efforts to help appellant were too late. (19 RT 4479.)

Dolores Ashmore, appellant's mother, first met Big Joey when she was nine years old. (19 RT 4487.) At 16, she became pregnant with appellant, dropped out of high school and got a job. (19 RT 4491.)

When Dolores found out she was pregnant, she and Big Joey moved in with Big Joey's mother, BeeBee. (19 RT 4493.) During Dolores' pregnancy, she smoked marijuana and cigarettes (19 RT 4492). She also had two car accidents. (19 RT 4494.) After one of the accidents, Dolores was hospitalized because the baby's heartbeat was irregular. (19 RT 4495.) When Dolores was five and a half months pregnant, she was again hospitalized. (19 RT 4495.) Appellant was born on September 1, 1971. (*Id.*)

At this time, Big Joey was using drugs on a daily basis. (19 RT 4498.) His drug use continued even when the baby was present. (*Id.*) Dolores and Big Joey would supplement their income from Big Joey's longshoreman job by selling marijuana. (19 RT 4500.) Several people per day would come to the house to purchase drugs. (19 RT 4502.) Appellant was in the house when these sales occurred and sometimes in the same room. (19 RT 4503.) Big Joey would ask appellant to pass marijuana joints to guests. (19 RT 4507.) Dolores occasionally asked appellant to take customers' drugs outside to their

cars and retrieve the money. (19 RT 4510.)

Big Joey and Dolores were married about a year and a half. (19 RT 4499.) During this time, they lived in five to seven different residences. (*Id.*) The last place Dolores lived with appellant was in the Excelsior District with Big Joey's sister Debbie. (*Id.*) Dolores tried to kill herself during the marriage, before appellant was one year old. (19 RT 4511.) She took some sleeping pills or Valium resulting in her hospitalization. (19 RT 4512.) Big Joey and Dolores' marriage was hectic and chaotic, characterized by physical violence and emotional abuse. (19 RT 4509.) Dolores eventually told Big Joey to move out. (19 RT 4513.)

After he left, Dolores continued to use drugs in front of her son. (*Id.*) Big Joey did not pay any child support and his only contribution was the occasional purchase of school clothes or toys. (19 RT 4514.) Between kindergarten and eight years of age, appellant attended three or four schools. He repeated the first grade because of his frequent absences. (19 RT 4517.)

When appellant was five and a half years old, Delores had another child with a man named Ed Sosa. (19 RT 4515.) The child's name was Marcus Sosa Bassillio. (*Id.*) Their relationship was good at first but Sosa "fooled around" like Big Joey. (19 RT 4516.) Dolores was with Sosa for three and a half years. (19 RT 4517.) Near the end of this relationship, there was

domestic violence and as a result Dolores left with the kids. (19 RT 4519.) Appellant was eight when Dolores split up with Sosa. (19 RT 4520.) After this, she supported herself with a job as a waitress and sold drugs a couple of times per week. (*Id.*) Dolores eventually asked BeeBee to take appellant for six months (19 RT 4523) but he ended up staying with her for two years. (*Id.*) Dolores told appellant he had to reside with his grandmother because there wasn't enough room for all of them. However, Marcus remained with Dolores. (*Id.*)

Dolores left Sosa in late 1979 or January of 1980 and about six months later moved in with a man named Richard Rossi. (19 RT 4525.) He was a drug dealer who sold methamphetamine. (19 RT 4529.) Rossi's three teenage daughters and dogs occupied a one-bedroom apartment. (19 RT 4525.) They soon moved into a friend's two- bedroom house, with his family of four. However, Rossi did not like appellant. (19 RT 4526.) Dolores admitted she chose to be with Mr. Rossi over her son. At this time, Dolores was using meth and cocaine. (*Id.*)

When appellant was eleven, Dolores and Richard Rossi were arrested for possession of drugs. (19 RT 4532.) Meth, cocaine, scales and cash were seized (*Id.*) and a large amount of methamphetamine and cocaine had been dealt from the house. (19 RT 4533.)

As soon as Rossi got out of jail he resumed selling drugs. (19 RT 4535.) Shortly thereafter, two men with guns broke into the house while appellant was there. (19 RT 4536.) One of the men put a gun to appellant's head and they beat Rossi. Appellant and Dolores pleaded with the men not to hurt them. (19 RT 4539.) They tied appellant and Dolores up and threw them on the bed. (19 RT 4540.) The men said that if they moved or got up they would kill appellant. The men told Rossi to open the safe and give them the money. (19 RT 4541.) Approximately one thousand dollars was stolen. (19 RT 4543.) Appellant was terrified he was going to be killed. (19 RT 4546.)

BeeBee died from a massive stroke when appellant was twelve. (19 RT 4549- 4550.) Appellant idolized his grandmother and would do anything for her. (19 RT 4551.) After her death, appellant lived with BeeBee's daughter Lolita. (19 RT 4556.) Dolores stopped contributing to appellant's support because Lolita received AFDC and financial aid for taking custody of him. (*Id.*) Dolores moved back with her own mother and asked Lolita to take appellant back. (*Id.)* After about a month and a half, Dolores moved out of her mother's house and went to a girlfriend's house with her sons Marcus and appellant. (19 RT 4558.) That lasted only two weeks and then Dolores went to live with her brother Rick. (19 RT 4559.) Appellant was in the same school throughout these moves. Shortly thereafter, Dolores again moved back with

her mother. (*Id.*)

Dolores stayed at her mother's home for six to nine months (19 RT 4560) and she then went to live with her brother Danny for three to six months. (19 RT 4561.) At this time, appellant was attending a new school, getting poor grades of "D"s and "F"s. (*Id.*) They then lived in hotels for a month or two. (19 RT 4562.) Appellant began to run away, particularly after the death of his grandmother. (19 RT 4565-4566.)

Once, Dolores received a house call from a social worker regarding child abuse. (19 RT 4567.) She learned that appellant was being abused by his step-grandfather Mike Wallace. Appellant had been missing for several days when Dolores was contacted. (19 RT 4568.) Appellant never came home to live with her again. (19 RT 4570.) Child Protective Services filed a case and he was made a ward of the court. (19 RT 4570.)

In 1986 appellant was sent to the California Youth Authority at age fifteen. (19 RT 4570.) Dolores could not visit him often as she did not have a car. Marcus continued to live with her. Eventually, she left Marcus with his aunt and uncle and Dolores moved to Mississippi with her current husband. (19 RT 4571.)

Joseph A. ("Big Joey") Perez, appellant's father, testified that appellant's grandfather, Joseph Alouishes Perez, was a longshoreman and

"fence" who bought stolen goods from addicts and other longshoreman. (20 RT 4578-4581.)

Big Joey began sniffing glue when he was eight or nine. (20 RT 4883.) At 12 or 13, Big Joey began using marijuana and alcohol. He would drink a couple of quarts of beer a day. (*Id.*) In junior high school, Big Joey used barbiturates and LSD. (20 RT 4884.) He started using heroin when he was 23 (20 RT 4585) and was addicted for 15 years, until he was 38. (20 RT 4586.) Big Joey was eventually spending up to $200 a day on heroin. (20 RT 4587.) To support his habit, he stole every day. (20 RT 4590.) Big Joey taught appellant to steal. (20 RT 4607.)

Big Joey first met Dolores when he was five or six years old and became romantically involved with her when she was sixteen. (20 RT 4592.) Dolores became pregnant with appellant when she was eighteen and Big Joey and Dolores got married after appellant was born. (*Id.*) At that time, they were living with BeeBee, Big Joey's mother. (20 RT 4593.) People often came to the house to buy drugs. (20 RT 4594.) This continued for two years. (20 RT 4595.) Dolores smoked marijuana every day when she was pregnant and also used mescaline. (20 RT 4596.) Big Joey did not try to stop her drug use. (*Id.*)

Appellant was born on September 1, 1971. (20 RT 4606.) Dolores and Big Joey brought him home to live with BeeBee. (20 RT 4607.) Big Joey

continued to sell drugs and work as a longshoreman. (*Id.*) He would only work a couple of days a week and his drug sales provided most of the family's income. (20 RT 4609.) Dolores and Big Joey were together for five years. (*Id.*)

When appellant would cry, Big Joey would blow marijuana smoke into his face to help him sleep. (20 RT 4611.) Appellant would sometimes put the joint in his mouth and he used marijuana as a toddler. (20 RT 4618-4619.) When appellant got high, everyone would laugh. (20 RT 4620.) Big Joey sold cocaine, acid and mescaline (20 RT 4621) and taught appellant about selling drugs. (20 RT 4622.) Drug dealing was proposed as a possible employment option for appellant when he grew up. (20 RT 4624.) Big Joey never told appellant that drug dealing was wrong. (*Id.*)

Big Joey made $200-300 a day selling drugs, the primary source of his income. (20 RT 4625.) The drug sales continued for a couple of years until Big Joey split up with Dolores. (20 RT 4626.) They divorced in 1975 when appellant was four. (*Id.*) After the divorce, Mr. Perez became addicted to heroin and all his efforts were devoted to getting high. (20 RT 4627, 4638.) One year, Big Joey used a stolen credit card to buy appellant Christmas gifts. (*Id.*) When appellant was seven or eight years old, they smoked marijuana together (20 RT 4630-4634) and Big Joey would take his son to "shooting

galleries," places where addicts buy and use heroin. (20 RT 4638.)

Big Joey exposed appellant to criminal activity by using him as a "point man" when he was nine or ten. (20 RT 4643.) Appellant once woke Big Joey up to tell him there was a BMW parked on the street. (20 RT 4644.) Big Joey jumped out of bed and got a screwdriver and told appellant to "keep point at the corner" and if the police came, to whistle. (20 RT 4645.) Big Joey used his son as a lookout more than 50 times. (20 RT 4647.) During this time, Big Joey also supported himself with car burglaries. (*Id.*) He did not provide any financial support for his son. (20 RT 4656.) During appellant's childhood, Big Joey was in prison four times: in 1984 and 1986 for auto burglary; in 1987 and 1988 for auto theft. (20 RT 4661.) He was in prison from 1984 to 1988. (20 RT 4661.)

From kindergarten through the fifth grade appellant lived with BeeBee. (20 RT 4652.) Appellant did well there because she was a strict disciplinarian, "like Hitler." (20 RT 4654.) BeeBee was very physically abusive. (20 RT 4655.) BeeBee's husband, David Lavern, who also lived in the home with appellant, was a heroin addict and an alcoholic. (20 RT 4657.)

When BeeBee died, Big Joey could not care for his son because he was strung out on dope. (20 RT 4662.) Big Joey wanted appellant to live with his brother Frank because he thought Dolores would make a babysitter out of

appellant. (*Id.*) He taught appellant "to engage in criminal activity...and avoid the police." (20 RT 4666.) Big Joey agreed he was not a good father. "He [appellant] just didn't have a chance. That's all. I can say he just didn't have a chance." "I don't know what the hell I was thinking." (20 RT 4667.)

Big Joey testified he knew Andrea Salcedo, appellant's wife. (20 RT 4672.) During the time appellant was married to her, Big Joey had a sexual relationship with her. (20 RT 4673.) This was when appellant was in jail. The relationship lasted 18 months. (*Id.*) Big Joey did not want appellant to find out about it, but he finally told him about the affair. (20 RT 4675.) Big Joey was aware that appellant was sent to the California Youth Authority but did not visit him there from 1986 to 1990. (20 RT 4681.)

Deborah Perez, appellant's aunt, testified that her parents, Joe Alouishes and BeeBee, were involved in criminal activity. (20 RT 4717.) Her father would steal merchandise from the docks and both parents would fence it. "She always had a hustle." (*Id.*) BeeBee was violent and a strict disciplinarian. (20 RT 4718.) Deborah's sisters were regularly beaten with brooms and other things. (20 RT 4719.)

Deborah met Dolores in junior high school and introduced her to Big Joey. (20 RT 4712.) They became romantically involved and Dolores soon became pregnant. (20 RT 4721.) Dolores took mescaline, smoked weed,

drank wine and smoked cigarettes during her pregnancy with appellant. (20 RT 4722.) Frequent drug sales occurred at BeeBee's house and both Deborah and Big Joey sold drugs. (20 RT 4724.) Big Joey stole car radios and dealt in stolen merchandise from the waterfront. (20 RT 4725.)

When he was a baby, appellant's parents would sometimes blow marijuana smoke in his nose to get him to sleep. (20 RT 4726.) As a little boy, appellant also smoked marijuana: "He grew up smoking weed." (20 RT 4728.) "He was in his crib when he started..." "He's always smoked weed, as far as I know." (*Id.*)

At thirteen or fourteen Deborah developed a drug problem and she graduated to heroin at age 17. She used heroin for 25 years. (20 RT 4732.) At the height of her addiction, she was spending $200 a day on heroin. (20 RT 4734.) Deborah would steal to support her habit. (20 RT 4735.)

There was always violence in the house and the main perpetrator was her mother BeeBee. (20 RT 4737.) However, Deborah was also responsible for much of the violence when she lived with Dolores and appellant. (*Id.*)

When appellant came to live with BeeBee, he was "a straight F student" and "after my mother got him going to school and got him on routines, he became an honor role student." (20 RT 4740.) BeeBee made sure appellant did his homework and involved him with sports. (20 RT 4741.) BeeBee was

supportive but also abused him with beatings with whatever she could get her hands on. (20 RT 4742.) This occurred almost daily. (20 RT 4743.) BeeBee would also scream abuse at him and call him names. "Joey cleaned up the house...he was a little slave." (20 RT 4743.) BeeBee had psychiatric problems, including nervous breakdowns, and went to a psychiatrist for many years. (20 RT 4745.) While appellant was living there, Deborah was using heroin and dealing cocaine. (20 RT 4746.) Deborah, BeeBee and Big Joey all used heroin and sold drugs out of the house. (20 RT 4748.) Appellant lived with Deborah for a short time when he was about eighteen. (20 RT 4757.)[18]

Richard Rossi was brought from state prison to testify. (20 RT 4760.) He met Dolores when he was working as a musician at a restaurant. (*Id.*) They moved in together about six months later. (20 RT 4762.) Mr. Rossi lived with Dolores for two years and appellant only came over three or four times and spent the night once. (20 RT 4763.)

Although Mr. Rossi's two daughters lived with him, there would have been room for appellant. (20 RT 4764-4765.) One night when appellant was

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[18] **Janice Duvauchelle,** appellant's second cousin, testified similarly that she remembered when appellant was living with his grandmother BeeBee. (21 RT 4825.) After BeeBee died, appellant went to live with Deborah and his father. (21 RT 4827.) Appellant told Ms. Duvauchelle that appellant was having problems at his mother's house and she once called Child Protective Service about her concerns. (21 RT 4828.)

there, they were awakened by men with shotguns. (20 RT 4770.) The men tied up Dolores and appellant and beat Rossi. (20 RT 4770.) Appellant was nine at the time. (*Id.*) The men beat Mr. Rossi with the butt of the shotgun. (20 RT 4772.) After this incident, Dolores took appellant back to his grandmother. (20 RT 4775.)

James Espinoza testified he had lived in the Excelsior District for thirty-nine years. (20 RT 4777.) It is a working-class neighborhood which has the highest per capita rates of teen pregnancy and incarcerated minors in San Francisco. (20 RT 4778.) In the 1980s, Mr. Espinoza was a social services provider working with parish sports programs, coaching soccer, baseball and basketball. (20 RT 4780.) He knew appellant from when he was seven or eight and coached him in baseball and soccer. (20 RT 4781). Appellant was a good athlete and helped out with "things that [didn't] even involve him." (20 RT 4783-4785.) Appellant seemed close to his grandmother. (20 RT 4787.)

Angelina Wallace, appellant's maternal grandmother, testified that when appellant was about a year old, she saw him with a bag of marijuana and became angry with her daughter and appellant's father. (21 RT 4802.) After that incident, they did not speak for a long time. (*Id.*) She lived just a few blocks away from them for about nine years. (21 RT 4803.) But even though

they were not speaking, she would babysit appellant. (*Id.*)

After BeeBee died, appellant came to live with Ms. Wallace, her husband Mike Wallace and several of their children. (21 RT 4807.) The family was eventually evicted because there were too many people living in the flat. (21 RT 4810.) Later, Dolores moved in with her again in a house on Manzanita Street in San Francisco. (21 RT 4811.) They lived together for four or five years. (21 RT 4812.)

Angelina saw Mike Wallace beat appellant four or five times. (21 RT 4815.) He punched appellant in the head or shoulders, pushed him around and verbally abused him. (21 RT 4818.) Appellant eventually ran away. (*Id.*) The last time he was gone for three or four months. (21 RT 4819.) Since then, Ms. Wallace has had little contact with appellant.(*Id.*)

Charla Gonzalez testified that in 1985 she was an employee of the San Mateo County Child Protective Services. (21 RT 4834.) In March of 1985 appellant, who had been placed in protective custody, was referred to her. (21 RT 4836-4838.) She had information that he had been physically abused by his maternal step-grandfather over a long period of time. He had run away and was refusing to go back. (*Id.*) Appellant, who was 13 at this time, looked well groomed and clean but "there was a sadness about him that I noticed." (21 RT 4840.) Appellant said that he had been frequently hit with a fist and a belt.

(21 RT 4841.)

Ms. Gonzalez took him to the shelter care home of Pamela Gensburg in San Mateo for a short term foster placement. (21 RT 4842.) At this time, appellant's father was incarcerated in Susanville State Prison. (21 RT 4843.) Appellant did not want to go back to his mother's house. (21 RT 4844.) Ms. Gonzalez interviewed appellant's mother and determined that she was not able to protect appellant from the abuse. (*Id.*)

The juvenile court allowed Ms. Gonzalez to keep appellant with Ms. Gensburg. (21 RT 4847.) Before he was dropped off, appellant wanted to visit a friend named Ricky, but appellant ran away and did not return to Pamela Gensburg's home. (*Id.*) Five days later, his mother called saying that appellant was at her house. (21 RT 4849.)

Ms. Gonzalez remembered appellant as a break dancer who was athletic and did well in school. (*Id.*) However, appellant rapidly transformed into a runaway and truant. (21 RT 4850.) In her opinion, appellant ran away from his home in order to protect himself. (21 RT 4853.)

Lolita Gutierrez, appellant's aunt, lived in her mother BeeBee's house from the time she was twelve until the age of sixteen. (21 RT 4859- 4862.) Lolita had a bad relationship with BeeBee, who would "go off" for the slightest thing. (21 RT 4863.) BeeBee would beat her, drag her by the hair

"[a]nd it was just awful but I went through this almost every single day." (21 RT 4863.) Joseph Alouishes, her stepfather, tried to protect Lolita from her mother. (21 RT 4865.) There was also a lot of violence between BeeBee and Joseph Alouishes. (21 RT 4866.) They fought often, sometimes with knives. Once he punched her in the face. BeeBee broke all his car windows with a baseball bat. (*Id.*)

Appellant did not have a warm and caring relationship with his parents as "[t]hey were really into themselves." (21 RT 4868.) Appellant came to live with Lolita's mother BeeBee because Dolores' boyfriend at the time did not get along with him. (21 RT 4869.) Appellant was about six or seven when he came to live with BeeBee. He lived there until BeeBee died when he was twelve. (*Id.*) Appellant helped her by doing chores, washing the dishes, and getting her coffee. (21 RT 4874.)

After BeeBee's death, appellant stayed in Lolita's house for about a month. (21 RT 4876.) There was a discussion as to where appellant could live, but staying with Dolores was not an option because of her boyfriend. (21 RT 4877.) Appellant could not live with his father because of his drug addiction and irresponsibility. (21 RT 4878.) Lolita decided to take custody of appellant when he was twelve. (*Id.*)

Appellant lived in their house less than three months. (21 RT 4880.)

He was despondent after BeeBee's death and kept repeating that he wanted to live with his mother. (21 RT 4881.) One day Dolores called and said she was going to take appellant back. (21 RT 4883.) During the time that appellant lived with Lolita, Dolores did not visit or provide financial support. (*Id.*) Lolita tried to talk Dolores out of taking appellant back. (21 RT 4884.) Lolita did not feel it was a "healthy place" for appellant because they would not keep him on track (*Id.*) and she was concerned about drug dealing and illegal activities in the house. (21 RT 4886.) Lolita did not agree with appellant's mother taking him back. (21 RT 4890.) "And to be quite frank with you, I hold her and my brother responsible for where we're at today." (21 RT 4891.)

In 1985 Lolita heard that appellant was in a safe house with Child Protective Services. (21 RT 4892.) Appellant briefly returned to Lolita's home in 1985 but stayed only a few weeks. (21 RT 4893.) He seemed very different and "wasn't following the rules." (21 RT 4894.) Lolita told him it was best that he leave. (*Id.*) Lolita was angry about the change in appellant and angry at Dolores. (21 RT 4896.) After that, Lolita lost contact with appellant and would see him only at family functions. (21 RT 4897.)

Arlene Brueggeman, a San Mateo County probation officer in the juvenile division, had appellant in her caseload in 1985. (21 RT 4908.) He

had been accused of shoplifting a pair of pants from J. C. Penny's in San Bruno. (21 RT 4910.) Ms. Brueggeman tried to assess whether he should go back home on probation or whether he needed a special program. (*Id.*)

After communicating with the family, she became aware of the abuse with his maternal step grandfather. (21 RT 4911.) The licensed foster mother, Lolita Gutierrez, contacted Ms. Brueggeman but appellant did not want to live with Lolita because he felt she was too strict. (21 RT 4912.) Ms. Brueggeman was going to recommend a general placement order to the court, which is with a foster home or a relative. (21 RT 4913.)

Ms. Brueggeman also referred appellant for a mental health evaluation. (21 RT 4914) which was performed at Hillcrest, a juvenile mental health facility. (21 RT 4915.) Appellant presented as quite immature, younger than most of the kids on her caseload. (*Id.*) Appellant was placed with Lolita for 12 days and then his aunt felt he "was out of her control." The home supervision officer felt appellant was violating his probation so he was brought back to Juvenile Hall. (*Id.*)

The court ordered appellant released on home supervision to his mother. (21 RT 4917.) Appellant then ran away and was missing for 19 days. (*Id.*) After another court date, appellant was sent to Stockton Children's Home, a group home. (21 RT 4918.)

Ms. Brueggeman's last recommendation to the court was on June 7, 1985, for further counseling. (21 RT 4919.) Appellant was "very difficult to handle because of his immaturity." He was "extremely immature and lacking in insight" and needed a lot of close supervision. (*Id.*)

Billie Lee Violette, a psychotherapist and psychoanalyst, worked at Hillcrest Mental Health Unit in 1985. (21 RT 4929.) Appellant's case was referred to her by Ms. Brueggeman. (21 RT 4930.) Ms. Violette's impression was that appellant came from "a pretty dysfunctional family in which he hadn't been protected..." (21 RT 4931.) He also had two traumas. "One was an incident where he was tied up [and] the mother's boyfriend was severely beaten." The other trauma was the death of his grandmother. "The impression I had was that he was different than a delinquently-oriented child." (21 RT 4932.) However, appellant did well in school and sports while he lived with his grandmother BeeBee. "He seemed to realize he was in trouble and needed help." (21 RT 4933.)

Runaways were not uncommon among the youths she supervised. (21 RT 4934.) She thought appellant ran away because he was not in a good situation with his mother and did not get along with his younger brother, whom he had to babysit. (*Id.*) Ms. Violette also thought the running away was due to "a lack of external controls, and there was abusiveness in the home. In

other words, he wasn't protected; but at the same time, beaten." (21 RT 4935.) She recommended that appellant be placed in a "controlling environment." (21 RT 4936.) At this stage, appellant was not particularly delinquent and "[t]hat's why I made the recommendations that I did." (21 RT 4937.)

Appellant also had problems with trust. He felt "that the psychiatrist that he had seen had violated his confidentiality." She thought it indicated a distrust. "...I saw him at grave risk because of the history that he had if he didn't get the help that he needed." (21 RT 4738.) "At that time I did not see him as a danger to the community." (21 RT 4941.)

Henry Nobles, a San Mateo County probation officer, was assigned to the Camp Glenwood Juvenile Facility in La Honda in 1986. (22 RT 4960.) Appellant had been committed there for four weeks because he had absconded from a youth employment project. (22 RT 4961.) Appellant was charged and convicted of an escape, a misdemeanor. (22 RT 4963.) In 1985, appellant was committed to the Children's Home of Stockton after stealing a pair of pants, a misdemeanor. He ran away after about three weeks. (22 RT 4964.) Appellant was then placed in Moss Beach Homes where he ran away again. (*Id.*) In December of 1985, appellant was placed in Natividad Boys Ranch in Salinas. He was allowed to go home for a visit but didn't return. (*Id.*) Appellant had been convicted of three non-violent misdemeanors when Mr.

Nobles saw his file. (22 RT 4965, 4985.)

Mr. Nobles considered returning appellant to Camp Glenwood, but it was not a locked facility. (22 RT 4966.) The only other available locked facility was the California Youth Authority. Appellant was only fourteen at the time. (*Id.*) Nobles had concerns about this and made the recommendation reluctantly due to appellant's age. (22 RT 4967.)

Mr. Nobles felt appellant was salvageable. (22 RT 4968.) He had not committed any serious or violent offenses, was only fourteen, had weak parental guidance, and was Hispanic and small in stature. Appellant would have to be a fighter to survive. (*Id.*) The court followed the CYA recommendation. (22 RT 4970.)

Loretta Bassillio, appellant's aunt, testified she was married to Dolores Bassillio's brother Rick. (22 RT 4986.) She first met appellant when he was about thirteen, after his grandmother died. (22 RT 4987.) Appellant was a nice kid. (*Id.*) Then Ms. Bassillio lost contact with him until he was released from the CYA when he was fifteen or sixteen. She decided to take appellant into her home. (22 RT 4988.)

The Bassillios picked appellant up at the CYA and brought him to South San Francisco. (22 RT 4989.) Appellant was different, more streetwise and harder. He had changed a lot. (*Id.*)

Appellant stayed in their home about a month. (22 RT 4990.) Ms. Bassillio enjoyed having him there. (*Id.*) Then the school district notified her that appellant had not been attending school, a condition of his probation. (*Id.*) When Ms. Bassillio told appellant he would have to be walked to school, he ran away. (22 RT 4991.) Appellant then lived with his father. (22 RT 4994.) Appellant would keep in contact by calling in. (*Id.*) His mother was always gone, "she was into partying and not coming home..." (22 RT 4996.) When appellant lived with Ms. Bassillio, his mother or father never came to see him, nor did they contribute to his support. (22 RT 4997.)

Susan Frankel, an attorney in San Francisco, testified that she knew appellant when she volunteered in 1988 for a mentoring program called "Volunteers In Parole" (VIP) that matched attorneys with youths who had just been released from CYA. (22 RT 5001.) She met appellant in 1989 when he was seventeen. (22 RT 5001.)

They first met for lunch and then again two weeks later. (22 RT 5002.) "He was very motivated at that time to get to know me and to develop a relationship and try and straighten out his life." (*Id.*) Ms. Frankel later learned that appellant had gone back to CYA. (22 RT 5003.) They corresponded. (*Id.*)

The next time she saw him was in late 1990 or early 1991. (22 RT 5004.) Frankel had started work at the San Francisco City Attorney's Office.

Appellant contacted her. (*Id.*) She picked him up at his father's apartment and they went to Chevy's Restaurant. Appellant wanted to apply to San Francisco City College. (*Id.*) The next time Frankel saw him was about a year later when he was hospitalized. (22 RT 5005.) He seemed changed, harder, less innocent. This was the last time they saw face to face. (22 RT 5007.) At the time of the trial, Frankel still corresponded with appellant, about once a month. (22 RT 5007.) "He adored [his] grandmother...and her death was very devastating to him...He felt that that was a real turning point in his life." (22 RT 5022.)

Eva Torrez testified that appellant was placed in her home because she was a foster mother for "CYA" boys recently paroled from the Youth Authority. (22 RT 5024.) There were four or five other "CYA boys" there at the time. (22 RT 5027.) Appellant shared a room with them. His parents did not visit him while he was there. (22 RT 5028.) He followed the program, "never got in any trouble" and tried to get along. (*Id.*) The other boys were intimidating. Appellant was 19 at the time (22 RT 5031) and immature like most of the CYA boys. (22 RT 5034.)

Gretchen White, a psychologist, was asked to "prepare a psycho-social history on Mr. Perez...in June of 2000." (22 RT 5046.) She reviewed many records and interviewed Perez family members. (22 RT 5047-5048.) "I found that Joey grew up in a family that was remarkably unstable, criminogenic."

(sic) It was "[a] family in which dissocial behavior was the norm." (22 RT 5048.) There was dysfunction for two generations "on both sides of the family." (22 RT 5049.) They were extensively involved in criminal activities. (22 RT 5049-5053.)

Appellant's parents were themselves both products of bad parenting. (22 RT 5038.) Dolores attempted suicide when appellant was seven months old. (22 RT 5059.) The parents separated when appellant was two. (*Id.*) He had experienced a lot of stress by the time he was twelve. (22 RT 5064.) "I believe that the key issues for Joey...was the attachment to his two parents who were simply not there for him, simply psychologically abandoned him..." (*Id)*

Despite her faults, BeeBee was a stable caretaker. "This was probably Joey's one good time in his life..." (22 RT 5066.) He "never stopped hoping that he would be able to live with his mother." (22 RT 5068.) BeeBee's death affected appellant greatly. (22 RT 5069.) "It had a devastating emotional impact on him, as well as a profound effect on his living circumstances." (22 RT 5070.) "One of the things that happened is that he developed an unresolved grief reaction as a result of BeeBee's death." (22 RT 5071.) His life deteriorated after BeeBee's death. (22 RT 5074.)

Appellant is "not a typical delinquently oriented child, but rather a child who has been overwhelmed with chaos, violence and loss." (22 RT

5075.) He had a fear of being hurt again. (22 RT 5080.)

Daniel Macallair, vice-president of Center on Juvenile and Criminal Justice, testified as a defense expert on juvenile detention facilities. (23 RT 5133-5138.) Research shows that the California Youth Authority (CYA) actually contributes to delinquent behavior. (23 RT 5138.) There are a lack of programs, poor staff-inmate relationships, racial and ethnic tensions, overcrowding, and gang warfare. (23 RT 5139.) Appellant was in CYA from 1986 to 1992. (*Id.*) All five conditions existed at that time. (23 RT 5140.) In 1988, over 70 per cent were there for a violent offense or had a previous violent offense. (*Id.*) Appellant did not have a violent offense when sent there. (23 RT 5141.) CYA was severely overcrowded from 1987 to 1993. (*Id.*) The witness stated that appellant would be exposed "to violence on a regular basis." (23 RT 5142.)

Appellant was fourteen when he entered CYA in 1986, making him among the youngest in the system. (23 RT 5144.) Only three percent were committed at age fourteen, like appellant. (23 RT 5162.) The O.H. Close facility was designated for younger male wards. (23 RT 5148.) There was an informal initiation where the wards would be asked if they want to join a gang, for protection. (23 RT 5150.) If a ward responded by fighting, he would be accepted into a gang. (23 RT 5151.) "Joining a gang in the Youth

Authority is considered essential for ensuring yourself protection." (23 RT 5154.) The youths are under constant stress. (23 RT 5158.) This has psychological consequences "and the stress within these living units does have an impact on behavior." (23 RT 5160.)

Appellant was at O.H. Close in 1986 and returned there in 1988. (23 RT 5161.) This facility was designed to house 379 wards, but it held 523 in 1986 and in 1988, it held 546 whose average age was 17.5. There was approximately one contracted psychiatrist per 500 kids. (23 RT 5166.)

Later, appellant was at the Holton and Preston facilities. (23 RT 5170.) These institutions were for older wards who tended to be more violent. (23 RT 5172.) Preston and Chino were considered "the most violent institutions within the system." (23 RT 5173.) The violence at Preston was well known. (23 RT 5174.)

At age 20, appellant was committed to the N.A. Chaddejerian facility. (23 RT 5178.) It replaced Preston as the institution for the most dangerous and delinquent youths. (*Id.*) Most of the youths there were committed for violent offenses and the median age was twenty-one. (23 RT 5179, 5205.)

A large number of youths committed to CYA re-offend. (23 RT 5184.) Ninety percent were "rearrested after their release from the California Youth Authority." (*Id.*) Appellant ran away from Natividad Ranch, Camp Glenwood,

and Moss Beach and these were good programs. (23 RT 5194.) However, it's "not unusual to have kids run from programs." (*Id.*)

5) The prosecution's rebuttal case at the penalty phase.

The prosecution presented several witnesses in an attempt to discredit defense witness Mr. Pasley's observations of the Contra Costa County jail cell extraction incident. **Scott Worthan,** a sergeant with the sheriff's office, attended an administrative hearing on October 12, 1999 regarding this incident. (23 RT 5219.) Appellant did not say he was beaten or kicked. (23 RT 5221.) **Patricia Ford,** an inspector from the District Attorney's office, attempted to show that Mr. Pasley could not have seen what he alleged regarding the cell extraction incident. (23 RT 5223- 5227.) **Jerry Sanchez,** a Pittsburgh, CA police homicide investigator, also attempted to show the same thing. (23 RT 5241-5257.)

On November 16, 2001, the jury reached a verdict of death. (24 RT 5540; 5 CT 1920-1922.) On January 25, 2002, a motion for a new trial was denied. (24 RT 5586.) A defense application for modification of the death sentence was also denied. (24 RT 5595.) The court found that the aggravating factors outweighed the mitigating ones and the defendant had shown "no sense of wrongdoing or remorse." (24 RT 5596.)

ARGUMENT

I. THE TRIAL COURT'S SYSTEM OF GROUP *VOIR DIRE* VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL.

Appellant's conviction and death sentence were unlawfully and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the California Constitution because the trial court's jury selection system did not allow adequate time for *voir dire* of the prospective jurors to ensure appellant a fair and impartial jury.

A. Introduction.

The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." (U.S. Const., Amend. VI.) The Fourteenth Amendment extended the right to an impartial jury to criminal defendants in all state criminal cases. (*Duncan v. Louisiana* (1968) 391 U.S. 145.) In addition, the Due Process Clause of the Fourteenth Amendment independently requires the impartiality of any jury empaneled to try a cause. (*Morgan v. Illinois* (1992) 504 U.S. 719, 726.)

The trial court's actions deprived appellant of his right to a fair and

impartial jury and a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 15 and 16 of the California Constitution, as well as his Eighth and Fourteenth Amendment rights not to be condemned to death except on the basis of unbiased and reliable procedures. (*United States v. Baldwin* (9th Cir. 1983) 607 F.2d 1295, 1298; *People v. Chapman* (1993) 15 Cal.App.4th 136, 141. *See also United States v. Saimiento-Rozo* (5th Cir. 1982) 676 F.2d 146, 148.) The trial court's failure to conduct adequate individual sequestered death qualification *voir dire* also violated appellant's right under California law to individual juror *voir dire* where group *voir dire* is not practicable. (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1184.)

"The conduct of voir dire is left to the broad discretion of the trial judge. The exercise of that discretion, however, is limited by 'the essential demands of fairness.'" (*Knox v. Collins* (5th Cir. 1991) 928 F.2d 657, 666 citing *Aldridge v. United States* (1931) 283 U.S. 308, 310.)

B. Facts in Support.

Jury selection began on September 12, 2001. (6 RT 1195.) Juror questionnaires were handed out. (6 RT 1312; the thirteen juror questionnaire volumes are designated as "JQ".) The defense had earlier made a motion for

sequestered *voir dire* [19] of the oral portion of jury selection (5 RT 1068; 4 CT 1300-1327) which was denied. (5 RT 1069.) In that motion, defense counsel argued that the courts's proposed system gave an inherent advantage to the prosecution (5 RT 1082; 4 CT 1305-1310); that it deprived appellant of a fair trial (4 CT 1305-1310); that it denied appellant equal protection (4 CT 1316-1323); and that it denied appellant his right to effective counsel and due process. (4 CT 1323.) The court also denied the request by the defense to impanel two juries (4 CT 1323-1328), one for each phase of the trial, holding that a unitary jury was proper. (5 RT 1082-1083.) A request for additional jury compensation in that same motion (4 CT 1330-1335) was also denied. (5 RT 1083.) Additionally, the court restricted each side's questioning to a total of only one half-hour for each panel of 25 jurors. (7 RT 1440.) Defense objections to this procedure were also denied. (7 RT 1444.) Thus, the court limited the defense in its questioning to **a little over one minute per juror**.

Even more restrictively, the court indicated that it would not allow questioning of those prospective jurors who "are clearly going to be challenged for cause"..."You can not ask any questions of some of them, and so forth"... and "...no time will be spent by you doing improper things such as

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[19] So-called "*Hovey" voir dire*. (*Hovey v. Superior Court* (1980) 28 Cal.3d 1.)

instructing them on the law." (7 RT 1444.) The court further stated that "...with respect to the half-hour limitation on attorney questioning that I have indicated will be in order, for the entire panel that translates into about four hours of questioning that is available to you, for counsel. I determined that...is...more than enough time." (7 RT 1441.)

In making this ruling, the court stated that it was exercising its discretion pursuant to Penal Code Section 233. (7 RT 1442.) In objecting, defense counsel Linda Epley pointed out that the court's time limits would amount to only about one minute per prospective juror. (*Id.*) Lead defense counsel William Egan also objected, stating that under Cal. Rule of Court 8.5 and the Code of Civil Procedure that "you have the right to examine the entire panel before, and exercise all challenges of cause before exercising peremptory challenges." (7 RT 1443.) The court denied the defense objections, stating "[y]our record is protected." (7 RT 1444.) Defense counsel Egan then observed that "[a]gain, I would say, allowing a little over one minute per juror is totally inadequate....Anyway, I think it's wholly inadequate and arbitrary under the statute." (*Id.*)

Additionally, the court did not allow any questionnaire-based stipulations as to certain jurors before the panel was brought in, which would have freed up more time for questioning the remaining jurors. (7 RT 1445.)

As a result, many jurors were questioned inadequately, especially regarding their attitudes to the death penalty. In general terms, this inadequacy is apparent from the record, which shows a remarkably short *voir dire* for a capital case. Not counting the excused jurors, it commenced at 7 RT 1445 and ended at 8 RT 1939, less than two full days, which also included discussions on various motions and exhibits unrelated to the *voir dire*. The little questioning which was allowed was so clearly inadequate that reversal is required without any particularized showing of harm. (*Covarrubias, supra,* 60 Cal.App.4th at 1184.)

If a particularized showing of prejudice is needed, there are troubling instances in the record where jurors changed their responses from the questionnaires and defense counsel could not inquire further because of the *voir dire* restrictions. Juror No. 7 in the *voir dire* was Juror No. 2 in the final jury. (7 RT 1481.) This juror was asked about their attitude toward the death penalty in question 101 where he/she says they have been against it but now opposes it "except in extreme cases." (*Id.*; 1 JQ 125-126.)

As to Question 120, the juror stated at *voir dire* that he/she could follow the law, which was a shift in their position. (7 RT 1482; 1 JQ 129.) This juror was asked about the terrorist attack of September 11, 2001 in New York, which occurred on the day immediately prior to jury selection. This juror

knew 6 people in New York and as for the death penalty, "[c]ertainly, [for] New York, Oklahoma City...Death is an option." "I could probably struggle with that. It would be difficult." (7 RT 1483.) In changing his questionnaire responses, this juror stated "I understand I need to follow the law, and I am confident I can do that." (7 RT 1484.)

Juror No. 11 in the *voir dire* was seated juror No. 4. (7 RT 1489.) This juror wrote that he believed that the criminal justice system made it too hard for the police and prosecutor to convict people accused of a crime. On his questionnaire, this juror wrote that "I'm sure there are circumstances where the system also impedes the police from doing their job." (1 JQ 87.) He said that was "just a comment." The court then suggested: "[a]nd you're prepared to follow the law?" (7 RT 1491.)

Juror No. 15 in the *voir dire* was seated as Juror No. 6. (7 RT 1497.) This juror knew people who worked in the district attorney's office in Arizona (1 JQ 350), two of whom were now judges, and one was on the Court of Appeals. (7 RT 1497.) As to the burden of proof, this juror believed "a good police officer would be more interested in the truth" than someone else. (7 RT 1498; 1 JQ 360.) This eventual juror was questioned for only two pages.

Further examples of prejudice are discussed in the next section of this issue.

C. Argument.

i. The *voir dire* procedure violated appellant's Constitutional rights to due process, trial by an impartial jury, effective assistance of counsel, and a reliable sentencing determination.

A criminal defendant has federal and state constitutional rights to trial by an impartial jury. (U.S. Const., 6th & 14th Amends.; *Parker v. Gladden* (1966) 385 U.S. 363; *Duncan v. Louisiana* (1968) 391 U.S. 145, 149; *Morgan v. Illinois* (1992) 504 U.S. 719, 726; Cal. Const, art. I, §§ 7, 15 & 16.) Whether prospective capital jurors are impartial within the meaning of these rights is determined in part by their opinions regarding the death penalty. Prospective jurors whose views on the death penalty prevent or impair their ability to judge in accordance with the court's instructions are not impartial and cannot constitutionally remain on a capital jury. (*See generally, Wainwright v. Witt* (1985) 469 U.S. 412; *Witherspoon v. Illinois* (1968) 391 U.S. 510; *see also Morgan v. Illinois, supra*, 504 U.S. at 733-734; *People v. Cummings* (1993) 4 Cal.4th 1233, 1279.)

Death qualification *voir dire* plays a critical role in ferreting out such bias and assuring the criminal defendant that his constitutional right to an impartial jury will be honored. (*Morgan v. Illinois, supra*, 504 U.S. at 729.) To that extent, the right to an impartial jury mandates *voir dire* that adequately identifies those jurors whose views on the death penalty render them partial

and unqualified. (*Id.*) Anything less generates an unreasonable risk of juror partiality and violates due process. (*Id.* at 735-736, 739; *Turner v. Murray* (1986) 476 U.S. 28, 37.) A trial court's severe limitation on the time allotted for *voir dire* or insistence upon conducting the death qualification portion of *voir dire* in the presence of other jurors solely because it would save time necessarily creates such an unreasonable risk.

This Court has long recognized that exposure to the death qualification process creates a substantial risk that jurors will be more likely to sentence a defendant to death. (*People v. Hovey* (1980) 28 Cal.3d 1, 74-75.) This Court also observed in *Hovey*:

> Given the frailty of human institutions and the enormity of the jury's decision to take or spare a life, trial courts must be especially vigilant to safeguard the neutrality, diversity and integrity of the jury to which society has entrusted the ultimate responsibility for life or death.
> (*Id.* at 81.)

When jurors state their unequivocal opposition to the death penalty and are subsequently dismissed, the remaining jurors may be less inclined to rely upon their own impartial attitudes about the death penalty when choosing between life and death. (*Id.* at 74.) By the same token, "[j]urors exposed to the death qualification process may also become desensitized to the intimidating duty of determining whether another person should live or die." (*Covarrubias v. Superior Court, supra*, 60 Cal.App.4th at 1173.) "What was

initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life." (*Hovey*, *supra,* at 75.) Death qualification *voir dire* in the presence of other members of the jury panel may further cause jurors to mimic responses that appear to please the court, and to be less forthright and revealing in their responses. (*Id.* at 80, fn. 134.)

Given the substantial risks created by exposure to the death qualification process, any restriction on individual and sequestered *voir dire* on death-qualifying issues, including that imposed by Code of Civil Procedure section 223 (which allows death qualification in the presence of other prospective jurors where practicable and abrogates this Court's mandate that such *voir dire* be done individually and in sequestration (*Hovey v. Superior Court, supra*, 28 Cal.3d at 80; *People v. Waidla* (2000) 22 Cal.4th 690, 713)) cannot withstand constitutional principles of jury impartiality. (*See, e.g., Morgan v. Illinois, supra*, 504 U.S. at 736, *citing Turner v. Murray, supra*, 476 U.S. at 36 ["The risk that . . . jurors [who were not impartial] may have been empaneled in this case and 'infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.'"].)

Nor can such restriction withstand Eighth Amendment principles

mandating a need for the heightened reliability of death sentences. (*See, e.g., California v. Ramos* (1983) 463 U.S. 992, 998-999; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

Likewise, because the right to an impartial jury guarantees adequate *voir dire* to identify unqualified jurors and provide sufficient information to enable the defense to raise peremptory challenges (*Morgan v. Illinois, supra*, 504 U.S. at 729; *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188), the negative influences of open death qualification *voir dire* violate the Sixth Amendment's guarantee of effective assistance of counsel.

Put simply, juror exposure to death qualification in the presence of other jurors leads to doubt that a convicted capital defendant was sentenced to death by a jury empaneled in compliance with constitutionally compelled impartiality principles. Such doubt requires reversal of appellant's death sentence. (*See, e.g., Morgan v. Illinois, supra*, 504 U.S. at 739; *Turner v. Murray, supra,* 476 U.S. at 37.)

Even assuming that individual sequestered death qualification *voir dire* is not constitutionally compelled in *all* capital cases, under the circumstances of this case, the trial court's severe limitation of the questioning and insistence upon conducting the death qualification portion of *voir dire* in the presence of

other jurors still violated appellant's constitutional rights to an impartial jury, a reliable death verdict and due process of law. The trial court's error also violated appellant's constitutional right to equal protection of the law and his federal due process protected statutory right to individual *voir dire* where group *voir dire* is impracticable. (*See Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Here, allocating a little over a minute to examine each juror was plainly inadequate.

ii. The trial court abused its discretion when it denied counsels' request for individual sequestered *voir dire*.

Code of Civil Procedure Section 223 vests trial courts with discretion to determine the feasibility of conducting *voir dire* in the presence of other jurors even in capital cases. (*People v. Box* (2000) 23 Cal.4th 1153, 1180; *People v. Waidla, supra*, 22 Cal.4th at 713; *Covarrubias v. Superior Court, supra*, 60 Cal.App.4th at 1184.) Under section 223, "[v]oir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases."

The proper exercise of a trial court's discretion under Section 223 however, must balance competing practicalities. (*See, e.g., People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977["[E]xercises of legal discretion must be . . . guided by legal principles and policies appropriate to the particular matter at issue."].) This Court has recognized that individual sequestered *voir*

dire on death penalty issues is the "most practical and effective procedure" to minimize the negative effects of the death qualification process. (*Hovey v. Superior Court, supra*, 28 Cal.3d at 80, 81.)

Although the trial court recognized that it had discretion to conduct either group or individual sequestered *voir dire* on death penalty issues (7 RT 1442), it simply denied without explanation the defense objections, stating "[y]our record is protected." (7 RT 1444.) The trial court also denied without explanation the defense's request for stipulations, which would have freed up more time for juror questioning. (7 RT 1445.) Rather than determining whether group *voir dire* was practicable in the particular circumstances of this case, it refused to conduct individual, sequestered *voir dire* simply because it presumably determined that Code of Civil Procedure Section 223 overruled *Hovey* and such *voir dire* was no longer required. (*Id.*)

Moreover, even if this Court concludes that the trial court did exercise proper discretion in denying *Hovey voir dire*, the trial court's own comments show that it abused its discretion in making that decision. Indeed, the trial court seemed to focus more upon the fact that *Hovey voir dire* was no longer required rather than engaging in a careful consideration of the practicability of large group *voir dire* as applied to appellant's case. (*e.g.*, 7 RT 1442.) (*Covarrubias v. Superior Court, supra*, 60 Cal.App.4th at 1183.)

To the extent the trial court was concerned solely with time, such consideration was inappropriate. "[A] court abuses its discretion if it dismisses a case, or strikes a sentencing allegation, solely 'to accommodate judicial convenience or because of court congestion.'" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531, *quoting People v. Kessel* (1976) 61 Cal.App.3d 322, 326.) It is an abuse of discretion and a denial of the defendant's right to an impartial jury when a court places convenience above a capital defendant's right to *Hovey voir dire* where group *voir dire* is impracticable.

The record set forth above shows that the trial court simply failed to engage "in a careful consideration of the practicability of . . . group voir dire as applied to [appellant's] case." (*Covarrubias v. Superior Court, supra*, 60 Cal.App.4th at 1183.) Moreover, it summarily rejected *Hovey voir dire* even though this Court has recognized it as "[t]he most practical and effective procedure available to minimize the untoward effects of death-qualification[.]" (*Hovey v. Superior Court, supra*, 28 Cal.3d at 80.)

In sum, the trial court's decision does not amount to the kind of "reasoned judgment" this Court ascribes to the sound exercise of judicial discretion. (*See People v. Superior Court (Alvarez), supra,* 14 Cal.4th at 977.)

Furthermore, the record shows that, as result of the trial court's denial

of sequestered *voir dire*, the entire jury venire was exposed to extremely prejudicial statements made by many of the prospective jurors during group *voir dire* relating to matters that would have been inadmissible at trial. The group venire was also needlessly exposed to improper attitudes toward the death penalty. For example, prospective juror Michael Bernard (No. 19) said that he wanted more judges to deal with the "crime wave." (7 RT 1547; 2 JQ 487.) The idea that the defendant does not have to present any evidence was "problematic" with him. (5 RT 1526.) He also stated that "[i]f a person committed a crime, they should be punished without regard to mental health" (7 RT 1550; 2 JQ 498) and he would not consider psychiatric testimony. (7 RT 1551; 2 JQ 497.) As he put it, "[c]rime equals punishment." (*Id.*; 2 JQ 503.) Natalie Milanio thought that the death penalty should be imposed regardless of the defendant's background if he was found guilty. (7 RT 1720; 2 JQ 737.) She gave the impression that it was proper to ignore such evidence and stated that "if a person commits a crime and he's found guilty, then he should receive the death penalty." (7 RT 1721.)

Prospective juror Jeffrey Maitlen stated that if appellant was found guilty, he would "adamantly press for the death penalty," based on what he heard on television. (7 RT 1651; 4 JQ 1234.) He stuck to the term "press for the death penalty" even after being coaxed by the court to state that he would

"give it serious consideration." (7 RT 1652.) Mr. Maitlen admitted he would draw inferences if the defendant did not take the stand (7 RT 1653; 4 JQ 1238) and that he was biased against social, mental health testimony. (7 RT 1654; 4 JQ 1242.) When he was questioned by the attorneys, Mr. Maitlen again told the court that he would "adamantly" push for the death penalty (7 RT 1712) and he didn't want to hear "excuses" like "I was beat as a child." (7 RT 1713.) He admitted he had an improper bias against such evidence (7 RT 1714) and twice characterized it as a "lame excuse." (7 RT 1717, 1718.)

The panel was also improperly exposed to publicity about the case as a result of the group *voir dire*. Prospective juror Susan Branagan stated that if the defendants were found guilty, she wanted them "killed like they killed her" because "I know all the details." (7 RT 1709; 4 JQ 1505.) She wrote on her questionnaire that she would not like to hear about their childhood background. (7 RT 1711; 4 JQ 1515, 1520.) Prospective juror Sharon Brechtel stated that, based on what she had learned through trial-related publicity, she felt that appellant was guilty and, as a result, she could not be impartial. (8 RT 1835; 7 JQ 2526-2527.) She added that there was "no way" she could set aside what she had learned about the case. (8 RT 1837; 7 JQ 2527.) The panel was again informed about the pre-trial publicity when prospective juror Mary Meredith stated that she was also not sure she could be fair because of what

she had heard about the case. (8 RT 1837.) George Herberger had heard the publicity, and, as a result, thought the defendant was guilty. (8 RT 1846.) He also felt that the defendant's background was irrelevant. (*Id.*) In his questionnaire, he checked every single box as "always" about possibilities as to when the death penalty should be applied. (8 RT 1849; 5 JQ 1757.) Had individual *voir dire* been conducted, the entire panel would not have heard these improper remarks based on prejudicial pre-trial publicity.

It is evident, therefore, that the trial court's failure to grant sequestered *Hovey voir dire* resulted in prospective and actual jurors alike hearing extremely prejudicial matters relating to jurors': (1) views mandating the death penalty for anyone found guilty of murder; (2) beliefs that mitigating evidence is of no moment and should be disregarded; (3) views about unfavorable pre-trial publicity indicating that appellant was guilty; (4) views about life-sentenced individuals being paroled; (5) views that the defendant either should or had to take the stand and that unfavorable inferences could be drawn if he did not; and (6) belief that a disadvantaged childhood background was just a lame excuse for murder. These views were heard by jurors who actually served on appellant's jury. This Court should vacate appellant's death verdict because the State cannot prove beyond a reasonable doubt that the trial court's error did not contribute to the verdict obtained. (*Chapman v.*

California (1967) 399 U.S. 18, 24.)

II. LEAD DEFENSE COUNSEL HAD A CONFLICT OF INTEREST, AS THE TRIAL JUDGE HAD FOUND HIM INEFFECTIVE IN A CASE PENDING IN THE COURT OF APPEALS.

Appellant's conviction, death sentence, and confinement are unlawful and were obtained in violation of his rights under the Due Process Clause of the Fifth Amendment, the Assistance of Counsel Clause of the Sixth Amendment, the Cruel and Unusual Punishment Clause of the Eighth Amendment, and the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment, as well as his corresponding rights under article I, sections 7, 8, 15, and 17 of the California Constitution, because he was deprived of his right to counsel free from debilitating conflicts of interest.

A. Facts in Support.

Trial counsel Mr. Egan had a conflict of interest because the trial judge had found him to have rendered ineffective assistance of counsel in a case that was currently pending on appeal at the time of appellant's trial, and Mr. Egan failed to file a motion for his recusal under Penal Code Section 170.6.[20] The

[20] Mr. Egan *did* file a motion to disqualify Judge Spinetta on different grounds: that he had made statements indicating he thought

outcome of this appeal could have had serious implications for Mr. Egan's career, as all instances of a final finding of ineffective assistance of counsel have to be reported to the California State Bar by the court.[21] With this threat hanging over his career, Mr. Egan should have filed a recusal motion because, as Judge Spinetta himself acknowledged, people might later say "Mr. Egan might have had to make decisions in this case, *People v. Perez*, with an eye towards what effect it might have on...anybody who's investigating the matter." (3 RT 613.) Judge Spinetta also pointed out that Mr. Egan should have filed the recusal motion because "he may have felt he had to conduct it [this case] in a certain way because it might impact the way the judge handles that situation [the other case]." (*Id.*)

On November 5, 1999, appellant's case was assigned to Judge Norman Spinetta by Judge Mark Simons. (3 RT 600.) On that date, there was an *ex parte* discussion, out of the presence of the district attorney or appellant, as to whether the defense attorneys felt comfortable trying the case in front of Judge

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appellant was guilty. (4 CT 1135-1183.) This separate issue is discussed in the following claim. These two issues are interrelated.

[21] California Business and Professions Code section 6086.7(a)(2) provides:

"A court shall notify the State Bar of any of the following:

...(2) Whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney."

Spinetta in light of his ruling in *People v. Eldridge* (Sept. 20, 2002)[2002 WL 31103022 (Cal. App.1 Dist.)]. (3 RT 602.) In *Eldridge*, Mr. Egan was trial counsel, the jury found Eldridge guilty, and a motion for a new trial had been granted by Judge Spinetta. (*Id.*) That motion was partly based on the ground of ineffective assistance of counsel. At the time of appellant's trial, it had been pending on appeal for about two years. (*Id.*) Judge Spinetta told Mr. Egan that

> The ruling...would have no impact on me whatsoever in how I view your overall performance as an attorney and my contacts with you..." The cumulative effect...led to a situation where I felt...the jury in that case was not given an opportunity to consider any real substantive issues...it appeared to me that she had no defense left.
> (3 RT 603.)

Judge Spinetta added that "[b]ut if you're wondering whether as a result of that situation there may be some view I entertain but that may be inimical to your client or you, the answer to that is an unequivocal no." (3 RT 604.) He also commented that this case [*Eldridge*] has had "some publicity." (*Id.*)

Judge Spinetta stated that he had "no problems" with either Mr. Egan or district attorney Paul Sequeira. (3 RT 605.) He observed that the court of appeals may rule there were strategic reasons for counsel's actions, and hold that he should not have granted the motion for a new trial. Judge Spinetta

added "[a]nd to be honest with you, I viewed it [the *Eldridge* case] almost not so much as an ineffective assistance of counsel case as a due process case. And I think I stated something to that effect when I announced the decision." (3 RT 605.)

Mr. Egan at first claimed that the ineffective assistance of counsel issues were not discussed by appellate counsel in the *Eldridge* case. (3 RT 606.)[22] However, appellate counsel, a Ms. Blair, was apparently having second thoughts and was wondering whether she should have subpoenaed Mr. Egan and developed the record. (3 RT 607.) In their briefs, the prosecution asked for a hearing on the ineffective assistance of counsel issue. Mr. Egan found out about it from a reporter's phone call. (*Id.*) As to the importance which he put on the matter, he stated that "...*this whole thing is definitely the worst thing that's ever happened to me in my career*" but "...I'm past it. But it's still there." (3 RT 608)(emphasis added). He added that "the whole reason I'm doing it [having this conversation] is I don't want to file a [motion under Penal Code] 170.6."[23] (*Id.*)

Judge Spinetta said that he was "comfortable" with Mr. Egan, adding

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[22] This was incorrect. These issues were discussed in the opinion. *See People v. Eldridge* (Sept. 20, 2002) [2002 WL 31103022] (Cal. App.1 Dist.)

[23] A motion under Penal Code 170.6 is a motion to disqualify the judge.

that "...on a personal level I'm sorry that it caused you so much pain. And you're saying that it has." (3 RT 608.) And again, "... I'm sorry it caused you personal pain...I do not feel anything derogatory or negative about your professional competency." (*Id.*)

Mr. Egan then stated that if the court of appeal upheld the motion for a new trial, Judge Spinetta would be "compelled to report my incompetence to the state bar." (3 RT 610.) Judge Spinetta responded, "[t]o the extent I'm obligated to do it, I would be obligated to do it." Although Judge Spinetta had never done it before, "I'm not clear that I have to do anything more than simply file a generalized report." (3 RT 611.) Mr. Egan said the judge might have to exercise his own judgment. However if the State Bar contacted him, Judge Spinetta said that "it would all have to be deferred until the conclusion of the trial." (*Id.*)

Then Judge Spinetta stated that he "didn't see any problems." Mr. Egan added, "I think we could deal with it." (3 RT 612.) However, if he had to report Mr. Egan to the state bar, Judge Spinetta said that it might put him in a situation "where people might say 'Mr. Egan might have had to make decisions in this case, *People v. Perez*, with an eye towards what effect it might have on what the Judge says to anybody who's investigating the matter.'" (3 RT 613.) He added, "Conceivably then someone would argue

down the line, 'Mr. Egan was in a conflict situation trying the case in front of this judge because he may have felt he had to conduct it in a certain way because it might impact the way the judge handles that situation.'" (*Id.*) The court also stated that it "could be the appearance of a conflict type of situation." (*Id.*)[24]

Mr. Egan, in referring to the possible state bar action, said, somewhat enigmatically, "they could do whatever they want to me...but that's not really true." (3 RT 614.) Judge Spinetta then got to the point of the dilemma and stated it accurately and succinctly: "Really, the question is should you be put in a position of trying a case in front of a judge who may be called upon to make comments about you in connection with this other matter. That's the question." (3 RT 614.) He suggested discussing it with appellant. (*Id.*)

Mr. Egan pointed out that his personal preference was to have the case tried by Judge Spinetta: "[a]nd my desire, whether or not it has any bearing on anything, is to have the case stay here." (3 RT 615.) The court then observed that "we need the client and the DA here" because "down the line somebody will say it shouldn't have proceeded in that department, given the situation that Mr. Egan and Judge Spinetta were in at that time because of the *Eldridge*

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[24] At this point, Mr. Egan stated that appellant's case will be "the last case I try, because I'm intending to retire." (3 RT 613.)

conflict. Then everything is for naught." (3 RT 615.)

On November 10, 1999, there was further discussion regarding the effect of the pending *Eldridge* case and the advisability of defense counsel filing a motion under Penal Code 170.6. (3 RT 620 *et. seq.*) Judge Spinetta stated that "[i]f the Court of Appeals affirms my decision...I may have to report it, and there may be an investigation in the matter." (3 RT 622.) He did not think he was "obligated by the statute to report it, and I have not done so." (*Id.*) The court noted that Government Code Section 6086.7 specifies when the court has to report to the State Bar. Subdivision (b) says "a reversal of judgment based upon incompetency of counsel." (*Id.*) Then the court engaged in some rather strained reasoning: "I concluded that an incompetency of counsel or ineffective assistance of counsel claim, does not constitute reversal of judgment...I had vacated the judgment for reasons that had nothing to do with performance of counsel. I had vacated the original judgment." (3 RT 622.) In the *Eldridge* case, the defendant Ms. Eldridge had been sentenced to two years. (3 RT 623.) Judge Spinetta vacated the judgment and rescheduled it for sentencing. New counsel brought a motion which was ultimately granted. "So from my perspective, there was no judgment pending. I granted the motion for a new trial at the time that there was no judgment. So there's no reversal of judgment." (*Id.*)

Judge Spinetta stated that he had run it by "Jessie" and the "legal research people" and they agreed. (3 RT 624.) However, "it strikes me some people do interpret that section as imposing an obligation of a trial court to report reversals of verdicts as opposed to judgments." (*Id.*) But "I don't buy it at the moment. That's why I've never reported this matter, and don't intend to report this matter. Because I don't feel it is within the call of Government Code Section 6086.7 (b)." (*Id.*)[25]

B. Argument.

Both the United States Constitution and the state constitution guarantee a defendant the right to counsel unburdened by conflicts of interests. (U.S. Const., Amend. VI; Cal. Const., art. I, section 15; *Wood v. Georgia* (1981) 450

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[25] The First District Court of Appeals on September 20, 2002 ultimately agreed with Judge Spinetta and held that Mr. Egan had rendered ineffective assistance of counsel in *Eldridge, and* that "the failure of the defense to offer any medical explanation was sufficiently prejudicial to undermine our confidence in the outcome." (*Eldridge, supra,* 2002 WL 31103022 at *22.) The opinion contains a lengthy discussion of the facts surrounding the ineffective assistance and Judge Spinetta's findings that were highly critical of Mr. Egan's performance in that case. (*Eldridge,* at *7-*22.) Among other holdings, Judge Spinetta "found that Egan's principal error was his failure to call an expert medical witness on defendant's behalf" when the "outcome depends almost entirely on whether there is a medical explanation for the conditions of the alleged victims..." (*Id.* at *10.) Judge Spinetta also stated that Egan's decision had "a disastrous two-fold effect" (*Id.*) and it left "the People's witnesses and case virtually unscathed and defendant's case seriously wanting of any evidence likely to move the jurors" and "so impoverished [the defense case] that its exclusion could not be justified..." (*Id.* at *11.)

U.S. 261, 271; *People v. Bonin* (1989) 47 Cal.3d 808, 833.) For purposes of conflict analysis, it is irrelevant whether counsel was retained or appointed. (*People v. Bonin, supra*, at 834.) "It is settled that an indigent charged with committing a criminal offense is entitled to legal assistance unimpaired by the influence of conflicting interests." (*People v. Rhodes* (1974) Cal.3d 180, 183.)

The legal analysis of situations in which counsel is burdened by a conflict of interest may be affected by whether the conflict was "actual" or merely "potential." In order to show a violation of the Sixth Amendment of the United States Constitution, a defendant who raised no objection at trial must show that his counsel was burdened by an "actual" conflict of interest and that the conflict adversely affected the representation. (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 348.) Once this showing has been made, the courts will not engage in "nice calculations as to the amount of prejudice," and the defendant will be entitled to relief without any further showing. (*Id.* at 349.) By contrast, under the California Constitution, "even a potential conflict may require reversal if the record supports 'an informed speculation' that appellant's right to effective representation was prejudicially affected. Proof of an 'actual conflict' is not required." (*People v. Mroczko* (1983) 35 Cal.3d 86, 105.) Like the federal "actual conflict" rule, this rule is applied even in the absence of any objection at trial. (*Id.*)

The U.S. Supreme Court's definition of the term "actual conflict" has been described as "rather vague." (*Beets v. Collins* (5th Cir. 1999) 65 F.3d 1258, 1265.) However, it seems clear that an "actual" conflict will be deemed to exist when an attorney "actively represents adverse interests." (*Id.*, citing *Cuyler v. Sullivan, supra*, at 348.) The term "potential conflict" appears to be defined for California purposes by means of this Court's "informed speculation" rule. (*People v. Mroczko, supra*, at 105.) Thus, a potential conflict exists if an informed speculation suggests that the defendant's right to effective representation was prejudicially affected

An attorney has a duty to represent his or her client with "undivided loyalty and effort" and his representation becomes deficient if a conflict deprives the client of this loyalty and effort. (*Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 612, *Wood v. Georgia, supra*, 450 U.S. at 272.) Thus, an attorney represents "adverse interests" and thereby creates an actual conflict of interests if the attorney's own financial or professional interests conflict with the representation of his client's best interests. (*See, e.g.*, ABA Model Rules of Professional Conduct, Rule 1.7 ["A lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests . . ."].) For example, an actual conflict has been found in cases in which an attorney has acquired publication or media rights regarding his

client's trial. (*U.S. v. Hearst* (9th Cir. 1980) 638 F.2d 1190, 1193; cf. *Bonin v. Calderon* (9th Cir.) 59 F.3d 815, 825-826 [literary rights agreement with client would create conflict, but lower court finding no such agreement existed upheld].)

Although conflicts of interest may be created by the actions of the attorney, they may also be created by the policies of the state or entity employing counsel to represent indigent defendants. (*Strickland v. Washington* (1984) 466 U.S. 668, 686, and cases there cited.) The Supreme Court has stated that the Sixth Amendment right to counsel is violated when the ability of counsel to make independent decisions about how to conduct the defense is compromised. (*Id.*) This Court has also held that financial and professional incentives or disincentives may deprive a defendant of the effective assistance of counsel. Thus, in *People v. Barboza* (1981) 29 Cal.3d 375, this Court created a judicially declared rule of criminal procedure, announced in an opinion authored by Justice Richardson, prohibiting public contracts with counsel for indigent defendants which "contain inherent and irreconcilable conflicts of interest." (*Id.* at 381.)

In *Barboza*, Justice Richardson reversed the conviction of two indigent defendants who had been represented by the Madera County Public Defender because the contract under which the public defender was paid created an

inherent conflict of interest. Under this contract, the public defender's office was to receive payments totaling $104,000 per year. However, each year $15,000 of this amount was placed in a special fund to be used to pay counsel who were appointed when the public defender could not represent an indigent defendant due to conflicts of interest. The public defender was entitled to any money left in the fund at the end of the year and was also required to make up any deficiency. As described by Justice Richardson, "[t]he direct consequence of this arrangement was a financial disincentive for the public defender either to investigate or declare the existence of actual or potential conflicts of interest requiring the employment of other counsel." (*Id.* at 379.)

Justice Richardson found that the contract ran afoul of the rule requiring attorneys to avoid "any relation which would prevent [the attorney] from devoting his entire energies to his client's interests." (*Id.*) "The contract here expressly places the public defender in a situation in which, potentially, his financial interests-- both personal and professional-- oppose the interests of certain of his client-defendants." (*Id.*, at 380.)

> No matter how well-intentioned the public defender might be, the contract places him in a situation with grave consequences and implications for the administration of justice. Not only is there an 'appearance of impropriety,' there is also a real and insoluble tension, created by the contract, between the defender's conflicting interests.
> (*Id.*)

Significantly, Justice Richardson did not analyze the case to determine whether the dual representation had prejudiced the defendants in any specific way, but instead concluded that the public defender's contract itself compelled reversal. "We therefore hold, as a 'judicially declared rule of criminal procedure' that contracts of the type herein presented contain inherent and irreconcilable conflicts of interest. It follows that defendants here are entitled to separate and independent counsel on retrial." (*Id.* at 381, internal citations omitted.)

As discussed *supra,* Judge Spinetta was forthright and open about the very real dilemma which counsel Mr. Egan was facing as a result of the pending appeal in the *Eldridge* case. This was far from a peripheral matter. It had caused "much pain" and "personal pain" to Mr. Egan. (3 RT 608.) In fact it was "the worst thing that's ever happened to [Egan] in my career," (*Id.*) which at the time of appellant's trial was very lengthy as he was on the verge of retirement, as he stated at 3 RT 613.[26] The finding in the *Eldridge* case had garnered "some publicity" (3 RT 604) and the holdings of Judge Spinetta were scathing in their evaluation of Mr. Egan's performance. As Mr. Egan was "intending to retire" after this trial (3 RT 613), his overriding concern would

[26] The *Eldridge* court noted that Mr. Egan had been practicing since 1975, or twenty-six years at the time of appellant's trial. (*Eldridge, supra,* at *14.)

have been to go out with a clear record. To do that, he would be unlikely to do anything at appellant's trial which could cause Judge Spinetta to cast him in an unfavorable light with regard to the state bar. Mr. Egan's overriding concern would have been in controlling and limiting the damage already done to his relationship with the trial judge, not in vigorously defending his client. In view of the importance both Judge Spinetta and Mr. Egan himself put on this pending matter, and the uncertainty about whether a report would have to be made to the state bar, appellant's case should have been transferred to a different judge. Mr. Egan's failure to move for the recusal of Judge Spinetta created a serious conflict of interest. Reversal is required.

III. TRIAL ERROR FOR FAILURE OF THE TRIAL JUDGE TO DISQUALIFY HIMSELF AS A RESULT OF COMMENTS THAT INDICATED HE COULD NOT BE IMPARTIAL.

Appellant's conviction, death sentence, and confinement are unlawful and were obtained in violation of his rights under the Due Process Clause of the Fifth Amendment, the Assistance of Counsel Clause of the Sixth Amendment, the Cruel and Unusual Punishment Clause of the Eighth Amendment, and the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment, as well as his corresponding rights under article I, sections 7, 8, 15, and 17 of the California

Constitution, because the judge who presided at his trial had shown, by pre-trial comments, that he could not be impartial and he refused to disqualify himself. As a result, appellant was deprived of his right to a fair trial.

A. Facts in Support.

On March 19, 2001, six months before appellant's trial commenced, the defense filed a motion to disqualify Judge Spinetta, on the basis of statements he made "in connection with the denial of the motion for a new trial and sentencing of Mr. Lee Snyder, a co-defendant in this case" where he indicated his belief in the guilt of the defendants. (4 CT 1135-1181; 4 RT 834.)[27] The motion was filed by lead defense counsel Mr. Egan. (4 CT 1135, 1182.) It alleged that appellant would move to have Judge Spinetta disqualified because he "has made statements that require disqualification under the provisions of California Code of Civil Procedure section 170.1(a)(6)(c)....such that a person aware of the facts might reasonably entertain a doubt that the judge would be impartial at Mr. Perez' trial." (4 CT 1135.) An accompanying motion made the same request "on constitutional grounds." (4 CT 1182-1183.)

The motion alleged that appellant, Maury O'Brien and Lee Snyder were

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[27] The motion, entitled a "Statement of Disqualification" is at 4 CT 1135-1181 and the accompanying "Motion To Disqualify On Constitutional Grounds" is at 4 CT 1182-1183.

indicted for murder and appellant's trial was severed from Mr. Snyder's. (4 CT 1136.) Mr. O'Brien had been offered leniency in exchange for testifying at Mr. Snyder's trial and "[a]ll parties and the court anticipate that Mr. O'Brien will testify at Defendant's trial..." (*Id.*) Judge Spinetta presided at both Mr. Snyder's and appellant's trials. (*Id.*) As Mr. Snyder was a juvenile at the time of the offense, he was not eligible for the death penalty. (*Id.*) Mr. Egan observed part of Mr. Snyder's sentencing hearing, where he recognized reporters from "the Contra Costa Times, the San Francisco Chronicle, KRON-TV and KGO-TV." (4 CT 1136-1137.) Judge Spinetta told Mr. Egan that he had granted permission for the news media to photograph and tape portions of the sentencing proceedings. (4 CT 1137.) As Mr. Egan stated in the motion

> On Saturday, March 3, 2001, I read an article in the San Francisco Chronicle relating to Mr. Snyder's sentencing. The article indicated that during the proceedings Judge Spinetta, in response to Mr. Snyder's assertion that he had not been involved in the crimes, made statements indicating his personal belief in the truth of the testimony given by Mr. O'Brien. I was concerned about this...
> (4 CT 1137.)

Mr. Egan asked the court reporter in Mr. Snyder's case to prepare a partial transcript of the sentencing hearing, which he attached to his motion. (4 CT 1155-1173.) Although Mr. Egan found that "the press did not quote Judge Spinetta with great precision," the judge did make the following prejudicial remarks at Snyder's sentencing:

1) "I am persuaded that the evidence that was presented in this case indicates that Mr. O'Brien was telling the truth in all material regards..." (PRT 4:18-20; 4 CT 1178.)[28]

2) "But having made that evaluation of the evidence in this case, I am persuaded, as I have said, that in all material respects he [O'Brien] was telling the truth." (PRT 4:26-28; 4 CT 1178.)

3) "I guess the way to express it is this: That I am as confident as one can be in these matters. These matters don't lend themselves to scientific precision, but I am allowing for that. I am confident as one can be that no injustice has occurred and that the jury has rightfully convicted defendant of the crimes charged in this case." (PRT 5:5-11; 4 CT 1179.)

4) "Evidence was presented. Based upon that evidence, the jury found you guilty of each and all the charges...I reviewed that evidence, as I indicated earlier, to assure myself that there was substantial...substantial evidence to support those verdicts....As I indicated earlier, I am

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[28] "PRT" refers to the partial transcript of the Snyder sentencing appended to Mr. Egan's motion, using Mr. Egan's page numbering, with the line number(s) following the page number. Although Mr. Snyder's trial transcript has been made a part of the Record on Appeal in this case, for easier reference appellant will use the pagination of Mr. Egan's motion and also the pagination of the partial transcript contained in the Clerk's Transcript of appellant's case. (4 CT 1155-1179.)

persuaded as much as anyone can be in these matters, that the verdicts were supported by substantial evidence and that you, in fact, did commit the murder that you were charged with." (PRT 35:22-26; 4 CT 1156.)

5) "This murder was senseless. It was vicious. It was heinous. All adjectives which I found in the correspondence I received which I alluded to earlier describing the kind of murder that it was. One individual in his letter to me indicated that what occurred here was that the victim, Mrs. Daher, was strangled, stabbed and stepped upon. And that's all true.

This was all done with premeditation. Indeed, it's striking to me here...these individuals, including you Mr....you, Mr. Snyder, set out to go kill someone else in Solano, stopped over in Lafayette, killed someone, Mrs. Daher, and then continued on to go to Solano to kill that individual again...

This premeditation permeates the whole process. The murder itself was...cold, it was callous, and it was perpetrated by what clearly indifferent murderers, among whom you are to be counted, Mr. Snyder.

Not only were you among the three, but I sat here through the...and heard the evidence, and the evidence strongly points to the fact

that Mrs. Daher was dead at the time she was stabbed. The evidence indicates that her neck was probably broken before she was stabbed, and the evidence indicated that you, yourself, along with Mr. Perez, were responsible and actively participated in that strangling, pulling the telephone cord that broke her neck."

(PRT 46:10-47:11; 4 CT 1167-1168.)

6) "One of the reasons I allowed the TV coverage that is taking place here is I want to give as much widespread notice as possible as to what happens to people who commit horrendous crimes of this nature. It's important to send out the message that individuals who do these things are going to be held accountable." (PRT 49:22-27; 4 CT 1170.)

In Mr. Egan's motion, he pointed out that there were many references to appellant both in Mr. O'Brien's testimony at the Snyder trial and his testimony in this case, as summarized *supra.*[29]

Newspaper accounts appended to the motion recounted the emotional

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[29] Some of the additional references summarized in Mr. Egan's motion, which need not be stated in detail here, are that Mr. O'Brien became acquainted with appellant shortly before the crime was committed; that O'Brien and Snyder conceived a plan to rob and, if necessary, kill a drug dealer in the Fairfield or Davis area; that appellant agreed to participate because he needed money; that they took BART and disembarked at Lafayette; that the three of them entered a house with an open garage door; and that appellant and Mr. Snyder strangled the woman they found in the house. (4 CT 1140-1141.)

nature of Snyder's sentencing hearing. (4 CT 1149-1153.)[30] The newspaper account in the Contra Costa Times stated that "Maury O'Brien told the jury in detail what he, Snyder and Joseph Perez did the day they robbed and killed Daher. O'Brien told the truth about the material facts, Spinetta said." (4 CT 1150.) The San Francisco Chronicle account stated that "[f]ellow suspect Maury O'Brien provided riveting testimony at Snyder's trial and is expected to testify against Perez." (4 CT 1153.)

The defense motion was made under Code of Civil Procedure §170.1(a)(6)(C). (4 CT 1135-1181.) An accompanying motion to disqualify Judge Spinetta was made on constitutional grounds (4 CT 1182-1183) and a later motion was made under Code of Civil Procedure §170.3(c)(3).

Judge Bernard Garber was assigned to rule on the motion for disqualification of Judge Spinetta under Code of Civil Procedure §170.3(c)(3). (4 CT 1238.)[31] Despite the numerous references to appellant at Mr. Snyder's sentencing hearing shown *supra*, Judge Garber held that "[t]he only place

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[30] Indeed, as discussed herein, several jurors commented during *voir dire* that they had already made up their minds based on what they had seen or heard in the media about the case, based on *these* media accounts.

[31] Judge Garber's ruling stated that "[t]he thrust of the Defendant's argument is based on Code of Civil Procedure §170.1(6)(c) which states 'A judge shall be disqualified if a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (4 CT 1239.)

where Mr. Perez was mentioned is on page 47, line 6 of the transcript..." (4 CT 1240.) This holding was at the very least ingenuous, if not outright erroneous, as it ignored the many other instances listed *supra* where appellant, if not directly named, is plainly referred to by Judge Spinetta.

Judge Garber then proceeded to deny the motion on several irrelevant and inapplicable grounds. He held that "the fact that a judge presided over a prior trial does not by itself bar him or her from presiding over a retrial" and "[t]his court is satisfied that there is no prohibition that would prevent the trial judge from hearing multiple separate trials of co-defendants." (4 CT 1240.) Of course this is true, but this was not the issue. While there is no such general prohibition, the prohibition was created by the judge's comments, not his status as a judge presiding over the separate trials of co-defendants.

Judge Garber then went on to state that "[i]n this case Judge Spinetta was limiting his comments to those which were necessary in ruling upon the motion for new trial and factors in determining the appropriate sentence for the co-defendant of Mr. Perez." (4 CT 1240.) Here, Judge Garber again misstated the issue. As Mr. Egan pointed out in his motion, the problem was not Judge Spinetta's comments on O'Brien's testimony:

> The comments made by Judge Spinetta concerning his belief that Mr. O'Brien told the truth in "material regards" and "material respects" were made at the time he was ruling on Mr. Snyder's Motion for New Trial. Judge Spinetta made it clear

> that in arriving at his decision to deny the motion he did what he is required to do. He must, and did, independently review the evidence as a '13th juror' and determine whether he would have decided the case differently from the other 12 jurors...He chose, appropriately, to comment on his personal and factual determinations regarding O'Brien's testimony.
> (4 CT 1143.)

Rather, the problem was the unnecessary comments that specifically related to appellant:

> That testimony [O'Brien's], in 'material regards' and 'material respects' constituted evidence as to Mr. Perez' identity, his knowledge, his planning, his intent, his motive, his mental state, his actions, his level of participation in the crime, and the overall circumstances of the crime. Thus, as regard (sic) to Mr. Perez, Mr. O'Brien provided material evidence for the proof of the crimes charged, the proof of the special circumstances charged and proof concerning a factor in aggravation at a potential penalty trial. The facts, in full context, do not provide a basis for determining that a person evaluating Mr. O'Brien's testimony could conclude that he was truthful in 'material regards' and 'material aspects' concerning Mr. Snyder, but not necessarily truthful concerning Mr. Perez. Legal necessity imposed upon Judge Spinetta the obligation to deal with the matters before him, and made it impossible to fulfill that obligation without raising, at a minimum, a doubt regarding his impartiality toward Mr. Perez.
> (4 CT 1143-1144.)

Judge Garber also misstated the facts in holding that Judge Spinetta limited his comments "to those which were necessary in ruling upon the motion for new trial and factors in determining the appropriate sentence" for Mr. O'Brien. (4 CT 1240.) This misstated the scope of the comments, which, as Mr. Egan pointed out, "while the statements concerning Mr. Perez were not

inappropriate per se, neither were they necessary for the Snyder hearings." (4 CT 1194.) Also irrelevant to the motion was Judge Garber's holding that Judge Spinetta "was making legitimate and appropriate comments necessary to make rulings in the case of the co-defendant." (4 CT 1241.) The motion was not based on the alleged impropriety of the judge's comments, but on the fact that, having made them, Judge Spinetta was now in a position that mandated his disqualification.

Judge Spinetta filed a written answer to this challenge in which he denied saying or doing anything that would disqualify him. (4 CT 1184-1188.) In that answer Judge Spinetta focused on the fact that his statements were made in the course of his judicial duties (4 CT 1185), and the language of Code of Civil Procedure 170.2(b) which states that "(i)t shall not be a grounds for disqualification that the judge...(h)as in any capacity expressed a view on a legal or factual issue presented in the proceeding..." (4 CT 1185.) Appellant's case was of course a different proceeding from that of Mr. Snyder's, where the views were expressed, and Code of Civil Procedure 170.2(b) is not applicable.

Judge Spinetta also argued that

> Even if the *Perez* trial is viewed as a separate proceeding from that involving *Snyder*..[m]y comments regarding the credibility of Maury O'Brien and the reasons I gave for sentencing Mr. Snyder to life without possibility of parole were exclusively

> based upon and related solely to the evidence presented in the *Snyder* trial. Since my comments in the *Snyder* 'case' were limited to the evidence presented there, it cannot reasonably be inferred from those comments that I have pre-judged the *Perez* 'case' in any manner.
> (4 CT 1186.)

However, the evidence presented in *Snyder*, at least at the guilt phase, was almost identical to that presented in the *Perez* proceedings, as they involved the same crimes. Although Judge Spinetta wrote his answer prior to the commencement of appellant's trial, this would have been reasonably expected by him when he wrote it. There is also a logical inconsistency in Judge Spinetta's assertion that the *Snyder* and *Perez* matters were the same proceeding (4 CT 1185) and his simultaneous assertion that his comments in *Snyder* were limited only to that case (4 CT 1186), which contradictorily assumes that they were different proceedings.

Judge Spinetta also focused on his subjective feeling that "it would be unreasonable to conclude that my evaluation of the evidence presented in the *Perez* case...might be impacted by my having heard and evaluated the evidence in the *Snyder* case." (*Id.*) On the contrary, this would be an eminently reasonable conclusion, as the evidence was expected to be similar in both cases, and it ultimately was. His conclusion was that "[a] person familiar with the different legal issues involved and knowing the role of the judge in such matters could not reasonably conclude that the statements made by me in

sentencing Mr. Snyder and ruling on his motion for a new trial in any way compromised my impartiality regarding Mr. Perez." (4 CT 1187.) But Judge Spinetta did not explain how or what "different legal issues" were involved in the two cases with the same facts.

As Mr. Egan pointed out in his reply, Judge Spinetta's answer does not address the issue as the statute frames it, that "the facts and circumstances bearing on the judge's possible partiality must be considered as of the time the motion is brought." (*United Farm Workers of America, AFL-CIO v. Superior Court (Maggio, Inc.)*(1984) 170 Cal.App.3rd 97, 105; cited at 4 CT 1199). As that case points out, "the use of the word 'might' in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." (*United Farm Workers* at 104-105.) It is not Judge Spinetta's subjective feelings that are in issue, but the viewpoint of the reasonable objective person.

Mr. Egan did not disagree that the statements made by Judge Spinetta were made in the course of official proceedings and in the discharge of his judicial duties. (4 CT 1194.) While the statements were not inappropriate per se, "regardless of their appropriateness in one context, they may still [be] reviewed as to their effect in another context. Here, Judge Spinetta's

appropriate statements in the Snyder proceedings do create an appearance of bias under the provisions of Code of Civil Procedure 170.1(a)(6)(C) insofar as the trial of defendant is concerned." (4 CT 1194.)

Judge Garber ultimately denied the motion. (4 RT 848.)

As to the resulting prejudice suffered by appellant, his trial was presided over by a judge who thought he was guilty. Appellant's jury knew that the presiding judge thought appellant was guilty. Additionally, the media dissemination of Judge Spinetta's statements biased some of the prospective jurors. Several of them formed negative opinions of Mr. Perez based on what they had heard about the case in the media. This could only have come from the Snyder trial and sentencing, as it directly preceded appellant's trial. The record reveals that several prospective jurors admitted they had seen various media reports and were biased against appellant as a result.

For instance, prospective juror Jeffrey Maitlen stated that if appellant was found guilty, he would "adamantly press for the death penalty," based on what he heard on television. (7 RT 1651.) Prospective juror Susan Branagan stated that if the defendants were found guilty, she wanted them "killed like they killed her" because "I know all the details." (7 RT 1709.) Prospective juror Sharon Brechtel stated that, based on what she had learned through trial-related publicity, she felt that Mr. Perez was guilty and, as a result, she could

not be impartial. (8 RT 1835.) She added that there was "no way" she could set aside what she had learned about the case. (8 RT 1837.) Prospective juror Mary Meredith similarly stated that she was not sure she could be fair because of what she had heard about the case. (8 RT 1837.) George Herberger had also heard the publicity, and, as a result, thought the defendant was guilty. (8 RT 1846.) It would be hard to overestimate the prejudicial impact on appellant's prospective jurors and jury panel of hearing or reading that the presiding judge thought that O'Brien had testified truthfully and that appellant was therefore guilty.

B. Argument.

A fair and impartial trial is a fundamental aspect of the right of accused persons not to be deprived of life or liberty without due process of law. (U.S. Const., Amends. V, VI, and XIV; Cal. Const., art. I, § 7, subd. (a); *see e.g.*, *Tumey v. Ohio* (1927) 273 U.S. 510, 523; *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266.) There are many components to a fair and impartial trial, one of which is a defendant's right to a trial by a detached, fair and impartial judge who is not biased against him. (*Id.*) It is fully recognized that the judiciary must not only be impartial but should always appear impartial. (*In re Richard W.* (1979) 91 Cal.App.3d 960, 967.)

Neither Judge Spinetta's statement nor Judge Garber's denial of the

motion for disqualification squarely addressed the issues raised by appellant. As shown above, Judge Garber denied the motion based on several findings which were either irrelevant or belied by the record. He ruled that "the fact that a trial judge presided over a prior trial does not by itself bar him or her from presiding over a retrial" (4 CT 1272); and that "there is no prohibition that would prevent the trial judge from hearing multiple separate trials of co-defendants." (*Id.*). As shown *supra,* appellant's counsel never made these arguments or claimed that the statements were inappropriate or disqualifying *per se.* Rather, the motion was made on the grounds that "they were not necessary for the Snyder hearings" (4 CT 1194) and that even if they were properly made in Snyder's case, they rendered the judge disqualified in the subsequent proceedings involving appellant. Defense counsel also pointed out the irrelevance of Code of Civil Procedure section 170.2, which states that "[i]t shall not be grounds for disqualification that the judge ...has in any capacity expressed a view on a legal or factual issue presented in the proceeding." (5 CT 1273.) That section, as discussed *supra,* is inapplicable here because the Snyder proceedings were not the same proceeding as applicant's trial.

People v. DeJesus (1995) 38 Cal.App.4th 1 is a case in which the defendants were assigned to trial before the same judge who had conducted the

preliminary hearing. (Cited at 4 CT 1195.) They objected on due process grounds, "stating that their rights were denied by having the same judge preside at both the preliminary hearing and the trial." (4 CT 1195.) The defendants alleged neither bias nor the appearance of bias, but rather that it was impermissible as a matter of law for a judge "to conduct both the preliminary hearing and the trial regardless of any actual impropriety or the appearance of impropriety.) (*Id.*) The *DeJesus* court held that

> The protection against any actual prejudice arising out of the conduct by the trial judge of the preliminary hearing lies not in the blanket prohibition proposed by appellants, but, rather, in the utilization of existing means of challenging a perceived bias or other lack of fairness of the trial judge....if counsel conclude a trial judge is for any reason biased, they may avail themselves of their remedies pursuant to Code of Civil Procedure section 170.1 or 170.6.
> (*DeJesus,* at 16-17.)

As the defense argued, if "a challenge under Code of Civil Procedure 170.1 in the preliminary hearing/trial context is not barred by section 170.2(b), neither is a challenge barred in the co-defendant trial/defendant trial context." (4 CT 1197.)

Appellant asserts that his right to a fair and impartial trial was violated when the trial court indicated it believed O'Brien had testified truthfully and failed to recuse himself, and that he was prejudiced thereby.

IV. THE TRIAL COURT ERRED IN "REHABILITATING" DEATH-PRONE JURORS BY ASKING LEADING AND SUGGESTIVE QUESTIONS ON *VOIR DIRE*, WHICH STACKED THE JURY IN FAVOR OF A DEATH SENTENCE, THEREBY DEPRIVING APPELLANT OF A FAIR AND IMPARTIAL JURY.

A. Introduction.

The jury selection procedure in appellant's case was accomplished through individual juror questionnaires, signed under penalty of perjury, and then individual questioning of the prospective jurors, mainly by the court.[32] As discussed *supra,* the defense and prosecution were limited to about one minute of questioning per juror, so the bulk of the *voir dire* was conducted by the court. Defense counsel objected to this procedure.

The trial court "rehabilitated" jurors who, on the basis of their questionnaires, would otherwise have been subject to challenges for cause by the defense. The court's interventions on behalf of pro-death jurors were designed to have them change their otherwise-objectionable questionnaire answers. These interventions, through leading and suggestive questions, had the inevitable effect of stacking appellant's jury pool with pro-death-penalty jurors.

The court's questioning was so suggestive and leading that it allowed

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[32] It was agreed in pre-trial motions that the jury room was to be filled with prospective jurors and they were to be brought out individually for *voir dire* questioning. (RT 74-75.)

pro-death-penalty jurors to conceal their disqualifying biases and basically led them to completely change their answers on the basis of the court's "guidance." In contrast, prospective anti-death penalty jurors were peremptorily excused without any corresponding rehabilitative efforts by the court or questioning by the attorneys.

Appellant was prejudiced by these actions, as some of these "rehabilitated" jurors actually served on his jury. For others, appellant had to use peremptory challenges against those who should have been excused for cause. More seriously, the cumulative effect of the improper rehabilitations was to skew the panel lopsidedly in favor of the State and in favor of a death verdict.

No matter how many peremptory challenges the defense had at their disposal, a biased jury would still have resulted due to the court's ability and demonstrated inclination to "seed" the panel with pro-death-biased prospective jurors in a quantity sufficient to overwhelm defense peremptory challenges. The court's rehabilitative efforts also inhibited and prejudiced the exercise of the defense peremptory challenges, as it would have been futile to challenge too many of the randomly-chosen objectionable jurors, beyond the extremely biased, if the remaining eligibles pool had an equal or possibly higher proportion of objectionable jurors, which it plainly did. Additionally, the

presence in the pool of "rehabilitated" jurors with extreme pro-death biases was another prejudicial factor for the defense, as challenging the moderately-biased risked their substitution with the extremely-biased.

The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." (U.S. Const., Amend. VI.) The Fourteenth Amendment extended the right to an impartial jury to criminal defendants in all state criminal cases. (*Duncan v. Louisiana* (1968) 391 U.S. 145.) In addition, the Due Process Clause of the Fourteenth Amendment independently requires the impartiality of any jury empaneled to try a cause. (*Morgan v. Illinois* (1992) 504 U.S. 719, 726.)

The court's actions deprived appellant of his right to a fair and impartial jury and a fair trial under the California Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 15 and 16 of the California Constitution, as well as his Eighth and Fourteenth Amendment rights not to be condemned to death except on the basis of unbiased and reliable procedures. (*United States v. Baldwin* (9th Cir. 1983) 607 F.2d 1295, 1298; *People v. Chapman* (1993) 15 Cal.App.4th 136, 141. *See also United States v. Saimiento-Rozo* (5th Cir. 1982) 676 F.2d

146, 148.)

"The conduct of voir dire is left to the broad discretion of the trial judge. The exercise of that discretion, however, is limited by 'the essential demands of fairness.'" (*Knox v. Collins* (5th Cir. 1991) 928 F.2d 657, 666 citing *Aldridge v. United States* (1931) 283 U.S. 308, 310.)

B. Facts in Support.

Appellant's *voir dire* and trial was presided over by Judge Peter L. Spinetta of the Contra Costa County Superior Court. In pre-trial proceedings, it was agreed that all prospective jurors would compete a questionnaire which inquired about their personal characteristics, attitudes toward the death penalty, ability to listen to mitigating evidence, prior experiences with the criminal justice system, and the like. The questionnaires were signed under penalty of perjury. Some of the jurors' answers on the questionnaire included disqualifying pro-death opinions that were changed at *voir dire* as a result of the court's coaching the prospective jurors toward the "correct" answers.

Juror No. 37 had several questionnaire answers that were "clarified" by the court in its examination. The court first clarified that the proof required was beyond a reasonable doubt, not proof beyond any doubt. (7 RT 1638-1639; 3 JQ 934.) But this juror also had preconceived notions about expert testimony and felt that it "was not always correct." (7 RT 1639; 3 JQ 938.)

Based on the questionnaire, there was a issue in the court's mind as to whether the juror would "listen to psychiatric, psychological testimony, mental health testimony." (7 RT 1639.) By a series of leading questions, such as "[a]fter you've heard it all, [would you] give it whatever weight you think it deserves, but not make that decision until you've heard it," and "[would you] [n]ot prejudge the matter," the juror agreed to consider these matters. (7 RT 1639-1640.) This juror's questionnaire answers also raised issues about an unwillingness to consider "the background and social history of the defendant." (7 RT 1640; 3 JQ 943.) The court noted " some question here about whether you'd listen to evidence about the social history of the defendant." (7 RT 1640.) After being asked "would you be willing to disregard cost in arriving at your decision" the juror agreed to disregard it. (7 RT 1640; 3 JQ 942.) This juror also thought there were some cases where he/she "would always impose the death penalty." (7 RT 1641; 3 JQ 942.) After being told that "the law requires neither of these penalties" this juror stated that he/she was prepared to follow the law.

Another prospective juror was identified by the court as "Juror No. 3" because he/she actually served on appellant's jury. (7 RT 1484.) This juror had many pro-prosecution answers both in their questionnaire (1 JQ at 138 *et seq.*) and at *voir dire*. Juror No. 3 was questioned about a brother in New

York, who was formerly a defense attorney for the New York Police Department. (7 RT 1486-1487.) Juror No. 3 did not think this would have any affect. (7 RT 1487.) Next the judge focused on this juror's answer to Question No. 31, where the juror was identified as a crime victim. (7 CT 1486.) Juror No. 3 wrote "I would be sympathetic to the victim." (*Id.*; 1 JQ 144.) The judge then engaged in a lengthy statement to the juror about the necessity to be fair and the prospective juror agreed to " try" to be fair. (7 RT 1487.) The judge finally asked the juror if he/she thought they could "pull it off." (*Id.*) Not surprisingly, the juror said yes. (*Id.*) The judge then explained about witness credibility and ended with the leading question, "I take it you're willing to do that?" (7 RT 1489.)

Juror No. 4 (7 RT 1489) believed that the criminal justice system made it too hard for the police and prosecutor to convict people accused of a crime. (7 RT 1491; 1 JQ 87.) He then said that was "just a comment" The court led him to the answer: "[a]nd you're prepared to follow the law?" (*Id.*)

Prospective juror Robert Ripley had disqualifying opinions as he was not willing to consider childhood and background information as mitigating. (7 RT 1509; 2 JQ 807.) Repeating his questionnaire answer, he stated that "I don't believe childhood events or social history has (sic) a bearing in the penalty phase." (7 RT 1509.) Despite further leading questioning by the court,

he repeated his view that background should not be considered

> It's very difficult for me. To explain...to give you a background on my thinking, my thinking is the defendant, if found guilty of first degree murder under special circumstances, I consider that a heinous crime as such. I don't believe that having someone's social or economic background should be viewed or weighed in looking at the penalty phase.
> (7 RT 1510-1511.)

The court then coaxed and led him: "But you now know what the law says...But it says you have to consider it. You have to, in good faith...do you want to think about it a little bit and let me know?" (7 RT 1511.) Not surprisingly, the juror then said he thought he could, but he qualified his answer: "[i]t depends on the circumstances." (7 RT 1511.) Again, after yet more coaxing, he stated that "I think I can do it" (7 RT 1512) but then again qualified it by stating that he might be affected by gory photos. After yet more questioning, he was basically back where he started and not sure he could be fair. (7 RT 1513.) The juror then revealed that he was a crime victim and "more apt to look at the victim's right, a heightened sensitivity to them." (7 RT 1514; *see also* 2 JQ at 787-788.)

After a break in his questioning, Robert Ripley was brought back for further questioning, but still insisted that he would not give consideration to the defendant's background. (7 RT 1559.) He stated that he could not promise to consider it (7 RT 1560) and it would affect his ability to be impartial. (7 RT

1561.) After another break in the questioning, he was brought back yet again. During further questioning by the prosecutor, Mr. Ripley stated that he would consider a person's criminal background in the penalty phase. (7 RT 1566.) But as for the social and family background, which would possibly be mitigating factors, he was much more reluctant, stating, "I see that it is the law" to consider both backgrounds. (7 RT 1567.) As he admitted, "I view these in two different contexts." (7 RT 1568.) Finally, he agreed he would reluctantly consider the defendant's social background. (7 RT 1569.) However, he once again qualified it by saying that "I don't see it [social background] as important an element as I would the others." (7 RT 1571.) Then the judge posed a leading question, ending with "do you see the difference?" Despite this coaching, this juror was still "wrestling" with giving social background any weight. (7 RT 1572.)

The defense then challenged this prospective juror for cause, but it was denied. (7 RT 1578.) In explanation, Judge Spinetta stated that Ripley is "very careful...is aware that he needs to be open-minded" despite a litany of answers that indicated the exact opposite. (7 RT 1579.) Defense counsel than gave a long objection as to this denial of the challenge for cause, stating that the only reason this juror changed his answers was because District Attorney Sequeira cross-examined him. (7 RT 1580.) Judge Spinetta stated that he did

not badger him.

Juror No. 1 had heard about the case in the media and as a result, was unsure whether she could be fair. (7 RT 1626; 1 JQ 80-81.) In the questionnaire, media exposure through newspapers, people at work, a co-worker, television, radio and people who knew the victims were all listed. (1 JQ 80.) Juror No. 1 was quite knowledgeable about the case, as the co-worker knew the victim's family, their children went to school together, and "they shared driving responsibilities for extra-curricular activities e.g. sports." (1 JQ 80.) Juror No. 1 also wrote in her questionnaire that

> [w]hoever did the crime were walking by [the] home, maybe walking from BART, saw the open garage w/SUV and saw it as an opportunity to take the SUV...It must have been totally devastating for the daughter to find her mother dead. We spoke about the efforts to find whoever killed the victim of that...I was horrified about it at the time. I kept reminding my husband to close the garage door because he has a habit of leaving it open when he walked our dog. Why give someone an opportunity to take anything from you or possibly harm you in any way...It's human nature to feel a bit biased towards someone who takes a human life...because they want to take a car...
> (2 JQ 80-81.)

The court then asked her a leading question: "Are you prepared to say: Look, I read about these things. I formed some opinions, but basically I am going to set all that aside. I am going to listen to the evidence and the law and I am going to make my decision based upon what I hear here. Is that in fact what you are prepared to do?" (7 RT 1627.) After this, the juror stated she

"thinks" she could do it. (*Id.*)

Prospective juror Neftalie Quirino Milanio at first stated that he would require the defendant to prove his innocence and then confusingly reversed that opinion and stated that he would not. (7 RT 1633.) Although clearly confused (7 RT 1634), the court then coaxed him to the "right" answers and he eventually stated that he could vote "not guilty." (7 RT 1635.) He was also led to the opinion that he would not consider the costs of imprisonment (7 RT 1636.) Although he wrote on his questionnaire that he would not consider mental health testimony (2 JQ 773), the court told him he must. (7 RT 1636-1637.)

C. Argument.

The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." (U.S. Const., Amend. VI.) The Fourteenth Amendment extended the right to an impartial jury to criminal defendants in all state criminal cases. (*Duncan v. Louisiana* (1968) 391 U.S. 145.) In addition, the Due Process Clause of the Fourteenth Amendment independently requires the impartiality of any jury empaneled to try a cause. (*Morgan v. Illinois*, *supra*, 504 U.S. at 726.)

Whether a prospective capital juror is impartial within the meaning of the Sixth and Fourteenth Amendments is determined in part on the basis of their opinions regarding the death penalty. A prospective capital juror is not impartial and "may be excluded for cause because of his or her views on capital punishment [if] the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; citing *Adams v. Texas* (1980) 448 U.S. 38, 40.) A prospective juror who will automatically vote either for or against the death penalty regardless of the court's instructions will fail to consider in good faith evidence of aggravating and mitigating circumstances. Such a juror is not impartial and cannot constitutionally remain on a capital jury. (*Witherspoon v. Illinois* (1968), 391 U.S. 510, 88 S. Ct. 1770; *Morgan v. Illinois* (1992), 504 U.S.719 at 728, 733-734, 112 S. Ct. 2222.)

In *Witherspoon*, the United States Supreme Court held that capital-case prospective jurors may not be excused for cause on the basis of moral or ethical opposition to the death penalty unless those jurors' views would prevent them from judging guilt or innocence, or would cause them to reject the death penalty regardless of the evidence. Excusal is permissible only if such a prospective juror makes this position "unmistakably clear." (*Id.*, 391 U.S. at 522, fn. 21.) *Witherspoon* also holds that the defendant is entitled to

an impartial jury at both phases of the trial, which was denied appellant here.

That standard was amplified in *Wainwright v. Witt* (1985) 469 U.S. 412, 105 S. Ct. 844, where the Court, adopting the standard previously enunciated in *Adams v. Texas* (1980) 448 U.S. 38 at 45, 100 S. Ct. 2521 448, held that a prospective juror may be excused if the juror's *voir dire* responses convey a "definite impression" (*Witt*, *supra*, 469 U.S. at 426) that the juror's views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Id.* at 424.) The *Witt* standard applies here. (*People v. Avena* (1996) 13 Cal.4th 394, 412.)

Thus, this Court's duty is to

> [E]xamine the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would "substantially impair the performance of [the juror's] duties . . ." was fairly supported by the record.

(*People v. Miranda* (1987) 44 Cal.3d 57, 94, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 176.)

A review of these jurors' entire juror questionnaires and *voir dire* leaves the "definite impression" that they so strongly in favor of the death penalty that their ability to follow the law was substantially impaired within the meaning of *Witt*. Hence, their "rehabilitation" by the trial court was error.

In *Ross v. Oklahoma* (1988) 487 U.S. 81, 108 S. Ct. 2273, the Supreme Court held that the erroneous refusal to disqualify a juror for cause under

Witherspoon, causing the defendant to exercise a peremptory challenge, did not violate his constitutional rights because no claim was made that any of the jurors who sat were not impartial nor were any challenged for cause and peremptory challenges are not a constitutional right. Here however, both exceptions are present. Many of the jurors discussed above were challenged for cause and it is alleged that the above-discussed jurors who actually sat on Appellant's jury were biased and not impartial.

D. Conclusions.

What is most disturbing about this process, and most violative of appellant's right to a fair trial, is the fact that the court's colloquy and inquiry did not serve the purpose of seating an unbiased jury that would be fair to both sides. The court's questioning of these pro-prosecution prospective and actual jurors was not done with the intent to weed out those with disqualifying or objectionable views regarding the death penalty or mitigating evidence. The questioning was not two-sided. Nor did it pose questions designed to reveal the extent of the bias rather than just put an acceptable face on it. The nature of the questioning, with long statements of the law backed by the authority of the trial judge, along with "don't you think" or "did you really mean" questions, left no room for disagreement. The sole purpose of the questioning was to "rehabilitate" the pro-death jurors, a process that benefitted only the

prosecution. Nor did any anti-death-penalty jurors receive the same rehabilitative treatment from the court. They were simply excused for cause without this "rehabilitative" questioning. For the reasons discussed herein, this was reversible error.

V. PROSECUTORIAL MISCONDUCT FOR PURPOSELY DELAYING FILING THE NOTICE OF AGGRAVATION.

Appellant's conviction and death sentence are invalid under the federal constitutional guarantees of due process, equal protection, trial before an impartial jury and a reliable sentence due to the substantial and injurious effect of prosecutorial misconduct in failing to file the notice of aggravation in a reasonably timely fashion. This misconduct distorted the fact-finding process and rendered both the trial and sentencing hearing fundamentally unfair. (U.S. Const. Amends. V, VI, VIII, & XIV.)

Hampering the defense investigative efforts, the prosecutor stalled and delayed filing the "Notice of Aggravation" outlining his intended penalty phase evidence until shortly before the trial commenced. The aggravation evidence concerned an alleged rape of witness Ms. Torres by appellant.

A. Facts in Support.

Despite repeated requests by the defense, the Notice of Aggravation was not filed at court hearings on January 26, 2001 (4 RT 758); March 2,

2001 (4 RT 758 *et. seq.*); March 16, 2001 (4 RT 790); May 24, 2001 (4 RT 869)(when the prosecutor stated that he "will think" about when he will file the notice of aggravation); June 15, 2001, (4 RT 896)(when the prosecutor said he has filed an "informal" notice of aggravation); and July 27, 2001, (4 RT 960)(when the prosecutor promised to have the notice filed that day). At every one of these court hearings, the defense complained that they had not yet received it. The Notice of Aggravation was received by the defense only on August 16, 2001, shortly before trial. (5 RT 1017, 1165.) It included evidence of an alleged rape incident regarding which the defense had not received any discovery. (5 RT 1165.) The court denied a motion to exclude the evidence and for a continuance based on this new allegation. (5 RT 1172.)

The record shows repeated requests for the Notice of Aggravation by defense counsel Linda Epley. On February 23, 2000, defense counsel Epley wrote to the district attorney seeking the Notice of Aggravation pursuant to Penal Code 190.3(b). (5 CT 1553.) On March 8, 2001, she wrote to district attorney Paul Sequeira requesting discovery of the factors in aggravation and, specifically, the uncharged rape of Andrea Jones. (4 CT 1218; 5 CT 1554.) On March 22, 2001, Ms. Epley wrote to the San Francisco Police Department requesting a copy of the rape report. (5 CT 1554.)

Much of this delay was due to the prosecutor's attempts to game the

system. For instance on March 2, 2001, the prosecutor attempted to provide an excuse for his failure to provide the notice:

> The Court suggested that I provide some idea to Ms. Epley of what we intend to use. It...it's much like the witness list idea. As soon as you provide a formal Notice of Aggravation...somebody is trying to lock me in, and I don't want to be locked in until the appropriate time before trial. If you look at Penal Code section 190.3, it says a reasonable time before trial. We are now about nine weeks away from trial. (4 RT 767.)

At that hearing, although the prosecutor stated he had provided "nine incidents of aggravation" to the defense, he also admitted that "[t]here may be a few other things that come up in the next week or two, but I don't plan on dropping anything on her 30 days before trial." (4 RT 766.) Yet that was exactly what the prosecutor did in regard to the alleged rape of Andrea Torres, as the defense had no discovery on that incident as late as August 16, 2001, just shortly before trial. (5 RT 1165.)

At the March 2, 2001 pre-trial hearing, defense attorney Linda Epley told the court she has been asking for the notice for over a year. (5 RT 768.) The prosecutor Mr. Sequeira stated that he was under no obligation to provide it earlier. (*Id.*) Mr. Egan noted that the prosecution failed to provide it by the end of the year as they had promised and the court had ordered. (5 RT 769.) Egan informed the court that "Mr. Sequeira didn't do what the court asked him to do." (5 RT 771.) Both sides were admonished regarding discovery. (5 RT

778.)

At the next pre-trial hearing on March 16, 2001, the failure of the prosecutor to file the notice was still in issue. (5 RT 786.) Ms. Epley claimed that the letter she received from the prosecution, entitled a "Notice of Aggravation," was only a one page letter itemizing nine factors in aggravation. (5 RT 790.) She claimed it did not meet the requirements for notice, as no discovery accompanied it. (5 RT 791.) Ms. Epley complained that "I am still in my infancy here with a trial date less than 60 days away, with some very major factors in aggravation that I would like to be very prepared on." (5 RT 794.) The court held that the standard is "reasonable" notice, citing *People v. Johnson* (1993) 6 Cal. 4th 1, which says that the people have an obligation to file a notice that is reasonable before the trial. (5 RT 795.) In *Johnson*, notice was given before jury selection and it was held to be timely. The court stated that the statute does not say when it must be filed, except that it must be before trial.

The filing of the notice was purposely delayed in order to prejudice appellant. The prosecutor Mr. Sequeira actually hinted that his delay was such a tactic. On May 24, 2001 he stated:

> MR. SEQIEIRA: I have given some thought to a time when I'm going to file a formal notice of aggravation.
> MS. EPLEY: What's that thought?
> MR. SEQUEIRA: That's between me and myself at this point.

MS. EPLEY: Okay.
MR. SEQUEIRA: Unless the court directs me a date to file a formal notice.
(4 RT 869.)

That same day, the court registered its impatience and stated: "Let's meet again in...[t]hree weeks...and in that time let's file a notice." (*Id.*)

MR. SEQUEIRA: Okay.
THE COURT: Okay. If you can't be ready or don't want to, be ready to tell us specifically why at that point, okay?
MR. SEQUEIRA: All right.
(*Id.*)

However, the defense still did not have full discovery three weeks later. The Notice of Aggravation was received only on August 16th, 2001, shortly before trial. (5 RT 1017, 1555; 4 CT 1278-1281.) Defense counsel Ms. Epley objected, terming the notice "very untimely" when she received it. (5 RT 1165.) The prosecutor again stated that he was only required to produce it "[p]rior to trial" [which] means 'prior to today,'" which was trial calling. (*Id.*) Defense counsel specifically objected due to the fact that "[o]n that notice is an alleged uncharged rape of Andrea Torres, which I have been talking about for some months now. I do not have any discovery about that incident." (*Id.*) As to the question of prejudice, she stated that "I cannot say to the court then that I could possibly be ready on that aggravation because I have nothing in order to prepare a defense." (*Id.*)

The defense then moved to exclude the Torres alleged rape incident

from being presented by the prosecution in aggravation. (5 RT 1167.) The prosecutor countered by claiming that in March he sent Ms. Epley a letter that was an informal notice of aggravation "which basically set out all the things that I intended to use in the penalty phase that are now in my formal notice. The only things that were not included were the Department of Corrections records, which I couldn't get because of the protective order." (5 RT 1168.) The prosecutor also stated that there will be no additional evidence other than that from Ms. Torres in connection with this alleged rape incident. (5 RT 1169.)

The court observed that since the defense knew who the detective in this incident was, there was nothing preventing their preparation. (*Id.*) The court then stated that it couldn't tell whether the defense was prejudiced as a result. (5 RT 1170.) Ms. Epley moved for a continuance because of the delay. (5 RT 1171.) In denying this motion, the court then reversed itself and ruled that there was no showing of prejudice. (5 RT 1172.)

B. Argument.

No evidence may be presented by the prosecution in aggravation unless notice has been given to the defendant within a reasonable time, as determined by the court, before trial. Penal Code section 190.3 par. 4. Penal Code section190.3 has been construed as requiring pretrial notice of the actual

evidence on which the prosecution intends to rely to establish aggravating factors at the penalty phase. (*Matthews v. Superior Court* (1989) 209 Cal. App. 3d 155, 158.) Reciprocal discovery pursuant to Penal Code 1054 et seq. is available with respect to penalty phase evidence and should normally be made at least 30 days prior to the commencement of the guilt phase of the trial. (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1238.) Here, appellant was not provided with discovery related to the evidence which supports the aggravation until October 2, four weeks *after* the jury trial had begun. (5 CT 1558.)

The prejudicial effects were three-fold. First, the filing of the notice immediately before the trial thwarted the investigation of this incident and efforts to discredit the witness. Secondly, it rendered trial counsel ineffective in jury selection, because they could not tailor their *voir dire* toward the attitudes of the jury regarding this rape allegation. The *voir dire* was not specially-tailored to take into account this allegation. Had defense counsel been given adequate notice of this incident, jury selection would in all probability have been far more effective. Third, the late filing of the death notice prevented the defense from preparing and requesting jury questionnaires designed to ferret out the attitudes of the prospective jurors towards this incident. Reversal is required.

VI. OTHER INSTANCES OF PROSECUTORIAL MISCONDUCT TAINTED APPELLANT'S TRIAL AND VERDICT.

Appellant's right to due process of law, equal protection of the laws, and a reliable sentence, trial by jury, and by an impartial sentencer, effective assistance of counsel, compulsory process, confrontation and cross-examination, proof of criminal offenses beyond a reasonable doubt were violated by prosecutorial misconduct. (U.S. Const. Amends. V, VI, VIII, XIV.)

A. Facts in Support.

i. Offering improper victim impact evidence at the guilt/innocence phase.

The prosecutor asked the victim's family various questions solely designed to elicit sympathy for them at the guilt phase.

i) Irrelevant victim impact testimony was elicited from the victim's husband Joe Daher at the guilt/innocence phase:

Q. How long have you known your wife?
A. Well, 30 years.
Q. Since high school?
A. Since high school.
Q. Did you go to school together?
A. Yeah, we did.
(9 RT 2081.)

ii) Irrelevant victim impact testimony was elicited from Annie Daher, the daughter of the victim at the guilt/innocence phase. She did not witness anything, did not add anything to the State's case for guilt, and did not view

the body. Her testimony was solely to elicit sympathy for the victim's family. (9 TR 2100-2111.)

ii. The prosecutor improperly vouched for the credibility of a witness.

The prosecutor improperly vouched for the credibility of witness Jason Hart at the guilt phase argument:

"But you think Jason Hart is going to tell the cops that he gave three guys a ride from what amounted to a murder if he didn't do it? Well, we know he didn't do it, so he's not going to do that."

(15 RT 3578.)

iii. Improper questioning and attempting to bias the jury.

The prosecutor repeatedly asked improper questions of defense penalty phase witness Susan Frankel, an attorney who had served as a mentor to Mr. Perez. Despite repeated objections and the court's rulings that such questions were improper, the prosecutor persisted in this line of questioning. The prosecutor questioned her about correspondence where Mr. Perez had denied he was involved in a crime:

> Q. MR. SEQUEIRA: If...let me ask you this question: If he would have confessed to the crime in the letter, would you have turned it over to anybody?
> A. MS. FRANKEL: I think it would be speculating...
> Q. No...
> A. ...as to what I would have done at that time.
> Q. If he had written you in the letter...
> MS. EPLEY: I'm going to object as to relevance, your Honor.

THE COURT: Sustained. Sustained. Speculation.
MR. SEQUEIRA: You didn't want to answer that question, did you, so you interposed your own objection because you're a lawyer; isn't that true?
MS. EPLEY: Objection, your Honor. Argumentative.
THE COURT: Sustained.
MR. SEQUEIRA: Isn't it true you didn't want to answer that question, ma'am?
MS. EPLEY: Objection, your Honor. The question's (sic) been sustained.
THE COURT: Sustained. Sustained.
MR. SEQUEIRA: Is there anything he would have written in the letter that would have made you turn it over to the authorities?
MS. EPLEY: Objection. Relevance.
THE COURT: Sustained.
(22 RT 5011-5012.)

Thus the prosecutor persisted in asking improper questions designed to discredit witness Ms. Frankel, to imply that she was biased toward appellant, and that she would have possibly acted unethically in order to protect him. The repeated sustaining of the defense's objections did not cure the effects of this misconduct. The jury was left with the impression that they could not trust Ms. Frankel's testimony about appellant.

iv. Argumentative questions designed to bias the jury.

Again, on questioning Ms. Frankel, the prosecutor resorted to argumentative questions designed to bias the jury against the defendant:

MR. SEQUEIRA: Well, because isn't it a particularly heinous crime that he goes into a woman's house and strangles her with a telephone cord and stabs her to death...
MS. EPLEY: Objection.
THE COURT: Sustained. Let's not be argumentative, please.

MR. SEQUEIRA: How do you feel about that?
MS. EPLEY: Objection. Relevance.
THE COURT: Sustained.
(22 RT 5016.)

v. Improper references to appeals.

At final argument, the prosecutor told the jury that he was asking them to "put him [appellant] on a bus" and have him "sit on death row until his appeals process is over and be executed." (24 RT 5407.) At the conclusion of the argument, defense counsel moved for a mistrial, stating that the mention of appeals, that he would sit in San Quentin "until all of his appeals were exhausted" "must mean, perhaps, the appeal will be successful." (24 RT 5531.)

vi. Improper references to lack of remorse.

At the penalty phase final argument, the prosecutor stated: "And what expressions of remorse do we hear about? Do we hear the conversation going: I can't believe we did that. Things completely whipped out of control. I don't know what happened. I mean things were—this is horrible No, don't hear that." (24 RT 5425.) Lack of remorse was once again mentioned, in sarcastic terms, in the prosecutor's final argument: "The defendant in an extraordinary show of remorse displays his trophy, right? Big diamond earning." (sic) (24 RT 5426.)

Defense counsel, at the conclusion of the argument, objected and

moved for a mistrial, citing several mentions of "where is the remorse?" (24 RT 5532-5533.) In response, prosecutor Sequeira stated that he did not talk about any successful appellate process and did not focus on lack of remorse. (24 RT 5533.) The court held that one has to be careful about mentioning appeals but it did not diminish the remarks did not diminish the jury's responsibility. As to the remarks about remorse, the court stated that they were in reference to circumstances of the crime. (24 RT 5534.) The motion for a mistrial was denied. (*Id.*)

vii. The cumulative effect of these instances of prosecutorial misconduct deprived appellant of a fair trial.

The effect of these individual instances of prosecutorial misconduct must be seen not only individually, but in the aggregate. Even if any one of them alone did not render the verdict unreliable or the trial unfair, their cumulative effect was to deprive appellant of a fair trial.

B. Argument.

It has long been recognized that misconduct by a prosecutor may be grounds for reversing a conviction. (*Berger v. United States* (1935) 295 U.S. 78, 85-88.) Part of this recognition stems from a systematic belief that a prosecutor, while an advocate, is also a public servant "whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Id.* at 88.)

It is the responsibility of the trial court to ensure that final argument is kept within proper and accepted bounds. (*United States v. Young* (1985) 470 U.S. 1, 6-11.) That responsibility must be discharged with full awareness that "the prosecutorial mantle of authority can intensify the effect on the jury of any misconduct." (*Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1399 (*en banc*)).

Decisions concerning penalty phase prosecutorial misconduct, like those regarding other aspects of a capital trial, have been predicated by the maxim that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida* (1977) 430 U.S. 349, 357.) This difference has required the courts to ensure, by means of procedural safeguards and a heightened degree of judicial scrutiny under this super due process standard, that the death penalty is not the product of arbitrariness or caprice.

> To pass constitutional scrutiny under this heightened standard, the death penalty must not be applied in an arbitrary or capricious manner. Rather, there must be 'an individualized determination whether the defendant in question should be executed, based on the character of the individual and the circumstances of the crime.'"
> (*Adamson v. Ricketts* (9th Cir. 1988) 865 F.2d 1011, 1021(*en banc*).)

Consequently,

> "[a] decision on the propriety of a closing argument must look

> to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances, and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law." (*Coleman v. Brown* (10th Cir. 1986) 802 F.2d 1227, 1239.) The avoidance of arbitrariness in the jury's exercise of its discretion also requires that jurors be "confronted with the truly awesome responsibility of decreeing death for a fellow human..." (*Lockett v. Ohio* (1978) 438 U.S. 586, 598.)

The United States Supreme Court has made it quite clear that the prosecutor may not "attach the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process." (*Zant v. Stephens* (1983) 462 U.S. 862, 885.) It has also been held that it is "clearly improper for a prosecutor to urge the imposition of death because of the race, religion, sex, or social status of the victim." (*Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1409(*en banc*). *See also Darden v. Wainwright* (1986) 477 U.S. 168, 181-82 ("the prosecutor's argument may not manipulate or misstate the evidence, or implicate other specific rights of the accused such as the right to counsel or the right to remain silent").)

A prosecutor's improper closing argument violates the due process clause of the Fourteenth Amendment if it was so prejudicial that it "infected the trial with unfairness." (*Darden v. Wainwright, supra,* 477 U.S. at 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637.) Whether a prosecutor's argument is an impermissible comment on the defendant's right not to testify

is reviewed *de novo.* (*United States v. Johnston* (5th Cir. 1997) 127 F.3d 380, 396; *United States v. Martinez* (5th Cir. 1998) 151 F.3d 384, 391.)

Both the individual and cumulative effect of these egregious errors in the prosecution's questioning and arguments was that they "infected the trial with unfairness." (*Darden v. Wainwright, supra,* 477 U.S. at 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637). Thus, even if this Court holds that any one of the errors alone was not sufficient to create this fundamental unfairness, the proper framework for the analysis is to examine the argument as a whole, as the jury heard it, and not simply to evaluate the individual claims separately.

VII. APPELLANT'S RIGHTS WERE VIOLATED WHEN THE TRIAL COURT REMOVED A SWORN AND SITTING JUROR DURING THE GUILT PHASE.

Appellant's right to due process of law, equal protection of the laws, and a reliable sentence, trial by jury, and by an impartial sentencer, effective assistance of counsel, compulsory process, confrontation and cross-examination, proof of criminal offenses beyond a reasonable doubt were violated by the improper removal of a sworn and seated juror during the guilt phase whose expressed scruples related solely to the penalty phase. (U.S. Const. Amends. V, VI, VIII, XIV.)

A. Facts in Support.

A jury was selected and sworn on September 19, 2001. (8 RT 1871.) The jury returned on September 24, 2001 for the first day of trial. Before opening statements commenced and out of the presence of the jury, Judge Spinetta told counsel that a couple of issues involving jurors had arisen. One juror had a problem regarding afternoon child care. Of more significance was another juror, "Juror No. 7"[33] who approached the judge *ex parte* and "indicated that he wanted to discuss with me his level of comfort with sitting on a death penalty case and suggesting that – that he may have some difficulty in that regard." (9 RT 2010.) Judge Spinetta had informed the juror that he could not discuss the issue without the presence of counsel. (*Id.*) The juror was told the matter would be addressed later in the day after the judge had an opportunity to discuss it with counsel. (*Id.*) A few other housekeeping matters were discussed, the jury was brought into court, opening statements were given by the prosecution and defense and several witnesses testified. (9 RT 2008-2009.)

At the end of the day after the other jurors were excused, Judge Spinetta asked Juror No. 7 to remain. (9 RT 2199.) Judge Spinetta explained that

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[33] This juror's name is redacted and he will be identified by his number as he actually served on appellant's jury.

before proceedings began, Juror No. 7 approached the judge and indicated he wanted to relate something to the court. (9 RT 2199.) Judge Spinetta then invited Juror No. 7 to relate his concerns. The juror explained that since being sworn on the jury the previous week he had "time and reason to reflect further on myself, on the death penalty" and that "I don't necessarily have a problem with the death penalty." (9 RT 2200.) Judge Spinetta interrupted and reminded Juror No. 7 of answers he had given on the jury questionnaire, including his answer "no" regarding whether he had any moral, religious or philosophical qualms about imposition of the death penalty. (9 RT 2200.)[34] The Judge asked: "Has anything changed in terms of how you would respond to that question now?" Juror No. 7 answered "yes," explaining that "I no longer think I am capable of making that decision myself." (9 RT 2199-2201.)

Juror No. 7 further explained that his new found qualms regarding imposition of the death penalty came from "deeper thought, personal reflection." (9 RT 2201.) Upon further questioning by the Judge, Juror No. 7 related that he no longer felt he could set aside personal feelings regarding

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[34] On his questionnaire, Juror No. 7 answered "no" to Question No. 101: "Do you have any religious, philosophical, moral or other views that might bear on your ability and/or willingness to make such a decision [whether punishment should be life or death]?" (5 JQ 1618.) The juror explained that "[m]y religious, philosophical, and moral views would guide my decision but not my willingness to make the decision." (5 JQ 1618-1619.)

the death penalty. (5 JQ 2202-2203.) The juror stated further that he could not contemplate any circumstances where he could impose the death penalty: "...I can't conceive of a situation where I reach that conclusion." (9 RT 2203.) Juror No. 7 noted that Timothy McVeigh had just recently been executed and that he didn't have a problem with the judgment and execution of McVeigh in that case (9 RT 2203), but "[a]t the same time, I imagine if I was on that, if I was on that jury, I can't imagine coming to that conclusion, that the penalty of death was preferable or somehow a better conclusion to reach than life in prison without parole." (9 RT 2203.) The juror acknowledged that he had previously believed he was capable of imposing a death verdict "[b]ut that is no longer the case. I no longer think I can do that." (9 RT 2204.) He also denied that there was "any specific event or anything that has happened" that caused his change of mind, rather that it was "just further reflection." (9 RT 2204.) Juror No. 7 concluded by saying: "I am a computer programer. I tend to think abstractly. And in general, I don't have a problem with that. When it comes to being the person that makes that decision, I don't see me actually reaching that conclusion. But, again, that's just since last Wednesday." (9 RT 2204.) With that, Judge Spinetta excused the juror and asked that he return the next morning. (9 RT 2204.)

The court and counsel then discussed the matter. The prosecutor was

adamant that Juror No. 7 was "unrehabilitable" and the court was inclined to agree. (9 RT 2206.) Nonetheless, the court recognized that removing a sitting juror "is always a matter of very – always a very, very, serious matter, and before doing it, I feel we have to explore every possibility and consider all angles." (*Id.*) Therefore, the judge concluded that Juror No. 7 should be questioned further and recessed for the evening. (9 RT 2206.) Defense counsel argued that "[h]e said I don't see myself reaching the position where I felt that the aggravating circumstances would so outweigh the mitigating circumstances that death would be the punishment I would choose" and that this did not disqualify him. (9 RT 2207.)

First thing the next day Juror No. 7 was brought in for further questioning. Judge Spinetta first asked the juror "[i]s your state of mind such that you could sit back, listen to the aggravating evidence, listen to the mitigating evidence, and then make—and honestly consider whether the aggravating circumstances or evidence outweighs the mitigating evidence or vice-versa. Can you honestly consider those things?" (10 RT 2215.) Then another essential question was posed by Judge Spinetta: "[o]r is your state of mind such that no matter what the aggravating circumstance is and no matter what the mitigating circumstance evidence is that you could not ever vote for life – or for death?" (*Id.*) The juror answered: "Yes, that's more the case.

Right now, thinking through the different possibilities, I can't imagine a case where I could find – where I would find the death sentence a more appropriate penalty than life imprisonment without possibility of parole." (10 RT 2215-2216.) On further probing by the court, the juror concluded: "I can't – I don't see me being capable of saying that death would be a more appropriate penalty than life in prison without possibility of parole." (10 RT 2215-2216.) The questioning was then concluded and the juror excused from the proceedings. (10 RT 2216.) No questions were asked whether the juror's views on the death penalty would affect his determination of guilt or the presence of special circumstances.

The prosecutor then moved for the recusal of Juror No. 7 and argued vigorously that he was disqualified and should be removed. The court acknowledged that "he had difficulty understanding what we were getting at." (10 RT 2217.) Defense counsel disagreed that the juror was disqualified and requested that

> if the court determines that he's not able to sit on the penalty phase, I ask that in the alternate he remain on the jury for the duration of the guilt phase. He's been on it. There's no reason why he can't be on it. He's qualified to sit on the guilt phase. If it turns out there is a penalty phase, the issue can be revisited and he could be disqualified from that.
> (10 RT 2217-2218.)

The court noted that "The reason for excusing him, if there's a reason

for excusing him, has to do with his inability to perform the duties and responsibilities of a juror during the penalty phase, that is, make the decision that a juror's called upon to make in that phase." (10 RT 2218.) The court also noted that if the juror had expressed his current views during *voir dire* "[i]f somebody had challenged him for cause, I would have excused him." (*Id.*) Judge Spinetta then observed that "it is true, as you point out, that the deformity, if you will, relates to the penalty phase." (10 RT 2218.) The question now posed was whether the juror's penalty-phase "deformity" was "good reason for excusing him from participating in the culpability phase." (10 RT 2218.) The court then mused about "various scenarios."

One scenario was not to tell the juror he would be excused at the penalty phase and to leave him in place. (10 RT 2218.) But, in that event, the court noted, "it could be argued that his decision in the culpability phase would be affected by his desire not to participate in the penalty phase." (*Id.*) However, as to this possibility, the court admitted that "we haven't voir dired him about that." (10 RT 2219.) On the other hand, the court mused,

> [i]f I do tell him and tell him don't worry about it, you're not going to be in the penalty phase, all you have to do is make the culpability decision, that might also affect him in the culpability. He might say, all right, if I don't have to worry about that, it might make it easier for him to render a decision of guilt, for example, because, remember, he did say he has no problem with other people imposing the death penalty. It's just he doesn't want to participate in it.

(10 RT 2219.)

Judge Spinetta worried that an appellate court "might say, well, under these circumstances, they facilitated the possibility of his rendering a guilty verdict." (10 RT 2219.) Regardless of its own speculative musings, the court had earlier noted that "we haven't voir dired him" about any of the posited scenarios but, nevertheless, was inclined to excuse him. (10 RT 2219.)

Defense counsel offered a "third option ... to tell him that at this point it's not really an issue for him as a juror. If he wants to raise it again at a point where it does become an issue, he can do so, and the court will listen to him and ask him questions again." (10 RT 2220.) Defense counsel stated that this

> isn't so different from a situation where a juror in the middle of proceedings realizes that they do, in fact, know a potential witness and they don't know if it would affect their ability to be a juror. And I've been in situations where the court says, well, let's see what happens. If it does in fact become a problem for you, let us know and we'll address it then. I had that happen many times. I've even had it happened (sic) during voir dire where the court in a capital case—where a court says, well, if that becomes an issue for you, something that the juror raised, let us know and we'll take care of it then.
> (10 RT 2220.)

As defense counsel noted: "[W]e don't necessarily excuse sitting jurors because of some possibility." (10 RT 2221.)

The prosecutor argued that "the People have a right to have jurors that are called death qualified." (10 RT 2221.) He argued that allowing the

scrupled juror to remain for the guilt phase denied the prosecution their right "to have 12 jurors that are willing to consider both penalties." (10 RT 2221.) According to the prosecutor, the legislature clearly "expressed a desire to do these trials in one phase with one jury." (10 RT 2222.) Furthermore, "[i]t is unbelievable and inconceivable that this man can sit on the jury and not have that decision in the future. The penalty phase can potentially affect his guilt phase." (10 RT 2222.) The fact the juror discovered his true feeling after being sworn to jury was of no moment to the prosecutor: "This juror cannot sit in this case. He's not qualified to sit in this case. It did come up later, *but it is no different than if he told us before*. Just because he's a sitting juror doesn't make a difference. He needs to be removed for cause." (10 RT 2223; emphasis added.)

~~The court reviewed the circumstances and concluded the following~~:

> His state of mind in my view substantially impairs his ability and prevents him from being able to properly discharge a key duty and responsibility of a juror in a capital case and that is to honestly consider both alternatives, both alternative punishments that are available by law in this type of a case and to make a decision based upon a relative comparison of the aggravating evidence and the mitigating evidence. In effect what we have here is a person whose views have led him—are such as to have him prejudge the case—at least, the penalty phase of the case... (10 RT 2224.)

The more difficult issue was whether the juror should be allowed to sit in guilt phase without telling him about his disability for penalty. On this

score, the court concluded that "the danger of telling him or not telling him or keeping him would – given his state of mind about the penalty, carries too great of a danger to impact him on the culpability decision." (10 RT 2225.) The court decided to approach the situation as if the issue had arisen before he was sworn and "a challenge for cause here lies and a challenge for cause here lies to excuse him from participating in this case. So I'm going to sustain the challenge to this juror." (10 RT 2226.)

The defense objected on the basis of the defendant's constitutional rights to due process and a fair trial. (10 RT 2226.) The defense also stated that this problem was the direct result of the inadequate *voir dire* (discussed *supra* in Issue I):

> And I believe to some extent this ties in with the situation that happens when we don't have sequestered voir dire, and there are some limitations placed on the amount of time that's available to question jurors. And when we get someone with a questionnaire and that person is not extensively questioned because everyone is going along with what's in the questionnaire, and then something like this comes up...maybe this would have been exposed....[in a] more...relaxed atmosphere in terms of doing the questioning, in other words, not being concerned with how much time is going to be taken up. And then both sides may have asked other questions and that person would be gone. By doing it this way, it has affected the manner in which we were exercising our peremptory challenges.
> (10 RT 2227.)

As will be shown, the decision to remove Juror No. 7 constitutes

reversible error.

B. Argument.

i. The trial court employed the wrong standard to dismiss a seated juror during guilt phase proceedings, depriving appellant of due process and his right to trial by jury.

The swearing of a jury carries constitutional significance. Both Federal and state constitutions provide that a person shall not be twice put in jeopardy for the same offense. (U.S. Const. art. V; Cal. Const., art. 1, § 15.) Jeopardy "attaches" when a defendant is placed on trial before a court of competent jurisdiction, on a valid accusatory pleading, before a jury "duly empaneled and sworn." (*Jackson v. Superior Court* (1937) 10 Cal.2d 350, 355; *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712; *Larios v. Superior Court* (1979) 24 Cal.3d 324, 329.) Jeopardy attaches when the jury is empaneled and sworn because of the "need to protect the interests of an accused in retaining a chosen jury." (*Crist v. Bretz* (1978) 437 U.S. 28, 35.)

In a capital case, *before* a jury has been empaneled and sworn, a *prospective* juror may be removed where it appears that the juror's views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 425; quoting *Adams v. Texas* (1980) 448 U.S. 38, 45.) However, once jeopardy has attached, removal of a juror is governed by Penal

Code section 1089, and basic constitutional principles of due process and the right to a jury trial. Pursuant to Section 1089, a juror may be removed if "upon other good cause shown to the court [the juror] is found to be unable to perform his or her duty" as a juror. The most common application of these statutes permits the removal of a juror who becomes physically or emotionally unable to serve as a juror due to illness or other circumstances. (*See People v. Cleveland* (2001) 25 Cal.4th 466, 474; cases cited therein.)

A trial court's decision to discharge a sitting juror for good cause from a criminal trial is reviewed for abuse of discretion. (*People v. Zamudio* (2008) 43 Cal.4th 327, 350.) Under this standard, a trial court's determination of good cause under section 1089, i.e., that a juror is found "unable to perform his duty," will be upheld if there is substantial evidence supporting it. (*People v. Cleveland, supra,* 25 Cal.4th at 488; Werdegar, J., concurring.) However, a juror's inability to perform as a juror must "appear in the record as a demonstrable reality." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1158; *People v. Johnson* (1993) 6 Cal.4th 1, 21; *People v. Compton* (1971) 6 Cal.3d 55, 60.)

> The demonstrable reality test entails a more comprehensive and less deferential review. It requires a showing that the court as trier of fact did rely on evidence that, in light of the entire record, supports its conclusion that bias was [or was not] established. It is important to make clear that a reviewing court does not reweigh the evidence under either test. Under the

> demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied. (*People v. Barnwell* (2007) 41 Cal.4th1038, 1052-1053.)

This Court has made clear that "[w]hile we rely on our trial courts to assess a juror's state of mind in such circumstances, we have explained that such decisions are not subject to the substantial deference afforded other factual decisions." (*People v. Wilson* (2008) 44 Cal.4th 758, 840.) The "demonstrable reality" standard is a "heightened standard," *Barnwell, supra,* and requires a "stronger evidentiary showing than mere substantial evidence." (*Wilson, supra,* 44 Cal.4th at 840; *People v. Cleveland, supra,* 25 Cal.4th at 488.)

In the present case, Judge Spinetta expressly determined to remove Juror No. 7 based on the principles of *Witt*, which applies to the selection of *prospective* jurors, instead of the principles embodied in section 1089 which applies to the removal of *seated* jurors. Judge Spinetta explicitly stated: "I believe the proper approach to this is to take the same position that would have been taken had the issue arisen before he was sworn..." (10 RT 2226.)

Appellant contends that the trial court's decision to employ the *Witt* "substantial impairment standard" was clear legal error and requires reversal. By the time the court removed Juror No. 7, the juror had completed a lengthy juror questionnaire in good faith; he had participated in *voir dire* and was

placed on the jury; he was sworn as a juror (8 RT 1871); he was seated on the jury for preliminary instructions and opening statements and he had listened to the testimony of prosecution witnesses. In short, Juror No. 7 was a fully engaged, participating member of the jury. There was no hint or suggestion that Juror No. 7 had misled or lied in his juror questionnaire or in *voir dire*. Removing this seated juror as if he was merely a *prospective* juror was violation of appellant's right to trial by jury, to a unanimous and reliable verdict and to due process of law. It was also a gross abuse of discretion.

But Judge Spinetta's error went further. Rather than dismissing Juror No. 7 based on a "demonstrable reality" that he was unable to perform his duties as a juror, the court posited several speculative scenarios as a basis for removal. Indeed, the court itself noted that the juror was not questioned about the effect his views on the death penalty might have on his guilt and special circumstances determination. (10 RT 2219: "[W]e haven't voir dired him about that.") Instead, the judge speculated that leaving the juror on for the guilt phase might skew the juror either towards conviction or against it. (10 RT 2218-2220.) Removing the juror based on speculation, or as defense counsel noted, based on "possibilities" (10 RT 2221), was improper and did not amount to evidence of a demonstrable reality justifying removal.

ii. Removal of Juror No. 7 during the guilt phase based on speculation about the effect his views on the death penalty could have on his assessment of guilt deprived appellant of the presumption of innocence

Any legal disability Juror No. 7's views entailed related solely to the penalty phase. There was nothing articulated by this juror which implicated his capacity to sit as a juror for the guilt determination. By focusing on this juror's potential disability at the penalty phase, appellant's right to a presumption of innocence was violated. The juror was dismissed on the clear assumption that there would be a penalty phase, in other words, that there was no possibility he would be found ineligible for death. This assumption was made explicit by the prosecutor: "It is unbelievable and inconceivable that this man can sit on the jury and not have that decision in the future." (10 RT 2222.) It was also explicit in Judge Spinetta's comments during co-defendant O'Brien's sentencing, in which he made assumptions about appellant's guilt, as shown *supra* in Issue III.

iii. A case of first impression?

Only a single case has been identified regarding the issue of a juror who "discovered" anti-death penalty scruples while engaged in the culpability phase. In *Jennings v. State* (1987) 512 So.2d 169, a Florida capital case, "an issue that is, if not unique, at least unusual" arose when a juror during the guilt phase of the trial told the court that she had not been "candid" with the court

regarding her feelings about the death penalty. (*Jennings,* 512 So.2d at 172-173.) The juror explained that while she could render an impartial verdict in the guilt phase, she could not recommend a death sentence. Unlike the present case, however, the prosecutor did not object to the juror remaining through the guilt phase but he did announce that removal would be requested in the event of a penalty phase. (*Id.*) Defense counsel similarly did not object to the juror remaining but would not stipulate to removal of the juror for a penalty phase. (*Id.* at 173.) The trial court removed the juror after the verdict in the guilt phase but before the penalty phase commenced. The appellant in *Jennings* argued his right to a fair trial was abridged by the interference with the "'magical' composition of the jury in the middle of the trial." (*Jennings, supra,* 512 So.2d at 173.)

In addressing the issue, the Florida Supreme Court stated:

> Aside from the fact that neither side requested it, *we see no compelling reason why the judge should have excused the juror from the guilt phase.* She said that despite her feeling about imposing the death penalty she would render a verdict as to guilt or innocence based solely on the law and the evidence. Therefore, section 913.13, Florida Statutes (1985)[35], does not

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[35] Florida Statutes section 913.13 states: "A person who has beliefs which preclude her or him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case."

apply as it disqualifies only those who cannot vote for guilt in a capital case."
(*Jennings* at 173.)

The Florida Supreme Court could not see how the trial judge's solution to "this unusual problem" could have prejudiced the appellant: "[a]t the outset, we note that it may be to a defendant's advantage (though obviously it was not here) to have a juror who is apprehensive about the death penalty consider guilt or innocence." (*Id.*) The Florida Court reached its conclusion despite noting that "[h]ad the subject juror originally stated during voir dire that she could not vote for death at the penalty phase, she would have been subject to removal for cause." (*Id.*)

The same result should obtain in this case. There was no basis for Judge Spinetta to conclude that Juror No. 7's views on the death penalty would disable him from sitting for the guilt phase. While in *Jennings* the juror affirmatively stated she could render a fair guilt verdict, here no inquiry was made on whether or how Juror No. 7's views might play out in the guilt phase, a fact noted by the court. (10 RT 2219.) Moreover, in *Jennings*, unlike here, there was some suggestion that the juror had misled the court and counsel in *voir dire* by revealing that she was not "candid" in her answers regarding the death penalty. There was no suggestion that Juror No. 7's scruples were arrived at with anything other than good faith refection upon a life and death

question.

iv. This is plain error under *People v. Allen/Johnson, People v. Wilson* and *People v. Pearson.*

Recently this Court has re-examined the circumstances under which the trial court may remove a juror. All three cases are instructive.

a) *People v. Allen/Johnson.*

In *People v. Allen/Johnson* (2011) 53 Cal.4th 60, 264 P.3d 336, 133 Cal.Rptr.3d 548, a juror was removed during deliberations. This Court reversed on the ground that the excluded juror had not committed misconduct by prejudging the case. *Allen/Johnson* was a capital case where the co-defendants were both convicted of first degree murder with multiple murder special-circumstances and sentenced to death. (*Id.* at 552.)

At trial, after several days of guilt phase deliberations, a jury foreperson reported that an individual identified as Juror No. 11 had prejudged the case while evidence was still being presented. (*Id.* at 553.) All jurors were interviewed and the trial court concluded that this juror had prejudged the case by relying on evidence not presented at trial. (*Id.*) The court discharged Juror No. 11 and seated an alternate. The defense contended that the court exceeded its jurisdiction under Penal Code section 1089.[36] (*Id.*)

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[36] Penal Code section1089 provides, in pertinent part, "if at any time, whether before or after the final submission of the case to the jury, a

In *Allen/Johnson,* on the fourth day of deliberations, the foreperson and Juror No. 4 expressed their concerns that Juror No. 11 had "made up his mind before deliberations began." (*Id.* at 554.) They stated that this juror had said, on the second day of deliberations, that "[w]hen the prosecution rested, she didn't have a case." (*Id.*) In an inquiry conducted by the court, Juror No. 11 denied he had made up his mind. However, Juror No. 4 was also questioned, and she "believed that Juror No. 11 had made up his mind before deliberations began" and that he misconstrued the evidence to support his position and that he was not "being completely honest" when he denied having already made up his mind. (*Id.*) Other jurors were also questioned and they gave conflicting accounts: some said Juror No. 11 had dozed off during deliberations; some said more than one juror had their minds made up; some said Juror No. 11 had based his decision on a belief that Hispanics would not falsify a document [a timecard]; one juror confessed his mind was made up prior to deliberations. (*Id.*)

When Juror No. 11 was re-questioned, he again denied having made up his mind but admitted he had made a remark about Hispanics not falsifying a

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juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate..."

document. (*Id.* at 555.) Over the defendants' objections, the court granted the prosecutor's motion to discharge Juror No. 11, "finding he had made up his mind before jury deliberations began and was basing a decision about [a witness's credibility]...on his personal opinion of how Hispanics as a group behave." (*Id.* at 555.) He was replaced by an alternate.

This Court ultimately concluded under state law that "the record does not show to a demonstrable reality that Juror No. 11 was unable to discharge his duty, the court abused its discretion by removing him." (*Id.* at 552.) This Court did not reach the question of whether this removal also violated the defendants' constitutional rights.

In *Allen/Johnson,* this Court recognized that whether and how to investigate an allegation of juror misconduct falls within the court's discretion, citing *People v. Alexander* (2010) 49 Cal.4th 846, 926, 113 Cal.Rptr.3d 190. (*Id.* at 556.) Although "a court should exercise caution" when investigating these allegations, "it must hold a hearing when it hears of allegations which, if true, would constitute good cause for a juror's discharge." (*Id.* at 556, *citing People v. Lomax* (2010) 49 Cal.4th 530, 588, 112 Cal.Rptr.3d 96.) Failure to do so "may be an abuse of discretion." (*Id.*) "For a juror to decide a case before it is submitted is misconduct." (*Id.* at 557.) The Court noted that when the trial court was informed that Juror No. 11 had said "[w]hen the prosecution

rested, she didn't have a case," this could suggest that he had made up his mind before all the evidence was presented. The trial court's questioning of the jurors was thus proper, and the defendant's allegations that it was both "aggressive and leading" were also rejected. (*Id.* at 557.) The trial court also properly inquired of Juror No. 4 as to the timecard remark, as this indicated a separate instance of misconduct, relying on facts outside the record. In cautionary remarks that have a bearing on Juror No. 7's removal in this case, this Court stated:

> Great caution is required in deciding to excuse a sitting juror. A court's intervention may upset the delicate balance of deliberations. The requirement of a unanimous verdict is an important safeguard, long recognized in American jurisprudence. This safeguard rests on the premise that each individual juror must exercise his or her own judgment in evaluating the case...
>
> Because of the importance of juror independence, review of the decision to discharge a juror involves 'a somewhat stronger showing' than is typical for abuse of discretion review.' ...The basis for a juror's discharge must appear on the record as a 'demonstrable reality' and 'involves 'a more comprehensive and less deferential review' than simply determining whether any substantial evidence' supports the court's decision... The reviewing court does not reweigh the evidence but looks to see whether the court's 'conclusion is manifestly supported by evidence on which the court actually relied.'...
>
> This heightened standard is used by reviewing courts to protect a defendant's fundamental rights to due process and a fair trial, based on the individual votes of an unbiased jury... (*Allen/Johnson,* 133 Cal.Rptr.3d at 558 (citations omitted).)

In *Allen/Johnson*, Juror No. 11 was discharged on two bases: his

alleged prejudgment of the case and his reliance on facts outside the record, neither of which were supported by the record. Here, there is nothing in the record that indicates that Juror No. 7 could not fairly and impartially evaluate the guilt phase evidence.

In *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 118 Cal.Rptr.3d 798, the Court of Appeal upheld the excusal of a juror who stated that her mind was made up mid-trial. "It was a flat unadorned, statement that this juror prejudged the case long before deliberations began and while a great deal more evidence had yet to be admitted." (*Grobeson,* 190 Cal.App.4th at 794; 118 Cal.Rptr.3d 798.) In *Allen/Johnson*, however, as here, "Juror No. 11's statement was made during deliberations, and only made reference to his previous state of mind at a single point during the trial. *It did not indicate an intention to ignore the rest of the proceedings.*" (*Allen/Johnson* at 559 (emphasis added).) Here, Juror No. 7 evidenced no intentions whatsoever to prejudge the guilt phase, and his removal was even more improper than the removal in *Allen/Johnson.* His removal should also be seen in the context of the trial court's comments in the Snyder case, which indicated it had prejudged the guilt of appellant and, as a result, assumed that there would be a penalty phase.

As in *Allen/Johnson,* Juror No. 7's statements were not "'an unadorned

statement' that he had prejudged the case. "It did not establish that he had ignored further evidence, argument, instructions, or the views of other jurors." (*Id.* at 559.) The situation is similar here with Juror No. 7: there is no indication he had any predisposition as to the guilt or innocence of appellant or that he would ignore or discount any guilt phase evidence. Juror No. 7's views regarding the death penalty represent his thought processes regarding the penalty phase alone, yet that portion of the trial had not yet begun.

As to those views, this Court has held that "it would be entirely unrealistic to expect jurors not to think about the case during the trial..." (*People v. Ledesma* (2006) 39 Cal.4th 641, 729, 47 Cal.Rptr.3d 326.) Juror No. 7's views simply expressed "[t]he reality that a juror may hold an opinion...is...reflective of human nature." (*Allen/Johnson* at 560.) As in *Allen/Johnson,* Juror No. 7's views did not demonstrate that he "refused to listen to all of the evidence, [would] begin deliberations with a closed mind, or declined to deliberate," (*Allen/Johnson* at 560), at least as to the guilt phase.

b) *People v. Wilson.*

In *People v. Wilson* (2008) 44 Cal.4th 758, 80 Cal.Rptr.3d 211, this Court held that the trial court violated the juror-removal statute when it removed a juror during penalty-phase deliberations. The juror in question had said that he could not vote for the death penalty if the defendant came from a

bad family. (*Id.* at 836.) The juror had also allegedly said "this is what you expect when you have no authority figure" to another juror between the testimony of the first and second witnesses. (*Id.* at 837.) In *Wilson,* this Court reaffirmed the principle of *Barnswell* that "a court's decision to remove a juror must be supported by evidence showing *to a demonstrable reality* that the juror is unable to perform the duties of a juror...This is a 'heightened standard' and requires a 'stronger evidentiary showing than mere substantial evidence.'" (*Wilson* at 840, quoting *Barnswell,* 41 Cal.4th at 1052.)

c) *People v. Pearson.*

In *People v. Pearson* (2012) 53 Cal.4th 306, 135 Cal.Rptr.3d 262, a capital case, this Court recently reaffirmed the principles discussed *supra.* Here, a prospective juror who expressed allegedly ambivalent attitudes about the death penalty was removed by the trial judge. This Court held that to be error, because "[t]o exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process." (*Pearson* at 332.) (*See also* the discussion *infra* (in sub-section 6 of this issue) of the federal constitutional standards under *Wainwright v. Witt* (1985) 469 U.S. 412 and *Witherspoon v. Illinois* (1968) 391 U.S. 510, 523.)

C. The removal of Juror No. 7 was structural error which was *per se* prejudicial.

Precisely because of the difficulty of accessing the impact of the improper removal of a seated juror, the error here should be deemed *per se* prejudicial requiring reversal. (*See Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-282 [harmless error analysis is inappropriate where jury given deficient reasonable doubt instruction].) By erroneously excluding Juror No. 7 over the defense's objections, the trial court denied appellant the impartial jury to which he was entitled under the Sixth and Fourteenth Amendments to the United States Constitution. (*Utrecht v. Brown* (2007) 551 U.S. 1, 6-9.) The erroneous removal of a juror is "not subject to a harmless-error rule, regardless of whether the prosecutor may have had remaining peremptory challenges and could have excused [Juror No. 7]." (*People v. Heard* (2003) 31 Cal.4th 946, 966, 4 Cal.Rptr.3d 131; *Pearson, supra,* 53 Cal.4th at 333.)

The case of *United States v. Harbin* (7th Cir. 2001) 250 F.3d 532, is particularly instructive. In *Harbin* the Seventh Circuit Court of Appeal addressed an issue it found to be "unprecedented": the prosecutor was allowed to use a peremptory challenge "saved" from the jury selection phase to eliminate a juror on the sixth day of an eight-day trial. The Seventh Circuit agreed with the defendant that the prosecution's mid-trial use of a peremptory challenge violated their Fifth Amendment due process right to a fair trial as

well as their Fifth Amendment right to the intelligent exercise of their peremptory challenges. As can be readily seen, in this case, as in *Harbin*, Judge Spinetta functionally "reopened" *voir dire* and permitted a new challenge to an otherwise fully competent juror.

Because no one could argue that the alternate who replaced the seated juror was somehow biased, the error in *Harbin* was deemed "precisely the type of error that 'defies harmless error analysis.'" (*Harbin, supra,* 250 Fed.3d at 545.) Appellant submits the same difficulty arises here. There is simply no way to assess the harm caused by the removal of a juror who is otherwise qualified and competent to determine guilt but *may* be disabled from determining penalty. Consequently, the error must deemed structural.

Another instructive case is *People v. Young* (1929) 100 Cal.App. 18, in which, after they had been selected and sworn, one of the jurors realized that he was socially acquainted with one of the defense witnesses. Much like the present case, the prosecutor sought permission to exercise a peremptory challenge. The court permitted the challenge over defense objection and an alternate juror was empaneled. The issue in *Young* concerned the defense's immediate plea of once in jeopardy which the Court of Appeal concluded should have been accepted. While the *Young* case's holding that the defendant's double jeopardy pleas was valid was ultimately overturned by

People v. Hernandez (2003) 30 Cal.4th 1, left undisturbed was the underlying finding of reversible error in allowing the prosecutor to employ a peremptory challenge to a sitting juror.

D. Removal of Juror No. 7 was also improper under *Witt* and *Witherspoon.*

"The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.'" (*Wainwright v. Witt, supra,* 469 U.S. 412, 423.) To permit the exclusion for cause of prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law." (*Witherspoon v. Illinois, supra*, 391 U.S. 510, 523. *See also Gray v. Mississippi* (1987) 481 U.S. 648, 658-659.)

Thus, as this Court explained in *People v. Heard, supra,* 31 Cal.4th 946, 958, "[a] prospective juror may be challenged for cause based upon his or her views regarding capital punishment only if those views would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*Wainwright v. Witt, supra*, 469 U.S. 412, 424; *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Mincey*

(1992) 2 Cal.4th 408, 456.) A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. The party seeking to have a prospective juror excused for cause, the prosecution in this case, bears the burden of demonstrating that a challenged juror is unfit to serve on the jury. (*People v. Stewart* (2004) 33 Cal.4th 425, 445-447.) The fact that it would be very difficult for a juror to ever impose a death sentence is not a sufficient basis for granting a challenge for cause. (*Id.* at 445.) In *Stewart*, this Court reiterated

> "that a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty. Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstances that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt, supra*, 469 U.S. 412."
> (*Id.*)

Moreover, in order to determine whether a prospective juror is fit to serve in a capital case, the trial court must analyze the prospective juror's questionnaire and *voir dire* as a whole, rather than simply focus on an isolated

statement. (*People v. Mason* (1991) 52 Cal.3d 909, 953.) Prospective jurors must not be excused if their comments as a whole indicate that their views on capital punishment would not prevent or substantially impair the performance of their duties. (*Id.*) Here, Juror No. 7's comments on his questionnaire gave no hints that his views were disqualifying.

In *Mason*, the defendant was charged with capital murder. During the initial questioning in *voir dire*, a prospective juror informed the court that she would "'always vote for capital punishment.'" (*Id.*) After the judge and counsel explained a juror's obligation to hear and consider mitigating evidence, the prospective juror answered that certain evidence could persuade her to vote against the death penalty. The prospective juror further explained that she "would try to leave [her] mind open and listen to everything" and that she could "really" and "realistically" see herself voting for life imprisonment instead of death. (*Id.*, at 953-954.) Defense counsel's motion to excuse the prospective juror for cause was rejected by the trial court.

On appeal, this Court refused to focus on the prospective juror's single statement that she would categorically vote for death in every case. Instead, this Court reviewed the prospective juror's "entire voir dire" and found that, given her other comments after being informed by the court of a juror's obligations, the prospective juror's views on capital punishment would not

have "prevented or substantially impaired the performance of her duties." (*Id.*)

Finally, only when the prospective juror's statements are equivocal will this Court defer to the trial court's determination of the prospective juror's state of mind. (*People v. Phillips* (2000) 22 Cal.4th 226, 234.) If the *voir dire* is unequivocal, the trial court's ruling will be upheld only if it is "fairly supported by the substantial evidence in the record." (*People v. Holt* (1997) 15 Cal.4th 619, 651; *People v. Heard*, *supra*, 31 Cal.4th at 958.)

The record does not support a finding that the views of Juror No. 7 would have prevented or substantially impaired the performance of his duties as a juror at the penalty phase. The present case is thus similar to *People v. Heard*, *supra*, 31 Cal.4th at 966, in which this Court found that the granting of the prosecution's challenge for cause was erroneous. In *Heard*, the prospective juror stated in his questionnaire that imprisonment for life without the possibility of parole to him represented a "worse" punishment than death. (*Id.*, at 964.) Later, however, during *voir dire*, the trial court explained to the prospective juror that California law considered death the more serious punishment and that the death penalty could be imposed under California law only if the aggravating circumstances outweighed the mitigating circumstances. (*Id.*) After being informed of the correct law, the prospective juror "did not provide any indication that his views regarding the death penalty

would prevent or significantly impair him from following the controlling California law." (*Id.*) Thus, this Court concluded that the "earlier juror questionnaire response, given without the benefit of the trial court's explanation of the governing legal principles, does not provide an adequate basis to support [the] excusal for cause." (*Id.*)

Furthermore, to the extent that the prospective juror was unwilling to vote for death unless he was absolutely certain that such a penalty was appropriate, his view was not inconsistent with California law. Under California law, a juror is "free to assign whatever moral or sympathetic value [he or she] deem[s] appropriate to each and all of the various" mitigating and aggravating factors. (CALJIC 8.88; *People v. Boyde* (1988) 46 Cal.3d 212, 253-254.) Similarly, a juror has the discretion not to vote for the death penalty unless the juror is satisfied that there is no doubt about the defendant's guilt. This Court has repeatedly stated that in determining penalty, "the jurors may consider any lingering doubts they may have concerning the defendant's guilt." (*People v. Medina* (1995) 11 Cal.4th 694, 743; *People v. Zapien* (1993) 4 Cal.4th 929, 989; *People v. Kaurish* (1990) 52 Cal.3d 648, 706.) Lingering doubt is considered a factor in mitigation under Penal Code section 190.3, factor (a) (circumstances of the crime), and factor (k) (any other circumstance that extenuates the crime or any sympathetic aspect of the defendant's

character or record). (*People v. Hines* (1997) 15 Cal.4th 997, 1068; *People v. Sanchez* (1996) 12 Cal.4th 1, 77-78.) In addition, as recently stated by this Court, "a [juror's] concern regarding the risk of error in the criminal justice process [] is not disqualifying by itself . . . ." (*Stewart, supra,* 33 Cal.4th at 449) [Excusal for cause was error when based on prospective juror's statement in questionnaire that "I don't believe in irrevers[i]ble penalties. A prisoner can be released if new information is found"].) Thus, this prospective juror's view that he would require certainty that the death penalty was appropriate before voting for death did not prevent or substantially impair the performance of his duties as a juror.

The erroneous excusal of Juror No. 7 for cause violated appellant's right to an impartial jury, and his right not to be deprived of his life without due process of law, under the Sixth and Fourteenth Amendments to the United States Constitution. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at 522-523.) The violation requires automatic reversal of the death judgment. (*People v. Heard*, *supra*, 31 Cal.4th. at 966.)

VIII. TRIAL ERROR IN ADMITTING TESTIMONY RELATING TO AN ALLEGED RAPE BY APPELLANT.

Appellant's conviction and death sentence are invalid under the federal constitutional guarantees of due process, equal protection, trial before an

impartial jury and a reliable sentence due to 1) the introduction of testimony regarding the alleged rape of Andrea Torres by appellant and 2) the court's ruling that the prosecution had no pre-trial obligation to disclose to the defense any information or discovery materials regarding this incident. This trial error distorted the fact-finding process and rendered the sentencing hearing fundamentally unfair. (U.S. Const. Amends. V, VI, VIII, & XIV.)

A. Facts in Support.

As discussed *supra,* Andrea Torres testified at the punishment phase regarding an alleged rape by appellant. (17 RT 4044-4101.) The defense filed a "Penalty Phase *In Limine* Motion Concerning Uncharged Rape of Andrea Torres." (5 CT 1552-1560.) The motion began by discussing the extensive efforts by defense counsel Linda Epley to obtain information regarding this incident, which occurred in San Francisco. (5 CT 1553.)

i. Trial error in the initial ruling that the prosecution had no obligation to turn over the Torres rape information.

The court discussed the rape evidence and held that no notice had to be given. The court interpreted the statute (190.3) as requiring only that some "effective notice" of some kind be given. (16 RT 3814-3816.) The court held that a law enforcement agency not involved in the instant prosecution (here, the San Francisco District Attorney's office) is not part of the prosecuting team that has an obligation to turn over the evidence. The court reasoned that as the

San Francisco District Attorney's office is not part of this case, "[s]o I don't believe there is any violation of the discovery statutes by the inability of the District Attorney's Office of this kind to produce the police reports involved in this case 30 days before trial." (16 RT 3816.) Defense attorney Linda Epley objected that she has never been advised of the circumstances, date, or parties present at this incident. She stated that the prosecuting district attorney knew that the San Francisco district attorney had the evidence and they were the investigating agency. (16 RT 3820.)

The prosecutor admitted that he received the report in 1998 but then apparently lost it and nobody went to San Francisco to get it. (*Id.*) Mr. Sequeira stated that he had an obligation to turn over only materials in his possession or in the possession of any part of the prosecuting team. (16 RT 3821.) He also admitted he had the police report earlier but "continual attempts to find it in his records have been unsuccessful..." He may actually never have had it, according to the court, "[a]nd so I don't believe they really had it." (16 RT 3821.) The court stated that if there was an issue with regard to the rape evidence, the remedy would be to continue the case, not exclude the evidence. (16 RT 3822.)

As required by the Supreme Court of the United States in *Brady v. Maryland* (1963) 373 U.S. 83, the State had a continuing obligation to reveal

the evidence it possessed regarding the incident with Ms. Torres.

ii. Trial error in admitting the rape evidence.

The defense moved to exclude the evidence relating to the alleged rape of Ms. Torres (5 CT 1552-1560) but the motion was denied and the jury heard Ms. Torres testify at the punishment phase of appellant's trial. Her testimony was opposed on the basis that Penal Code 190.3(b), which allowed evidence in aggravation of criminal activity to be introduced, did not cover this alleged attempted rape. (*Id.*) The defense cited *People v. Rodrigues* (1994) 8 Cal. 4th 1060, 1169 for the proposition that Penal Code section 190.3(b) is limited to conduct that violates a penal statute. The statute limits admissibility to only that evidence which demonstrates the commission of an actual crime. (*People v. Phillips* (1985) 41 Cal. 3d 29, 72.) The defense argued that the minimal facts in the report of the San Francisco Police Department (*see* 5 CT 1561-1563) "do not provide enough information about the incident to determine if the events involve a crime, a statutory rape as defined in Penal Code section 261.5 (which would not qualify as Penal Code 190.3(b) evidence) or a forcible rape as described in Penal Code 261" which would qualify. (5 CT 1559-1560.) Appellant contends the court erred in denying this motion and admitting this evidence, for these reasons.

B. Argument.

A capital murder trial is not a game. The state's obligation is to do justice, not to seek the short-term victories of gamesmanship. (*Berger v. United States, supra,* 295 U.S. 78, 80.) It is a fundamental tenet of constitutional criminal procedure that "the government must turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 57 (*citing United States v. Agurs* (1976) 427 U.S. 97 and *Brady v. Maryland, supra,* 373 U.S. 83, 87.)) The materiality requirement of *Brady* is judged by whether there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v. Bagley* (1985) 473 U.S. 667, 682.) The defendant meets this burden if he shows that the suppressed evidence could have created a reasonable doubt -- either as to the defendant's guilt or as to whether the death penalty would have been imposed -- that did not otherwise exist. (*Agurs*, 427 U.S. at 112; *McDowell v. Dixon* (4th Cir. 1988) 850 F.2d 740.)

The State failed to timely provide the information on this alleged rape to the defense, which constitutes the suppression of material evidence which "could reasonably be taken to put the whole case in such a different light as to

undermine confidence in the verdict." (*Kyles v. Whitley* (1995) 514 U.S. 419.) The trial court erred in failing to suppress this evidence.

i. The Materiality Standard.

In *Brady v. Maryland*, *supra,* the Supreme Court held that the prosecution's suppression of evidence favorable to a defendant violates due process where the evidence is material either to guilt or to punishment. *Id.* at 87. Under *Brady* and its progeny, a proceeding is rendered fundamentally unfair if: (1) the prosecution suppressed favorable evidence; and (2) the evidence was material to either guilt or punishment. (*Kyles v. Whitley*, *supra*; *Bagley*, *supra,* 473 at 683; *Brady*, 373 U.S. at 87; *Blackmon v. Scott* (5th Cir. 1994) 22 F.3d 560, 564.) The Court has rejected any distinction between impeachment and exculpatory evidence for purposes of *Brady* analysis. (*Bagley*, 473 U.S. at 677; *Giglio v. United States* (1972) 405 U.S. 150, 154.)

Evidence is material "if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." (*Kyles*, 514 U.S. 419; *Bagley*, 473 U.S. at 682.) Here, although the information was finally disclosed, it was untimely, and appellant's defense was unable to properly prepare for it, either with the juror questionnaires or in *voir dire.* The trial court erred in ruling that the prosecution had no duty to turn over the evidence which was in their constructive possession and also in

allowing the prosecution to present it without any penalty. The *Brady* and *Kyles* analysis applies equally here, as the untimely disclosure prejudiced appellant.

Harmless error analysis is not applicable to *Brady* violations. (*Kyles*, 514 U.S. at 435.) The Court stated that "once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless error review." (*Id.*)

The *Kyles* court held that "the individual prosecutor has a *duty to learn of any favorable evidence* known to the others acting on the government's behalf in the case." (*Id.* at 435.) In other words, the prosecutor cannot ignore information gathered by another police agency, here the San Francisco district attorney, to duck his duty to disclose favorable information to the defense.

The materiality standard is satisfied here because of the importance of the alleged rape as to the punishment phase of the trial. An alleged rape would have been seen as important evidence of callousness and brutality. The untimely disclosure meant that the defense was not afforded a fair opportunity to decide whether the defendant should take the stand to deny it, as there were no other witnesses. Additionally, the defense was not allowed to question the jury as to the possible impact of the incident. Reversal is required.

IX. APPELLANT'S TRIAL WAS CONDUCTED IN AN INHERENTLY PREJUDICIAL ATMOSPHERE AS IT COMMENCED ON SEPTEMBER 12, 2001.

Appellant's conviction, death sentence, and confinement are unlawful and were obtained in violation of his rights under the Due Process Clause of the Fifth Amendment, the Assistance of Counsel Clause of the Sixth Amendment, the Cruel and Unusual Punishment Clause of the Eighth Amendment, and the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment, as well as his corresponding rights under article I, sections 7, 8, 15, and 17 of the California Constitution, because appellant's jury was empaneled on September 12, 2001, one day after the horrific events of mass destruction and murder at the World Trade Center and the Pentagon of 9-11 (September 11, 2001).

A. Facts in Support.

Jury selection lasted from September 12, 2001 until September 19, 2001. Trial commenced on September 24, 2001. The intense pro-government patriotic fervor generated by this traumatic event meant that the defense was operating under a tremendous disadvantage both in attempting to discredit the State's case for appellant's guilt and in opposing the State's request for the death penalty.

Some of the jurors had actual connections to the events of 9-11. Juror

No. 2 was asked about the events in New York and said he knew six people in New York. (7 RT 1483.) He made an analogy to the events in Oklahoma City: "Certainly, New York, Oklahoma City..." Death was an option: "I could probably struggle with that." It would be difficult." (*Id.*) Other references to the events of 9-11 occurred. Potential juror Nicholas Bogatinoff: stated that "[y]ou must remember we filled these out after a pretty horrible thing." [the events of 9-11] (8 RT 1775.)

B. Argument.

The due process clause of the Fourteenth Amendment guarantees the right of state criminal defendants to be tried by an impartial jury. The Fourteenth Amendment incorporates the essence of the Sixth amendment right to be tried "by a panel of impartial 'indifferent' jurors [whose] verdict must be based upon the evidence developed at the trial." (*Irwin v. Dowd* (1961) 366 U.S. 717.) As Chief Justice Earl Warren noted in his concurrence in *Estes v. Texas* (1965) 381 U.S. 532, 552 (Warren, C.J., concurring) due process requires the courts to safeguard against "the intrusion of factors into the trial process that tend to subvert its purpose." *Id.* at 560. Specifically, the courts must guard against "the atmosphere in and around the courtroom [becoming] so hostile as to interfere with the trial process, even though...all the forms of trial conformed to the requirements of law..." (*Id.* at 561; *Woods v. Dugger,*

(11th Cir. 1991) 923 F.2d 1454, 1456-57.)

As the leading case of *Sheppard v. Maxwell* (1966) 384 U.S. 333 observed, "legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." (*Sheppard,* at 350, quoting *Bridges v. State of California* (1941) 314 U.S. 252, 271.) A defendant is entitled to a fair trial "in a public tribunal free of prejudice, passion, excitement, and tyrannical power." (*Sheppard* at 350.) There is the requirement that "the jury's verdict be based on evidence received in open court, not from outside sources", *Sheppard,* at 351, and the "prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for then it is not tempered by protective procedures'" (*Id.,* quoting *Marshall v. United States* (1959) 360 U.S. 310, 313.) Juror statements "that [they] would not be influenced by the news articles, that [they] could decide the case only on the evidence of record, and that [they] felt no prejudice against petitioner as a result of the articles" are not considered dispositive. (*Sheppard,* at 351.)

In *Estes v. Texas, supra,* the Supreme Court set aside a conviction despite the absence of any showing of prejudice. As the Court said in *Estes:*

> [i]t is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result

that it is deemed inherently lacking in due process.
(*Id.*, at 542-43.)

Normally, a showing of either actual or inherent prejudice is required in order to prevail on a claim of denial of a fair trial. (*Holbrook v. Flynn* (1986) 475 U.S. 560; *Irvin v. Dowd* (1961) 366 U.S. 717; *Woods v. Dugger* (11th Cir. 1991) 923 F.2d 1454, 1457.) The test for inherent prejudice is "not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'" (*Holbrook v. Flynn,* 475 U.S. at 570, quoting *Estelle v. Williams,* (1976) 425 U.S. 501.)

Here, the prejudice came from the huge impact of the 9-11 attacks on New York and the Pentagon on all Americans, as it was certainly the defining and most traumatic moment of this century to date. This prejudice was entirely separate from and in addition to the unfavorable publicity arising from this particular case. Aside from the impact of the media reports discussed elsewhere herein, the terrorist attacks added another prejudicial factor to the equation: that the atmosphere immediately post 9-11 was extremely pro-government, pro law-and-order, and thus pro-prosecution and hostile to a defendant charged with a home-invasion murder. Under these circumstances, appellant's trial began on certainly the most inauspicious date imaginable. Because of these prejudicial external events, it should have been continued.

X. THE TRIAL COURT ERRED IN VOUCHING FOR A PROSPECTIVE JUROR'S INCONSISTENT ANSWERS.

Appellant's conviction, death sentence, and confinement are unlawful and were obtained in violation of his rights under the Due Process Clause of the Fifth Amendment, the Assistance of Counsel Clause of the Sixth Amendment, the Cruel and Unusual Punishment Clause of the Eighth Amendment, and the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment, as well as his corresponding rights under article I, sections 7, 8, 15, and 17 of the California Constitution, because the trial judge endorsed the inconsistent comments of a prospective juror.

A. Facts in Support.

In front of the panel, the trial court questioned Michael Bernard Jr. who had written disqualifying answers on his questionnaire. In that questionnaire, he wrote that he was not willing to consider "psychological, psychiatric or other mental health testimony regarding a defendant in determining the appropriate sentence at the penalty phase" adding "crime=punishment." (2 JQ 503.) This prospective juror also wrote that he was unwilling to consider any background information or social history in considering the punishment, adding "I don't care for a history lesson." (2 JQ 503.) He thought that a life sentence was worse than death because of the cost to taxpayers. (2 JQ 503.)

This prospective juror wrote "maybe" to the question of whether "it would be hard for [him] not to require the defense to prove the defendant is innocent?" (2 JQ 494.) He also wrote that "[i]f a person committed a crime, they should be punished without regard to mental health....It should not matter that a person is drunk, stoned, high, enraged or had a bad day....[if they were] it is reasonable to assume they might temporarily revert to that state and perform in the same way." (2 JQ 498.) He was "strongly against" life sentences without the possibility of parole and thought "[i]f a person is to be caged for life, why not save the taxpayers money and execute them in 5 years." (2 JQ 501.) He thought all the possibilities for a death sentence listed in Question 113 should result in an automatic death penalty. (2 JQ 502.) This prospective juror also thought that "crime, drug traffic and gangs are out of hand. The current jail/punishment system is outdated, over rated, and obviously not a deterrent to crime...We need more judges/courtrooms and better processes to stem the crime waves." (2 JQ 487.)

This prospective juror then repudiated these answers to the judge when questioned at *voir dire*. The trial court then congratulated him for being honest. There were two prejudicial effects: 1) the panel heard it and were improperly influenced; and 2) it had a chilling effect on later defense impeachment of this juror.

In his questioning in front of the panel, Michael Bernard, Jr., who worked at a consulting firm, seemed initially very hesitant to serve as a juror in this matter. (7 RT 1523.) He was concerned about the viability of his company in his absence (7 RT 1524) and stated that it was conceivable the firm could "not cover" without him. (7 RT 1525.) He admitted that he had views about the criminal justice system, but "could follow the law." (7 RT 1526.) The idea that the defendant does not have to present any evidence was "problematic" with him. (*Id.*) At *voir dire*, he said he could listen to psychiatric evidence, despite saying the opposite on his questionnaire. He wrote "I don't care for a history lesson" but at questioning he claimed he could follow the law. (*Id.*)

The court then thanked him and said "I believe you tried to answer every question, notwithstanding the pressures of work, and I thank you very much. And I appreciate your honesty." (7 RT 1529.) Defense counsel had a conference at the bench and objected that "he's being congratulated for giving these answers that I think are extraordinarily inconsistent with what he's done, and now I'm supposed to be attacking this guy after the court has congratulated him." (7 RT 1530.)

B. Argument.

The trial court's comments had the prejudicial effect of sanctioning this

prospective juror's improper comments regarding the duty of the defendant to produce evidence and his unwillingness to listen to the defendant's "history." As defense counsel pointed out, this served as an endorsement of these comments to the remainder of the panel who could have thought the judge agreed with this opinion.

The United States Supreme Court has conferred upon trial courts the final authority for ensuring that a criminal defendant receives a fair trial. *United States v. Frazier* (1948) 335 U.S. 497, 511, emphasis added ["duty reside[s] in the court to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality."].) Moreover, a biased tribunal is one of the few "structural errors" in a trial that is not subject to harmless error analysis. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *United States v. Nelson* (2d Cir. 2002) 277 F.3d 164, 204, fn. 48 [right to an impartial adjudicator, whether judge or jury, can never be treated as harmless, and is structural error]; *Standen v. Whitley* (9th Cir. 1993) 994 F.2d 1417, 1422 [structural error is error which is "destructive of such basic elements as an impartial tribunal"].) Relying on these principles, federal courts have repeatedly required trial judges to act *sua sponte* rather than allow a biased juror to be sworn. (*Miller v. Webb* (6th Cir. 2004) 385 F.3d 666, 675 [when confronted with a biased juror, the judge must, either *sua sponte* or upon a

motion, dismiss the juror for cause, citing *Frazier, supra*]; *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 463 [trial court and counsel ultimately share responsibility for removing biased jurors]; *Tyler v. Nelson* (10th Cir. 1999) 163 F.3d 1222, 1229 ["Trial courts are responsible for guaranteeing that juries are fair and impartial."]; *United States v. Torres* (2d Cir. 1997) 128 F.3d 38, 43 [trial judge has duty, either *sua sponte* or upon counsel's motion, to dismiss prospective jurors for cause].)

In appellant's case, with or without an objection by one of the parties, the trial court had a duty to see that the trial was free from structural error – in this case, a biased tribunal. (*Johnson v. Armontrout* (8th Cir. 1992) 961 F.2d 748, 756 ["The presence of a biased jury is no less a fundamental structural defect than the presence of a biased judge."]; *United States v. Wiles* (10th Cir. 1996) 102 F.2d 1043, 1057 ["Due to the nature of structural error, whether a defendant objects . . . is simply irrelevant."]; *Johnson, supra,* 961 F.2d at 754 [a defendant who fails to object to a juror is only without a remedy *if he fails to prove actual bias*]; *Ford v. United States* (5th Cir. 1953) 201 F.2d 300, 301 [an objection to a juror raised after the verdict is too late *unless* actual bias is shown].)

XI. THE JURY SELECTION PROCEEDINGS WERE BIASED IN FAVOR OF PRO-DEATH JURORS.

A. Facts in Support.

The following prospective and actual jurors should have been dismissed, excluded or disqualified:

1) Juror L.M.D. (identified by initials because he/she actually served on appellant's jury) had several disqualifying answers in her juror questionnaire. This juror had heard, from newspapers and television, that "[a] Lafayette house was robbed and the woman at the house was shot and killed by the robbers" and "assumed what I was reading/hearing [about the case] was for the most part accurate." (3 JQ 928.) This juror expressed racist views that some racial or ethnic groups "tend to be more violent than Whites and/or are more inclined to commit crimes" adding "[t]hose who come from poorer backgrounds or where education is not encouraged." (3 JQ 931.) The juror thought the death penalty "[i]s correct and just for victims' families and tax-paying citizens who support the justice system." (3 JQ 940.) Life without parole "is costly to victims' families and tax-paying citizens." (3 JQ 941.) "Life imprisonment is extremely costly. However there are numerous criminals who live on death row without the sentence ever being carried out either!" (3 JQ 942.)

At *voir dire,* this juror again expressed notions about expert testimony

and felt that it "was not always correct." (7 RT 1639.) Based on the questionnaire, there was a issue in the court's mind as to whether the juror would "listen to psychiatric, psychological testimony, mental health testimony." (7 RT 1639.) This juror's questionnaire answers also raised issues about a willingness to consider "the background and social history of the defendant." (7 RT 1640.) This juror also thought there were some cases where he *"would always impose the death penalty."* (7 RT 1641.)

2) A juror was identified by the court as "Juror No. 3" because she actually served on appellant's jury. (7 RT 1484.) This juror had many pro-prosecution answers both in the questionnaire and at *voir dire*.

This juror was the victim of both rape and a mugging. (1 JQ 143.) As a crime victim, Juror No. 3 wrote that "I would be sympathetic to victim." (1 JQ 144.) This juror had heard about the case through newspapers and wrote that "they took the BART and went in an open garage. She was found dead in her home." (1 JQ 148.) As a result, "we need to keep garage door closed." (*Id.*) The juror's attitudes about the case before coming to court for jury duty were "it is a tragedy...It is a terrible tragedy but every person deserves a fair trial and is innocent until proven guilty." (1 JQ 149.)

Juror No. 3 was questioned about a brother in New York, who used to be a defense attorney for the New York Police Department. (7 RT 1486-1487.)

Juror No. 3 did not think it would affect him/her. (7 RT 1487.) Next the judge focused on this juror's answer to Question No. 31, where he indicated that she was a crime victim. (7 CT 1486.) Juror No. 3 wrote "I would be sympathetic to the victim." (*Id.*) The court's restrictions on *voir dire* did not allow defense questioning on the more troubling questionnaire answers.

3) Prospective juror Robert Ripley had several questionnaire answers which indicated he would not consider a defendant's background. He was "not sure" whether the details of the murder would so influence his emotions as to render him able to fairly and impartially evaluate the evidence. (2 JQ 800.) This prospective juror also believed that death should be mandatory for certain crimes as "there are circumstances where the crime committed against society is so heinous those that are guilty should not live." (2 JQ 804.) He believed the death penalty served to "keep society safe from those who commit crimes against it." 2 JQ 805.) Mr. Ripley also believed there were several crimes which deserved the death penalty in all cases. (2 JQ 806.) He also wrote that he would not consider background information, a defendant's social history or childhood in determining the appropriate sentence, adding that he did not "believe childhood events or social history have a bearing on the penalty phase." (2 JQ 807.)

At *voir dire,* Mr. Ripley reiterated his disqualifying opinions and again

stated he was not willing to consider childhood and background information as mitigating. (7 RT 1509.) He stated that "I don't believe childhood events or social history has (sic) a bearing in the penalty phase." (7 RT 1509.) Despite further questioning, he repeated his view that background should not be considered

> It's very difficult for me. To explain...to give you a background on my thinking, my thinking is the defendant, if found guilty of first degree murder under special circumstances, I consider that a heinous crime as such. I don't believe that having someone's social or economic background should be viewed or weighed in looking at the penalty phase.
> (7 RT 1510-1511.)

Again, after yet more coaxing, he was still unsure, stating "I think I can do it" (7 RT 1512) but then again qualified it by stating that he might be affected by gory photos. After yet more questioning, he was basically back where he started and not sure he could be fair. (7 RT 1513.) The juror then revealed that he was a crime victim and "more apt to look at the victim's right, a heightened sensitivity to them." (7 RT 1514.)

After a break in his questioning, Robert Ripley was brought back for further questioning, but still insisted that he would not give consideration to the defendant's background. (7 RT 1559.) He stated that he could not promise to consider it (7 RT 1560) and it would affect his ability to be impartial. (7 RT 1561.) After another break in the questioning, he was brought back yet again.

During further questioning by the prosecutor, Mr. Ripley stated that he would consider a person's criminal background in the penalty phase. (7 RT 1566.) But as for the social and family background, which would possibly be mitigating factors, he was much more reluctant, stating, "I see that it is the law" to consider both backgrounds. (7 RT 1567.) As he admitted, "I view these in two different contexts." (7 RT 1568.) Finally, he agreed he would reluctantly consider the defendant's social background. (7 RT 1569.) However, he once again qualified it by saying that "I don't see it (social background) as important an element as I would the others." (7 RT 1571.) Then the judge posed a leading question, ending with "do you see the difference?" Despite this coaching, this juror was still "wrestling" with giving social background any weight. (7 RT 1572.)

The defense then challenged this prospective juror for cause, but it was denied. (7 RT 1578.) In explanation, Judge Spinetta stated that Ripley is "very careful...is aware that he needs to be open-minded" despite a litany of answers that indicated the opposite. (7 RT 1579.) Defense counsel than gave a long objection as to this denial of the challenge for cause, stating that the only reason this juror changed his answers was because District Attorney Sequeira cross-examined him. (7 RT 1580.) Judge Spinetta stated that he did not badger him.

4) Juror No. 1 had heard about the case in the media and as a result, was unsure whether she could be fair. (7 RT 1626; 1 JQ 80-81.) In the questionnaire, media exposure through newspapers, people at work, a co-worker, television, radio and people who knew the victims were all listed. (1 JQ 80.) Juror No. 1 was quite knowledgeable about the case, as the co-worker knew the victim's family, their children went to school together and "they shared driving responsibilities for extra-curricular activities e.g. sports." (1 JQ 80.) Juror No. 1 also wrote in her questionnaire that

> [w]hoever did the crime were walking by [the] home, maybe walking from BART, saw the open garage w/SUV and saw it as an opportunity to take the SUV...It must have been totally devastating for the daughter to find her mother dead. We spoke about the efforts to find whoever killed the victim of that...I was horrified about it at the time. I kept reminding my husband to close the garage door because he has a habit of leaving it open when he walked our dog. Why give someone an opportunity to take anything from you or possibly harm you in any way...It's human nature to feel a bit biased towards someone who takes a human life...because they want to take a car...
> (2 JQ 80-81.)

At *voir dire,* Juror No. 1 was still unsure and stated only that she "thinks" she could do it. (7 RT 1627.)

5) Prospective juror Quirino Milanio at first stated that he would require the defendant to prove his innocence and then confusingly reversed that opinion and stated that he would not. (7 RT 1633.) Although clearly confused (7 RT 1634), the court then coaxed him to the "right" answers and

he eventually stated that he could vote "not guilty." (7 RT 1635.) He was also led to the opinion that he would not consider the costs of imprisonment (7 RT 1636.) Although he wrote on his questionnaire that he would not consider mental health testimony (2 JQ 773), the court told him he must. (7 RT 1636-1637.)

B. Argument: Constitutional standards mandated the dismissal of these actual and prospective jurors.

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

This error infected the entire *voir dire* and forced appellant's trial counsel to use peremptory challenges to remove those prospective jurors who specifically had stated their bias, prejudice or inability to follow relevant aspects of the law. The end result was that the jury pool was biased toward death, and the ultimate jury selected was biased toward death in violation of

the Fifth, Sixth, Eighth and Fourteenth Amendments. It violated the basic premise that "[t]he process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to either side of the case." (*Morgan v. Illinois, supra*, 504 U.S. 719, 734.)

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

Morgan v. *Illinois, supra*, 504 U.S. 719 makes it clear that the trial court should have excused these actual and prospective jurors. In *Morgan*, the trial court had refused a defense request to ask prospective jurors whether they

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

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

Court rejected the view that jurors who would automatically rule for death are constitutionally permissible:

> . . . [S]uch jurors obviously deem mitigating evidence to be irrelevant to their decision to impose the death penalty: they not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and they will not consider it. While Justice Scalia's jaundiced view of our decision today may best be explained by his rejection of the line of cases tracing from *Woodson* v. *North Carolina* and *Lockett* v. *Ohio* . . . , it is a view long rejected by this court.
> (*Morgan* v. *Illinois, supra,* 504 U.S. at 736 (citations omitted).

Such a "merciless juror" "will not give mitigating evidence the consideration that the statute contemplates." (*Id.* at 738.) In California, a juror who states he or she will not consider mitigating evidence is a juror who is explicitly stating he or she will not follow the law, and a cause challenge to such a juror should be granted. (*People* v. *Coleman* (1988) 46 Cal.3d 749, 768.)

In *People* v. *Easley* (1983) 34 Cal.3d 858, 877-880, this Court made it clear that mitigating evidence could not be limited to facts that lessen the gravity of the crime, but must also include facts pertaining to the background of the defendant, as the United States Supreme Court has long required. Necessarily, then, a juror's ability to be fair and impartial on penalty is "substantially impaired" if the juror is willing to consider only mitigating facts about the crime, but not about the defendant's background. A juror with such

a state of mind is "substantially impaired," within the meaning of *Witt*. (*See People* v. *Coleman, supra*, 46 Cal.3d at 767-768; *see also Morgan* v. *Illinois, supra*, 504 U.S. 719.)

C. The trial court's duty to ensure an impartial panel.

As discussed *supra* in the previous issue, the United States Supreme Court has conferred upon trial courts the final authority for ensuring that a criminal defendant receives a fair trial before an impartial jury. (*United States v. Frazier, supra,* 335 U.S. 497, 511, emphasis added ["duty reside[s] in the court to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality."].) In appellant's case, with or without an objection by one of the parties, the trial court had a duty to see that the trial was free from structural error – in this case, a biased tribunal. (*Johnson v. Armontrout* (8th Cir. 1992) 961 F.2d 748, 756 ["The presence of a biased jury is no less a fundamental structural defect than the presence of a biased judge."]; *United States v. Wiles* (10th Cir. 1996) 102 F.2d 1043, 1057 ["Due to the nature of structural error, whether a defendant objects . . . is simply irrelevant."]; *Johnson, supra,* 961 F.2d at 754 [a defendant who fails to object to a juror is only without a remedy *if he fails to prove actual bias*]; *Ford v. United States, supra,* 201 F.2d 300, 301 [an objection to a juror raised after the verdict is too late *unless* actual bias is shown].)

While the federal decisions previously cited are unanimous in holding that the trial judge must step in, decisions of this Court at first appear to hold otherwise. (*See e.g.*, *People v. Hillhouse* (2002) 27 Cal.4th 469 [defendant must exhaust peremptory challenges in order to preserve for appeal the trial court's denial of for cause challenges]; *People v. Staten* (2000) 24 Cal.4th 434, 454 [failure to raise issue below waives the issue for appeal]; *People v. Bolin* (1998) 18 Cal.4th 297, 316; *People v. Kipp* (1998) 18 Cal.4th 349, 365 [trial court has no *sua sponte* duty to remove jurors for cause; defendant may not raise on appeal issues of jury composition if he has not exhausted peremptory challenges].) In *Hillhouse, supra*, the defendant argued that the trial court improperly denied five of his challenges for cause. However, he accepted the jury after having used only 11 of his peremptory and only one of the five objectionable jurors actually served on the jury. This Court found that although the seated juror gave some answers which might have caused the trial court to remove him, he gave other answers that suggested he was qualified, and ultimately he agreed to listen to the evidence and render an impartial decision based only on the evidence and the court's instructions. Those responses provided a sufficient basis for the trial court's decision to deny the challenge for cause. (*Hillhouse, supra*, 27 Cal. 4th at 488-489.)

Likewise, in *Staten, supra*, three jurors who sat on the jury were

challenged for the first time on appeal. None of the three were challenged for cause or with peremptory challenges and the defendant had peremptory challenges remaining when he accepted the jury panel. Although Staten claimed on appeal that the trial court should have removed these jurors on its own motion, the record simply did not support that claim. Despite written responses which strongly favored the death penalty, all three jurors agreed during *voir dire* that they would weigh the evidence, follow the court's instructions, and give due consideration to both possible penalties. (*Staten*, *supra*, 24 Cal.4th at 452-454.) In light of that record, this Court held that "none of the jurors expressed beliefs regarding the death penalty . . . that would necessarily subject them to excusal for cause." (*Id.* at 454.)

More recently, this Court confirmed once again that in order to demonstrate that the erroneous inclusion of a juror violated a defendant's right to a fair and impartial jury, the defendant must establish one of two things: *either* that he was deprived of a peremptory challenge he would have used to remove a juror who participated in the case *or "that a biased juror actually sat on the jury that imposed the death sentence*." (*People v. Blair* (2005) 36 Cal.4th 686, 742, quoting *Ross v. Oklahoma* (1988) 487 U.S. 81, 85, emphasis added; *see also People v. Ramos* (2004) 34 Cal.4th 494, 519 [with respect to juries "courts tolerate some imperfection short of actual bias."].) The seating

of an actually biased juror is a defect which courts, including this Court, have never tolerated.

In appellant's case, the trial court was fully aware of these jurors' disqualification and the court's own responsibility for excusing jurors who admit they will not consider the defendant's background or childhood, have been unduly influenced by the media, or would not consider mental health issues. Such jurors, such as the five discussed *supra,* are likely to automatically vote for death. To illustrate this principle, the case most nearly on point is *Hughes v. United States, supra*, 258 F.3d 453. In that case, prospective juror Jeanne Orman twice confirmed her belief that because of close personal ties to law enforcement, she did not think she could be fair to the defendant. (*Id.* at 456.) Although both the trial judge and defense counsel asked "group" follow-up questions to which Ms. Orman gave no response, no one attempted to rehabilitate her individually. The defense did not challenge Orman nor did it exhaust its peremptory challenges, and Orman was eventually sworn as a juror. For the first time in a petition for a writ of habeas corpus, the defendant claimed that his counsel had been ineffective in failing to strike Orman after she had admitted she could not be fair. (*Id.* at 456-457.) The *Hughes* court placed responsibility upon the trial court to obtain assurances of impartiality directly from the juror after she had stated she could not be fair:

> [W]hat distinguishes Petitioner's case from [the cited precedent] is the conspicuous lack of response, *by both counsel and the trial judge*, to Orman's clear declaration that she did not think she could be a fair juror. The district court's reliance on unrelated group questioning of potential jurors on voir dire does not address the simple fact that neither counsel *nor the court* offered any response to Orman's declaration or follow-up questions directed to Orman. Although the precedent of the Supreme Court and this Court makes us circumspect about finding actual juror bias, such precedent does not prevent us from examining the compelling circumstances presented by the facts of this case - *where both the district court and counsel failed to conduct the most rudimentary inquiry of the potential juror to inquire further into her statement that she could not be fair. The [previously cited] precedent included key elements of juror rehabilitation and juror assurances of impartiality which are absent here.*
> (*Id.* at 458-459, emphasis added.)

The trial court still had the obligation to dismiss the juror *sua sponte* and the court chastised the trial court for its "complete lapse" in carrying out its obligation during *voir dire*:

> "[I]n each case a broad discretion and duty reside in the court to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality . . ." "Accordingly, *the presiding trial judge has the authority and responsibility, either sua sponte or upon counsel's motion, to dismiss prospective jurors for cause*." [citation omitted], quoting. *United States v. Frazier, supra,* 335 U.S. 497, 511, emphasis added). "When a prospective juror manifests a prior belief that is both material and contestable . . . it is the judge's duty to determine whether the juror is capable of suspending that belief for the duration of the trial." [citations omitted.]
> (*Hughes v. United States, supra*, 258 F.3d at 463-464, emphasis added.)

The trial judge had the power and the duty to dismiss, remove or excuse

these five potential or actual jurors. (*See, e.g.*, *People v. Merced* (2001) 94 Cal.App.4th 1024, 1028 [trial court did not err in removing juror *sua sponte* when juror expressed belief in jury nullification]; *People v. Roldan* (2005) 35 Cal.4th 646, 691, confirming the power of the trial court to remove prospective jurors *sua sponte* ["Some jurors were excused on stipulation by both sides, some by the court on its own motion, and some for cause due to their views on the death penalty."].) Prejudice is shown by the fact that three of these five actually sat on appellant's jury. The trial court's failure to act was error necessitating reversal.

XII. THE TRIAL COURT ERRED IN DENYING DEFENSE OBJECTIONS TO DUPLICATIVE AND GORY CRIME SCENE PHOTOS.

A. Facts in Support.

Three crime scene photos were introduced, State's Exhibit Nos. 39, 40, and 59. The defense objected to No. 59, which showed two evidence markers. (8 RT 1959.) The defense objected to No. 59 as duplicative. All three were admitted (8 RT 1960) and the objection to No. 59 was overruled. The defense also objected to No. 103 on the grounds that it duplicated No. 40. No. 103 was a picture of the victim with phone cord around her head. It was a closeup and defense counsel Egan said the body had been moved. (8 RT 1963.) The court

said it should not come in. (8 RT 1964.) Mr. Egan then objected to No. 105, another photo of the victim with the cord around her neck. The court ruled that No. 105 would be admitted but No. 106 was not admitted. The court then gave a long statement as to why No. 105 should come in only in the penalty phase. (8 RT 1965.)

No. 107 was a closeup of the same wound. (8 RT 1966.) It was not as inflammatory as 106. The defense noted that

> The pathologist who performed the autopsy is not going to testify because she's moved across the country, and another pathologist who wasn't even present is going to testify. And certainly that person isn't going to be able to give any testimony at all regarding the appearance of that wound was different from some previous point in time.
> (8 RT 1968.)

The prosecutor then admitted that "I'm highlighting every stab wound. Every stab wound is further evidence of intent to kill, express malice." (8 RT 1969.) He stated that he wanted all the pictures in evidence and stated that there will be an expert to give an opinion based on the photos. (8 RT 1969.) The court admitted No. 107 but not No. 106. (8 RT 1970.)

No. 108 was a photo that showed the victim partially nude and dead. (8 RT 1971.) The defense objected on the grounds that it was not necessary. The defense's arguments as to Nos. 109 and 111 were similar, that it was "gilding the lily." (8 RT 1973.) The defense argued that there is no need to

show any photo at all "in order to establish the number of wounds" or the location of the wounds. They also argued that the photos were humiliating to the victim, they go beyond what happened at the scene of the crime, and they provoke passion and anger in the jury. (8 RT 1974.) Prosecutor Sequeira stated that the murder was gruesome and originally there were over a hundred autopsy photos. He alleged that they are "cleaned up and antiseptic..." (8 RT 1975.) The court admitted Nos. 108, 109 and 111 and 107 but asked "do we really need the head shot here?" (*Id.*)

The court then said it would take that photo under advisement. In this consideration, the court stated that as to the "head shot," No. 109, he would consider cropping it, so "you could still see all the back wounds." "I may let the whole [No.] 109 in." (8 RT 1976.) The court stated that No. 108 was not all that prejudicial (8 RT 1977) but noted "[a]ll this blood here at the bottom...I suppose it carries a potential for some undue prejudicial value." (8 RT 1977.)

Defense counsel Egan again stated that the photos were humiliating for the victim and her family. (8 RT 1978.) Some jurors wrote in their questionnaires that they "couldn't stand the bloody photographs, that they felt a tremendous amount of sympathy for the family and they thought this might influence them, they were off the jury. They were disqualified from serving." (*Id.*) The prosecutor said this was illogical in that the people who would be

affected were already disqualified. (8 RT 1979.) However, defense counsel stated that the photos would affect anybody.

The court observed that showing the stab wound locations has probative value and prejudice has been minimized. (8 RT 1980.) Also, the court stated that cropping No. 108 would create more problems. The court held that the value of the photos is great: "I don't find the prejudice." (8 RT 1981.) But the court also admitted that the prejudicial effect of No. 106 would be great so it was excluded. No. 103 was also not admitted, but the other photos were admitted, except No. 109, where the head was cropped. Defense counsel repeated their objections, so they did not have to interpose them later, based on Evidence Code section 352 grounds and also due process and fair trial grounds. (8 RT 1982.)

B. Argument.

"Autopsy photos have been described as 'particularly horrible,' and where their viewing is of no particular value to the jury, it can be determined the only purpose of exhibiting them is to inflame the jury's emotions against the defendant." (*People v. Marsh* (1985) 175 Cal.App.3d 987, 998, quoting *People v. Burns* (1952) 109 Cal.App.2d 524, 541.)

In *Marsh,* the defense objected on Evidence Code section 352 grounds to the introduction of seven slides of autopsy photos which graphically

depicted the cranial injuries of the murder victims. The prosecutor argued that the slides were relevant to show the amount of force used to inflict the fatal blows. The slides were admitted and the defendant was convicted. On appeal, the court held that although the cause of death was the central issue in the case, the autopsy surgeon's testimony was adequate to make the prosecution's point. The slides were far more prejudicial than probative and their introduction into evidence was error. Similarly, in *People v. Smith* (1973) 33 Cal.App.3d 51, the defense objected under Evidence Code section 352 to the introduction of three color photographs of the murder victims, particularly one which depicted a woman's semi-nude, mutilated bloody corpse. On appeal, the defendant alleged abuse of discretion in admitting the photos. The Court of Appeal found that the photos "have a sharp emotional effect, exciting a mixture of horror, pity and revulsion" and held that the trial court erred in admitting them. (*Id.* at 69.)

In addition to violating state law, the court's ruling deprived appellant of his federal constitutional rights to due process and a reliable trial. (U.S. Const. 5th, 8th and 14th Amends.; *see Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545 (irrelevant photographs of blood-splattered crime scene could render trial fundamentally unfair).) To the extent the error was solely one of state law, it nevertheless violated appellant's right to due process by depriving

him of a state-created liberty interest. (*Hicks v. Oklahoma, supra,* 447 U.S. 343; *Hewitt v. Helms* (1983) 459 U.S. 460, 466.) The conviction and death sentence must be reversed.

XIII. THE TRIAL COURT ERRED IN VOUCHING FOR THE CREDIBILITY OF A CRUCIAL PROSECUTION WITNESS.

Appellant's conviction and death sentence were unlawfully and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the California Constitution because the trial court vouched for the credibility of a crucial prosecution witness, Mr.Jason Hart.

A. Facts in Support.

i. The immunity agreement.

The trial court granted transactional immunity to key prosecution witness Jason Hart in presence of his attorney, Mr. Ernest Gonzalez. (12 RT 2637.) Mr. Hart was granted the immunity if he testified "fully and truthfully." (*Id.*) Defense attorney Ms. Egan objected to this wording because "I don't feel it is necessary...in having the jury be aware of that." (12 RT 2638.) She argued that if the jury was told about this agreement, "that the court is saying, 'Sounds like it's the truth'..." (12 RT 2640.) The court responded that the order did not address "the issue of...if and when the issue of credibility will be

raised." (*Id.*) The defense responded that the jury should not hear that if Hart did not tell the truth, then he could be prosecuted for the crimes. (12 RT 2641.) In summary, the defense's objection was that the jury should not learn about the portion of the agreement that had to do with Hart telling the truth. (12 RT 2642.)

The court admitted that the jury might give enhanced credibility to a witness who could be prosecuted if they did not tell the truth. (12 RT 2643.) As the judge stated, "I mean, it is reasonable that a juror could say, gee, I don't think the person would lie, because if he's lying, he or she could be prosecuted for these things." (12 RT 2644.) And the court added that "I'm just telling you a reasonable inference is that this supports the credibility of the witness." (*Id.*)

The defense then objected on the basis that the jury would not know that there would be a subsequent determination as to whether the witness told the truth, but might think that the determination was already made at trial, and that therefore the witness was necessarily truthful. (12 RT 2645.) The court said that was not a reasonable inference. (*Id.*)

The court then overruled the objection. (12 RT 2646.) Jason Hart was granted transactional immunity for his testimony if he testified "fully and truthfully." (12 RT 2637.) The immunity order read "It is further ordered

that if Jason Hart testifies fully and truthfully, he shall be granted transactional immunity coextensive with that provided in Penal Code 1324 and shall not be prosecuted." (12 RT 2646.) At the beginning of Hart's testimony, the jury was informed that he had been granted immunity. (12 RT 2662.) The jury was told that he 'got a grant of immunity that was signed by the court that you can't be prosecuted..." (12 RT 2663.) Hart told the jury that it was his understanding that in order for the grant of immunity, he was supposed to tell the truth. (12 RT 2663.)

ii. Prejudice to appellant.

Having the jury hear this immunity agreement was very prejudicial to the defense, as they were left with the impression that Hart, a key prosecution witness, was testifying "fully and truthfully" per the agreement. Hart was the individual who initially led the police to suspect appellant. (14 RT 3168.) It is undisputed that when Hart initially met with the police, he lied to them. (*Id.*) Hart was eventually arrested (14 RT 3179) as an accessory to the crime. (14 RT 3189.) The officers threatened Hart by telling him that he was facing the death penalty. (14 RT 3194.) During this questioning the officers told Hart that "Rockhead was involved" and Hart then told the officer that appellant was known as "Joe Rockhead." (14 RT 3207.) At that time, the officers did not know who "Rock" was. (14 RT 3214.) Hart's credibility as the identifier of

"Rock" as appellant was a keystone of the prosecution's case.

There was also immense prejudice from Hart's trial testimony. He not only told the jury that appellant's nickname was Joe Rockhead but also stated that he had sold appellant drugs in the past. (12 RT 2665-2667, 2702.)

Most importantly, he involved appellant in the murder scheme. Hart testified regarding plans he allegedly concocted with O'Brien and Snyder to rob a drug dealer in Fairfield. (12 RT 2668, 2705.) Hart told the jury that appellant volunteered for the plan to rob the drug dealer as he was broke and needed some money. (12 RT 2671.)

Hart was also a central witness to the events of the day of the murder. He testified that on March 24 he was asked for a ride to Fairfield and he refused and, along with appellant, O'Brien and Snyder tried to find someone else to give them a ride. (12 RT 2678.) Hart told the jury that he dropped appellant, Snyder and O'Brien off at the Balboa BART station. (*Id.*) Later, appellant allegedly called Hart and asked to be picked up in Fairfield. (12 RT 2681.) Hart's testimony was that he and his friend Shawn drove to the Overnighter Hotel in Fairfield (12 RT 2681), pulled into the parking lot and saw appellant with O'Brien and Snyder. (12 RT 2683.) Hart told the jury that appellant said that they had gone to Lafayette and robbed a lady. (12 RT 2686.) He also testified that they admitted to tying up and strangling her with

a phone cord until she was dead. Despite his own admitted history of lying, the immunity agreement led the jury to believe he was telling the truth. In actuality, Hart had abundant reason to fabricate a story that minimized his own involvement in the murder.

B. Argument.

The facts summarized *supra* left appellant's jury with the impression that the trial court was vouching for the truthfulness of a key prosecution witness, Mr. Jason Hart. As a result, it also left the impression of judicial bias in favor of prejudging appellant's guilt because the jury would have believed that if Hart was testifying truthfully, appellant was involved in the murder. Even if there was no actual judicial bias here, at the very least the jury's knowledge of the plea agreement gave them the appearance of bias.

A defendant in a criminal case is entitled to the presumption of innocence. Essential to the presumption of innocence are the rights to be tried by an impartial tribunal and to be deprived of life, liberty or property only by due course of law. (U.S. Const. Amend V. VI.) A defendant's right to be tried by an impartial tribunal is sacrosanct, regardless of the evidence against him. (*Tumey v. Ohio, supra,* 273 U.S. 510, 535, 47 S. Ct. 437.) The right to an impartial judge is so sacred that the United States Supreme Court has declared a violation of this right to be "structural" error. (*Neder v. United States* (1999)

527 U.S. 1, 13, 119 S. Ct. 1827, 1833 (1999)(citing *Tumey,* 273 U.S. 510, 47 S. Ct. 437; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, 113 S. Ct. 2078, 2081 (1993).) The presence of a biased judge on the bench is a structural defect in the trial mechanism. (*Arizona v. Fulminante, supra,* 499 U.S. 279, 309-310, 111 S. Ct. 1246.) This "structural" error has been held to be categorically immune from a harmless error analysis. (*Arizona v. Fulminante, supra,* 499 U.S. at 290, 111 S. Ct. at 1254.)

XIV. THE TRIAL COURT ERRED IN DENYING A MOTION FOR A MISTRIAL BASED ON THE JURY OVERHEARING IMPROPER AND PREJUDICIAL REMARKS ON TAPE.

Appellant's conviction and death sentence were unlawfully and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the California Constitution because the trial court erroneously denied a motion for a mistrial when the jury overheard improper and prejudicial remarks on a tape recording of a co-defendant. The remarks informed the jury that appellant had "just got out of the penitentiary."

A. Facts in Support.

At the guilt/innocence phase of appellant's trial, certain tapes of interviews of Mr. O'Brien were admitted into evidence (13 RT 3043) and

played for the jury. (*Id.*) The defense made a motion for a mistrial based on the playing of the interviews of Mr. O'Brien. (13 RT 3044-3045, 3048.)

There was no factual dispute as to the premises of the motion. Page 10 lines 8 to 12 of Exhibit 110 were the concern. (13 RT 3049.) There were three incidents: 1) a reference to Mr. Perez having been in the penitentiary that was not in the printed transcript. (13 RT 3050.) The jury heard "[h]e (appellant) just got out of the penitentiary." These were lines 3 and 4 of page 93. (13 RT 3052.) Both parties inadvertently failed to omit that reference from the tapes (13 RT 3053.) The court stated that "[t]here is no gainsaying the fact, however, that the jury heard the reference to penitentiary on the tape and may have read it also in the transcript before we substituted page 93 and 94." (13 RT 3054.)

The second problem area was speculation on the tape by Mr. O'Brien that appellant wanted to kill him. (13 RT 3056.) There was another reference that "[w]ell I believe Rock wants to kill me right now because he knows that I saw him." (13 RT 3056.) Parts of this tape were redacted for the printed transcript (page 96 line 22 through page 100 line 11) (13 RT 3057) but the prosecutor inadvertently had the jury hear certain lines that had been redacted (13 RT 3058.)

A third problem concerned a test that the police were to administer to

Mr. O'Brien, and in which he says he is pretty nervous. (13 RT 3059.) There were two references to a test. (13 RT 3060.) The court stated that it did not make any difference whether the mistake was purposeful or inadvertent, "the issue remains the same." But it was accepted that the mistake was inadvertent. (13 RT 3061.)

With respect to the penitentiary reference (what was referred to as "problem No. 1") "there's no question that that was both heard and read in the transcript." As to "problem No. 3, 'the reference to the test, was heard but it was not in the transcript." (13 RT 3062.) The court stated that "[t]he area that references [the] penitentiary, there is I think little doubt that exposing a jury to a defendant's prior criminality, directly or indirectly, presents at least a possibility of prejudicing a defendant's case and...I think we all agree that a reference to the defendant having been in the penitentiary is, however indirectly, a reference to prior criminality..." (13 RT 3063.) The defense objected, stating that it was "inadmissible character testimony about the defendant." (13 RT 3064.)

As to the problems about mentioning the tests, there was no reference to the results of any test. (13 RT 3068.) The prosecution stated that there were over 400 pages of tapes and transcripts. (13 RT 3069) and two oblique references to the "tests" in these pages, arguing that it was irrelevant and

harmless. (*Id.*) The defense stated that the penitentiary reference was prejudicial as many people always want to know the defendant's prior record. (13 RT 3071.) "Everything [Mr. O'Brien] is doing is to make Mr. Perez out to be a bad guy, and his having been in the penitentiary corroborates that." (13 RT 3072.)[37] There was a dilemma in that the penitentiary reference was inadmissible but the defense did not want to highlight it by pointing out to the jury that they should ignore it. (13 RT 3074.)

"The problem is, this particular mistake because it wasn't caught could be seen as incompetence of counsel, and I don't know how we deal with that issue." (13 RT 3075.) As defense counsel Egan stated:

> ... I just missed them. I just flat out missed them....We both...Mr. Sequeira I think will agree...I felt very rushed in trying to get the tapes and the transcripts completed because we knew the jury was waiting. The court had set times it wanted these things done....We ended up using an un-redacted tape with this switch maneuver that turned out to let in inadmissible evidence, even more than the ones that I had missed on the redaction effort.
> (13 RT 3075.)

Defense counsel added that

> ...I should have come in here yesterday and said: I haven't listened to these tapes and I can't...we shouldn't play them before the jury. I don't care if they have to go home for two days. I need to list...we need to listen to the tapes before the jury

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[37] Appellant had been in the penitentiary for armed robbery and being an ex-felon with a firearm. (13 RT 3073.)

> hears them to make sure there aren't any mistakes. And I didn't do that, and I should have. That's how we got into this mess in the first place...we didn't check the unredacted stuff to see if we missed anything.
> (13 RT 3077.)

The court stated that in regard to Mr. O'Brien stating that Mr. Perez wanted to kill him, the jury did not hear it and nothing to indicate they saw it in the transcript. (13 RT 3078.) As to the "tests," the court ruled that the jury did hear references to the "test" but not any references to what the test was about. (13 RT 3079.) The court added that "I am confident that if there was an error at all in this [the tests] getting to the attention of the jury, it certainly was harmless error, especially in light of my admonition to them to disregard the references to test." (13 RT 3080.)

But as to the penitentiary reference, this was termed "problematic." The court cited *People v. Harris* (1994) 22 Cal.App.4th 1575, at 1581, where there was a good discussion of this dilemma, and "harmless error" was held to be the proper test. (13 RT 3081.) The question was taken under submission so that the court could first hear "all the evidence in this case, and to make a final ruling with respect to that." (*Id.*) The court was inclined to admonish the jury to disregard the reference to the penitentiary. (13 RT 3082.) Other cases the court looked at were *People v. Williams* (1997) 16 Cal.4th 153, 211 and *People v. Rhinehart* (1973) 9 Cal.3d 139, 152. (13 RT 3083.) The defense

pointed out that appellate courts use a "fait accompli" standard that trial courts are not bound by. (13 RT 3084.)

After considering the issues, the court stated that it would apply this test: "[a]ssuming the jury heard these things, is it reasonably likely that it affects the outcome?" This is best done after hearing all the evidence. (13 RT 3086-3087.) The court stated that it wanted to take it under submission until all the evidence was heard. (13 RT 3088.) It added that whether what the jury heard was prejudicial or not "depends upon how this case totally unfolds." (13 RT 3089.) The motion for a mistrial was ultimately denied.

B. Argument.

This improper introduction of evidence of a stay in the penitentiary was evidence that appellant had committed other crimes. This error violated a host of constitutional guarantees and requires that appellant's death sentence be vacated since the error is not subject to harmless error review. (*See Maynard v. Cartwright* (1988) 486 U.S. 356, 363-66; *Godfrey v. Georgia*, (1980) 446 U.S. 420, 432-433.)

It is clear that the mistake here, while inadvertent, was error harmful to appellant. Even though the jury was admonished to disregard the penitentiary reference, they should not have heard it in the first place and it would have been unrealistic to expect that they would simply put no weight on it. While

the court adopted a "wait and see" approach to the error, there was nothing that came up at trial after the problem arose that indicated it was simply harmless.

Whether taken either individually or cumulatively, the introduction of the "other crimes" evidence deprived appellant of a fair trial. The death sentence must be vacated.

XV. THE TRIAL COURT ERRED IN ADMITTING ACCOMPLICE TESTIMONY.

Appellant's conviction and death sentence were unlawfully and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the California Constitution because the trial court erred in admitting extensive testimony from accomplices Maury O'Brien and Jason Hart.

A. Facts in Support

As discussed in the factual summary *supra,* the prosecution's case rested heavily on the testimony of co-defendant **Maury O'Brien**, who was also charged with the murder of Mrs. Daher. (11 RT 2430.) Mr. O'Brien denied stabbing Mrs. Daher to death on March 24, 1998, but admitted going into her house with the intent to rob the occupants and admitted responsibility for her death. (11 RT 2431.) He admitted he was facing capital murder

charges and possible execution, and by testifying, he was asking for consideration not to be executed. (11 RT 2432.) In other words, his life depended on his testimony.

The prosecution simply had no case against appellant without Mr. O'Brien's testimony. The highlights of his testimony were:

1) Two or three days before the murder, Jason Hart introduced O'Brien to appellant as someone who might be interested in a robbery and at this time, O'Brien knew him as "Rock." (11 RT 2447.) O'Brien saw "Rock" every day in the two or three days before the murder. (11 RT 2448.) They would buy $100 to $150 worth of cocaine at least every day.

2) On March 24, "Rock" showed up unexpectedly and it was decided they would commit the robbery that day. (11 RT 2449.) No one else had a car so they decided to take BART to Fairfield. (11 RT 2452.) Snyder and "Rock" were looking out into the hills and everyone decided to rob a house instead of going to Fairfield. (11 RT 2454.)

3) They got off BART, walked up Happy Valley Road and saw a house with the garage door open. (11 RT 2466.) They went into the garage and "Rock" shut the garage door with a button. (*Id.*) Lee Snyder took out his gun and O'Brien entered the house through a door in the garage. (11 RT 2267.)

4) The first thing they saw was the victim in the kitchen. (11 RT

2469.) O'Brien said that this was a robbery. The lady turned around and started to say something but "Rock" put his hand over her mouth and hit her on the head and she went down on the floor. (*Id.*)

5) "Rock" said that O'Brien would have to kill the victim because O'Brien inadvertently spoke Snyder's name. (11 RT 2475.) "Rock" came downstairs and asked her where the good jewelry was, and she led them to a jewelry box in the closet. (11 RT 2476.)

6) At some point the victim was taken upstairs by Snyder and "Rock." (11 RT 2478.) O'Brien stayed downstairs as a lookout. (11 RT 2479.) O'Brien then heard noises and went upstairs to the large master bedroom. (11 RT 2480.) Snyder was pulling out a telephone cord and "Rock" was kneeling on the other side of the bed "maybe holding the victim down." (11 RT 2481.) Snyder had his foot on the victim and "Rock" was pulling on the cord and the victim's neck was bent backwards. (11 RT 2484.)

7) O'Brien was told to get a knife from the kitchen and saw "Rock" take it and stab the victim many times. (11 RT 2489.)

8) Then they went downstairs and drove away in the victim's car, a Mercedes sports utility vehicle. (*Id.*; 11 RT 2491.) "Rock" handed O'Brien the knife and he folded it and put it in his pocket. (*Id.*) "Rock" drove, O'Brien was in the front seat and Snyder was in the rear. (11 RT 2492.)

9) They ditched the victim's car in Fairfield and later tried to retrieve it and headed to where "Rock" and Snyder had left it. (11 RT 2508.) There were police cars with spotlights surrounding it so they jumped a fence and ran back to a hotel. (11 RT 2509.) "Rock" called Jason Hart who came and picked them up.(*Id.*) "Rock" allegedly told Hart about the murder and his friend "Mac Shaun" who accompanied Hart. Shaun was upset because he was now an accomplice to murder or accessory after the fact. (11 RT 2511.)

10) In his first interview with the police, O'Brien told them that Snyder, "Rock" and himself were responsible for the murder. (*Id.*)

Accomplice **Jason Hart** was also granted transactional immunity for his testimony if he testified "fully and truthfully." (12 RT 2637.) The highlights of Hart's testimony were:

1) He had known appellant his entire life, since they were kids. (12 RT 2662.) Appellant's nickname was "Joe Rockhead" and Hart had sold him drugs in the past. (12 RT 2665-2667, 22702.)

2) On March 23, 1998, Hart went to Lee Snyder's house with appellant. (12 RT 2665.) Snyder and O'Brien wanted to go to Fairfield and rob someone who Hart thought was a drug dealer. (12 RT 2668, 2705.) Hart just wanted to buy the stolen goods and not be involved in a robbery. (12 RT 2669, 2727.) O'Brien and Snyder had not met appellant before this and Hart

introduced him as Joe. (12 RT 2670.) Appellant volunteered for the plan to rob the drug dealer as he was broke and needed some money. (12 RT 2671.)

3) The next day, March 24, Hart picked up appellant and they went to Snyder's house at about 11 or 12. (12 RT 2674.) They sat around and smoked dope and again talked about the plan to rob the drug dealer. (12 RT 2676.)

4) Later, appellant called Hart and asked to be picked up in Fairfield. (12 RT 2681.) Hart and his friend Shawn drove to the Overnighter Hotel in Fairfield. (12 RT 2681.) Hart pulled into the parking lot and saw appellant with O'Brien and Snyder. (12 RT 2683.) Appellant said that instead of Fairfield they had gone to Lafayette and robbed a lady. (12 RT 2686.) They also said that they tied her up and strangled her with a phone cord and that she was dead. Hart eventually bought two rings from appellant. (12 RT 2690, 2692.) Hart then dropped appellant off at his cousin's house. (12 RT 2691.)

This summary of O'Brien and Hart's testimony shows that they were both accomplices and that the testimony was crucial to the prosecution's case.

B. Argument.

i. Accomplice testimony is inherently suspect and constitutional prerequisites to its use were not followed in this case.

The Supreme Court has noted that "[t]he use of informers, accessories,

accomplices, false friends, or any of the other betrayals, which are 'dirty business' may raise serious questions of credibility." (*On Lee v. United States* (1952) 343 U.S. 747, 757.) Such testimony "ought not to be passed upon ... under the same rules governing other apparently credible witnesses." (*Crawford v. United States* (1908) 212 U.S. 183, 204.)

In the case of *In re Miguel L.*, (1982) 32 Cal.3d 100, 108-09, this Court noted that:

> [A]ccomplice testimony is `often given in the hope or expectation of leniency or immunity.' (*People v. Wallin, supra*, 32 Cal.2d at p. 808; *see also* Comment, *Accomplice Corroboration – Its Status in California*, (1962) 9 UCLA L.Rev. 190, 192.) As a result, an accomplice has a strong motive to fabricate testimony which incriminates innocent persons or minimizes his participation in the offense and transfers responsibility for the crimes to others.

Other courts have been equally skeptical about the veracity of accomplice informants. (*See United States v. Baresh* (S.D.Tex. 1984) 595 F.Supp. 1132, 1135 (agreement contingent upon indictments "placed far more stress upon [witness'] veracity [despite government's requirement of truthfulness] than its gossamer frailness could withstand"); *United States v. Turner*, (E.D.Mich. 1979) 490 F.Supp. 583, 602 (credibility of witness more suspect when he believed that leniency is contingent upon his testimony), *aff'd*, 633 F.2d 219 (6th Cir. 1980); *People v. Green* (1951) 102 Cal.App.2d 831, 838-39 (agreement premised upon conviction of defendant resulted in unfair

trial)).

This Court has rejected the argument that accomplice testimony is so inherently unreliable that it should never serve as a basis for a death verdict. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1179-80.) However, courts and scholars[38] have recognized that certain constitutional prerequisites must be followed in admitting such testimony.[39] Where accomplice informants are under compulsion to conform their testimony to a particular version of facts, defendants may be denied "any effective cross-examination of the witnesses, thereby depriving them of the fundamental right to a fair trial." (*People v. Medina* (1974) 41 Cal.App.3d 438, 450; *People v. Allen* (1986) 42 Cal.3d 1222, 1251-53; *People v. Fields* (1983) 35 Cal.3d 329.) Here, the prosecutor

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[38] "It is important to note that accomplice testimony is ordinarily more damaging and frequently less reliable than that of a disinterested witness. The likelihood of perjury is increased because the accomplice, admittedly guilty, may be seeking to diminish the severity of his own punishment or to gain revenge. And the chance of successful perjury is increased by the fact that the accomplice, completely familiar with the events of the crime, can fabricate a believable story which can withstand cross-examination." (*The Rosenberg Case: Some Reflections on Federal Criminal Law*, 54 Columbia Law Review, 219, 234 (1954)).

[39] Some of the more common precautions are mentioned in *United States v. Fallon* (7th Cir. 1985) 776 F.2d 727 at 734. The *Fallon* court noted particularly the subjection of the accomplice's testimony to cross-examination, the credibility of the testimony as determined by the jury, and proper jury instructions concerning the credibility of accomplice witnesses. (*Fallon* at 734).

granted immunity in exchange for truthful testimony, which clearly implied that the witnesses were compelled to testify in ways which would satisfy the prosecutor. The prosecutor would be satisfied with testimony which inculpated appellant.

California has a specific jury instruction, which was given in this case, stating that accomplice testimony is to be viewed with distrust. (CALJIC No. 3.18; 5 CT 1740.) Jury instructions requiring accomplice corroboration were also given. (CALJIC No. 3.11, 3.12; 5 CT 1738-1740.) The jury was also informed that Maury O'Brien was an accomplice as a matter of law if the jury found that the crimes charged against appellant were committed by anyone. (CALJIC No. 3.16; 5 CT 1741.)

Testimony may be so contaminated and untrustworthy that the efficacy of cross-examination to expose lies is rendered so unlikely and the testimony so inherently unreliable that the admission of such evidence would violate due process. (*See, e.g., Williams v. Woodford* (9th Cir. 2002) 306 F.3d 665.) Such was the case here.

Necessary safeguards were so flagrantly abused by the admission of the testimony that appellant's right to due process was violated.

ii. The testimony of the accomplice informants was too unreliable to be admitted and violated due process.

The reliability problem that accomplice witnesses raise is similar to

those raised by jailhouse informants and tainted eyewitness identification cases, in which the witnesses, despite the inaccuracy of their testimony, may be largely immune to the corrective process of cross-examination. Such witnesses "are quite likely to be absolutely convinced of the accuracy of their recollection." Thus their credibility, understood as their truth-telling demeanor, is unlikely to betray any inaccuracies or falsehoods in their statements. (*State v. Michaels* (1994) 642 A.2d 1372, 1382.) A similar difficulty exists because accomplice witnesses have the incentive to lie, have access to inside information, and, all too frequently, law enforcement coaching, deliberate or otherwise.

Bargaining for accomplice testimony produces an enormous incentive for a witness to lie or stick to mistakes (or police suggestions) made at the beginning of their association with the police or prosecution.[40] Such witnesses, like the tainted eyewitness, are, as the court noted, not likely to change their story. (*Michaels* at 1382.)

This Court has spelled out analytical steps for tainted eyewitness cases that may be useful for analyzing the problem of accomplice witness testimony as well: (1) questioning whether the initial pre-trial identification was unduly

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[40] Hughes, *Agreements for Cooperation in Criminal Cases*, (1992) 45 Vanderbilt Law Review 1, 35.

suggestive and unnecessary, and (2) evaluating (if the answer to the first question is "yes") the reliability of the identification under the totality of the circumstances.[41] (*People v. Johnson* (1992) 3 Cal.4th 1183, 1216. Similarly, in cases involving accomplice witness testimony the court should examine whether or not the accomplice witness' bargain with the prosecution was unduly coercive and suggestive, and should then decide whether the testimony has other sufficient indicia of reliability under a totality of the circumstances test.

In *Michaels*, the court concluded that once the defendant has shown sufficient threshold evidence of the unreliability of the offered evidence, the burden of proof shifts to the prosecution to prove such reliability by clear and convincing evidence. (*Michaels*, 642 A.2d 1372, 1383.) A very similar rule exists for tainted identification cases in California. (*People v. Caruso* (1968) 68 Cal.2d 183, 186-87, 190.) Thus, the State should have been required to show that the testimony was reliable. The prosecutor never did so. Additionally, both O'Brien's and Hart's testimony was inconsistent with

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[41] The *Johnson* court draws the test from *Manson v. Brathwaite* (1977) 432 U.S. 98, *People v. Gordan* (1990) 50 Cal.3d 1223, 1242 and *Neil v. Biggers* (1972) 409 U.S. 188.) The test also includes specified factors for testing the reliability of the identification, such as what kind of opportunity the witness had to see the defendant, consistency with other prior descriptions, and the level of certainty at the time of confrontation. (*Johnson* at 1216.)

earlier versions they had given to the police and was replete with lies and incredulous statements.

The trial court erred in failing to hold an evidentiary hearing in which the prosecution would have had the burden of proof to show by clear and convincing evidence that the accomplice witnesses' testimony met the required standard of constitutional reliability. In the alternative the accomplice testimony should have been excluded under Evidence Code section 352.[42] In *People v. Blankenship* (1985) 167 Cal.App.3d 840, the court upheld a trial court's ruling that certain in-court testimony was inadmissible under Evidence Code section 352 because there was insufficient proof of trustworthiness. (*Blankenship* at 848.) As discussed *supra*, courts have found that in some cases in which testimony is being given for personal advantage, the prejudicial impact can so outweigh the probative value that the testimony could or should be ruled inadmissable.

In capital cases, this need for reliable evidence is all the greater. The United States Supreme Court has made it clear that due process requires a heightened reliability for evidence. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38.) This testimony fell far short of that standard.

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[42] California Evidence Code section 352 allows the court to exclude evidence whose probative value is outweighed by its unjustly prejudicial effect.

iii. Appellant was denied due process because the prosecution's case depended substantially on the testimony of witnesses who were under a strong compulsion to testify in conformity with earlier unreliable statements.

In *People v. Medina, supra*, witnesses who were present at the time of a murder were given immunity from charges connected with the killing in return for their testimony. (*Medina,* 41 Cal.App.3d at 450.) This immunity, however, was subject to the condition, written into the order, that their testimony at trial was not materially or substantially changed from prior statements to law enforcement officers. This condition, the *Medina* court found, "denied to defendants any effective cross-examination of the witnesses, thereby depriving them of the fundamental right to a fair trial." (*Id.*) The essence of the decision in *Medina* was that

> [A] defendant is denied a fair trial if the prosecution's case depends substantially on accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion.
> (*Id.* at 455.)

In *People v. Fields, supra*, 35 Cal.3d 329, this Court considered a situation similar to, but distinct from, the situation of *Medina*. In *Fields* a witness testified, in response to prosecution questioning, that she had agreed, in a plea bargain, to testify only to the truth. In response to defense questioning, however, she testified that she understood her agreement to be

that she would testify in accordance with her last statement to the police. The defendant argued that the arrangement therefore violated the rule of *Medina*. The Court, though, noted that her statements were not necessarily inconsistent. (*Fields* at 360.) If, the court reasoned, the last statement the witness gave the police was truthful, then, in effect, she had agreed to testify in accord with that statement. (*Fields* at 360-61.) The inconsistency arose, according to the Court, not from her words but from her failure to dispute leading questions put to her by the defense. (*Fields* at 361.) The Court stated

> [W]e recognize that a witness in Gail Fields' position is under some compulsion to testify in accord with statements given to the police or the prosecution. The district attorney in the present case obviously believed that Gail's last statement was a truthful account, and if she deviated materially from it he might take the position that she had breached the bargain, and could be prosecuted as a principal to murder. . . [However,] the requirements of due process are satisfied when a witness' agreement with the prosecution permits the witness to testify freely at trial and to respond to any claim that he breached the agreement by showing that the testimony he gave was a full and truthful account.
> (*Fields* at 361.)

The essential rule of *Medina*, however, is still in effect and was reaffirmed in *People v. Allen*, in which this Court stated:

> [W]hen the accomplice is granted immunity subject to the condition that his testimony substantially conform to an earlier statement given to the police . . . or that his testimony result in defendants conviction . . . the accomplice's testimony is tainted beyond redemption and its admission denies the defendant a fair trial.

(*People v. Allen* (1986) 42 Cal.3d 1222, 1251-52.) In *Allen*, the Court stated that a deal for immunity would be valid if it required "only that the witness testify fully and truthfully." (*Allen* at 1253.)

Clearly the *Fields* case contemplates a situation in which the witnesses' statement is a fair representation of what the witness believes to be "the truth." As has been recently noted, however,

> [T]he intractable problem is that a witness may lie or make mistakes at the proffer, and conditions as to the truthfulness may serve as the strongest inducement of the witness to perpetuate the lie or not to retract the mistake. [The witness' temptation to lie is] not just a natural feature of the landscape but specifically is introduced or inflated by the government when it offers immunity or leniency in return for cooperation.[43]

Surely this problem is only exacerbated when the police and prosecution confuse the issue of what is meant by the term "the truth." In this case, the police decided upon a version of what they would accept as "the truth" very early in the process. Officers decided that appellant was guilty and would accept nothing but accounts which implicated him. Only when the witnesses parroted back statements inculpating appellant were the officers satisfied.

The violation of state law was a violation of a state created liberty

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[43] Hughes, *Agreements for Cooperation in Criminal Cases*, (1992) 45 Vanderbilt Law Review 1, 35.

interest in fair jury instructions. It also led to unreliable evidence in capital proceedings. These violations constituted a violation of federal due process. (*See, e.g., Wolff v. McDonnell* (1974) 418 U.S. 539; *Vitek v. Jones* (1980) 445 U.S. 480; *Hewitt v. Helms* (1983) 459 U.S. 460; *Hicks v. Oklahoma, supra,* 447 U.S. 343.)

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

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

XVI. THERE WAS INSUFFICIENT NON-ACCOMPLICE CORROBORATING EVIDENCE.

A. Facts in Support.

Appellant incorporates herein by reference the factual discussion of the previous issue.

B. Argument.

This Court has held, citing Penal Code section 1111, that accomplice testimony is inadmissible absent corroboration. (*People v. Gurule* (2002) 28 Cal.4th 557, 628; *see also People v. McDermott* (2002) 28 Cal.4th 946, 1000 [when prosecutor presents accomplice witness testimony at penalty phase regarding a defendant's alleged prior violent conduct there must be corroboration of that testimony].) The corroborating evidence "may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense," but it must be present. (*People v. Brown* (2003) 31 Cal.4th 518, 556, citations omitted.[44]) Corroborating evidence will be sufficient "if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (*Id.*)

Although the corroboration need only be "slight," it nonetheless must exist. Here, it didn't. To be considered as evidence, it must be admissible

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[44] Although this opinion was modified (2003 WL 22448524, Oct. 29, 200 (unpublished)) the modification does not affect the judgment.

under the relevant rules. Here, the evidence the prosecutor introduced was that of "totally uncorroborated" accomplice witnesses, Maury O'Brien and Jason Hart. As such, it was inadmissible. (*People v. Gurule, supra*, 28 Cal.4th 557 at 628; *People v. McDermott, supra*, 28 Cal.4th at 1000.) No forensic evidence linked appellant to the crime scene, the victim's car, or the alleged murder weapon. Without the testimony of O'Brien and Hart, the State would not have had a case against appellant.

XVII. TRIAL COURT ERROR IN ALLOWING INADMISSABLE HEARSAY TESTIMONY FROM THE PATHOLOGIST WHO WAS NOT PRESENT AT THE AUTOPSY.

Appellant's right to due process of law, equal protection of the laws, and a reliable sentence, trial by jury, and by an impartial sentencer, effective assistance of counsel, compulsory process, right of confrontation and cross-examination, proof of criminal offenses beyond a reasonable doubt and freedom from self-incrimination, was violated by the introduction of hearsay testimony regarding the victim's death from a pathologist who was not present at the autopsy. (U.S. Const. Amends. V, VI, VIII, XIV; *Crawford v. Washington* (2004) 541 U.S. 36; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 129 S.Ct. 2527; *Bullcoming v. New Mexico* (2011) 131 S. Ct. 2705.)

A. Facts in Support.

Before the trial testimony of the pathologist, the prosecutor announced that the person who had actually performed the autopsy would not testify at appellant's trial:

> The pathologist who performed the autopsy is not going to testify because she's moved across the country, and another pathologist who wasn't even present is going to testify. And certainly that person isn't going to be able to give any testimony at all regarding the appearance of that wound was different from some previous point in time.
> (8 RT 1968.)

At trial, the State called **Dr. Brian Peterson,** a forensic pathologist, who testified regarding the autopsy on Janet Daher performed on March 26, 1998. (13 RT 3001.) His only connection to the case was that at the time of the trial he worked for a company, Forensic Medical Group in Fairfield, that was the former employer of the physician who actually performed the autopsy, Dr. Susan Hogan. (13 RT 3001.) At the time of the trial, Dr. Hogan had moved out of the area. (13 RT 3004.) She formerly worked for the Forensic Medical Group, who had a contract with Contra Costa County to perform autopsies. (*Id.*) There was no proffer or evidence to show that Dr. Hogan was presently unavailable to testify other than that she did not currently live "in the area."

As a result, the entire trial testimony of Dr. Peterson was inadmissible

hearsay. As to prejudice, his testimony was very detailed, central to the prosecution's case and theory of the cause of death, and very inflammatory.

Dr. Peterson first opined, apparently on the basis of Dr. Hogan's notes, that this was not a gunshot case, so no x-rays were done (13 RT 3005), only photos of the victim's body, with and without clothes. (13 RT 3006.) Dr. Peterson testified that there was evidence of ligature strangulation, which is strangulation by use of an object. (13 RT 3007.) He opined that it was accomplished by a phone cord. His opinion was that the cord was wrapped around the neck with sufficient force to leave a furrow in the skin. (*Id.*) He opined that there was also bleeding in the whites of the eyes and bleeding in the muscles of the neck. (*Id.*) This was central to the State's theory of the cause of death.

Dr. Peterson also testified that the cord was around the neck when the body was received at the morgue. (13 RT 3008.) According to this witness, the hemorrhages in the victim's eyes were caused by pressure to the neck. (*Id.*) He opined that there would have had to have been considerable force to cause the furrows in the neck. (13 RT 3009.) From his view of the pictures, he stated that there were also stab wounds. (13 RT 3010.) "If an injury is deeper than it is long, that's a stab wound." (*Id.*)

This witness also provided extensive details about the nature and

causation of the victim's various wounds. He stated that stab wound "A" was a cut on the right side of the neck, six inches below the top of the head and four inches long. (13 RT 3011.) His opinion was that it was relatively superficial and not potentially mortal. (13 RT 3012.) Stab wounds B, C, D and E were wounds to the left side of the chest. (*Id.*) All were superficial except E which went to the left lower lung lobe. They all had two sharp edges. (13 RT 3013.) All of this testimony came from information in Dr. Hogan's notes.

The witness also stated that there was blood inside the chest cavity. (13 RT3014.) According to Dr. Peterson, Wound E may have been sufficient to cause death as it may have collapsed the lung. (*Id.*) Wounds F, G, H and I are near the top of the chest and F was the deepest. (13 RT 3016.) That wound could have been lethal, the witness opined, as it caught the jugular vein, the carotid artery and the thyroid gland. (13 RT 3017.)

The witness also gave extensive details on additional wounds, denominated as Wounds J, K, L, M, N, and O, all lower stab wounds. These were deeper. All six of them entered the lung either on the right or on the left. The entire blade was in the body. (13 RT 3018.) There was also a wound to the front of the left arm. (13 RT 3019.)

Although this witness was not present at the autopsy, he was allowed

to present his speculative opinion that the victim was first strangled and then stabbed. (13 RT 3020.) He told the jury that "[h]er heart was still beating at the time those stab wounds were delivered." Shown People's Exhibit 46, his opinion was that the wounds were consistent with being caused by this knife. (*Id.*) His overall opinion was that death was caused by a combination of ligature strangulation and stabbing. (13 RT 3021.)

On cross-examination, the defense brought out that the report was actually written by Dr. Hogan. (13 RT 3022.) Dr. Peterson did not know when she wrote it. (13 RT 3023.) Additionally, he had not reviewed this case until two weeks prior to trial. (*Id.*)

This witness also testified that there were some abrasions to the left side of the victim's face. (13 RT 3024.) Abrasions on the left cheek were consistent with rug burns. (*Id.*) The witness stated that there were no specific head wounds at all, such as would be caused by being hit in the head with a VCR. (13 RT 3025.) The witness then opined that there is no way to tell if Mrs. Daher was conscious or unconscious when she was stabbed. (*Id.*)

This error cannot be held to be harmless, as the prosecutor himself admitted that the photos introduced and examined by the pathologist were central to his case. In attempting to admit the many gory and prejudicial photos the prosecutor stated that "I'm highlighting every stab wound. *Every*

stab wound is further evidence of intent to kill, express malice." (8 RT 1969((emphasis added.) He argued that he wanted all the pictures in evidence and, to support that argument, stated that there will be an expert who will give an opinion based on the photos. (8 RT 1969.) That expert was Dr. Peterson, who was not even present at the autopsy.

B. Argument.

i. The Confrontation Clause.

This testimony was the centerpiece of the prosecution's theory as to the manner of the victim's death *and* evidence of appellant's intent to kill *and* evidence of express malice, as the prosecutor himself admitted. (8 RT 1969.) As such, it was essential to the State's case. Yet it relied entirely on hearsay testimony and this witness's reading and interpretation of the coroner's report written by someone else. More importantly, it was a violation of the Sixth Amendment's Confrontation Clause: "The accused shall enjoy the right...to be confronted with the witnesses against him." This means that the prosecution must present its witnesses in court, under oath, face-to-face with the defendant, and make them available for cross examination. In order to protect the integrity of this confrontation requirement, the Clause precludes the introduction of certain out-of-court statements. Here, appellant had no opportunity to confront and cross-examine the actual coroner who prepared the

report.

In *Crawford v. Washington, supra,* 124 S. Ct. 1354, the United States Supreme Court held that out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause,[45] unless the witnesses are unavailable and the defendants had prior opportunity to cross-examine them, regardless of whether such statements are deemed reliable by the court.[46]

The Supreme Court explained that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." (*Crawford v. Washington* at 1365.)

> The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the 'right ... to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." See *Mattox v. United States* (1895), 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895)...."

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[45] The Sixth Amendment Confrontation Clause's bedrock procedural guarantee applies to both federal and state prosecutions. (*Pointer v. Texas* (1965) 380 U.S. 400, 406 (1965).)

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

(*Crawford v. Washington*, at 1365.)

The Supreme Court held:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.
> (*Crawford v. Washington*, *supra,* at 1366.)

That Court explained that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." (*Id.* at 1371.)

"Testimonial" has been defined as an assertion "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Melendez-Diaz, supra,* 129 S. Ct. at 2532 (quoting *Crawford,* 541 U.S. at 52.) "To rank as 'testimonial,' a statement must have a "primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to a later criminal prosecution." (*Bullcoming v. New Mexico, supra,* 131 S. Ct. 2705, 2714 n.6 (plurality)(quoting *Davis v. Washington* (2006) 547 U.S. 813, 822; *see also*

Michigan v. Bryant (2011) 131 S. Ct. 1143, 1165.)[47] Testimonial evidence includes "extrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." (*White v. Illinois* (1992) 502 U.S. 346, 365 (Thomas, J., concurring in part), *quoted in Crawford,* 541 U.S. at 52 and in *Melendez-Diaz,* 129 S. Ct. at 2543.) A statement need not "directly accuse [the defendant] of wrongdoing" to be testimonial. The Confrontation Clause applies to all testimony offered by the prosecution. (*Melendez-Diaz,* 129 S. Ct. at 2535.)

In *Melendez-Diaz* the Supreme Court responded to the State's argument that forensic laboratory reports, similar to the autopsy report in issue here, were admissible as business or official records, and held that "whether or not they qualify as business or official records, the analysts' statements here...were testimony against the petitioner." (*Id.* at 2537.) A record of contemporaneous observations of the crime scene or other evidence, made after the fact, is

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[47] In *Bullcoming,* the prosecutor called as a witness a scientist from the same laboratory who had not signed a blood alcohol analysis report. The analyst who had actually prepared the report did not testify. The testifying scientist was familiar with blood-alcohol analysis in general and the laboratory's testing protocols. (*Bullcoming,* 131 S. Ct. at 2706-12.) The Supreme Court held that the report was testimonial and that the "surrogate testimony" of the substitute witness "does not meet the constitutional requirement...[of] the accused's right to be confronted with the analyst who made the certification, unless the analyst is unavailable at trial..." (*Id.* at 2710.)

testimonial. (*Id.* at 2535.) *Melendez-Diaz* specifically held that human assertions in autopsies, drug lab reports and other forensic reports made for the purpose of producing evidence for litigation are "testimonial statements" that could not be introduced unless their authors were subject to the "crucible of cross-examination." (*Id.* at 2527; *see also United States v. Moore* (D.C. 2011) 651 F.3d 30, 69-74 (autopsy reports were testimonial).) When testimonial forensic reports are presented as evidence against a defendant, the Confrontation Clause guarantees the defendant the opportunity to test through cross-examination the "honesty, proficiency, and methodology" of the analyst who actually performed the forensic analysis. (*Melendez-Diaz* 129 S. Ct. at 2536-38; *Bullcoming,* 131 S. Ct. at 2710.)

In *Moore,* as here, the medical examiner who testified (Dr. Petersen) may have had only a supervisory role in the office. (*Moore,* 651 F.3d at 72.) The *Moore* Court rejected the government's attempts to avoid the Confrontation Clause on the grounds that the autopsy report was non-testimonial, holding that the argument was foreclosed by *Bullcoming.* (*Id.*) The reasoning was that because "a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations," and the analyst tested the evidence and prepared a report, it was testimonial. (*Bullcoming* at 2717.) The "fact that each autopsy found the

manner of death to be a homicide caused by gunshot wounds, are 'circumstances which would lead an objective witness to believe that the statement would be available for use at a later trial.'" (*Moore,* 651 F.3d at 73, quoting *Melendez-Diaz,* 129 S. Ct. at 2532.)

In *Bullcoming, supra,* the United States Supreme Court held that a scientific report dealing with intoxication could not be used as substantive evidence against the defendant unless the analyst who prepared and certified the report was subject to cross-examination. Just as here, the Court rejected the surrogate testimony despite the fact that the testifying expert was a knowledgeable representative of the laboratory who could explain the lab's processes and the details of the report because "[t]he accused's right is to be confronted with the analyst who made the certification." (*Bullcoming,* 131 S. Ct. at 2710.) Just as here, the report in *Bullcoming* was signed by the non-testifying expert and it was offered for the substantive purpose of proving the truth of the matter asserted by its out-of-court author. Here, the autopsy report, prepared and signed by the missing coroner, was offered to prove the horrific manner of death of the victim Mrs. Daher, the cause of her death, and, indirectly, appellant's role in that death. It was both offered for its truth and it was testimonial.

The United States Supreme Court on June 18, 2012 addressed once

again the application of the Confrontation Clause to forensic evidence in *Williams v. Illinois* (2012) ___U.S.___, 132 S. Ct. 2221. *Williams* involved a forensic analyst testifying, based in part on a DNA profile performed by someone else, that DNA found inside a rape victim matched DNA taken from the defendant. Justice Alito's plurality opinion agreed that the DNA profile was not testimonial and that therefore Williams did not have the right to confront the DNA report's creator. It was held not to be testimonial because it was the expert's testimony, rather than the report itself, that was offered for the truth of the matter asserted. The report was only a premise on which the expert's testimony was based.

Williams, according to the four member plurality, held that reports that are subsidiary or the internal work product leading up to a formal report are not testimonial and therefore not subject to the Confrontation Clause. Justice Thomas, in his concurring opinion, agreed with the plurality that the report was not testimonial because it was not sufficiently formal or certified. The subsidiary report at issue in *Williams* was far enough removed and informal so that the accused did not automatically have the right to cross-examine the authors.

Thus, in the realm of forensic evidence, the Confrontation Clause continues to deem *formal* forensic reports, such as the autopsy report at issue

here, to be testimonial. Subsidiary reports or statements made as part of a lab's internal work product used to generate a final incriminating report will generally be held not to be testimonial in the wake of *Williams.* However, formal and final reports such as the autopsy here, remain testimonial after *Williams.* The situation here is thus not analogous to that in *Williams,* as the autopsy report here was both formal and final, not simply a preliminary or subsidiary report made in preparation of a final report. *Williams* has no effect on the analysis of the error. There was no "subsidiary" report here.

Nor can this error be excused on the basis that the medical examiner who did perform the autopsy (Dr. Hogan) was unavailable. "The prosecution bears the burden of establishing" that a witness is unavailable. (*Ohio v. Roberts, supra,* 448 U.S. 56, 75.) A witness is unavailable if a witness has unexpectedly gone missing and the prosecution cannot find the witness, "despite good faith efforts undertaken prior to trial to locate and present that witness." (*Id.* at 74.) If the government has not undertaken reasonable attempts to produce the witness, then the witness is not unavailable. (*See, e.g., Barber v. Page* (1969) 390 U.S. 719, 722-25; *Hernandez v. State* (Nev. 2008) 188 P.3d 1126 (insufficient effort on State's part when simply accepted claim at time of trial of "family emergency" and did not investigate in any way); *State v. King* (Wis. App. 2005) 706 N.W.2d 181 (insufficient effort when

witness contacted several times, learned of her reluctance to appear and failed to issue subpoena); *State v. Cox* (2010 Minn.)(prosecution must actively seek the witness's participation).)

Nor was it sufficient here for the State to merely allege that Dr. Hogan was "out of state." (8 RT 1968.) In this situation, it must be shown that the witness is permanently or at least indefinitely beyond the court's jurisdiction and "the state [i]s powerless to compel his attendance...either through its own process or through established procedures." (*Mancusi v. Stubbs* (1972) 408 U.S. 202, 208.) There was no showing that the government could not find the witness or even that "good faith efforts [were] undertaken prior to trial to locate and present that witness." (*Roberts,* 448 U.S. at 74.) If the government has not undertaken reasonable efforts to produce the witness, then the witness is not unavailable. (*Barber v. Page, supra,* 390 U.S. 719, 722-25.) But if, as here, the prosecution knows where the witness is, and "procedures exist[] whereby the witness could be brought to the trial, and the witness [is] not in a position to frustrate efforts to secure his production," a witness outside the jurisdiction is not unavailable. (*Roberts,* 448 U.S. at 77.) Here, there was nothing to show that the prosecution ever made any efforts to procure Dr. Hogan, let alone to show that she could not have been procured or was otherwise unavailable.

ii. The hearsay argument.

Generally, hearsay evidence is generally inadmissible under the Hearsay Rule. (*See* Evidence Code section 1200.) Dr. Peterson's testimony was obvious hearsay, as he was not present at the autopsy, was not the author of the notes upon which he relied, and hence his testimony was entirely based on these out-of-court statements. Such evidence is inadmissible. Even assuming, *arguendo*, that the evidence had some non-hearsay, not-for-truth value, the probative value of that evidence was substantially outweighed by the danger of undue prejudice created by its admission.

Evidence Code section 352 provides:

> The Court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or of misleading the jury.

This code section requires the trial court to undergo a careful scrutiny of such evidence:

> Evidence Code section 352 vests discretion in the trial judge to exclude evidence where its probative value us substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of prejudice, of confusion of issues, or of misleading a jury... (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291.)

What section 352 is designed to avoid "is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence,

rather, the statute uses the word in [the] sense of 'prejudging' a person or cause on the basis of extraneous factors." (*People v. Zapien, supra,* 4 Cal.4th 929, 958.) The danger of undue prejudice is that the evidence is likely to arouse the emotions of the jurors or be used in some manner unrelated to the issue on which it was admissible. (*People v. Cudjo* (1993) 6 Cal.4th 585, 610.) "Substantial danger of undue prejudice" within the meaning of §352 thus refers to situations where the evidence may be misused by the jury for a purpose other than that for which it was admitted. (*People v. Foilson* (1994) 22 Cal.App.4th 1841.)

The prosecution offered this evidence in order to show the horrific circumstances of the death of the victim, specifically that she was first strangled with a telephone cord, a process that would have taken some time. In addition, in attempting to have the court admit the prejudicial autopsy photos, the prosecutor admitted that the interpretation of those photos was central, as "*every stab wound is further evidence of intent to kill, express malice.*" (8 RT 1969((emphasis added.) There was absolutely no showing that the the physician who actually performed the autopsy, Dr. Susan Hogan (13 RT 3001), was unavailable at the time of the trial, as is required under *Crawford* in order to admit the hearsay. All that was stated was that at the time of the trial Dr. Hogan had moved out of the area (13 RT 3004), not that she

was unavailable. Even if she was unavailable, the evidence would be inadmissible without the opportunity of the defense to cross examine her.

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

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

XVIII. MISCELLANEOUS TRIAL COURT ERRORS DEPRIVED APPELLANT OF A FAIR TRIAL.

A. Facts in Support.

i. The family of the victim was allowed in the courtroom during the guilt phase.

The trial court judge stated that he did not want to exclude the victim's

family from the courtroom. (5 RT 1159.) The defense objected, stating that it will be victim impact evidence if they are present. (5 RT 1160.) The objection was on the basis that it would be a denial of due process and equal protection. (5 RT 1161.) The motion was denied.

ii. Trial error for refusing to treat low-income jurors as cognizable class entitled to extra compensation.

The trial court refused to grant extra compensation to low-income jurors. Susan Batey claimed a hardship exemption as she made only $10 an hour. The court stated that people of low income do not represent a cognizable class and do not need to be compensated extra. (6 RT 1199.) The defense made a record and objected, stating that this would exclude a fair cross-section. (6 RT 2100.) The defense made their objection on due process grounds. (*Id.*) As a result, appellant was deprived of a jury of his peers.

iii. Court coaching of witnesses.

The court asked Mr. O'Brien to clarify what BART station they had gotten off when they walked back to the hills as he had apparently made a mistake as to the correct station. (11 RT 2455.) The defense objected, stating that it was not appropriate for the court to ask this witness "what BART station" and then have him say "Lafayette," the correct station. (11 RT 2456.) These are matters for cross-examination, the defense asserted. The court stated it did not ask or tell him which station (*Id.*) and that there was no intent

to direct the witness: "It was neutral. I asked him in a neutral way." (11 RT 2457.) The defense countered that they were entitled to point out mistakes and thereby impeach this crucial witness, not the court. (11 RT 2458.)

iv. Improper "snitch" instruction.

The defense objected to CALJIC 17.41.1, the "snitch" instruction which allowed jurors to report holdout jurors to the court. (15 RT 3467.) The court cited *People v. Williams* (2001) 25 Cal.4th 441. (15 RT 3468.) That case makes clear the jury cannot ignore the law. (15 RT 3469.) The defense argued that there is a threat or coercion in this instruction, because if a juror does not feel the State has proved the case beyond a reasonable doubt, the other jurors could report them to the judge when it could be merely a matter of them being unable to articulate their feelings. (15 RT 3470.) The defense attorneys pointed out that the instruction could coerce a juror in the minority. (15 RT 3471.) It would put pressure on a "holdout" juror in violation of the Sixth Amendment. However, the objection was preserved and the instruction was given. (15 RT 3472.)

This Court disapproved of this instruction in *People v. Engelman* (2002) 28 Cal.4th 436 but held it was not unconstitutional. (*See also People v. Brady* (2010) 50 Cal.4th 547, 587; *People v. Wilson, supra,* 44 Cal.4th 758, 805-806.) Appellant urges this Court to reconsider these opinions in light of

the inherently coercive nature of the instruction.

v. Improper aggravating evidence due to trial court error in denying motion *in limine* to exclude CDC incidents.

Before the commencement of the punishment phase, the prosecution stated that they intended to pursue all five California Department of Corrections incidents allegedly involving appellant. (16 RT 3773.) The prosecutor said they would not seek to introduce "nonstatutory aggravating factors" such as rule violations, but would introduce the Armenta/Contreras, Flores and Lucas incidents. (16 RT 3774.)

In the Flores incident, the inmates were both hitting each other. (16 RT 3775.) There was no evidence appellant initiated the incident, according to the court. "The burden's on the people to prove it wasn't in self-defense" and "..it's not enough to show that he was involved in violence, but it has to be criminal activity." (16 RT 3776.)

With regard to the Lucas incident, it seemed to be consensual, according to the court. (16 RT 3778.) Appellant was trying to protect Contreras, his "little homie." (16 RT 3779.) It was pointed out that a Penal Code section allows for the defense of others. (16 RT 3780.) Appellant said he was concerned with Contreras so he jumped in and hit Armenta. (16 RT 3781.)

The court was not prepared to exclude these issues (involving Aragon, Armenta, and Lira). (16 RT 3782.)

vi. Trial error for failure of the court to admonish the jury to disregard emotional outburst.

During the cross-examination of Andrea Torres, the following occurred;

Q. What were your mixed feelings?
A. First of all, I didn't want to deal with it.
AUDIENCE MEMBER: Just like a 13 year old. You're leading the witness on here.
THE COURT: One second, please. The attorneys will...
AUDIENCE MEMBER: I know. But my daughter was 13 years old, your Honor.
THE COURT: Sir, hold on one second.
(17 RT 4074.)

The court then correctly took a short break and discussed the situation. The audience member identified himself as Mr. Torres, Andrea's father. (17 RT 4074-4075.) The court then admonished Mr. Torres, who apologized for his outburst. (17 RT 4075.) But when the trial reconvened, the court did not admonish the jury to disregard any of Mr. Torres' comments, which improperly generated sympathy for Ms. Torres. Even though the defense did not specifically request an admonition, the court had a *sua sponte* duty to admonish and inform the jury that they should disregard any comments from this spectator.

vii. Instructional error at the penalty phase by giving the instruction on lewd acts with a child under 14.

The defense made multiple objections to the court's giving the instruction regarding lewd acts with a child under 14. Their final objection

was that under CALJIC 10.65, there was no criminal intent if the person had a reasonable good faith belief that the person consented. (24 RT 5369.) They also stated that they were objecting under Evidence Code 352 (24 RT 5370) as well as on due process grounds under the Fourteenth Amendment. (24 RT 5370.) Their argument was that it would diminish the individualized nature of the jury's determination by bringing in a factor the jury should not consider. (24 RT 5370.) The court stated that the State wanted to emphasize the sexual touching instead of the intercourse. (24 RT 5371.) The objection was overruled. (24 RT 5372.) The defense also asserted an Eighth Amendment violation. (*Id.*)

Including this irrelevant instruction violated appellant's rights under the Sixth, Eighth, and Fourteenth Amendments. Instructing the jury on irrelevant matters diluted the jury's focus, distracted its attention from the task at hand, and introduced confusion into the deliberative process. Such irrelevant instructions also created a grave risk that the death penalty was imposed on the basis of inapplicable factors. Indeed, this Court has said that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) Here the failure to screen out inapplicable factors meant that the jurors were required to make an *ad hoc*

determination on the legal question of relevancy. This undermined the reliability of the sentencing process.

The inclusion of this inapplicable instruction also deprived appellant of his right to an individualized sentencing determination based solely on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 411, 414; *Beck v. Alabama, supra,* 447 U.S. 625, 637.) Reversal of appellant's death judgment is required.

viii. Instructional error made when interrupting defense counsel's final argument.[48]

Defense counsel told the jury at final argument in the penalty phase "[a]nd if you find that the mitigation should equal the aggravation in weight, you must vote for life." In front of the jury, the court interrupted and said, "No, that's not correct. The last instruction...the last statement of law stated by counsel is incorrect, ladies and gentlemen. You ignore that." The court then stated there was no authority for that assertion.[49] (24 RT 5483.)

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[48] *See also* Argument XX.

[49] *Kansas v. Marsh* (2006) 126 S. Ct. 2516 (statute requiring death if aggravating and mitigating factors are in "equipose" does not violate 8th and 14th Amendment). The trial was prior to this case.

Further discussion of this issue was held out of the presence of the jury in chambers. The court said that defense counsel could only say that "unless you are persuaded that the aggravating circumstances that they warrant death...you can't vote for death." (24 RT 5484.) The court then stated,

> [y]ou can only vote for life if you find that the mitigating circumstances when compared with to the aggravating circumstances warrant life. That's the only time you can do it....It's...it's...aggravating circumstances outweigh the mitigating circumstances in the sense that they warrant death, you vote for death...Life is not the default position.
> (24 RT 5485.)

The court had a problem with the "equal" argument, saying that if they feel neither life nor death is warranted, they are hung. (24 RT 5486.)

There was a discussion of the "so substantial" language. The court said it does not mean that they have to be substantially greater, but that they are significant enough to warrant death. (24 RT 5487.) The court then stated that "[c]ounsel believes that life is a default position, and it is not." (24 RT 5488.) Judge Spinetta stated that "[a]ggravation that simply outweighs mitigation, but not to the extent that warrants death, you can not vote for death. That doesn't mean you can vote for life. You can't vote for life." (24 RT 5489.) Attempting to clarify further, the court then stated

> ...before you can vote for death it's not enough to say aggravating circumstances outweigh mitigating. They must outweigh mitigating circumstances to such an extent to warrant death...Before you can vote for life, the mitigating circumstances must outweigh the aggravating circumstances as

> to warrant...life.
> (24 RT 5490.)

Then the court stated that "[y]ou can only vote for death when the aggravating circumstances are so substantial in comparison to mitigating as to warrant life." (24 RT 5491.) "Obviously, I have no problem with your telling the jury: Look, you can't vote for death unless you feel it outweighs it to the extent that it warrants...aggravating outweighs mitigating to the extent it warrants death." (24 RT 5492.) The court tried to simplify it again:

> What the statute is simply saying...is you weigh the aggravating and you weigh with the mitigating and you compare them and then you are led to a conclusion either death is warranted or life is warranted. And if you are led to no conclusion in that regard, then you can't make up your mind.
> (24 RT 5493.)

B. Argument.

~~The facts and argument of Issue XX *infra* are incorporated herein.~~ The cumulative effect of the errors produced a trial setting that was fundamentally unfair and denied appellant the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. (*Taylor v. Kentucky* (1978) 436 U.S. 478 at 487; and *see Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.) In addition, the Eighth Amendment guarantee of heightened reliability in death judgments (*Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585) also compels reversal when the cumulative effect of errors undermines confidence

in the reliability of the judgment. Appellant submits that the errors in this case require reversal both individually and because of their cumulative impact.

In his presentation of the above claims, appellant has shown how each individually merits relief as a denial of his constitutional rights or a violation of federal law. However, there are situations in which an appellant alleges several constitutional errors or violations of state or federal law, each of which is found harmless by the court, or none of which is found to be a constitutional violation, but which, in the aggregate, deny the appellant a fair trial. Hence, this claim is presented in the alternative to the analysis of appellant's other claims, not as a comment on their individual merits.

In *Taylor v. Kentucky, supra,* 436 U.S. 478, the Supreme Court accepted the notion that several errors, none of which individually rise to constitutional dimensions, may have the cumulative effect of denying a defendant a fair trial. In *Taylor,* the Court did not assess each error to determine whether it was individually harmless. Nor did the Court concern itself only with errors which individually were of constitutional dimension. Instead, the Court evaluated the circumstances surrounding the defendant's trial to determine that the state had denied the defendant fundamental fairness as guaranteed by the Due Process Clause of the Fourteenth Amendment. As the Fifth Circuit has held, a trial is fundamentally unfair if "there is a reasonable probability that the verdict might have been different had the trial

been properly conducted." (*Kirkpatrick v. Blackburn,* (5th Cir. 1985) 777 F.2d 272, 278-79.)

As explained *supra*, the trial errors of this case violated state and federal constitutional protections under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Accordingly, the errors and their cumulative effect must be evaluated under the *Chapman* standard of review, and reversal is required unless appellee can prove them harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18 at 24.)

All of the errors described above in combination worked to deny appellant a fair trial.

XIX. THE TRIAL COURT ERRED IN ALLOWING PREJUDICIAL VICTIM IMPACT EVIDENCE AT THE PUNISHMENT PHASE.

Appellant's death sentence is unlawful and was obtained in violation of his rights under the Due Process Clause of the Fifth Amendment, the Assistance of Counsel Clause of the Sixth Amendment, the Cruel and Unusual Punishment Clause of the Eighth Amendment, and the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment, as well as his corresponding rights under article I, sections 7, 8, 15, and 17 of the California Constitution, because the trial judge allowed prejudicial victim impact evidence at the punishment phase of the trial.

A. Facts in Support.

At the very end of the prosecution's penalty phase presentation, and just prior to the matter being submitted to the jury, the State offered testimony from the victim's two young daughters. They testified regarding the loss of their mother. Lauren Daher, the elder daughter of the victim, testified that she was 15 when her mother died. (18 RT 4181.) It was eight days before her sixteenth birthday and she was a sophomore in high school. (*Id.*) When she arrived at the crime scene with her father, the police talked to him and "he just hit the ground hysterical." (18 RT 4182.) Ms. Daher's younger sister "was scared and shocked and didn't really say much." (18 RT 4183.) Lauren Daher told the jury that her mother "was the kindest and most gentle and caring person I think I've ever met. The kind that would do anything for anyone." (18 RT 4183.) Although they fought a lot, they still had a great relationship. (18 RT 4184.) The death of her mother has "been the hardest thing I think I could ever even imagined. I have turned into the mom of the family. I have two kids, my dad and my sister and a lot more responsibilities than I ever would have managed that I had taken for granted when I had her." (18 RT 4184.) The victim's death meant that she missed Lauren's sixteenth birthday eight days later, as well as high school graduation, Mother's Day and Christmas. (18 RT 4184-4185.) She said that "my entire junior year of high school. I didn't really go to school because I couldn't get up in the morning.

There were times I just wished I wouldn't wake up." (18 RT 4185.) She had been in counseling for four years. (*Id.*) The jury was shown pictures of the family on vacation. (18 RT 4185-4186.) Lauren thinks about her mother every day, "[m]ore than once or twice a day." (18 RT 4186.)

Annie Daher, the victim's younger daughter, who was 12 when her mother died, also testified. (18 RT 4187.) The day of her mother's death "was just absolutely terrible," she was "scared to death the whole time," and when the policeman told her father, "he just collapsed..." (18 RT 4188.) She felt bad because she never appreciated her as much as she should have. Her mother was a strong role model, "an incredibly giving person," and they loved each other a lot. (18 RT 4189.) The jury was told that Mrs. Daher never missed a game or a horse show. (*Id.*) Annie too had been going to therapy. (18 RT 4190.) She found it difficult to concentrate on school work and was exhausted and depressed. (18 RT 4191.) She thought about her mother every day. (18 RT 4192.) Immediately after this testimony, the State rested. (18 RT 4194.)

This issue was preserved as the defense filed a "Penalty Phase *In Limine* Motion Concerning Victim Impact Evidence." (5 CT 1547-1551.) The motion sought to exclude

> any victim impact evidence relating to any circumstances of which the defendant could not reasonably have been aware at the time of the capital offense; any evidence that is irrelevant or

> inflammatory; and any opinions of the victim's family about the crime, the defendant, or the appropriate sentence to be given. (5 CT 1550.)

In that motion, the defense acknowledged that Penal Code 190.3(a) and *People v. Edwards* (1991) 54 Cal.3d 787, 835-836 allows "evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim." (5 CT 1548.) The motion was denied and the testimony was allowed. (16 RT 3814.)

B. Argument.

The United States Supreme Court in *Payne v. Tennessee* (1991) 501 U.S. 808, 111 S.Ct. 2597, held that the Eighth Amendment erects no *per se* bar to the admission of certain victim impact evidence during the sentencing phase of a capital case. The Court, however, has acknowledged that victim impact evidence can be so unduly prejudicial as to render the sentencing proceeding fundamentally unfair and violative of the Due Process Clause of the Fourteenth Amendment. (*Id.* at 825, 111 S.Ct. at 2608.)

The victim impact evidence introduced in the present case was cumulative, redundant, and oppressive in nature, as to encourage a shifting of the focus of the sentencing proceeding away from appellant and on to the victim and the victim's family. Such a result was not intended by the Court in *Payne* which repeatedly reasoned that the sentencing authority was entitled to see only "a quick glimpse of the life petitioner chose to extinguish Y[.]"

(*Payne,* 501 U.S. at 830, 111 S.Ct. at 2611 (O'Connor, J., concurring) (quoting *Mills v. Maryland* (1988) 486 U.S. 367, 397, 108 S.Ct. 1860 (Rehnquist, C.J., dissenting)).)

As the defense argued in their motion, the *Edwards* court "limits victim impact evidence to encompass only that evidence that logically shows the harm caused by the defendant. (5 CT 1548.) The defense cited *People v. Saunders* (1995) 11 Cal.4th 475, 549 that the courts should limit evidence in these emotional areas. (5 CT 1548-1549.) Additionally, the motion cited Judge Kennard's concurring opinion in *People v. Fiero* (1991) 1 Cal.4th 173, 264-265 acknowledging that in Penal Code 190.3(a) the term *circumstances* "should be understood to mean only those facts or circumstances either known to the defendant when he committed the crime, or properly adduced in proof of the charges adjudicated at the guilt phase, emphasizing that the presently existing statutory authorization goes no further." (5 CT 1549.)

The introduction of such cumulative, redundant, and oppressive victim impact evidence was so unduly prejudicial as to violate the principles of fundamental fairness and the constitutional requirements of the Due Process Clause of the Fourteenth Amendment.

The failure to bar victim impact evidence in accordance with the defense's motion constituted a violation of appellant's Fifth and Fourteenth Amendment rights to due process and equal protection, his Sixth Amendment

rights to effective assistance of counsel, the confrontation of witnesses and an impartial jury, and his Eighth Amendment right against cruel and unusual punishment and his rights under the California Constitution.

The United States Supreme Court has repeatedly emphasized that because of the exceptional and irrevocable nature of the death penalty, "extraordinary measures" are required by the Eighth Amendment to ensure the reliability of decisions regarding both guilt and punishment in a capital trial. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 118, 102 S.Ct. 869, 878 (O'Connor, J.,concurring); *see also Beck v. Alabama, supra,* 447 U.S. 625, 637-38, 100 S.Ct. 2382, 2389-90; *Lockett v. Ohio, supra,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964; *Gardner v. Florida, supra,* 430 U.S. 349, 357-58, 97 S.Ct. 1197, 1204; *Woodson v. North Carolina, supra,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991.)

Thus, this victim impact evidence was improper and necessitates a new sentencing phase trial for appellant.

XX: THE TRIAL COURT ERRED IN GIVING THE "SO SUBSTANTIAL" INSTRUCTION *SUA SPONTE*.[50]

XXI: THE TRIAL COURT ERRED IN DENYING A MOTION FOR A NEW TRIAL BASED ON THE COURT'S GIVING THE "SO SUBSTANTIAL" INSTRUCTION.

Appellant's right to due process of law, equal protection of the laws, and a reliable sentence, trial by jury, and by an impartial sentencer, effective assistance of counsel, compulsory process, right of confrontation and cross-examination, proof of criminal offenses beyond a reasonable doubt and freedom from self-incrimination, was violated by the court's giving the "so substantial" instruction *sua sponte,* which misled the jurors . That instruction was constitutionally flawed because it did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects. Giving that flawed instruction, and the court's failure to grant appellant a new trial as a result, violated his fundamental rights to due process (U.S. Const., 14th Amend.), a fair trial by jury (U.S. Const., 6th & 14th Amends.), and a reliable penalty determination (U.S. Const., 6th, 8th & 14th Amends.) and requires reversal of his sentence. (*See, e.g.*, *Mills v. Maryland, supra,*486 U.S. 367, 383-384.)

A. Facts in Support.

The trial court, when it gave the jury instructions regarding the

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[50] *See also* Argument XVIII(h) which is incorporated herein.

aggravating and mitigating factors, without prior discussion or warning gave the following additional instruction, termed "Supplemental Jury Instruction No. 1":

> Just for clarification purposes, I do want to give you one more instruction on the law at this time. And it is as follows:
> If you find that the aggravating factors are so substantial in comparison to the mitigating factors as to warrant death, you may vote for death.
> If you find that the mitigating factors are so substantial in comparison to the aggravating factors as to warrant life without the possibility of parole, you may vote for life without the possibility of parole.
> If after a comparison of the aggravating and mitigating factors you are unable to conclude that either death or life without the possibility of parole is warranted, you may vote for neither.
> I hope that clarifies the law with respect to this subject matter.
> (24 RT 5526; 5 CT 1919.)

This was the last jury instruction given to appellant's jury. As there was no prior warning or discussion with counsel, the defense objected to this instruction when it was given. The objection to the instruction about mitigating evidence was that there was no default position for the jury to vote for a life sentence. The court agreed that "[y]ou had no opportunity beforehand to say anything about it. I will agree with that." Once it was given "the jury was gone almost immediately." (24 RT 5569.)

In a motion for a new trial, the defense argued there is some authority that life should be the default position. (24 RT 5570.) The court said that there is no burden of proof and said that the words "so substantial" were not in the

statute but in the case law. The court took the position that "so substantial" "means sufficient to warrant," that the question is not quantitative, but qualitative. (24 RT 5571.) The court stated that "[s]o substantial" "is not adding anything different to what is in the statute about outweighs." (24 RT 5572.)

Defense counsel disputed that and cited CALJIC 8.88 for the proposition that "so substantial for the aggravating factors but not for mitigating factors. "There is a distinction there." (*Id.*) As defense counsel stated, "aggravating and mitigating are not covered by the statute....[h]owever, we see no statutory intent to require death if the jury merely finds more bad than good about the defendant, and to permit life without parole only if it finds more good than bad." (24 RT 5573.) The trial court said that "they specifically used that language to make sure that people understood that this case was not a quantitative analysis that was being called upon. There was a qualitative or normative analysis." (24 RT 5574.) Therefore, the court added, there is no burden of proof in this matter. Defense counsel argued again that "[t]hey are talking about qualitative analysis." One mitigating factor could outweigh many aggravating factors, they stated. (24 RT 5575.) Mr. Egan argued that the statute does not say anything about "so substantial," just "outweighs." (24 RT 5577.)

The court opined that the defense has this concept of "so substantial"

to mean that "it's not enough that the aggravating factors outweigh the mitigating factors. They must outweigh them substantially and that's not correct." (24 RT 5578.) Mr. Egan stated "I think that there is a tremendous amount of inconsistency there." (24 RT 5580.) The court admitted that "there is language" in the cases that there is a burden of proof on the people before the jury can vote for death. (24 RT 5580.) "And I guess I'm enough of a Scalian. I believe you look at the language of the statute and that's where we start." (24 RT 5581.)

The court then stated that the instruction was factually accurate. (24 RT 5584.) Then the court noted that the issue was not raised earlier and again the defense said they had no opportunity as the jury was immediately dismissed. Defense counsel "looked at each other like we were still puzzled..." The motion for a new trial was denied. (24 RT 5586.)

B. Argument.

California Penal Code section 190.3 states that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code section 190.3.) The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the petitioner's circumstances required under the Eighth Amendment. (*Boyde v.*

California (1990) 494 U.S. 370, 377.)

However, this mandatory language is not included in CALJIC No. 8.88. Instead, the instruction here informed the jury merely that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. In *People v. Duncan* (1991) 53 Cal.3d 955, this Court held that this formulation was permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating (sic)." (*Id.*, 53 Cal.3d at 978.)

However, appellant respectfully submits that this is simply not so. The word "substantial" means only "of or having substance." (Webster's New World Dictionary (3d College ed. 1989) p. 1336.) Although the word carries with it the connotations "considerable," "ample," and "large" (*id.*), it neither means nor suggests "outweigh." The instruction therefore fails to conform to the requirements of Penal Code section 190.3. The instruction by its terms would plainly permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances. By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violated the Fourteenth Amendment. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346-347.)

In addition, appellant submits that the instruction improperly reduced

the prosecution's burden of proof below that required by the applicable statute. An instructional error that mis-describes the burden of proof, and thus "vitiates *all* the jury's findings," can never be shown to be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281, emphasis in original.)

i. The instruction caused the jury's penalty choice to turn on an impermissibly vague and ambiguous standard.

The question of whether to impose a death sentence hinged on whether the jurors were "persuaded that the aggravating circumstances [we]re so substantial in comparison with the mitigating circumstances as to warrant death." (24 RT 5526; 5 CT 1919.) However, the words "so substantial" provided the jurors with no guidance as to "what they ha[d] to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright, supra,* 486 U.S. 356, 361-362.) Using that phrase violated the federal constitution because it created a vague, directionless and unquantifiable standard, inviting the sentencer to impose death through the exercise of "the kind of open-ended discretion held invalid in *Furman*" [*v. Georgia* (1972) 408 U.S. 238] (*Id.* at 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating

circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (*See Zant v. Stephens, supra,* 462 U.S. 862, 867, fn. 5.)[51]

Appellant acknowledges that this Court has opined that, in this context, "the differences between [*Arnold* and California capital cases] are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. Appellant submits that the differences between those cases do not undercut the Georgia Supreme Court's reasoning.

This case has at least one quality in common with *Arnold* and *Breaux*: it featured penalty-phase instructions which did not "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Arnold, supra,* 224 S.E.2d at 391.) The instant instruction, like the one in *Breaux*, uses the term "substantial" to explain how jurors should measure and weigh the "aggravating evidence" in deciding on

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[51] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (*See Gregg v. Georgia* (1976) 428 U.S. 153, 202.)

the correct penalty.

In fact, using the term "substantial" arguably gives rise to more severe problems than those identified in *Arnold*, because the instruction here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance. Nothing about the instruction given here "implies any inherent restraint on the *Godfrey v. Georgia, supra,* 446 U.S. 420, 428.) Because the instruction rendered the penalty determination unreliable, the death judgment must be reversed.

ii. The instruction failed to inform the jurors that the central determination is whether the death penalty is appropriate, not simply authorized.

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 305; *People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown*, 479 U.S. 538.) However, CALJIC No. 8.88 does not make that standard of appropriateness clear. Telling the jurors they may return a judgment of death if the aggravating evidence "warrants" death does not inform them that the central inquiry is whether death is the appropriate penalty.

A rational juror could find in a particular case that death was warranted but not appropriate, because "warranted" has a considerably broader meaning than "appropriate." Merriam-Webster's Collegiate Dictionary (10th ed. 2001)

defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found that such a sentence was permitted, not that it was "especially suitable," fit, and proper, i.e., appropriate. The Supreme Court has demanded that death sentences be based on the conclusion that death is the appropriate punishment, not merely one that is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate.

Whether death is "warranted" is decided when the jury finds the existence of a special circumstance authorizing the death penalty. (*See People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, even if the jury makes the preliminary determination that death is warranted or authorized it may still decide that penalty is not appropriate.

This crucial sentencing instruction violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.) and denies due process. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma, supra,* 447 U.S.

343, 346.) The judgment must therefore be reversed.

iii. The instruction failed to inform the jurors that they were required to impose life without the possibility of parole if they found that mitigation outweighed aggravation.

Section 190.3 directs that after the jury considers the aggravating and mitigating factors it "shall impose" a sentence of imprisonment for life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code section190.3.) The United States Supreme Court has held that this requirement is consistent with the individualized consideration of the defendant's culpability required by the Eighth Amendment. (*See Boyde v. California, supra,* (1990) 494 U.S. 370, 377.)

This mandatory language is not included in CALJIC No. 8.88, which tells the jury that death may be imposed if the aggravating circumstances are "so substantial" in comparison to the mitigating circumstances that death is warranted. Use of the phrase "so substantial" does not properly convey the "greater than" test mandated by section 190.3. CALJIC No. 8.88 would permit the imposition of a death penalty whenever aggravating circumstances were "of substance" or "considerable," even if outweighed by the mitigating circumstances. Because it fails to conform to the specific mandate of section 190.3, CALJIC No. 8.88 violates the Fourteenth Amendment. (*See Hicks v. Oklahoma, supra*, 447 U.S. at 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 281 (emphasis original).)

This Court has approved the language of CALJIC No. 8.88 on the basis that since it states that a death verdict requires that aggravation outweigh mitigation, "it [i]s unnecessary to instruct the jury of the converse." (*People v. Duncan, supra,* 53 Cal.3d 955, 978.) Appellant respectfully asserts that the Court's conclusion conflicts with numerous opinions disapproving instructions emphasizing the prosecution's theory of a case while minimizing or ignoring the defense theory. (*See, e.g., People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *see also Reagan v. United States* (1895) 157 U.S. 301, 310.)

The law does not rely on jurors to infer one rule from the statement of its opposite. (*See People v. Moore, supra,* 43 Cal.2d at 526-527.) Thus, even assuming that the instruction at issue here was a correct statement of law, it stated only the conditions under which a death verdict could be returned, and not those under which a verdict of life was required.

It is well-settled that in criminal trials the jury must be instructed on any

defense theory supported by substantial evidence. (*See People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) Denying that fundamental principle in appellant's case deprived him of due process. (*See Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma, supra*, 447 U.S. at 346.) Moreover, CALJIC No. 8.88 is not saved by the fact that it is a sentencing instruction, as opposed to one guiding the determination of guilt or innocence, since reliance on such a distinction would violate equal protection. (*See* U.S. Const., 14th Amend.; Cal. Const., art. I, §§ *Pyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, slighting a defense theory in instructions not only denies due process, but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the case. (*See Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028.) Reversal of appellant's death sentence is required.

iv. Conclusion

As set forth above, CALJIC No. 8.88, failed to comply with the requirements of the due process clause of the Fourteenth Amendment, and the cruel and unusual punishment clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

XXII: CALIFORNIA'S SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh, supra,* 548 U.S. 163, 179, fn. 6.[52] *See also*, *Pulley v. Harris, supra*, 465 U.S. 37, 51 (while comparative

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[52] In *Marsh*, the Supreme Court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the Court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (548 U.S. at 178.)

proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances"

section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

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

In *People v. Schmeck* (2005) 37 Cal.3d 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims

by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at 304.)

Appellant has no wish to unnecessarily lengthen this brief. Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then,[53] appellant identifies the following systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them:

A. Lack of written findings

The California death penalty scheme fails to require written findings by the jury as to the aggravating and mitigating factors found and relied on, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly

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[53] *See, e.g.*, *People v. Taylor* (2010) 48 Cal.4th 574, 108 Cal.Rptr.3d 87 at 169-170 and *People v. McWhorter* (2009) 47 Cal.4th 318, 377-379. *See also, e.g.*, *People v. Collins* (2010) 2010 WL 2104766 at *60; *People v. Thompson* (2010) 2010 WL 2025540, at *45-*46; *People v. D'Arcy* (2010) 48 Cal.4th 257, 307-309; *People v. Mills* (2010) 48 Cal.4th 158, 213-215; *People v. Ervine* (2009) 47 Cal.4th 745, 810-811; *People v. Carrington* (2009) 47 Cal.4th 145, 198-199; *People v. Martinez* (2010) 47 Cal.4th 911, 967-968.

rejected these arguments. (*See, e.g.*, *People v. Collins*, 2010 WL 2104766 at *60; *People v. Thompson*, 2010 WL 2025540, at *45-*46; *People v. Taylor*, 108 Cal.Rptr.3d 87 at 170; *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Mills*, 48 Cal.4th at 213 ; *People v. Martinez*, 47 Cal.4th at 967.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

B. Failure to place the burden of proof on the prosecution to establish that death is appropriate beyond a reasonable doubt and that related matters have been proven beyond a reasonable doubt.

i. The jury was repeatedly advised and instructed that there was no burden of proof.

The jurors in this case were not instructed that the reasonable doubt standard governed their ultimate determinations with respect to the appropriate penalty in this case, with that burden of proof resting squarely upon the prosecution. They were not instructed that the prosecution also had the burden to establish the existence of all aggravating circumstances beyond a reasonable doubt, or that they could impose a sentence of death only if they were persuaded beyond a reasonable doubt by the prosecution that the aggravating circumstances were so substantial in comparison with the mitigating circumstances that the death penalty was justified and that death was the appropriate penalty to be imposed under all the circumstances. Indeed, during

voir dire, before and during closing arguments, and during the judge's delivery of instructions, the jurors were repeatedly and affirmatively advised by both parties' counsel and instructed by the trial court that there was *no burden of proof placed upon either party* with respect to aggravating or mitigating factors or the penalty determination itself.

Before closing arguments commenced, the trial court instructed the jury as follows:

> The defendant in this case has been found guilty of murder of the first degree. The allegations that the murder was committed under special circumstances have been especially found to be true. It is the law of this case that the penalty for a defendant found guilty of murder if the first-degree shall be death or confined (sic) in the state prison for life without possibility of parole...
> This under the laws of this state, you must determine, if you can do so, which of these penalties shall be imposed upon the defendant....
> (24 RT 5375; 5 CT 1859.)
>
> Further, in determining which penalty is to be imposed you shall consider, take into account, weigh and be guided by the following factors, if applicable...
> (24 RT 5376; 5 CT 1865.)
>
> An aggravating factor is a 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 a 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....
> (24 RT 5378; 5 CT 1867.)

> A mitigating circumstance does not have to be proved beyond a reasonable doubt, nor do any of the aggravating circumstances have to be proved beyond a reasonable doubt, excepting those set forth...in paragraph (b) above...
> (24 RT 5398; 5 CT 1911.)

> 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 of 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.
> (24 RT 5400; 5 CT 1914.)

Under California law, a defendant convicted of first-degree special-circumstance murder cannot receive a death sentence unless a penalty-phase jury subsequently (1) finds that aggravating circumstances exist, (2) finds that the aggravating circumstances outweigh the mitigating circumstances, and (3) finds that death is the appropriate sentence. The jury in this case was not told that these three decisions had to be made beyond a reasonable doubt, an omission that violated the Supreme Court decisions in *Ring v. Arizona* (2002) 536 U.S. 584 and its progeny. Nor was the jury given any burden of proof or persuasion at all (except as to a prior conviction and/or other violent criminal conduct). These were errors that violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the

appropriateness of the death penalty, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (*See, e.g.*, *People v. Collins*, 2010 WL 2104766 at *60; *People v. Taylor*, 108 Cal.Rptr.3d 87 at 169; *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Mills*, 48 Cal.4th at 213 ; *People v. Martinez*, 47 Cal.4th at 967 ; *People v. Ervine*, 47 Cal.4th at 810-811 ; *People v. McWhorter*, 47 Cal.4th at 379; *People v. Schmeck*, 37 Cal.4th at 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

ii. *Apprendi* holds that allocating to the prosecution the burden of proof beyond a reasonable doubt is required by the Fifth, Sixth and Fourteenth Amendments.

A state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt, unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved by the prosecution beyond a reasonable doubt, per the general due process requirements of the Fifth and Fourteenth Amendments and the right to jury trial guaranteed by the Sixth Amendment. *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476.

California's death penalty sentencing scheme violates each of these constitutional guarantees and *Apprendi* by failing to require capital juries to find aggravating factors beyond a reasonable doubt.

Under California's statutory scheme, a conviction for first degree murder simpliciter carries a maximum sentence of 25 years to life. (Penal Code section 190.) If the jury finds the defendant guilty of first degree murder and also finds special circumstances to be true, the offense carries a maximum sentence of life without the possibility of parole. (Penal Code section 190.2.)

Under California's statutes, neither a judge nor a jury may sentence a defendant to death based solely on the jury's findings at the guilt phase. In order to impose the increased punishment of death, the jury must make additional factual findings and weigh those findings at the penalty phase. These findings include the existence of at least one aggravating factor plus a finding that the aggravating factor or factors outweigh any mitigating factors. (Penal Code section 190.3.)

Under the *Apprendi* holding, because these three additional matters are absolutely required in order to impose an increased punishment, they constitute sentencing factors that must be proved beyond a reasonable doubt by the prosecution. (*Apprendi*, 530 U.S. at 476.) Thus, under the *Apprendi* rationale, appellant was entitled to a jury instruction that before a death verdict could be returned, the jury was required to find that the prosecution had proven beyond a reasonable doubt that: (1) any aggravating factors upon which it relied were true; (2) the aggravating factor or factors outweighed the mitigating factors; and (3) death was the appropriate punishment. The failure of California law

to require such instructions renders California's death penalty scheme unconstitutional; the trial court's failure to provide such instructions to the jury here renders appellant's death sentence invalid.

Without a jury instruction allocating the proper burden of proof to the prosecution to establish beyond a reasonable doubt the existence of the aggravating factors, and stating the absence of any burden on the defense to establish the existence of any mitigating factors, (*see Apprendi, supra*, at 484-485, citing and discussing *Mullaney v. Wilbur* (1975) 421 U.S. 684), *Apprendi* bars the imposition of the death penalty. No such instruction was given in this case. The failure to properly instruct on the burden of proof is a structural error "without which [the penalty trial] cannot serve its function." (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 281.) It is, therefore, reversible per se. (*Id.* at 281-82.)

iii. Placing the burden of proof beyond a reasonable doubt upon the prosecution is also required by the Fifth, Sixth, Eighth and Fourteenth Amendments.

Additionally, even apart from *Apprendi*, the failure to require that the necessary penalty phase determinations for imposition of a death sentence be made beyond a reasonable doubt with the burden of proof resting upon the prosecution also violates the Fifth Amendment guarantee of due process, the Sixth Amendment guarantee of trial by an impartial jury, the Fourteenth Amendment guarantees of due process and equal protection, and the Eighth

and Fourteenth Amendment requirement of heightened reliability in a death determination. (*Walton v. Arizona* (1990) 497 U.S. 639; *Ford v. Wainwright* (1980) 477 U.S. 399, 414; *Beck v. Alabama* (1980) 447 U.S. 625.) The same is true regarding the absence of any burden on the defense to establish the existence of any mitigating factors. (*See Mullaney v. Wilbur*, *supra*, 421 U.S. at 697-698.)

In this case, the jury was instructed to consider three factors, which "if applicable," (24 RT 5376) could be either aggravating or mitigating factors:

> (a), the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of the special circumstances found to be true.
>
> (b), the presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or ~~attempted use of force or violence or the express or implied~~ threat to use force or violence;
>
> (c) the presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings;
> (24 RT 5376, 5379; 5 CT 1865.)

The jurors were also instructed that all the other enumerated factors "can only be considered by you to be mitigating factors" (24 RT 5379):

> (d) Whether or not the present offense was committed while the defendant was under the influence of a mental or emotional disturbance;
>
> (e) whether or not the victim was a participant in the victim's

(sic) homicidal conduct or consented to the homicidal act;

(f) whether or not the offense was committed under circumstances which the defendant reasonably believed to be a justification or extenuation for his conduct;

(g) whether or not the defendant acted under extreme duress or under the substantial domination of another person;

(h) Whether or not at the time of the present 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;

(i) the age of the defendant at the time of the crime;

(j) whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor;

(k) any other circumstance which extenuates the gravity of the present offense even though it is not a legal excuse for the crime, including but not limited to anything relating to defendant's character, background, history, mental or physical condition or record, or related to the circumstances attendant to the crime for which he has been convicted that you find serves as a basis for a sentence in this case of less than death.
(24 RT 5377-5378; 5 CT 1865-1866.)

After arguments, the court then instructed the jury *sua sponte* that

Just for clarification purposes, I do want to give you one more instruction on the law at this time. And it is as follows:
If you find that the aggravation factors are so substantial in comparison to the mitigating factors as to warrant death, you may vote for death.
If you find that the mitigating factors are so substantial in comparison to the aggravating factors as to warrant life without the possibility of parole, you may vote for life without the possibility of parole.

> If after a comparison of the aggravating and mitigating factors you are unable to conclude that either death or life without the possibility of parole is warranted, you may vote for neither. (24 RT 5526-5527.)[54]

Thus, the jury itself had the responsibility of determining what the aggravating circumstances and the mitigating circumstances were and to set the value of those circumstances independently. And, as noted, *infra*, the jury was instructed by the trial court that neither side had any burden of proof regarding the aggravating or mitigating factors, or the ultimate penalty determination.

The failure to give proper instructions violated due process and equal protection guarantees of the Fifth and Fourteenth Amendments, as well as the Eighth Amendment requirement of a reliable penalty determination. The burden of proving appropriate punishment must be the same as that of proving guilt or special circumstances; namely, beyond a reasonable doubt with the burden resting upon the prosecution. (*See, e.g., In re Winship* (1970) 397 U.S. 358; *Walton v. Arizona, supra*, 497 U.S. 639.) Notably, the United States Supreme Court has held that:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

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[54] This "so substantial" instruction is also discussed in Issue XXI.

(*Addington v. Texas* (1979) 441 U.S. 418, 423, *quoting In Re Winship, supra,* 397 U.S. at 370 (Harlan, J., concurring) (internal quotation marks omitted).)

C. Lack of requirement that the jury unanimously find that specific aggravating circumstances exist.

During the penalty phase, the state introduced evidence that appellant had a prior felony conviction. This evidence was admitted pursuant to section 190.3, subdivision (c). (24 RT 5376.) The jurors were instructed they could not rely on the prior conviction unless it had been proven beyond a reasonable doubt. The jurors were never told that before they could rely on this aggravating factor, they had to unanimously agree that defendant had suffered this prior conviction. In light of the Supreme Court decisions in *Ring v. Arizona, supra*, 536 U.S. 584 and its progeny, the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable and non-arbitrary penalty phase determination. This Court has repeatedly rejected these arguments. (*See, e.g., People v. Collins*, 2010 WL 2104766 at *60; *People v. Taylor*, 108 Cal.Rptr.3d 87 at 170; *People v. Martinez*, 47 Cal.4th at 967; *People v. Schmeck*, 37 Cal.4th at 304.) The Court's decisions should be

reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

D. Lack of inter-case proportionality review.

The California death penalty scheme fails to require inter-case proportionality review, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (*See, e.g.*, *People v. Collins*, 2010 WL 2104766 at *60; *People v. Thompson*, 2010 WL 2025540, at *45-*46; *People v. Taylor*, 108 Cal.Rptr.3d 87 at 170; *People v. D'Arcy*, 48 Cal.4th at 308; *People v. D'Arcy*, 48 Cal.4th at 308-309; *People v. Mills*, 48 Cal.4th at 214 ; *People v. Martinez*, 47 Cal.4th at 968.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

E. Failure to adequately narrow the class of offenders eligible for the death penalty.

California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast

majority who are not. This Court has repeatedly rejected this argument. (*See, e.g.*, *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Mills*, 48 Cal.4th at 213 ; *People v. Martinez*, 47 Cal.4th at 967; *People v. Schmeck*, 37 Cal.4th at 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

F. Unbounded and excessive prosecutorial discretion.

In California, the prosecutor has sole authority to make what is literally a life or death decision, without any legal standards to be used as guidance. Irrespective of whether prosecutorial discretion in charging is constitutional in other situations, the difference between life and death is not at all analogous to the usual prosecutorial discretion situation, *e.g.*, the difference between charging something as a burglary or a theft. As it stands, an individual prosecutor has complete discretion to determine whether a penalty hearing will be held to determine if the death penalty will be imposed. As Justice Broussard noted in his dissenting opinion in *People v. Adcox* (1988) 47 Cal.3d 207, 275-276, this creates a substantial risk of county-by-county arbitrariness.

Under this statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications in different counties will not be singled out for the ultimate penalty. The decision to seek the death penalty under California law will inevitably be influenced by irrelevant considerations such as the size of

the county budget, the notoriety of the victim, the race of the defendant, and the proximity of the next general election. These factors are particularly exaggerated when, as in this case, the prosecution is personally undertaken by an elected official. (*See Maynard v. Cartwright, supra,* (1988) 486 U.S. 356, 363 (discussing the holding in *Godfrey v. Georgia, supra,* 446 U.S. 420).)

Moreover, the absence of standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible considerations, or simple arbitrariness. The arbitrary and wanton prosecutorial discretion allowed by the California scheme – in charging, prosecuting and submitting a case to the jury as a capital crime – merely compounds, in application, the effects of vagueness and arbitrariness inherent on the face of the California statutory scheme. Just like the "arbitrary and wanton" jury discretion condemned in *Woodson v. North Carolina* (1976) 428 U.S. 280, 303, such unprincipled, broad discretion is contrary to the principled decision-making mandated by *Furman v. Georgia* (1972) 408 U.S. 238.

In general, state action that is bereft of standards, without anything to guide the actor and nothing to prevent the decision from being completely arbitrary, is a violation of a person's right to due process of law. (*Kolender v. Lawson* (1983) 461 U.S. 352, 358.) This standard applies to prosecutors as much as other state actors. (*Id.*)

In this case, the offenses with which appellant was charged were worthy

of condemnation. So is any charge that is potentially capital. This case involved a single homicide. However, prosecutors sometimes do not seek the death penalty for capital offenses, even in cases involving multiple murders. (*See, e.g., People v. Walker* (1993) 17 Cal.App.4th 1189 (negotiated plea bargain to two counts of first-degree murder, with sentence of 25 years to life); *People v. Bobo* (1990) 229 Cal.App.3d 1417, 1421-1422 (defendant convicted of arson and three counts of first-degree murder (by stabbing); death penalty not sought); *People v. Moreno* (1991) 228 Cal.App.3d 564, 567-568 (defendant convicted of two counts of first-degree murder, burglary and attempted robbery; death penalty waived).) The absence of standards to guide such decisions falls under *Kolender* and other vagueness cases.

There is no statewide standard by which the decision to seek the death penalty may be reviewed, there is no oversight agency to insure uniformity, and there is no authority accorded the trial court to review the death decision for abuse of discretion. Therefore, there is a substantial risk of county-by-county arbitrariness, in violation of the Equal Protection Clause. (*See Bush v. Gore* (2000) 531 U.S. 98.) The vagueness and overbreadth of California's death penalty statute, described above, further compound the unguided, arbitrary nature of capital sentencing decisions within this State.

G. Instructing the jury in the terms of a unitary list of aggravating and mitigating factors.

i. Instructing the jury with Section 190.3's unitary list, per CALJIC No. 8.84.1, violated the Fifth, Sixth, Eighth and Fourteenth Amendments.

Appellant's jury was instructed using a unitary list of aggravating and mitigating factors numbered (a) through (k) as discussed *supra.* (24 RT 5376-5378; 5 CT 1865-1866.) The court then informed the jury that "[t]he factors set forth in paragraphs (a) through (k) above constitute aggravating and/or mitigating factors." (24 RT 5378; 5 CT 1867.) The court then went on, confusingly, to inform the jurors that "the factors set forth in (a), (b) and (c) above are the only factors that can be considered by you as aggravating factors. However, you may also find one or more of these factors to be a mitigating factor." (24 RT 5379; 5 CT 1870.) The court also told the jurors that "[t]he factors set forth in all paragraphs other than (a), (b) and (c) can only be considered by you to be mitigating factors." (24 RT 5379; 5 CT 1870.)

These CALJIC 8.84.1 instructions could only have confused the jury, failed to inform them whether factors (a) through (c) were aggravating or mitigating and allowed them to be considered as either, and failed to give any definition or explanation of aggravation which might have served as a narrowing principle in the application of the factors. These errors resulted in unconstitutionally arbitrary and inconsistent sentencing, in several distinct

respects.

Permitting the jury to use mitigating evidence in aggravation impermissibly allows the imposition of the death sentence in an arbitrary[55] and unprincipled manner, violating the Eighth and Fourteenth Amendments. (*See Gregg* v. *Georgia*, *supra*, 428 U.S. at 192; *Zant* v. *Stephens*, *supra*, 462 U.S. at 865.) The instructional omissions and ambiguities here made such errors even more likely and demonstrate the unconstitutional vagueness of Penal Code § 190.3 and CALJIC No. 8.84.1's unitary list and its death-bias.

The unconstitutional vagueness of section 190.3's and CALJIC No. 8.84.1's unitary list therefore gave the jury no guidance whatsoever and allowed the penalty decision process to deteriorate into a standardless, confused, subjective, arbitrary and unreviewable determination for each juror, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg* v. *Georgia*, *supra*, 428 U.S. at 192; *Godfrey* v. *Georgia*, *supra*, 446 U.S. at 428-429; *Stringer* v. *Black* (1992) 503 U.S. 222 at 235-236; *Zant* v. *Stephens* (1983) 462 U.S. 862 at 865.)

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[55] With no guidance afforded to juries as how the state deems mental disturbance or age to be "particularly relevant to the sentencing decision," (*Gregg* v. *Georgia*, *supra*, 428 U.S. at 196), identically situated defendants will be sentenced differently depending purely upon the subjective predilections of the jurors involved.

ii. Section 190.3 and the instructions allowed the jurors to engage in an undefined, open-ended consideration of non-statutory aggravating factors.

As noted *supra*, the jury was instructed to consider some of the matters set forth in Penal Code section 190.3 "if applicable," (24 RT 5376; 5 CT 1865) as aggravating or mitigating factors. Thus, the jury itself had the responsibility of determining which factors were aggravating and which were mitigating.

The jurors were informed that the first three factors could be considered either in mitigation or in aggravation (24 RT 5378-5379; 5 CT 1867, 1870) which is contrary to the constitutional mandate and the practice of twenty-two other states.[56]

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[56] As noted, reviewing courts often find it useful to refer to history and to the current practices of other states in determining whether a state has framed its statutes consistent with the requirements of due process. (*Schad* v. *Arizona* (1991) 501 U.S. 624 at 640.)

An initial safeguard for capital sentencing is the enumeration of aggravating factors as such, so as to guide, channel and limit the penalty jury's consideration of evidence against the accused to relevant matters. The vast majority of states do so, although California does not. Of thirty-four capital punishment states, twenty-four have implemented statutory provisions separately listing a specified set of aggravating factors and a set of mitigating factors. (*See* Ala. Code § 13A-5-49, 51 (1982); Ariz. Rev. Stat. Ann. § 13-703(F), (G) (West 1993); Ark. Code Ann. §§ 5-4-604, 605 (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103(4), (5) (West 1993); Conn. Gen. Stat. Ann. § 53a-46a(g), (h) (West 1985); Fla. Stat. Ann. § 921.141 (5), (6) (West 1992); Ill. Ann. Stat. ch. 38, para. 9-1(b), (c) (Smith-Hurd 1992); Ind. Code Ann. § 35-50-2-9 (b), (c) (West 1993); Ky. Rev. Stat. Ann. § 532.025(2) (Michie 1984); La. Code Crim. Proc. Ann. art. 905.4, 905.5 (West 1993); Md. Ann. Code art. 27, § 413 (d), (g) (1993); Miss. Code Ann. § 99-19-101 (5), (6) (1992); Mont. Rev. Code Ann. §§ 46-18-303, 304 (1992); Neb. Rev. Stat. § 29-2523 (1987); N.H.

Rev. Stat. Ann. § 630:5(VI), (VII) (1992); N.M. Stat. Ann. §§ 31-20A-5, 6 (Michie 1990); N.C. Gen. Stat. § 15A-2000(e), (f) (1988); Ohio Rev. Code 2929.04(A), (B) (Page's 1992); 42 Pa. Cons. Stat. Ann. § 9711(d), (e) (1993); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204 (i), (j); Utah Code Ann. §§ 76-3-207(3), 76-5-202 (1993); Wash. Rev. Code Ann. §§ 10-.95.020, 070 (West 1990); Wyo. Stat. § 6-2-102 (h), (j) (1988).)

Six more states use a specific list of aggravating factors, leaving mitigating factors unspecified and open-ended. (Del. Code Ann. tit. 11, § 4209(e) (1992); Ga. Code Ann. § 17-10-30(b) (Harrison 1990); Idaho Code § 19-2515(g) (1987); Okla. Stat. Ann. tit. 21, § 701.12 (West 1983); S.D. Codified Laws Ann. § 23A-27A-1 (1993); Va. Code Ann. § 19.2-264.2 (Michie 1990).) Texas does not label its penalty phase factors as "aggravating," but such a nature is apparent on the statute's face. (Tex. Code Crim. Proc. Ann. art. 37.071 (West 1993).

California's statute is dramatically different, directing jurors to take into account any of ten general factors, without designating which are aggravating and which mitigating. (Penal Code § 190.3.)

Additionally, twenty states specifically guide jurors' discretion by limiting the jurors' consideration of evidence in aggravation to matters specified by statute. (*See* Ariz. Rev. Stat. Ann. § 13-703 (E), (F) (West 1993); Ark. Code Ann. § 5-4-604 (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103 (West 1993); Conn. Gen. Stat. Ann. § 53a-46a (b) (West 1985); Fla. Stat. Ann. § 921.141(2)(a) (West 1992); Ga. Code Ann. § 17-10-30 (b) (Harrison 1990); Ind. Code Ann. § 35-50-2-9 (a) (West 1993); Ky. Rev. Stat. Ann. §§ 532.025(2) (Michie 1984); La. Code Crim. Proc. Ann. art. 905.3 (West 1993); Md. Ann. Code art. 27, § 413(f) (1993); Miss. Code Ann. § 99-19-101(3) (1992); N.M. Stat. Ann. § 31-20A-2 (Michie 1990); N.C. Gen. Stat. § 15A-2000(e) (1988); Ohio Rev. Code. § 2929.04(A) (Page's 1992); Okla. Stat. Ann. tit. 21, § 701.10(c) (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(d) (1993); S.C. Code Ann. § 16-30-20(A) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-1 (1993); Tenn. Code Ann. § 39-13-204(i) (1993); Va. Code Ann. § 19.2-264.2 (Michie 1990).)

California's statute approves the opposite procedure, explicitly permitting the open-ended use of evidence in aggravation beyond the general statutory categories. Section 190.3 states:

> In the proceedings on the question of penalty, *evidence may be presented* by both the people and the defendant *as to any matter relevant to aggravation*, mitigation, and sentence *including, but not*

As quoted above, the instruction read told the jury that it should "take into account" (24 RT 5376; 5 CT 5376) factors could be considered either aggravating or mitigating. A problem with factor (d) is that "mental or emotional disturbance" (24 RT 5377; 5 CT 1865) requires the sort of subjective, vague, arbitrary, unreviewable determination by each juror as to what level of mental "disturbance" is adequate for consideration that has consistently been found constitutionally unacceptable. (*See, e.g.*, *Maynard v. Cartwright*, *supra*, 486 U.S. at 363-364 ("especially"); *Shell v. Mississippi* (1990) 498 U.S. 1, 4 ("especially"); *Moore v. Clarke* (8th Cir. 1990) 904 F.2d 1226, 1232-1233("exceptional").)

Section 190.3's unitary list and the instructions' unitary listing of factors were unconstitutionally vague in failing to limit the jury to consideration of specified factors in aggravation or mitigation; they were confusing; they failed to guide the jury and allowed the penalty decision process to proceed in an

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> *limited to*, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

Id. (emphasis added).

arbitrary, capricious, death-biased and unreviewable enterprise manner, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg* v. *Georgia*, *supra*, 428 U.S. at 192; *Godfrey* v. *Georgia*, *supra*, 446 U.S. at 428-429; *Stringer* v. *Black*, *supra*, 503 U.S. at 235-236; *Zant* v. *Stephens*, *supra*, 462 U.S. at 865.)

H. California's failure to provide any of the penalty phase safeguards commonly employed in other capital case jurisdictions violates the Fifth, Sixth, Eighth and Fourteenth Amendments.

As set forth *supra*, the United States Supreme Court has repeatedly recognized that the death penalty is qualitatively different in nature from any other punishment. Therefore, capital case sentencing systems may not create a substantial risk that a death judgment and execution will be inflicted in an arbitrary and capricious manner. (*Gregg* v. *Georgia*, *supra*, 428 U.S. at 189; *Godfrey* v. *Georgia*, *supra*, 446 U.S. at 431.) *Furman* and *Gregg* require that ". . . the State must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case" justify the sentence. (*McCleskey* v. *Kemp* (1987) 481 U.S. 279 at 305.) Accordingly, penalty phase aggravating factors in "weighing states," such as California, may not be unconstitutionally vague. (*Stringer* v. *Black, supra*, 503 U.S. at 235-236.)

As discussed above, reviewing courts often find it useful to refer to

history and to the current practices of other states in determining whether a state has framed its statutes consistent with the requirements of due process. (*Schad* v. *Arizona*, *supra*, 501 U.S. at 640.)

In the arguments listed above, appellant has cited various other states with capital sentencing laws or case law which require various safeguards to lessen the chance of an arbitrary or capricious death judgment.[57] Such safeguards have been instituted to attempt to eliminate the use of unconstitutionally vague penalty phase factors, eliminate death-biased proceedings, eliminate arbitrary and capricious death judgments and executions, and make death judgments meaningfully reviewable on appeal. Although the various states employ varying combinations of these and other safeguards to fulfill the described constitutional requirements, California's system singularly fails to employ any of these safeguards, or to employ alternative but comparable measures. Therefore, California's capital case system is unconstitutional on its face and as applied here, under the Fifth,

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[57] The safeguards described above generally include statutory or case law requirements of: (1) written findings as to the aggravating factors found by the jury; (2) proof beyond a reasonable doubt of the aggravating factors; (3) jury unanimity on the aggravating factors; (4) a finding that aggravating factors outweigh mitigating factors beyond a reasonable doubt; (5) a finding that death is the appropriate punishment beyond a reasonable doubt; (6) a procedure to enable the reviewing court to meaningfully evaluate the sentencer's decision; and (7) definition of which specified relevant factors are aggravating, and which are mitigating.

Sixth, Eighth and Fourteenth Amendments, as described above.

I. The California Supreme Court's failure to conduct constitutionally adequate review of capital sentences.

This Court fails to conduct a constitutionally adequate review of automatic appeal and habeas corpus cases, and institutionally does not conduct such review in capital cases, in violation of appellant's rights to due process, heightened capital case due process, individualized and meaningful appellate review, and the prohibition against cruel and unusual punishments, per the Fifth, Eighth and Fourteenth Amendments. (*Parker v. Dugger* (1991) 498 U.S. 308, 321-322 (1991); *see also Geders v. United States* (1976) 425 U.S. 80; *Herring v. New York* (1975) 422 U.S. 853; *Beck v. Alabama, supra,* 447 U.S. 625, 637; *Zant v. Stephens, supra,* 462 U.S. 862, 879; *Woodson v. North Carolina, supra,* 428 U.S. 280, 304; *Johnson v. Mississippi, supra,* 486 U.S. 578, 584.)

The California death penalty scheme fails to afford capital defendants with the same kind of disparate sentence review as is afforded felons under the determinate sentence law, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment.

This Court has repeatedly rejected these arguments. (*See, e.g.*, *People v. Collins*, 2010 WL 2104766 at *60; *People v. Mills*, 48 Cal.4th at 214 ; *People v. Martinez*, 47 Cal.4th at 968 ; *People v. Ervine*, 47 Cal.4th at 811.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

Appellant also incorporates the allegations contained in the remainder of this brief as though fully set forth herein in each of these sub-claims.

The constitutional violations set forth in each of these sub-claims warrant the granting of this petition without any determination of whether these violations substantially affected or influenced the jury's verdict. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 638 n.9.) Furthermore, these constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of appellant's rights had a substantial and injurious effect or influence on the penalty judgment, rendering it fundamentally unfair and resulting in a miscarriage of justice.

XXIII. SECTION 190.3 AND THE RELATED PENALTY PHASE INSTRUCTIONS, *AS USED AT APPELLANT'S TRIAL*, WERE UNCONSTITUTIONAL.[58]

Appellant's right to due process of law, equal protection of the laws, and a reliable sentence, trial by jury, and by an impartial sentencer, effective assistance of counsel, compulsory process, right of confrontation and cross-examination, proof of criminal offenses beyond a reasonable doubt and freedom from self-incrimination, was violated by the Penal Code section 190.3 instructions used at his trial. Appellant was deprived of his fundamental rights to due process (U.S. Const., 14th Amend.), a fair trial by jury (U.S. Const., 6th & 14th Amends.), and a reliable penalty determination (U.S. Const., 6th, 8th & 14th Amends.) and these errors require reversal of his sentence. (*See, e.g.*, *Mills v. Maryland, supra,* 486 U.S. 367, 383-384.)

A. Introduction: United States Supreme Court cases preclude vagueness in capital sentencing statutes and aggravating factors.

The United States Supreme Court has held that the first problem with

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[58] To the extent that this Court has rejected any of these constitutional challenges to the 1978 law, as well as the other systemic issues raised, appellant respectfully renews each argument, makes other related arguments here, and asks that this court reconsider its former rulings, because they are incorrect interpretations under both the United States Constitution (per the Fifth, Sixth, Eighth and Fourteenth Amendments) and the California Constitution (per art. I, §§ 7, 15, 17 and 24).

using a vague aggravating factor in a penalty phase weighing process, or with employing a vague capital sentencing system, is that such vagueness:

> . . . creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance . . . [and] creates the possibility not only of randomness but also of bias in favor of the death penalty . . .
> (*Stringer v. Black* (1992) 503 U.S. 222.)

In order to minimize this risk of arbitrary and capricious application of the death penalty, the Supreme Court has long held that a state's aggravating factors must ". . . channel the sentencer's discretion . . ." by ". . . clear and objective standards . . ." that provide ". . . specific and detailed guidance . . . ," so as to ". . . make rationally reviewable the process for imposing a sentence of death." (*Lewis v. Jeffers* (1990) 497 U.S. 764, 774, *quoting Godfrey v. Georgia*, *supra,* 446 U.S. 420, 428.)

A capital sentencing scheme may not allot the sentencer complete discretion in deciding whether a defendant should be sentenced to death based merely on the facts of a particular case. (*Furman v. Georgia*, *supra*, 408 U.S. at 239-240, 255-257, 309-310, 314.) The jury must be ". . . given guidance about the crime . . . that the State, representing organized society, deems particularly relevant to the sentencing decision." (*Gregg v. Georgia*, *supra*, 428 U.S. at 196, emphasis supplied (plur. opn., Stewart, Powell and Stevens, JJ.).) *Furman* and *Gregg* require that ". . . the State must establish rational

criteria that narrow the decision maker"s judgment as to whether the circumstances of a particular defendant's case . . ." justify the sentence. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305, emphasis supplied.)

> . . . [W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

(*Lewis v. Jeffers*, *supra*, 497 U.S. at 774, *quoting Gregg v. Georgia*, *supra*, 428 U.S. at 189 (internal quotation marks omitted).)

It follows that a sentencing statute or jury instructions which, as here, merely instruct the sentencer to look at vague categories, without attempting any further limitation or guidance, are unconstitutionally vague. (*See, e.g.*, *Maynard v. Cartwright, supra*, 486 U.S. at 363; *Godfrey v. Georgia*, *supra*, 446 U.S. at 429-433.)

The United Sates Supreme Court has applied such an analysis to penalty phase aggravating factors. In *Stringer v. Black, supra,* 503 U.S. 222, the United States Supreme Court held that the Eighth Amendment's prohibition against unconstitutionally vague aggravating factors is applicable not only to aggravating factors designed to narrow the class of death eligible defendants, but also, in "weighing states" like California, to aggravating factors that are weighed by the jury in making its penalty decision.

> [I]f a state uses aggravating factors in deciding who shall be

> eligible for the death penalty *or* who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion. . . .
>
> . . . Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. *A vague aggravating factor used in the weighing process is in a sense worse*, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.

(*Stringer v. Black, supra*, 503 U.S. at 235-236, emphasis supplied.) Under the Eighth Amendment, ". . . a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty." (*Richmond v. Lewis* (1992) 506 U.S. 40.)

The application of these principles to the California capital sentencing system was before the United States Supreme Court in *Bacigalupo v. California* (1992) 506 U.S. 802. The Supreme Court vacated the underlying *Bacigalupo* judgment[59] and remanded the matter to this Court, for further

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[59] In *People v. Bacigalupo* (1991) 1 Cal.4th 103, 148 ("*Bacigalupo* I") this Court ruled that the Eighth Amendment's prohibition against unconstitutionally vague aggravating factors did not apply to those factors under section 190.3 which the jury was instructed to weigh in reaching its penalty decision. Defendant petitioned the United States Supreme Court for certiorari, arguing that the opinion was inconsistent with the subsequent *Stringer* decision. (*Bacigalupo v. California*, Petition for Writ of Certiorari, pp. 20-22.)

consideration of section 190.3, in light of *Stringer v. Black, supra.* (*Bacigalupo* v. *California, supra*; *see People v. Wader* (1993) 5 Cal.4th 610, 663-664, n.12.) This Court re-affirmed its *Bacigalupo I* decision, in *Bacigalupo II.* (*People v. Bacigalupo* (1993) 6 Cal.4th 457 (93 D.A.R. 15433, Dec. 7, 1993, cited "*Bacigalupo II*".)

Appellant respectfully submits that the Eighth Amendment's vagueness limitations and the other constitutional guarantees do apply to section 190.3 and penalty phase instructions. The trial court here failed its constitutional duties by reading instructions which left the jurors "unguided and untethered" in their penalty adjudication.

B. Factor (a) of Penal Code Section 190.3, which directed the jury to separately weigh the "circumstances of the crime" as a factor in aggravation, violated the Eighth and Fourteenth Amendments.[60]

As discussed *supra,* at the close of the penalty phase, Judge Spinetta gave appellant's jury a number of factors under Penal Code Section 190.3 which they were to "take into consideration, weigh and be guided by..." (24 RT 5376; 5 CT 1865.) Factor (a), the aggravating factor that allowed appellant's jury to impose death based on the "circumstances of the crimes," made the penalty-determination process here look dangerously similar to the standardless scheme invalidated in *Furman v. Georgia*, *supra*, 408 U.S. 238.

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[60] Appellant acknowledges that this court has previously rejected similar contentions (*People v. Wader*, *supra*, 5 Cal.4th at 663-664), but respectfully requests that the issue be reconsidered.

Factor (a) failed to identify any aspect of the underlying offense which might aggravate punishment. This factor did nothing to limit the discretion of the jury; instead, it inherently invited each juror to personally determine why he or she was most offended by the crime, and use that perception as a reason for aggravation, without any reference to any objective standard.

Section 190.3, subdivision (a) is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death, is vague and standardless, and violates appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. In addition, the jury was not required to be unanimous as to which "circumstances of the crime" amounting to an aggravating circumstance had been established, nor was the jury required to find that such an aggravating circumstance had been established beyond a reasonable doubt, thus violating *Ring v. Arizona*, 536 U.S. 584 and its progeny[61] and appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at 609.)

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[61] *Ring v. Arizona, supra,* 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 296, *United States v. Booker* (2005) 543 U.S. 220, *Cunningham v. California* (2007) 549 U.S. 270.

This Court has repeatedly rejected these arguments. (*See, e.g.*, *People v. Collins*, 2010 WL 2104766 at *60; *People v. Mills*, 48 Cal.4th at 213-214; *People v. Martinez*, 47 Cal.4th at 967 ; *People v. Ervine*, 47 Cal.4th at 810 ; *People v. McWhorter*, 47 Cal.4th at 378; *People v. Mendoza* (2000) 24 Cal.4th 130, 190; *People v. Schmeck*, *supra,* 37 Cal.4th at 304-305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

C. Section 190.3's Factor (b) is unconstitutionally vague under the Eighth and Fourteenth Amendments and resulted in arbitrary and capricious sentencing.[62]

In addition to the CALJIC No. 8.84.1's instruction on "the circumstances of the crimes" under factor (a), the penalty jury was directed to consider as aggravation, under factor (b):

> The presence or absence of criminal activity by the defendant, other than the crimes for which defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence, or the express or implied threat to use force or violence.
>
> (24 CT 5376; 5 CT 1865.)

Shortly thereafter, the court read to the jury another instruction telling the jurors that they could consider factor (b) as either aggravating or mitigating.

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[62] This Court has rejected similar claims previously (*People v. Fierro* (1991) 1 Cal.4th 173, 230-232.) Appellant respectfully asks the issues involved be reconsidered.

(24 RT 5379; 5 CT 1870.)

This instruction was unconstitutionally vague in the same ways as the factor (a) instruction, discussed *ante*, and incorporated by reference. The instruction afforded the jurors no guidance or limitations as to how to evaluate the crimes or incidents and was standardless, arbitrary, subjective and weighted toward death. Factor (b) allowed the jury to impose death, at least in part, on the basis of ". . . criminal activity by the defendant which involved the use or attempted use of force or violence. . . ." (24 RT 5376; 5 CT 1865.) The trial court did not give guidelines or place limits on this factor, or instruct the jury on the elements of the potentially relevant crimes, or define violence or force. The jurors were not told that they could rely on this factor (b) evidence only if they unanimously agreed beyond a reasonable doubt that the conduct had occurred. In light of the Supreme Court decision in *Ring v. Arizona, supra,* 536 U.S. 584 and its progeny, the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at 609.) In the absence of a requirement of jury unanimity, appellant was also deprived of his Eighth Amendment right to a reliable, non-arbitrary penalty phase determination and to freedom from cruel and unusual punishment.

This Court has repeatedly rejected these arguments. (*See, e.g., People*

v. Collins, 2010 WL 2104766 at *60; *People v. D'Arcy*, 48 Cal.4th at 308 ; *People v. Martinez*, 47 Cal.4th at 967 ; *People v. Lewis* (2006) 39 Cal.4th 970, 1068.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

In addition, allowing a jury that has already convicted the defendant of first degree murder to decide if the defendant has committed other criminal activity violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to an unbiased decisionmaker, to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment.

This Court has repeatedly rejected these arguments. (*See, e.g., People v. Hawthorne* (1992) 4 Cal.4th 43, 77.) The Court's decisions in this vein should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

D. The trial court failed to delete inapplicable mitigating factors, in violation of the Eighth and Fourteenth Amendments.

The trial court erred in failing to eliminate the inapplicable factors *sua sponte*.[63] The instructions told the jurors to consider factors which were

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[63] This Court has previously rejected similar arguments regarding the *sua sponte* obligation to delete inapplicable mitigating factors. (*People v. Miranda* (1987) 44 Cal.3d 57, 104; *People v. Kelly* (1990) 51 Cal.3d

irrelevant to this case,[64] in violation of the Eighth Amendment. Although the jurors were told that "not all factors will be relevant in all cases and a factor which is not relevant to the evidence should be disregarded" (24 RT 5378-5379; 5 CT 1869), the Eighth Amendment requires that the jury not be distracted from determining whether the death penalty is appropriate in light of the particular defendant and crime. (*Booth v. Maryland* (1987) 482 U.S. 496, 507.) Jury instructions must limit the jury's consideration to factors that are both relevant to the capital sentencing decision and rooted in the evidence before them. (*See California v. Brown* (1987) 479 U.S. 538, 543; *McCleskey v. Kemp, supra,* 481 U.S. 279, 313-314, n. 37.) Here, in failing to eliminate the inapplicable factors *sua sponte,* the jury was left on their own to determine which factors were relevant and which were not.

If the jury is to base its decision on all relevant sentencing factors raised by the evidence, then it must be instructed which relevant factors are raised by the evidence and that those are the only factors to be considered. Each juror was nonetheless left on her own to determine whether said factors were aggravating or mitigating here. These instructions improperly told the jurors

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931, 968.) Appellant respectfully asks that this court reconsider these issues.

[64] Factors irrelevant to this case included: factor (e) (victim participation); factor (f) (moral justification/extenuation); and (g) (duress). (24 RT 5377; 5 CT 1865-1866.)

to consider mitigating factors which were clearly inapplicable, giving rise to the equally clear message that the absence of evidence regarding a mitigating factor equaled aggravation. These instructions violated the requirement that rational, objective criteria guide the sentencer's discretion and created an impermissible risk of arbitrary and capricious decision making. (*McCleskey v. Kemp*, *supra*, 481 U.S. at 301-303.)

Furthermore, by the instruction's encouraging abstract, irrelevant considerations of the inapplicable factors in sentencing, appellant was deprived of his constitutional rights to an individualized sentencing determination (and meaningful appellate review of that sentence) based only on the "factors about the crime and the defendant . . . [that are] particularly relevant" (*Gregg* v. *Georgia*, *supra*, 428 U.S. 153, 192)[65] and the Eighth and Fourteenth Amendment's heightened level of due process and requirement of heightened

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[65] The court's instruction effectively and incorrectly made a threshold legal determination that all the factors in CALJIC No. 8.84.1 (Rev. 1986) (Mod.) were relevant, violating well-established principles of state law (*see People* v. *Hannon* (1977) 19 Cal.3d 588, 597), in addition to the resulting constitutional violations, discussed *ante*. Additionally, the duty to edit standardized jury instructions which are written to apply to a theoretically wide range of cases also rests with the court in California and is not left to the jury. (*See, e.g.*, *People* v. *Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884 [editing CALJIC No. 2.20].) Such editing is necessary to avoid jury confusion and avoid injecting irrelevant considerations into the deliberations, both of which the court instead encouraged. Therefore, the instruction violated state law as well as federal constitutional guarantees, and reversal is mandated, even under the *Watson* standard.

reliability in capital cases. (*Ford* v. *Wainwright, supra,* 477 U.S. 399, 414; *Beck* v. *Alabama, supra,* 447 U.S. 625, 637-638 and n. 13; *also see McElroy v. Guagliardo* (1960) 361 U.S. 281 (Harlan, J., diss.).) The fact that the court effectively told the jurors that all factors were relevant, *i.e.*, to be considered, when several factors were not relevant, only exacerbated the error.

Finally, the language of the statute and instruction could lead a reasonable juror to conclude that the "whether or not" language preceding factors (d), (e), (f), (g), (h) and (j) (24 RT 5377; 5 CT 1865-1866) means either of two equally erroneous propositions: (1) that those factors are always applicable and must be either aggravating or mitigating, or (2) the factors are always irrelevant, as "whether or not" is commonly used to as "irrespective of . . ." a given matter. Because this phrase precedes some factors which can only properly be considered in mitigation, interpretation (1) erroneously transformed mitigating factors into aggravating ones. (*See People v. Benson* (1990) 52 Cal.3d 754, 801.)

Vagueness in the statute and instruction undoubtedly lead to such erroneous interpretations and impermissibly tilted the sentencing decision toward death, based on entirely irrelevant factors, in violation of the Eighth and Fourteenth Amendments. (*Stringer v. Black, supra,* 503 U.S. 222.)

E. The trial court did not define mental illness as a mitigating factor or delete factor (d)'s "extreme" modifier, resulting in unconstitutional vagueness in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

The version of CALJIC 8.84.1 which the court used instead instructed the jury that only an "extreme mental or emotional disturbance," per factor (d), or capacity questions involving impairment due to mental disease, defect or intoxication, per factor (h) were to be taken "into account" in ". . . determining which penalty is to be imposed . . .". (24 RT 5377; 5 CT 1865-1866.) That is, these factors could be considered either aggravating or mitigating. The court concluded the reading of CALJIC No. 8.84.1 by telling the jury that it might find relevant "any other" extenuating circumstance, per factor (k). (24 RT 5377; 5 CT 1866.) This aspect of the instruction has three constitutional deficiencies.

First, this Court has previously defined factor (d) as purely a mitigating factor. (*People v. Davenport* (1985) 41 Cal.3d 247, 288.)[66] The threshold problem with the standard CALJIC instruction is that, absent an explicit limitation of factor (d) to mitigation, jurors may well consider it in

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[66] This characterization no doubt arose due to the ". . . belief, long held by this society, that defendants who commit criminal acts that are attributable to . . . emotional and mental problems, may be less culpable than defendants who have no such excuse." (*California v. Brown*, *supra*, 479 U.S. at 545 (O'Connor, J., conc.).)

aggravation. They may also consider the lack of mitigation as aggravation. Mental or emotional instability is not a factor which jurors will automatically or intuitively understand as mitigating in nature; they may well conclude that it is indicative of defendant's future dangerousness and therefore aggravating.[67] This aspect, standing alone, violates the Eighth Amendment.

The language of factors (d) and (h) injected unconstitutional arbitrariness into the penalty decision, using constitutionally vague terminology which impermissibly invites random choices and biases the process toward death. (*Stringer v. Black*, *supra*, 503 U.S.222.) Such terminology permits an unacceptable risk that there will be no principled distinction between those cases in which the death penalty is imposed and those in which it is not. (*Maynard v. Cartwright*, *supra*, 486 U.S. at 361-362.) A sentence based on such vague instructions is unreviewable, in violation of the Eighth and Fourteenth Amendments. (*Godfrey v. Georgia*, *supra*, 446 U.S. at 428.)

The second problem with the standard CALJIC instruction, assuming the jury understood factor (d) to be mitigating, is its specification that only

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[67] For an example of such attitudes by a judge, *see Miller v. State* (Fla. 1979) 373 So.2d 882, 883-885 [trial judge sentenced defendant to death based on defendant's incurable mental illness rendering defendant a future danger, ever after recognizing such disturbances are mitigating]; as to public attitudes, see Note, (1979) 12 John Marshall J. Prac. & Proc. 351, 365.

"extreme" mental illness may be considered. This language has all the constitutional infirmities discussed above,[68] plus others all its own.

A sentencing entity may not refuse to consider, or be precluded from considering, any relevant mitigating evidence. (*Mills* v. *Maryland, supra,* 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plur. opn., Burger, C.J.).) The "extreme" adjective preceding "mental or emotional disturbance" created a barrier to the jury's full consideration and assignment of mitigating weight to appellant's evidence, in violation of these authorities.

This Court recognized this limitation in *People* v. *Ghent* (1987) 43 Cal.3d 739, 776, but held that this constitutional defect was cured by the factor (k) language. (*Id.*; *see People* v. *Kelly* (1990) 51 Cal.3d 931, 968-969.) A reasonable juror could have understood these instructions to unconstitutionally limit one another, i.e., that the factor (k) language referred only to any

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[68] Aggravating factors that include constitutionally vague terms like "extreme" must also meet constitutional vagueness standards. "Extreme" does not provide sufficient guidance to avoid arbitrary and capricious sentencing, provides no principled basis for distinguishing between a death sentence and life without parole, and is death-biased; sentences based on such terms are also unreviewable, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Stringer* v. *Black, supra*, 503 U.S. 222; *Maynard* v. *Cartwright, supra*, 486 U.S. at 361-362; *Godfrey* v. *Georgia, supra*, 446 U.S. at 428; *see, e.g.*, *State* v. *David* (La. 1985) 468 So.2d 1126, 1129-1130 [holding vague an aggravating factor which allowed the jury to impose death based upon a "significant" history of criminal conduct]; *Arnold* v. *State*, *supra*, 224 S.E.2d at 391-392 [holding vague an aggravating factor which allowed the jury to impose death based upon a "substantial" history of assaultive convictions].)

evidence "other" than those areas explicitly discussed earlier in the same instruction, i.e., mental or emotional disturbances. (*See Francis v. Franklin* (1985) 471 U.S. 307, 315-316).[69] This undue limitation of the jury's ability to consider all relevant mitigating evidence resulted in the imposition of death in violation of the Eighth and Fourteenth Amendments. (*Lockett v. Ohio, supra*, 438 U.S. at 604.)[70]

The third problem with factor (d) is that "extreme" requires the sort of subjective, vague, arbitrary, unreviewable determination by each juror as to what level of mental illness is adequate for consideration that has consistently

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[69] This interpretation is required by rules of interpretation, e.g., the provisions that: specific rules take precedence over general rules, both as a matter of legal interpretation and common understanding (*Rose v. California* (1942) 19 Cal.2d 713, 723-724; *People v. Breyer* (1934) 139 Cal. App. 547, 550); and *expressio unius est exclusio alterius*, the "[e]xpression of one thing is the exclusion of another." (*Black's Law Dictionary* (West Rev. 4th Ed. 1968) p. 692; *In Re Lance W.* (1985) 37 Cal.3d 873, 888.)

Here the jury was told that they ". . . shall consider, take into account, and be guided by the following factors, if applicable . . . ," followed at "(d)" by whether appellant was ". . . under the influence of extreme mental or emotional disturbance . . ." (24 RT 5377; 5 CT 1865.) The former clause defined the latter as the only form of mental disturbance to be considered, i.e., "extreme," and pre-empted any further use of evidence relating to the categorical field of mental or emotional disturbances.

[70] Alternatively, at a minimum there is therefore a legitimate basis for finding ambiguity concerning the factors actually considered by the jury. (*California v. Brown, supra*, 479 U.S. at 546 (O'Connor, J., conc.).)

been found constitutionally unacceptable. (*E.g.*, *Maynard* v. *Cartwright*, *supra*, 486 U.S. at 363-364 ["especially"];[71] *Shell* v. *Mississippi*, *supra,* 498 U.S. 1, 4 ["especially"]; *Moore* v. *Clarke* (8th Cir. 1990) 904 F.2d 1226, 1232-1233 ["exceptional"].)[72] The jury instructions on factor (d), alone and considered together with the penalty instructions as a whole, were prejudicially violative of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg* v. *Georgia*, *supra*, 428 U.S. at 192; *Godfrey* v. *Georgia*, *supra*, 446 U.S. at 428-429; *Stringer* v. *Black*, *supra*, 503 U.S. 222; *Zant* v. *Stephens*, *supra*, 462 U.S. at 865.)

F. The trial court's failure to read necessary instructions related to the burden of proof and reasonable doubt violated the Fifth, Sixth, Eighth and Fourteenth Amendments.[73]

The instructions contained constitutional errors in section 190.3's

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[71] Notably, the unconstitutionally vague "especially" is a synonym for "extremely" (*Random House Thesaurus, College Edition* (1984) p. 257), the adverbial form of "extreme." (*Webster's New World Dictionary, Second College Edition* (Simon & Schuster 1980), at 498.)

[72] This constitutional flaw is also found in factor (g)'s ". . . *extreme* duress or . . . *substantial* domination . . ." as read to appellant's jury. (24 RT 5377; 5 CT 1866.) The use of such modifiers in various instructions was unconstitutional, because it could have conveyed to a reasonable juror that only the most extreme versions of various potential mitigating factors which were in fact to be considered in mitigation.

[73] Appellant is aware that this Court has rejected similar contentions (*e.g., People* v. *Allen* (1986) 42 Cal.3d 1222, 1285), but respectfully requests that the issue be reconsidered.

factors and the related CALJIC instructions, which were unconstitutionally vague, failed to direct or limit the jury's discretion, encouraged the jury to act in a constitutionally arbitrary, capricious, unreviewable manner and skewed the sentencing process in favor of execution, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at 192; *Godfrey v. Georgia*, *supra*, 446 U.S. at 428-429; *Stringer v. Black* (1992) 503 U.S. 222; *Zant v. Stephens*, *supra*, 462 U.S. at 865; *see State v. Wood* (Utah 1982) 648 P.2d 71, 83.)

The instructions at issue related to the burden of proof, which must be judged in light of the Due Process Clause:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

(*Addington* v. *Texas* (1979) 441 U.S. 418, 423, quoting *In Re Winship* (1970) 397 U.S. 358, 370 (Harlan, J., conc.; internal quotation marks omitted)). Criminal cases merit the highest standard, the beyond a reasonable doubt test:

> . . . the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.
> . . . [¶] . . . In cases involving individual rights, whether criminal or civil, the standard of proof at a minimum reflects the value society places on individual liberty.

(*Santosky* v. *Kramer* (1982) 455 U.S. 745, 755, quoting *Addington* v. *Texas*,

supra, 441 U.S. at 415, 423; quotation marks and brackets omitted.)

The imposition of a death sentence represents the ultimate imposition on individual liberty. Therefore, the Fourteenth Amendment's general concepts of due process and equal protection, and the Eighth and Fourteenth Amendment's heightened level of due process and requirement of heightened reliability in capital cases (*Ford v. Wainwright*, *supra*, 477 U.S. at 414; *Beck* v. *Alabama*, *supra*, 447 U.S. at 637-638 and n. 13) mandate the use of the beyond a reasonable doubt standard in all decisions by capital case sentencers.

G. These errors individually and cumulatively prejudiced appellant and mandate reversal.

Section 190.3 (and its embodiment in CALJIC No. 8.84.1), the related instructions given, and the other instructional failures discussed herein violated the Fifth, Sixth, Eighth and Fourteenth Amendments, as described above. These errors are each prejudicial and mandate reversal individually and cumulatively.

As to all the unconstitutionally vague provisions of section 190.3 (manifested in large part in CALJIC No. 8.84.1), reversal is automatic, because the use of a vague aggravating factor in the weighing process created randomness and a bias in favor of execution. (*Stringer v. Black*, *supra*, 503 U.S. 222.)

As the Supreme Court has stated, "[t]he constitutionality of a State's

death penalty system turns on review of that system in context." (*Kansas v. Marsh, supra, 548* U.S. 163, 179, fn. 6. *See also Pulley v. Harris*, *supra*, 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].) Viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment.

XXIV. APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE TO HIS ACCOMPLICES AND AS TO BOTH HIS INDIVIDUAL CULPABILITY UNDER AN INTRA-CASE REVIEW, AND WHEN COMPARED TO OTHERS WHO HAVE COMMITTED SIMILAR OFFENSES.

The Eighth Amendment to the United States Constitution prohibits the imposition of "cruel and unusual punishment," including sentences which are grossly disproportionate to the offense as defined or committed, or to the individual culpability of the offender.

A. Facts in Support.

Assuming, *arguendo*, that appellant was guilty of the murder of Mrs.

Daher, he was not the sole person responsible for her death. The fact that appellant has been sentenced to death while the prosecutor did not even seek death against the other defendants demonstrates a lack of proportionality. Death is different, and an LWOP sentence does not compare to a sentence of death. Appellant's death sentence is grossly disproportionate to the punishment of coconspirators Lee Snyder and Maury O'Brien.

The United States Supreme Court has repeatedly stated that "death is different"; that is, the death penalty is qualitatively different than any other criminal punishment. As stated in *Woodson v. North Carolina, supra,* 428 U.S. 280, 305, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

Imposition of the death penalty against appellant fails to satisfy the constitutional requirement that a capital sentencing procedure rationally distinguish those who deserve the ultimate sanction from those who do not. (*Godfrey v. Georgia, supra,* 446 U.S. 420, 427.) The necessity of particularized objective appellate review is a necessary component of a valid death penalty statute:

> The provision for appellate review in the Georgia capital sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an

> aberrant jury . . . [T]he appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

(*Gregg v. Georgia, supra*, 428 U.S. at 206.)

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

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." (*People v. Brown* (1988) 46 Cal.3d 432, 447.) The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: its role is not merely to find facts, but also– and most important– to render an individualized, normative determination about the penalty appropriate for the particular defendant– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the

> *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina* (1976) 448 U.S. 280, 305). *See also, People v. Ashmus* (1991) 54 Cal.3d 932, 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard].)

Appellant's death sentence is disproportionate to the crimes committed and to the treatment of the other principals in the crime, Lee Snyder and Maury O'Brien. Appellant's sentence violates the Fifth, Sixth, Eighth and Fourteenth Amendments, and must be vacated. Reversal is mandated, as the judgment here was entirely "swayed by the error," *Kotteakos v. United States* (1946) 328 U.S. 750, 765, and the error had substantial and injurious effect or influence in determining the jury's verdict, resulting in actual prejudice. (*Brecht v. Abrahamson, supra*, 507 U.S. at 623, 637, quoting *Kotteakos, supra*, 328 U.S. at 776.)

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

578, 584-85.)

XXV. THE DEATH PENALTY VIOLATES EQUAL PROTECTION PRINCIPLES UNDER BOTH THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW.

Pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10 1984, Art 14 and 16, 23 I.L.M. 1027 (Entry into force for the United States November 20, 1994), *Inter-American Convention on Human Rights*, November 22 1969, Art 4 and 7, 1144 UNTS 123, 9 I.L.M. 673 (Entry into force July 18, 1978), *International Covenant of Civil and Political Rights*, December 19 1966, Art 2(3) and 6 -7, 999 UNTS 171, 6 I.L.M. 368 (Entry into force for the United States September 8, 1992), Second Optional Protocol to the *International Covenant on Civil and Political Rights*, December 15 1989, UN GAOR Supp. (No. 49) at 207, UN Doc. A/44/49 (1989) (Entry into force July 11, 1991), Article 18, *Vienna Convention on the Law of Treaties*, May 23 1969, Art 18, 1155 UNTS 331; 8 ILM 679 (Entry into force January 27, 1980), *Bush v. Gore* (2000) 531 U.S. 98, as well as statutory and jurisprudential authorities cited below, and all other applicable constitutional, statutory, treaty, customary international law, evolving international standards, and jurisprudential authority, the death penalty is unconstitutional and otherwise

unlawful.

"The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." (*Johnson v. Mississippi, supra,* 486 U.S. 578, 584 (citations omitted).) It is well established that when a defendant's life is at stake, a court must be "particularly sensitive to insure that every safeguard is observed." (*Gregg v. Georgia*, *supra,* 428 U.S. 153, 187.) This heightened standard of reliability is "a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright, supra,* 477 U.S. 399, 411.)

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

(*Woodson v. North Carolina*, *supra,* 428 U.S. 280, 305.) The United States Supreme Court has repeatedly emphasized the principle that because of the exceptional and irrevocable nature of the death penalty, "extraordinary measures" are required by the Eighth and Fourteenth Amendments to ensure the reliability of decisions regarding both guilt and punishment in a capital trial. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (O'Connor, J.,

concurring); *see also Beck v. Alabama, supra,* 447 U.S. 625, 637-38; *Lockett v. Ohio, supra,* 438 U.S. 586, 604; and *Gardner v. Florida , supra,* 430 U.S. 349, 357-58.)

Under the Equal Protection principle that the Supreme Court announced in *Bush v. Gore, supra,* 531 U.S. 98, current California law is unconstitutional because it fails to set forth uniform standards as to when a prosecutor should seek the death penalty in a potentially capital case. The Supreme Court's holding in that case is quite simple: When fundamental rights are involved, the Equal Protection Clause of the Fourteenth Amendment requires that there be "uniform" and "specific" standards to prevent the arbitrary and disparate treatment of similarly situated people. (*Bush*, 531 U.S. 106.) Because the Florida Supreme Court did not set forth such standards in its opinion ordering a recount, but instead announced only that ballots should be counted according to a vague "intent of the voter" standard, the recount would not respect the "equal dignity owed to each voter." (*Id.* at 104.)

The California death penalty system concerns a right even more fundamental than the right to vote, that is, the right to life. As was true in the Florida recount, in California the lack of statewide standards to guide prosecutors in determining which cases warrant seeking the death penalty inevitably leads to the disparate treatment of similarly situated people accused of potentially capital offenses. While the Supreme Court stated that its holding

in *Bush v. Gore* was limited to the facts of that case, the principles it announced are sound and must be subject to respect as precedent. Those principles require that the method of deciding which defendants may face the death penalty be subject to at least as much scrutiny as the process of counting votes. The need for equality and non-arbitrariness when the state seeks to deprive a citizen of his life outweighs any benefits of unbridled prosecutorial discretion.

In 2001, the Supreme Court of Canada placed the use of the death penalty in the United States for ordinary crimes into an international context:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan ... According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.) The

California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant raises this argument under the Eighth Amendment as well. (*See Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 (Brennan, J., dissenting.).)

A. International Law

Article VII of the *International Covenant of Civil and Political Rights* ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1992, and applies to the states under the Supremacy Clause of the federal Constitution. (U.S. CONST., art. VI, § 1, cl. 2.) Consequently, this Court is bound by the ICCPR.[74] The

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[74] The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (*See* 138 Cong. Rec. S4784, § III(1).) These qualifications do not preclude appellant's reliance on the treaty because, inter alia, (1) the treaty is self-

United States Court of Appeals for the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; *but see Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty on him constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. There is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (*See United States v. Duarte-Acero*, *supra*, 208 F.3d at 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 (Norris, J., dissenting).) Thus, appellant requests that the Court reconsider and, in the context of this case,

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executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and purpose of the treaty, which is to protect the individual's rights enumerated therein (*see* RIESENFELD & ABBOT, *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties* (1991) 68 Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (*see* 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty (*see* Quigley, *Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582).

find his death sentence violates international law. (*See Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

B. The Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason – as opposed to its use as a regular punishment for ordinary crimes – is particularly uniform in the nations of Western Europe. (*See, e.g., Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (Brennan, J., dissenting.); *Thompson v. Oklahoma* (1988), 487 U.S. 815, 830 (Stevens, J., plurality opinion)). Indeed, *all* nations of Western Europe – plus Canada, Australia, and New Zealand – have abolished the death penalty. (Amnesty International, "*The Death Penalty: List of Abolitionist and Retentionist Countries*" at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)[75]

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because our Founding Fathers looked to the nations of Western Europe for the "law of

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[75] Many other countries including almost all Eastern European, Central American, and South American nations also have abolished the death penalty either completely or for ordinary crimes. (*See* Amnesty International's "*List of Abolitionist and Retentionist Countries*," *supra,* at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)

nations" as models on which the laws of civilized nations were founded and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (*Miller v. United States* (1870) 78 U.S. 268, 315 (Field, J., dissenting), quoting 1 Kent's Commentaries 1; *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress's power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. (*Miller v. United States*, *supra*, 78 U.S. at 315-316, fn. 57 (Field, J., dissenting).)

"Cruel and unusual punishment" as defined in the Constitution is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) And if the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the

use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world – including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (*See Atkins v. Virginia*, *supra*, 536 U.S. at 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma, supra,* 487 U.S. 815, 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

Assuming *arguendo* that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (*See Hilton v. Guyot*, *supra*, 159 U.S. 113; *see also Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) Thus,

California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and Appellant's death sentence should be set aside.

XXVI. APPELLANT'S DEATH SENTENCE IS ARBITRARY UNDER INTERNATIONAL LAW

The right to life is the most fundamental of the human rights contained in the International Bill of Rights. (*See, e.g.*, *Universal Declaration on Human Rights*, GA Res. 217A (III), U.N. GAOR, 3d Sess. art. 3, U.N. Doc. A/810 (1948)("Everyone has the right to life, liberty, and security of the person"); *International Covenant on Civil and Political Rights*, Dec. 19, 1966, art. 6, 999 U.N.T.S. 171, 174-75 (*entered into force* Mar. 23, 1976)("Every human being has the inherent right to life").) A number of human rights instruments also provide that a state may not take a person's life "arbitrarily." (*See, e.g.*, ICCPR, art. 6; *American Convention on Human Rights*, art. 4, 1144 U.N.T.S. 123; *African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, 4 EHRR 417, 21 I.L.M. 58, art. 4.) In evaluating "arbitrary arrest and detention" (barred by Art. 9(1) of the ICCPR), the Human Rights Committee, relying on drafting history, concluded that "arbitrariness" is not to be equated with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of

predictability.

The Inter-American Court on Human Rights has addressed the meaning of "arbitrary" executions in an advisory opinion regarding the interpretation of the Vienna Convention on Consular Relations. (OC-16/99, Inter-Am. Ct. H.R. (October 1, 1999).) That Court observed that states may impose the death penalty only if they rigorously adhere to the due process rights set forth in the ICCPR. The court concluded that the execution of a foreign national after his consular notification rights have been violated would constitute an "arbitrary deprivation of life" in violation of international law. (*Id.* at 76, para. 137.) By analogy, the execution of an individual is prohibited as "arbitrary" if a state violates any of the principles contained in the ICCPR. As discussed *infra, supra,* appellant's conviction and sentence violate numerous provisions of the ICCPR.

Various delegates involved in the drafting of the ICCPR proposed the following definitions of the term "arbitrary" (1) fixed or done capriciously or at pleasure; (2) without adequate determining principle; (3) depending on the will alone; (4) tyrannical; (5) despotic; (6) without cause upon law; and (7) not governed by any fixed rule or standard. Schabas at 76. In *Van Alphen v. The Netherlands*, the Human Rights Committee held that "arbitrariness" encompasses notions of inappropriateness, injustice, and lack of predictability. ((No. 305/1988), U.N. Doc. A/45/40, Vol. II, p. 108, §§5.8. *See also* Daniel

Nsereko, *Arbitrary Deprivation of Life: Controls on Permissible Deprivations*, in *The Right to Life in International Law* 248 (Bertrand Ramcharan, ed., 1985)(deprivation of life is arbitrary if it is done in conflict with international human rights standards or international humanitarian law).)

Appellant's death sentence is arbitrary under any of these criteria. The California statutory system fails to truly narrow the scope of death eligible offenses. The result is that virtually any first-degree murder satisfies one or more aggravating circumstances. Considering the small percentage of first degree murders which result in death sentences, there is little correlation between the severity of the offenses and the sentence imposed. Consequently, there is no predictability as to when a sentence of death will be rendered. The lack of any proportionality review exacerbates these infirmities. The result is that under whatever standard applied, appellant's death sentence is arbitrary.

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

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836.

The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." (*People v. Brown* (1988) 46 Cal.3d 432, 447.) The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: its role is not merely to find facts, but also– and most important– to render an individualized, normative determination about the penalty appropriate for the particular defendant– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina*, *supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard].)

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

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

XXVII. APPELLANT'S RIGHT TO BE TRIED BEFORE AN IMPARTIAL TRIBUNAL WAS VIOLATED BY DEATH QUALIFICATION PROCEDURES

Article 14 of the ICCPR guarantees the right to a "fair and public hearing by a competent, independent, and impartial tribunal," and the right to be presumed innocent. ICCPR, art. 14(1); (2). In its Implementing Comments, the drafters stressed that Article 14 must be read as broadly as needed to root out the threat to fairness that arises in a particular proceeding. ICCPR, General Comment on Implementation, Para. 5. And finally, Article 26 specifically guarantees that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law." ICCPR, Art. 26. The Human Rights Committee has held that "[t]he right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception." (*Gonzales del Rio v. Peru*, No. 263/1987, H.R. Comm. para. 5.2 (1992).) Moreover, in *Richards v. Jamaica*, No. 535/1993, H.R. Comm. para. 7.2 (1997), the Committee found a violation of Article 14 in a capital case involving extensive pretrial publicity, and ruled that Jamaica could not lawfully carry out the execution. (*Id.*)

The Committee's decision in *Richards* is consistent with the notion that nations must rigorously observe a defendant's fair trial rights in capital cases, and may only impose the death penalty where these standards are observed. (William Schabas, *The Abolition of the Death Penalty in International Law* 108-09 (1997).)

Appellant's jury was also selected after being "death qualified" pursuant to *Hovey* and *Witherspoon*. This selection process unfairly skewed the jury pool to conviction-prone and death-prone jurors, and resulted in a biased tribunal.

As noted above, appellant's jury was subjected to inflammatory and irrelevant pre-trial publicity and evidence. This evidence served to arouse the passions of the jury and made them decide the case based on passion and not a careful weighing of the evidence. The misconduct of the prosecutor further exacerbated this error. The jury which rendered a verdict and sentence was not independent and impartial. Reversal is mandated.

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

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> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: its role is not merely to find facts, but also– and most important– to render an individualized, normative determination about the penalty appropriate for the particular defendant– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina, supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard].)

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

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

XXVIII. APPELLANT HAS A RIGHT TO LITIGATE VIOLATIONS OF HIS RIGHTS BEFORE INTERNATIONAL TRIBUNALS

The United Nations has established committees to monitor the enforcement of the ICCPR and the Torture Convention, but the United States does not accept their jurisdiction to hear individual complaints of treaty violations. As a result, individuals in the United States may not petition these committees to hear their individual cases. The United States failure to obey its treaty commitments violated the Constitution, which makes treaties the "Supreme Law of the Land." Customary international law also dictates that the United States accept jurisdiction from the body put in place to monitor and enforce the ICCPR.

There are two bodies that address human rights violations in the Americas: the Inter-American Commission of Human Rights, and the Inter-American Court on Human Rights. Individuals may file complaints with the Commission alleging violations of human rights set forth in the American Declaration of the Rights and Duties of Man and/or the American Convention on Human Rights. Individuals may also petition the Commission for

"precautionary measures," or injunctive relief. In death penalty cases with imminent execution dates, appellants may request that the Commission issue precautionary measures that call for a stay of execution. The Commission follows diplomatic protocol, and is not a court. When requesting a stay of execution, the Commission will send a letter to the U.S. Secretary of State describing the basis for its request. The State Department must then relay the request to the appropriate state authorities. Appellant has not yet filed any such complaints, out of respect for the jurisdiction of this Court. The Inter-American Commission also has the power to conduct on-site investigations and hearings.

The United States has not accepted the jurisdiction of the Inter-American Court on Human Rights to resolve "contentious cases," or cases in which an individual or country seeks redress for wrongdoing by the United States. As discussed above, this refusal violates both treaty law and customary international law.

The Inter-American Court has jurisdiction to issue advisory opinions "regarding the interpretation of the [American] Convention or other treaties concerning the protection of human rights in the American States." (*American Convention on Human Rights*, Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996).) On occasion, the United States will appear before the Court in such cases, thereby implicitly accepting the jurisdiction of the Court

to issue "advisory opinions." One such case was the opinion issued October 1, 1999, regarding the Vienna Convention on Consular Relations. "The mere fact that the Court has made a pronouncement in an advisory opinion rather than in a contentious case does not diminish the legitimacy or authoritative character of the legal principle enunciated by it." (Thomas Buergental, *International Human Rights in a Nutshell* 220 (2d ed. 1995).) The United States should not be free to accept jurisdiction only when it serves its interests.

International human rights have been a concern for the countries of the world for years. The United States likes to consider itself a leader in the human rights movement, and is, in fact, one of the most active participants in protecting human dignity and human rights. The *International Covenant on* nations, including the U.S., have ratified. This treaty bestows vital human rights to the citizens of the participating countries.

In order to satisfy its obligations under its treaty obligations as well as customary international law, the United States must allow appellant the opportunity to litigate his claims before the international tribunals charged with monitoring and enforcing his rights. Appellant has thus far not sought such relief, out of respect for the jurisdiction of this Court. Therefore, appellant requests that in the event that the Court denies all of his claims, the stay of execution remain in effect for a sufficient time to allow appellant to seek relief from the international tribunals discussed above. Alternatively,

appellant asks for a statement from the Court that it will not do so, to be issued forthwith, so that he can seek relief in those tribunals concurrently.

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

XXIX. THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE LIKEWISE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT APPELLANT'S CONVICTIONS AND PENALTY BE SET ASIDE.

Appellant was denied his right to a fair trial by an independent tribunal, and his right to the minimum guarantees for the defense under customary international law as informed by the *Universal Declaration of Human Right*, the *International Covenant on Civil and Political Rights* (ICCPR), and the *American Declaration of the Rights and Duties of Man* (American Declaration). Additionally, appellant suffered racial discrimination during his trial and penalty phase which also constitutes violations of customary international law as evidenced by the equal protection provisions of the above-

mentioned instruments and of the *International Convention Against All Forms of Racial Discrimination.*

While appellant's rights under state and federal constitutions have been violated, these violations are being tried under international law as well, as the first step in exhausting administrative remedies in order to bring appellant's claim in front of the Inter-American Commission on Human Rights. Should all appeals within the United States justice system fail, appellant intends to bring his claim to the Inter-American Commission on the basis that the violations appellant has suffered are violations of the American Declaration of the Rights and Duties of Man.

A. Background.

The two principal sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank with federal statutes.[76] Customary international law is equated with federal common law.[77] International law must be considered and

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[76] Article VI, § 1, clause 2 of the United States Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[77] *Restatement Third of the Foreign Relations Law of the United States* (1987), p. 145, 1058. See also *Eyde v. Robertson* (1884) 112 U.S. 580.

administered in United States courts whenever questions of right depending on it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Murray v. The Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 102, 118, 2 L.Ed. 208.) When a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of nations, if any possible construction remains . . ." (*Weinberger v. Rossi* (1982) 456 U.S. 25, 33.) The United States Constitution also authorizes Congress to "define and punish . . . offenses against the law of nations," thus recognizing the existence and force of international law. (U.S. Const. Article I, § 8.) Courts within the United States have responded to this mandate by looking to international legal obligations, both customary international law and conventional treaties, in interpreting domestic law. (*Trans World Airlines, Inc. v. Franklin Mint Corp.* (1984) 466 U.S. 243, 252.)[78]

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[78] *See also Oyama v. California* (1948) 332 U.S. 633, 68 S.Ct. 269, which involved a California Alien Land Law that prevented an alien ineligible for citizenship from obtaining land and created a presumption of intent to avoid escheat when such an alien pays for land and then transfers it to a U.S. citizen. The court held that the law violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion stating that the UN Charter was a federal law that outlawed racial discrimination, noted "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to

International human rights law has its historical underpinnings in the doctrine of humanitarian intervention, which was an exception to the general rule that international law governed regulations between nations and did not govern rights of individuals within those nations.[79] The humanitarian intervention doctrine recognized intervention by states into a nation committing brutal maltreatment of its nationals, and as such was the first expression of a limit on the freedoms of action states enjoyed with respect to their own nationals.[80]

This expression was furthered in 1920 by the *Covenant of the League of Nations*. The Covenant contained a provision relating to "fair and human conditions of labor for men, women and children." The League of Nations

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race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned." (*Id.* at 673; *see also Namba v. McCourt* (1949) 185 Or. 579, 204 P.2d 569, invalidating an Oregon Alien Land Law, "The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed . . . When our nation signed the Charter of the United Nations we thereby became bound to the following principles (Article 55, subd. c, and see Article 56): 'Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' (59 Stat. 1031, 1046.)" (*Id.* at 604.)

[79] *See generally*, Sohn and Buergenthal, *International Protection of Human Rights* (1973) p. 137.

[80] Buergenthal, *International Human Rights* (1988) p.3.

was also instrumental in developing an international system for the protection of minorities.[81] Additionally, early in the development of international law, countries recognized the obligation to treat foreign nationals in a manner that conformed with minimum standards of justice. As the law of responsibility for injury to aliens began to refer to violations of "fundamental human rights," what had been seen as the rights of a nation eventually began to reflect the individual human rights of nationals as well.[82]

It soon became an established principle of international law that a country, by committing a certain subject-matter to a treaty, internationalized that subject-matter, even if the subject-matter dealt with individual rights of nationals, such that each party could no longer assert that such subject-matter fell exclusively within domestic jurisdictions.[83]

B. Treaty Development.

The monstrous violations of human rights during World War II furthered the internationalization of human rights protections. The first modern international human rights provisions are seen in the United Nations

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81 *Id.*, pp. 7-9.

82 *Restatement Third of the Foreign Relations Law of the United States*, (1987) Note to Part VII, vol. 2 at 1058.

83 *Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco* (1923) P.C.I.J., Ser. B, No. 4.

Charter, which entered into force on October 24, 1945. The UN Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[84] By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

In 1948, the UN drafted and adopted both the *Universal Declaration of Human Rights*[85] and the *Convention on the Prevention and Punishment of the Crime of Genocide*.[86] The *Universal Declaration* is part of the *International*

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[84] Article 1(3) of the UN Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, *entered into force* October 24, 1945. In his closing speech to the San Francisco United Nations conference, President Truman emphasized that: "The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere --without regard to race, language or religion -- we cannot have permanent peace and security in the world." (Robertson, *Human Rights in Europe*, (1985) 22, n.22 (quoting President Truman).)

[85] *Universal Declaration of Human Rights*, *adopted* December 10, 1948, UN Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization (hereinafter Universal Declaration).

[86] *Convention on the Prevention and Punishment of the Crime of Genocide*, *adopted* December 9, 1948, 78 U.N.T.S. 277, *entered into force* January 12, 1951 (hereinafter Genocide Convention). Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. (*See generally*, Buergenthal, *International Human Rights*, *supra* at 48.)

Bill of Human Rights,[87] which also includes the *International Covenant on Civil and Political Rights*,[88] the Optional Protocol to the ICCPR,[89] the *International Covenant on Economic, Social and Cultural Rights*,[90] and the human rights provisions of the UN Charter. These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing human rights through international obligations. Additionally, the United Nations has sought to enforce the obligations of member states through the Commission on Human Rights, an organ of the United Nations consisting of forty-three member states, which reviews allegations of human rights violations.

The Organization of American States, which consists of thirty-two member states, was established to promote and protect human rights. The OAS Charter, a multilateral treaty which serves as the Constitution of the

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[87] *See generally* Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills,"* (1991) 40 Emory L.J. 731.

[88] *International Covenant on Civil and Political Rights*, *adopted* December 16, 1966, 999 U.N.T.S. 717, *entered into force* March 23, 1976 (hereinafter ICCPR).

[89] Optional Protocol to the *International Covenant on Civil and Political Rights*, *adopted* December 16, 1966, 999 U.N.T.S. 302, *entered into force* March 23, 1976.

[90] *International Covenant on Economic, Social and Cultural Rights*, *adopted* December 16, 1966, 993 U.N.T.S. 3, *entered into force* January 3, 1976.

OAS, entered into force in 1951. It was amended by the Protocol of Buenos Aires which came into effect in 1970. Article 5(j) of the OAS Charter provides, "[t]he American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex."[91] In 1948, the Ninth International Conference of American States proclaimed the *American Declaration of the Rights and Duties of Man*, a resolution adopted by the OAS, and thus, its member states. The *American Declaration* is today the normative instrument that embodies the authoritative interpretation of the fundamental rights of individuals in this hemisphere.[92]

The OAS also established the Inter-American Commission on Human Rights, a formal organ of the OAS which is charged with observing and protecting human rights in its member states. Article 1(2)(b) of the Commission Statute defines human rights as the rights set forth in the American Declaration, in relation to member States of the OAS who, like the United States, are not party to the American Convention on Human Rights. In practice, the OAS conducts country studies, on-site investigations, and has the power to receive and act on individual petitions which charge OAS member

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[91] OAS Charter, 119 U.N.T.S. 3, *entered into force* Dec. 13, 1951, *amended* 721 U.N.T.S. 324, *entered into force* Feb. 27, 1970.

[92] Buergenthal, *International Human Rights*, *supra*, at 127-131.

states with violations of any rights set out in the American Declaration.[93] Because the Inter-American Commission, which relies on the American Declaration, is recognized as an OAS Charter organ charged with protecting human rights, the necessary implication is to reinforce the normative effect of the American Declaration. [94]

The United States has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As an important player in the drafting of the UN Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[95] Though the 1950s was a period of isolationism, the United States renewed its commitment in the late 1960s and throughout the 1970s by becoming a signatory to numerous international human rights agreements and

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[93] Buergenthal, *International Human Rights*, *supra*. Appellant notes that this appeal is a step in exhausting his administrative remedies in order to bring his claim in front of the Inter-American Commission on the basis that the violations appellant has suffered are violations of the *American Declaration of the Rights and Duties of Man.*

[94] Buergenthal, *International Human Rights*, *supra.*

[95] Sohn and Buergenthal, *International Protection of Human Rights* (1973) at 506-9.

implementing human rights-specific foreign policy legislation.[96]

The United States has stepped up its commitment to international human rights by ratifying three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the *International Covenant on Civil and Political Rights*; President Bush deposited the instruments of ratification on June 8, 1992. *The International Convention Against All Forms of Racial Discrimination*,[97] and the *International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[98] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[99]

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[96] Buergenthal, *International Human Rights*, *supra*, p. 230.

[97] *International Convention Against All Forms of Racial Discrimination*, 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. More than 100 countries are parties to the Race Convention.

[98] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, *entered into force* on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong., 2d Sess., 136 *Cong. Rev.* 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 20, 1994.

[99] Buergenthal, *International Human Rights*, *supra*, p.4.

United States courts generally do not give retroactive ratification to a treaty; the specific provisions of a treaty are therefore enforceable from the date of ratification onward.[100] However, Article 18 of the Vienna Convention on the Laws of Treaties provides that a signatory to a treaty must refrain from acts which would defeat the object and purpose of the treaty until the signatory either makes its intention clear not to become a party, or ratifies the treaty.[101] Though the United States courts have not strictly applied Article 18, they have looked to signed, unratified treaties as evidence of customary international law.[102]

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[100] Newman and Weissbrodt, *International Human Rights: Law, Policy and Process*, (1990) p. 579.

[101] *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, T.S. No. 58 (1980), *entered into force* Jan. 27, 1980 (hereinafter Vienna Convention). The Vienna Convention was signed by the United States on April 24, 1970. Though it has not yet been ratified by the United States, the Department of State, in submitting the Convention to the Senate, stated that the convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec.Doc. L., 92d Cong., 1st Sess. (1971) at 1. Also, the Restatement Third of the Foreign Relations Law of the United States cites the Vienna Convention extensively.

[102] *See for example Inupiat Community of the Arctic Slope v. United States* (9th Cir. 1984) 746 F.2d 570 (citing the *International Covenant on Civil and Political Rights*); *Crow v. Gullet* (8th Cir. 1983) 706 F.2d 774 (citing the *International Covenant on Civil and Political Rights*); *Filartiga v. Pena-Irala* (2nd Cir. 1980) 630 F.2d 876 (citing the *International Covenant on Civil and Political Rights*).

See also Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma* (1992) 25 Geo.Wash.J.Int'l.L. & Econ. 71. Ms. Charme argues that Article 18 codified the existing interim (pre-ratification) obligations of parties who are

C. Customary International Law.

Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation.[103] The United States, through signing and ratifying the ICCPR, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. The substantive clauses of these treaties articulate customary international law and thus bind our government. When the United States has signed or ratified treaty, it cannot ignore this codification of customary international law and has no basis for refusing to extend the protection of human rights beyond the terms of the U.S. Constitution.[104]

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signatories to treaties: "Express provisions in treaties, judicial and arbitral decisions, diplomatic statements, and the conduct of the International Law Commission compel, in the aggregate, the conclusion that Article 18 constitutes the codification of the interim obligation. These instances indicate as well that this norm continues as a rule of customary international law. Thus all states, with the exception of those with a recognized persistent objection, are bound to respect the obligation of Article 18."

[103] *Restatement Third of the Foreign Relations Law of the United States*, § 102. This practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state, and empirical evidence of the extent to which the customary law rule is observed.

[104] Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills,"* (1991) 40 Emory L.J.731 at 737.

Customary international law is "part of our law." (*The Paquete Habana, supra*, at 700.) According to 22 U.S.C. § 2304(a)(1), "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."[105] Moreover, the International Court of Justice, the principal judicial organ of the United Nations, lists international custom as one of the sources of international law to apply when deciding disputes.[106] These sources confirm the validity of custom as a source of international law.

The provisions of the *Universal Declaration* are accepted by United States courts as customary international law. In *Filartiga v. Pena-Irala*, (2d Cir. 1980) 630 F.2d 876, the court held that the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights . . . ." (*Id.*) at 882. The United States, as a member state of the OAS, has international obligations under the OAS Charter and the American Declaration. The *American Declaration*, which has become incorporated by reference within the OAS Charter by the 1970 Protocol of Buenos Aires, contains a comprehensive list of recognized

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[105] 22 U.S.C. § 2304(a)(1).

[106] *Statute of the International Court of Justice*, art. 38, 1947 I.C.J. Acts & Docs 46. This statute is generally considered to be an authoritative list of the sources of international law.

human rights which includes the right to life, liberty and security of person, the right to equality before the law, and the right to due process of the law.[107] Although the *American Declaration* is not a treaty, the United States voted its approval of this normative instrument and as a member of the OAS, is bound to recognize its authority over human rights issues.[108]

The United States has acknowledged the force of international human rights law on other countries. Indeed, in 1991 and 1992 Congress passed legislation that would have ended China's Most Favored Nation trade status with the United States unless China improved its record on human rights. Though President Bush vetoed this legislation,[109] in May 1993 President Clinton tied renewal of China's MFN status to progress on specific human rights issues in compliance with the Universal Declaration.[110]

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[107] *American Declaration of the Rights and Duties of Man*, Resolution XXX, Ninth International Conference of American States, reprinted in the Inter-American Commission of Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser. L/V/II.50, doc. 6 (1980).

[108] Case 9647 (United States) Res. 3/87 of 27 March 1987 OEA/Ser. L/V/II.52, doc. 17, para. 48 (1987).

[109] See Michael Wines, *Bush, This Time in Election Year, Vetoes Trade Curbs Against China,* N.Y. Times, September 29, 1992, at A1.

[110] President Clinton's executive order of May 28, 1993 required the Secretary of State to recommend to the President by June 3, 1994 whether to extend China's MFN status for another year. The order imposed several conditions upon the extension including a showing by China of adherence to the *Universal Declaration of Human Rights*, an acceptable accounting of those imprisoned or detained for non-violent expression of political and

The *International Covenant on Civil and Political Rights*, to which the United States is bound, incorporates the protections of the *Universal Declaration*. Where other nations are criticized and sanctioned for consistent violations of internationally recognized human rights, the United States may not say: "Your government is bound by certain clauses of the Covenant though we in the United States are not bound."[111]

D. Due Process Violations.

The factual and legal issues presented herein demonstrate that appellant was denied his right to a fair and impartial trial in violation of customary international law as evidenced by Articles 6 and 14 of the *International*

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religious beliefs, humane treatment of prisoners including access to Chinese prisons by international humanitarian and human rights organizations, and promoting freedom of emigration, and compliance with the U.S. memorandum of understanding on prison labor. See Orentlicher and Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China* (1993) 14 Nw. J. Int'l L. & Bus. 66, 79. Though President Clinton decided on May 26, 1994 to sever human rights conditions from China's MFN status, it cannot be ignored that the principal practice of the United States for several years was to use MFN status to influence China's compliance with recognized international human rights. *See* Kent, *China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989-1994* (1995) 17 H. R. Quarterly, 1.

[111] Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures* (1993) 42 DePaul L. Rev. 1241, 1242. Newman discusses the United States' resistance to treatment of human rights treaties as U.S. law.

Covenant on Civil and Political Rights[112] as well as Articles 1 and 26 of the American Declaration.

The United States deposited its instruments of ratification of the ICCPR on June 8, 1992 with five reservations, five understandings, four declarations, and one proviso.[113] Article 19(c) of the *Vienna Convention on the Law of Treaties* declares that a party to a treaty may not formulate a reservation that is "incompatible with the object and purpose of the treaty."[114] The *Restatement Third of the Foreign Relations Law of the United States* echoes this provision.[115]

The ICCPR imposes an immediate obligation to "respect and ensure" the rights it proclaims and to take whatever other measures are necessary to give effect to those rights. United States courts, however, will generally

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[112] The substantive provisions of the Universal Declaration have been incorporated into the ICCPR, so these are incorporated by reference in the discussion above. Moreover, as was noted above, the Universal Declaration is accepted as customary international law.

[113] Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights* (1992) S.Exec.Rep. No.23, 102d Cong., 2d Sess.

[114] Vienna Convention, *supra*, 1155 U.N.T.S. 331, *entered into force* Jan. 27, 1980.

[115] *Restatement Third of the Foreign Relations Law of the United States*, (1987) § 313 cmt. b. With respect to reservations, the Restatement lists "the requirement . . . that a reservation must be compatible with the object and purpose of the agreement."

enforce treaties only if they are self-executing or have been implemented by legislation.[116] The United States declared that the articles of the ICCPR are not self-executing.[117] The Bush Administration, in explanation of proposed reservations, understandings, and declarations to the ICCPR, stated: "For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated."[118]

But under the Constitution, a treaty "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. (*Asakura v.*

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[116] Newman and Weissbrodt, *International Human Rights: Law, Policy and Process*, (1990) p. 579. *See also Sei Fujii v. California* (1952) 38 Cal.2d 718, 242 P.2d 617, where the California Supreme Court held that Articles 55(c) and 56 of the UN Charter are not self-executing.

[117] Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights* (1992) S.Exec.Rep. No.23, 102d Cong., 2d Sess.

[118] Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights* (1992) S.Exec.Rep. No.23, 102d Cong., 2d Sess. at 19.

Seattle (1924) 265 U.S. 332, 341, 68 L.Ed. 1041, 44 S.Ct. 515.)[119] Moreover, treaties designed to protect individual rights should be construed as self-executing. (*United States v. Noriega* (1992) 808 F.Supp. 791.) In *Noriega*, the court noted, "It is inconsistent with both the language of the [Geneva III] treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs -- not to create some amorphous, unenforceable code of honor among the signatory nations. 'It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests . . . . Even if Geneva III is not self-executing, the United States is still obligated to honor its international commitment.'" (*Id.* at 798.)

Though reservations by the United States provide that the treaties may not be self-executing, the ICCPR is still a forceful source of customary international law and as such is binding upon the United States.

Article 14 provides, "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him . . .

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[119] Some legal scholars argue that the distinction between self-executing and non self-executing treaties is patently inconsistent with express language in Article 6, § 2 of the United States Constitution that all treaties shall be the supreme law of the land. (*See generally* Jordan L. Paust, *Self-Executing Treaties* (1988) 82 Am. J. Int'l L. 760.)

everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article 6 declares that "[n]o one shall be arbitrarily deprived of his life . . . [The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court."[120] Likewise, these protections are found in the American Declaration: Article 1 protects the right to life, liberty and security of person; Article 2 guarantees equality before the law; and Article 26 protects the right of due process of law.[121]

In cases where the UN Human Rights Committee has found that a State party violated Article 14 of the ICCPR, in that a defendant had been denied a fair trial and appeal, the Committee has held that the imposition of the sentence of death also was a violation of Article 6 of the ICCPR.[122] The Committee further observed, "the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and

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[120] *International Covenant on Civil and Political Rights*, *supra*, 999 U.N.T.S. 717.

[121] *American Declaration of the Rights and Duties of Man, supra.*

[122] *Report of the Human Rights Committee*, p. 72, 49 UN GAOR Supp. (No. 40) p. 72, UN Doc. A/49/40 (1994).

the right to review of conviction and sentence by a higher tribunal.'"[123]

Further, Article 4(2) of the ICCPR makes clear that no derogation from Article 6 ("no one shall be arbitrarily deprived of his life") is allowed.[124] An Advisory Opinion issued by the Inter-American Court on Human Rights concerning the Guatemalan death penalty reservation to the *American Convention on Human Rights* noted "[i]t would follow therefore that a reservation which was designed to enable the State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it."[125] Implicit in the court's opinion linking non-derogability and incompatibility is the view that the compatibility requirement has greater importance in human rights treaties, where reciprocity provides no protection for the individual against a reserving state.[126]

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[123] *Id.*

[124] *International Covenant on Civil and Political Rights*, *supra*, 999 U.N.T.S. 717.

[125] Restrictions to the Death Penalty (Arts. 4(2) and 4(4), *American Convention on Human Rights*), Advisory Opinion No. OC-3/83 of September 8, 1983, Inter-Amer.Ct.H.R., ser. A: Judgments and Opinions, No. 3 (1983), reprinted in 23 I.L.M. 320, 341 (1984).

[126] Edward F. Sherman, Jr. *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation* (1994) 29 Tex. Int'l L.J. 69. In a separate opinion concerning two Barbadian death penalty reservations, the court further noted that the object and purpose of

Appellant's rights under customary international law, as codified in the above-mentioned provisions of the ICCPR and the *American Declaration*, were violated throughout his trial and sentencing phase.

E. Conclusion.

The due process violations that appellant suffered throughout his trial and sentencing phase are prohibited by customary international law. The United States is bound by customary international law, as informed by such instruments as the ICCPR and the Race Convention. The purpose of these treaties is to bind nations to an international commitment to further protections of human rights. The United States must honor its role in the international community by recognizing the human rights standards in our own country to which we hold other countries accountable.

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modern human rights treaties is the "protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all individuals within their jurisdiction."Advisory Opinion No. OC-2/82 of September 24, 1982, Inter-Am.Ct.H.R., ser. A: Judgments and Opinions, No.2, para.29 (1982), reprinted in 22 I.L.M. 37, 47 (1983). These opinions are an indicator of emerging general principles of treaty law, and strengthen the argument that the United States death penalty reservation is impermissible because it is incompatible.

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

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

XXX. THE UNCONSTITUTIONAL USE OF LETHAL INJECTION RENDERS APPELLANT'S DEATH SENTENCE ILLEGAL

Appellant's sentence of death is illegal and unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution, because execution by lethal injection, the method by which the State of California plans to execute him, violates the prohibition of cruel and unusual punishment.

The State of California plans to execute appellant by means of lethal injection. In 1992, California added as an alternative means of execution

"intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections." (Penal Code §3604.) As amended in 1992, Penal Code §3604 provides that "[p]ersons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection." As amended, §3604 further provides that "if either manner of execution . . . is held invalid, the punishment of death shall be imposed by the alternate means . . . ."

In 1996, the California Legislature amended Penal Code §3604 to provide that "if a person under sentence of death does not choose either lethal gas or lethal injection . . ., the penalty of death shall be imposed by lethal injection."

On October 4, 1994, the United States District Court for the Northern District of California ruled in *Fierro v. Gomez* (N.D. Cal. 1994) 865 F.Supp. 1387 that the use of lethal gas is cruel and unusual punishment and thus violates the constitution. In 1996, the Ninth Circuit affirmed the district court's conclusions in *Fierro*, concluding that "execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments." *(Fierro v. Gomez* (9th Cir. 1996) 77 F.3d 301, 309.) The Ninth Circuit also permanently enjoined the state of California from administering lethal gas. (*Ibid.*) Accordingly, lethal injection

is the only method of execution currently authorized in California.

In 1996, the Ninth Circuit concluded, in *Bonin v. Calderon* (9th Cir. 1996) 77 F.3d 1155, 1163, that because the use of lethal gas has been held invalid by the Ninth Circuit, a California prisoner sentenced to death has no state-created constitutionally protected liberty interest to choose his method of execution under Penal Code §3604(d). Under operation of California law, the Ninth Circuit's invalidation of the use of lethal gas as a means of executions leaves lethal injection as the sole means of execution to be implemented by the state. (*Id.*; see Penal Code §3604(d).) Because Bonin did not argue that execution by lethal injection is unconstitutional, the Ninth Circuit concluded, with no discussion nor analysis, that the method of execution to be implemented in his case was applied constitutionally. (*Id.)*

The lethal injection method of execution is authorized to be used in thirty-one states in addition to California. Between 1976 and 1996, there were 179 executions by lethal injection.[127] Of the 56 people executed in the United States in 1995, only seven died by other means. Lethal injection executions have been carried out in at least the following states: Arizona, Arkansas, Delaware, Idaho, Illinois, Louisiana, Maryland, Missouri, Montana, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Utah,

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[127] This figure includes all lethal injection executions in the United States through January 22, 1996.

Virginia and Wyoming.

Consequently, there is a growing body of evidence, both scientific and anecdotal, concerning these methods of execution, the effects of lethal injection on the inmates who are executed by this procedure, and the many instances in which the procedures fail, causing botched, painful, prolonged and torturous deaths for these condemned persons.

Both scientific evidence and eyewitness accounts support the proposition that death by lethal injection can be an extraordinarily painful death, and that it is therefore in violation of the prohibition against cruel and unusual punishment set forth in the Eighth Amendment of the United States Constitution. The Eighth Amendment is applicable to the states through the Fourteenth Amendment. (*Robinson v. California* (1962) 370 U.S. 660.)

The drugs authorized to be used in California's lethal injection procedure are extremely volatile and can cause complications even when administered correctly. The procedure exposes the inmate to substantial and grave risks of prolonged and extreme infliction of pain if these drugs are not administered correctly.

Medical doctors are prohibited from participating in executions on ethical grounds. The Code of Medical Ethics was set forth in the Hippocratic Oath in the fifth century B.C. and requires the preservation of life and the

cessation of pain above all other values.[128] Medical doctors may not help the state kill an inmate.[129] The American Nurses Association also forbids members from participating in executions.

The first lethal injection execution in the United States took place in 1982 and was plagued by mishaps from the outset. Because of several botched executions, the New Jersey Department of Corrections contacted an expert in execution machinery and asked him to invent a machine to minimize the risk of human error. Fred Leuchter's lethal injection machine, designed to eliminate "execution glitches," was first used on January 6, 1989 for an execution in Missouri.

The dosages to be administered are not specified by statute, but rather "by standards established under the direction of the Department of Corrections." (Penal Code §3604(a).) The three drugs commonly used in lethal injections are Sodium Pentothal, Pancuronium Bromide and Potassium

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[128] The Oath provides: "I will follow the method of treatment which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to anyone if asked, nor suggest any such counsel."

[129] During the American Medical Association's annual meeting in July 1980, their House of Delegates adopted the following resolution: "A physician, as a member of a profession dedicated to the preservation of life when there is hope of doing so, should not be a participant in a legally authorized execution. [However, a] physician may make a determination or certification of death as currently provided by law in any situation."

Chloride.

The Sodium Pentothal renders the inmate unconscious. The Pancuronium Bromide then paralyzes the chest wall muscles and diaphragm so that the subject can no longer breathe. Finally, the Potassium Chloride causes a cardiac arrhythmia which results in ineffective pumping of blood by the heart and, ultimately, a cardiac arrest.

The procedures by which the State of California plans to inject chemicals into the body are so flawed that the inmate may not be executed humanely, so as to avoid cruel and unusual punishment.

Death by lethal injection involves the selection of chemical dosages and combinations of drugs by untrained or improperly skilled persons. Consequently, non-physicians are making medication dosing decisions and prescriptions that must otherwise be made by physicians under the law.

Since medical doctors may not participate or aid in the execution of a human being on ethical grounds, untrained or improperly skilled, non-medical personnel are making what would ordinarily be informed medical decisions concerning dosages and combinations of drugs to achieve the desired result. The effects of the lethal injection chemicals on the human body at various dosages are medical and scientific matters, and properly the subject of medical decision-making. Moreover, the efficacy of the drugs will vary on different individuals depending on many factors and variables, which would ordinarily

be monitored by medical personnel.

There is a risk that the dosages selected by untrained persons may be inadequate for the purposes for which they were selected, may result in unanticipated or inappropriate effects in a particular individual for medical or other reasons, and may inflict unnecessarily extreme pain and suffering.

There is a risk that the order and timing of the administration of the chemicals would greatly increase the risk of unnecessarily severe physical pain and/or mental suffering.

The desired effects of the chemical agents to be used for execution by lethal injection in California may be altered by inappropriate selection, storage, and handling of the chemical agents.

Improperly selected, stored and/or handled chemicals may lose potency, and thus fail to achieve the intended results or inflict unnecessary, extreme pain and suffering in the process.

Improperly selected, stored, and/or handled chemicals may be or become contaminated, altering the desired effects and resulting in the infliction of unnecessary, extreme pain and suffering. California provides inadequate controls to ensure that the chemical agents selected to achieve execution by lethal injection are properly selected, stored and handled.

Since medical doctors cannot participate in the execution process, non-medical personnel will necessarily be relied upon to carry out the physical

procedures required to execute appellant.

These non-medical technicians may lack the training, skill and experience to effectively, efficiently and properly prepare the apparatus necessary to execute appellant, prepare appellant physically for execution, ensure that he is restrained in a manner that will not impede the flow of chemicals and result in a prolonged and painful death, insert the intravenous catheter properly in a healthy vein so that chemicals enter the blood stream and not infiltrate surrounding tissues, and administer the intravenous drip properly so that unconsciousness and death follow quickly and painlessly.

Moreover, inadequately skilled and trained personnel are unequipped to deal effectively with any problems that arise during the procedure. They may fail to recognize problems concerning the administration of the lethal injection. Once problems are recognized, these untrained personnel may not know how to correct the problems or mistakes. Their lack of adequate skill and training may unnecessarily prolong the pain and suffering inherent in an execution that goes awry.

The use of unskilled and improperly trained technicians to conduct execution by lethal injection and the lack of adequate procedures to ensure that such executions are humanely carried out have resulted in the unwarranted infliction of extreme pain, resulting in a cruel, unusual, and inhumane death for the inmate in numerous cases across the United States in recent years.

In 1982, Charles Brooks of Texas was the first person executed by lethal injection in the United States. The Warden of the Texas prison reportedly mixed all three chemicals into a single syringe. The chemicals had precipitated; thus, the Warden's initial attempt to inject the deadly mixture into Brooks failed.

On March 13, 1985, Steven Peter Morin laid on a gurney for forty-five minutes while his Texas executioners repeatedly pricked his arms and legs with a needle in search of a vein suitable for the lethal injection. (Michael Graczyk, *Convicted Killer in Texas Waits 45 Minutes Before Injection is Given,* Gainesville Sun, March 14, 1985; *Murderer of Three Women is Executed in Texas,* New York Times, March 14, 1985.) Problems with the execution prompted Texas officials to review their lethal injection procedures for inmates with a history of drug abuse. (*Id.*)

Over a year later, on August 20, 1986, Texas officials experienced such difficulty with the procedure that Randy Wools had to help his executioners find a good vein for the execution. (*Texas Executes Murderer,* Las Vegas Sun, August 20, 1986.)

Similarly, on June 24, 1987, in Texas, Elliot Johnson laid awake and fully conscious for thirty-five minutes while Texas executioners searched for a place to insert the needle.

On December 13, 1988, in Texas, Raymond Landry was pronounced

dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the execution, the syringe came out of Landry's vein, spraying the deadly chemicals across the room towards witnesses. The execution team had to reinsert the catheter into the vein. The curtain was pulled for 14 minutes so witnesses could not observe the intermission. (Michael Graczyk, *Landry Executed for '82 Robbery Slaying,* Dallas Morning News, December 13, 1988; and Michael Graczyk, *Drawn-Out Execution Dismays Texas Inmates,* Dallas Morning News, December 15, 1988.)

On May 24, 1989, in Huntsville, Texas, Stephen McCoy had such a violent physical reaction to the drugs (heaving chest, gasping, choking, etc.) that one of the witnesses fainted, crashing into and knocking over another witness. Houston attorney Karen Zellars, who represented McCoy and witnessed the execution, thought the fainting would catalyze a chain reaction among the witnesses. The Texas Attorney General admitted the inmate "seemed to have a somewhat stronger reaction," adding, "The drugs might have been administered in a heavier dose or more rapidly." (*Man Put to Death for Texas Murder,* The New York Times, May 25, 1989; *Witnesses to an Execution,* Houston Chronicle, May 27, 1989.)

On January 24, 1992, in Varner, Arkansas, it took the medical staff more than 50 minutes to find a suitable vein in Rickey Ray Rector's arm.

Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the ordeal Rector, who suffered serious brain damage from a lobotomy, tried to help the medical personnel find a patent vein. The administrator of the State's Department of Corrections Medical Programs said, paraphrased by a newspaper reporter, "the moans came as a team of two medical people, increased to five, worked on both sides of Rector's body to find a suitable vein." The administrator said that may have contributed to his occasional outbursts. (Joe Farmer, *Rector, 40, Executed for Officer's Slaying,* Arkansas Democrat-Gazette, January 25, 1995; Sonja Clinesmith, *Moans Pierced Silence During Wait,* Arkansas Democrat-Gazette, January 26, 1992.)

On March 10, 1992, in McAlester, Oklahoma, Robyn Lee Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered, the muscles in his jaw, neck and abdomen began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag. Death came eleven minutes after the drugs were administered. *Tulsa World* reporter, Wayne Greene said, "The death looked scary and ugly." *(Witnesses Comment on Parks' Execution,* Durant Democrat, March 10, 1992; *Dying Parks Gasped for Life,* The Daily Oklahoman, March 11, 1992; *Another U.S. Execution Amid Criticism Abroad,* New York Times, April 24, 1992.)

On April 23, 1992, Billy Wayne White died 47 minutes after his executioners strapped him to the gurney in Huntsville, Texas. White tried to help prison officials as they struggled to find a vein suitable to inject the killing drugs. (*Man Executed in '76 Slaying After Last Appeals Rejected*, Austin (Tex) American-Statesman, April 23, 1992; *Killer Executed by Lethal Injection*, Gainesville Sun, April 24, 1992; Michael Graczyk, *Veins Delay Execution 40 Minutes*, Austin American Statesman, April 24, 1992; Kathy Fair, *White Was Helpful at Execution*, Houston Chronicle, April 24, 1992.)

On May 7, 1992, in Texas, Justin Lee May had a violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the *Item* in Huntsville, Texas, May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze...." Associated Press reporter Michael Graczyk wrote, "He went into a coughing spasm, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back, if he had not been belted down. After he stopped breathing, his eyes and mouth remained open." (Michael Graczyk, *Convicted Texas Killer Receives Lethal Injection*, (Plainview, Texas) Herald, May 7, 1992; *Convicted Killer May Dies*, (Huntsville, Texas) Item, May 7, 1992; *Convicted Killer Dies Gasping*, San Antonio Light, May 8, 1992; Michael Graczyk *Convicted Killer Gets Lethal Injection*, (Denison, Texas) Herald, May 8, 1992.)

On May 10, 1994, in Illinois, after the execution had begun, one of the three lethal drugs used to execute John Wayne Gacy clogged the tube, preventing the flow of the drugs. Blinds were drawn to block the scene, thereby obstructing the witnesses' view. The clogged tube was replaced with a new one, the blinds were reopened, and the execution resumed. Anesthesiologists blamed the problem on the inexperience of prison officials who conducted the execution. Doctors stated that the proper procedure taught in "IV 101" would have prevented this error. (Rob Karwath and Susan Kuczka *Gacy Execution Delay Blamed on Clogged T.B. Tube*, Chicago Tribune, Page 1, May 11, 1994.)

On May 3, 1995, Emmitt Foster was executed by the State of Missouri. Foster was not pronounced dead until 29 minutes after the executioners began the flow of lethal chemicals into his arm. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit the witnesses' view. Executioners finally reopened the blinds three minutes after Foster was pronounced dead. According to the coroner who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney. The coroner believed that the tightness stopped the flow of chemicals into the veins. Several minutes after the strap was loosened, death was pronounced. The coroner entered the death chamber 20 minutes after the execution began, noticed the problem, and told the officials to loosen

the strap so that the execution could proceed.

The Constitution prohibits deliberate indifference to the known risks associated with a particular method of execution. (*Cf. Estelle v. Gamble* (1976) 429 U.S. 97, 106.) As illustrated in the above accounts and will be demonstrated in detail at an evidentiary hearing, following discovery, investigation, and other opportunities for full development of the factual basis for this claim, there are a number of known risks associated with the lethal injection method of execution, and the State of California has failed to take adequate measures to ensure against those risks.

The Eighth Amendment safeguards nothing less than the dignity of man, and prohibits methods of execution that involve the unnecessary and wanton infliction of pain. Under *Trop v. Dulles* (1958) 356 U.S. 86, 100, the Eighth Amendment stands to safeguard "nothing less than the dignity of man."

To comply with constitutional requirements, the State must minimize the risk of unnecessary pain and suffering by taking all feasible measures to reduce the risk of error associated with the administration of capital punishment. (*Glass v. Louisiana* (1985) 471 U.S. 1080, 1086; *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 709-711 (Reinhart, J., dissenting); see also, *Zant v. Stephens* (1985) 462 U.S. 862, 884-85 [state must minimize risks of mistakes in administering capital punishment]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (O'Connor, J., concurring) [same].)

It is impossible to develop a method of execution by lethal injection that will work flawlessly in all persons given the various individual factors which have to be accessed in each case. Appellant should not be subjected to experimentation by the State in its attempt to figure out how best to kill a human being.

California's use of lethal injection to execute prisoners sentenced to death unnecessarily risks extreme pain and inhumane suffering. Such use constitutes cruel and unusual punishment, offends contemporary standards of human decency, and violates the Eighth Amendment of the United States Constitution.

The Eighth Amendment prohibits methods of execution that involve the "unnecessary and wanton infliction of pain." (*Gregg v. Georgia*, *supra*, at 173.) Appellant's sentence must be reversed.

XXXI. THE CUMULATIVE EFFECT OF THE ERRORS RENDERS THE VERDICT AND SENTENCE UNCONSTITUTIONAL

The Sixth Amendment guarantees criminal defendants the right to a fair trial. The cumulative effect of multiple constitutional errors can deprive defendants of this right. "Prejudice may result from the cumulative impact of multiple deficiencies." (*Ewing v. Williams* (9th Cir. 1979) 596 F.2d 391, 395(citing *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc),

cert. denied, 440 US 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979).)

Capital cases in particular require a careful examination of the cumulative prejudice created by multiple errors. (*Lockett v. Ohio, supra,* 438 US 586.) In *Johnson v. Mississippi, supra,* 486 US 578, the Supreme Court stated:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment, in any capital case.' Although we have acknowledged that there can be no perfect procedure for deciding which cases governmental authority should be used to impose death, we have also made it clear that such decisions cannot be predicated on a mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'

Each of the errors need not be individually of a degree that demands reversal. "Multiple errors, even if harmless individually, may entitle a appellant to habeas relief if their cumulative effect prejudiced the defendant." (*Ceja v. Stewart* (9th Cir. 1996) 97 F.3d 1246, 1254; *see also Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Tucker* (9th Cir. 1983) 716 F.2d 576, 595; *Kelly v. Stone* (9th Cir. 1975) 514 F.2d 18, 19.)

The death judgment rendered here must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases. (*See People* v. *Hayes* (1990) 52 Cal.3d 577, 644 [court weighs prejudice of guilt phase instructional error against prejudice in penalty phase].)

The jury was instructed at the penalty phase to consider all of the evidence which has been received during any part of the trial. However, because the issue resolved at the guilt phase is fundamentally different from the question resolved at the penalty phase, the possibility exists that an error might be harmless as to the guilt determination, but still prejudicial to the penalty determination. (*Smith* v. *Zant* (11th Cir. 1988) 855 F.2d 712, 721-722 [admission of confession harmless as to guilt but prejudicial as to sentence].) Appellant has demonstrated numerous guilt phase errors, including errors in charging, admission of evidence, and numerous instructional errors among others. The significance these errors is magnified by the incomplete appellate record.

Penalty phase errors are manifestly prejudicial to the penalty phase determination. (*See Woods* v. *Dugger* (11th Cir. 1991) 923 F.2d 1454; *Lesko* v. *Lehman* (3d Cir. 1991) 925 F.2d 1527.) Appellant has shown numerous penalty phase errors.

Even if this Court were to hold that no one of the guilt or penalty errors, by itself, was prejudicial, the cumulative effect of these errors sufficiently undermines the confidence in the integrity of the penalty phase proceedings so that reversal is required. Here, each initial guilt phase error formed a foundation on which each subsequent penalty phase error was cumulatively laid, giving rise to a structure of error housing the death judgment.

Reversal of the death sentence is mandated, because the state will fail in any effort to show that all the foregoing constitutional violations had no effect whatever on the jury. (*See Caldwell* v. *Mississippi* (1985) 472 U.S. 320, 341; *Hitchcock* v. *Dugger* (1987) 481 U.S. 393, 399; *Penry* v. *Lynaugh* (1989) 492 U.S. 302, 328.) Moreover, in this context, any violation of state law would also offend the Fifth, Eighth and Fourteenth Amendment rights to liberty, due process and heightened capital case due process, given that such state law error occurred in this capital case and was inextricably interwound in the process which resulted in appellant being condemned. (*See Hicks* v. *Oklahoma*, *supra*, 447 U.S. at 346.) Therefore, the foregoing *Caldwell* standard must be applied to evaluate all errors against the penalty phase judgment,[130] and reversal of the death judgment is mandated.

The instant appeal has detailed numerous constitutional errors. Even if the individual errors were not sufficient on their own, taken cumulatively they denied appellant a fair trial. The foregoing created a web of prejudice. Each violation of defendant's rights caused the creation of another constitutional error, until the trial was covered with a blanket of prejudice,

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[130] The failure to make such an application would violate the Eighth and Fourteenth Amendment rights to due process and heightened capital case due process. (*Lockett* v. *Ohio*, *supra*, 438 U.S. at 604; *Gardner* v. *Florida*, *supra*, 430 U.S. at 357-362; *Chambers* v. *Mississippi* (1973) 410 U.S. 284, 294; *Beck* v. *Alabama*, *supra*, 447 U.S. at 637-638.)

smothering any possibility of a fair trial. The foregoing errors combined to form the strong, but unsupported by lawful evidence, impression that defendant was an evil, sadistic killer who would be a threat to society as long as he lived. As the penalty decision was a close one, any error or misconduct that prejudiced defendant had a crucial impact on his right to a fair and reliable sentence.

None of these numerous trial errors may be considered in a vacuum. The cumulative effect of the prejudice deprived defendant of a fair trial on the issue of guilt and special circumstances and denied him an individualized and reliable determination of death as the proper penalty. The resulting conviction and death verdict are therefore flawed and must be overturned.

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

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the

penalty phase of a capital trial." (*People v. Brown, supra,* 46 Cal.3d 432, 447.) The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury ... is charged with a responsibility different in kind from ... guilt phase decisions: its role is not merely to find facts, but also– and most important– to render an individualized, normative determination about the penalty appropriate for the particular defendant– i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'.

(*Id.*, at 448 (*quoting Woodsen v. North Carolina, supra*, 448 U.S. at 305). *See also, People v. Ashmus, supra*, 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard]).

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

CONCLUSION

For all the foregoing reasons, the judgment and sentence of death must be reversed. In the event that the judgment is otherwise affirmed, the cause must be remanded for a new hearing on the automatic motion to modify the judgment of death.

DATED: September 11, 2012.

Respectfully submitted,

A. RICHARD ELLIS
ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I am the attorney appointed by this Court to represent Appellant, Joseph Perez, Jr, in this automatic appeal. I conducted a word count of this brief using my office's computer software (WordPerfect X5). On the basis of that computer-generated word count, I certify that this brief, excluding tables, certificates and the appendix, is 95,049 words in length.

Dated: September 11, 2012.

A. Richard Ellis
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

I, A. RICHARD ELLIS, hereby declare that I am a citizen of the United States, over the age of eighteen, an active member of the State Bar of California, and not a party to the within action. My business address is 75 Magee Ave, Mill Valley, California 94941.

On September 11, 2012 I served the within

APPELLANT'S OPENING BRIEF

on the interested parties in said action listed below, by placing a true and correct copy of the same in a sealed envelope, with 1st class postage affixed thereto, and placing the same in the United States Mail, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Mill Valley, California, on September 11, 2012.

A. RICHARD ELLIS