SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* v. ANGELO MICHAEL MELENDEZ, *Defendant and Appellant.*	S118384 San Joaquin County Superior Court No. SP081070B

APPELLANT'S OPENING BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, San Joaquin County

(HONORABLE TERRENCE VAN OSS, JUDGE, of the Superior Court)

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DEATH PENALTY

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STATEMENT OF APPEALABILITY

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

STATEMENT OF THE CASE

The San Joaquin County District Attorney filed an information against appellant, Angelo Michael Melendez, and his codefendant, LaTroy Ashanti Taylor, on December 21, 2001. Count 1 alleged that Melendez and Taylor committed the murder (§ 187) of Koi Wilson on or about December 13, 2000. It was further alleged as to both defendants that they committed the murder while engaged in the commission of a robbery within the meaning of section 190.2, subdivision (A)(17). The information further alleged as to Taylor, that he was armed with a firearm, a handgun, within the meaning of section 12022, subdivision (a)(1). It was alleged as to Melendez that he intentionally and personally discharged a firearm, a handgun, and proximately caused great bodily injury, as defined in section 12022.7, to Wilson, within the meaning of sections 12022.53, subdivision (d) and 12022.53, subdivision (c), 12022.53, subdivision (b) and/or 12022.53, subdivision (e). In addition, it was alleged as to Melendez, that in the commission of this offense he personally used a firearm within the meaning of section 1203.06, subdivision (a)(1) and 12022.5, subdivision (a)(1), rendering the charge a serious felony pursuant to section 1192.7, subdivision (c)(8). (CT 183-185.)[2]

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

[2] "CT" refers to the clerk's transcript; "Supp. CT" refers to the Clerk's Supplemental Transcript on Appeal; "RT" refers to the reporter's transcript.

Count 2 of the information alleged that both defendants committed attempted murder (§§ 664/187) of Ricky Richardson on or about December 13, 2000. It was further alleged that Taylor was armed with a firearm within the meaning of section 12022, subdivision (a)(1), and that Melendez intentionally and personally discharged a handgun and proximately caused great bodily injury. (§§ 12022.7, and 12022.53, subd. (d), 12022.53, subd. (c), 12022.53, subd. (b) and/or 123022.53, subd. (e).) It was further alleged that Melendez personally used a firearm within the meaning of sections 1203.06, subd. (a)(1) and 12022.5, subd. (a)(1), rendering the offense serious felony under section 192.7, subdivision (c)(8). (CT 185-186.)

Count 3 alleged that both defendants committed a first degree residential robbery (§ 211) of Ricky Richardson, and that this offense was a serious felony within the meaning of section 1192.7, subdivision (c)(19). It was further alleged that Taylor was armed with a firearm during the robbery. (§ 12022, subd. (a)(1). It was further alleged that Melendez intentionally and personally discharged a firearm proximately causing great bodily injury. (§§ 12022.7 and 12022.53, subd. (c), 12022.53, subd. (b) and/or 12022.53, subd. (e).) It was further alleged that Melendez personally used a firearm (§§ 1203.06, subd. (a)(1) and 12022.5, subd. (a)(1)) and rendered the offense a serious felony under section 1192.7, subdivision (c)(8). (CT 187-188.)

The information also alleged that Melendez was convicted of three prior felonies within the meaning of sections 1170.12, subdivision (b) and 667, subdivision (d) (shooting at inhabited dwelling, § 246; assault with intent to commit murder, § 217, and assault with a deadly weapon, § 245(A)(1)). It was further alleged with regard to the above-described conviction for assault with intent to commit murder, as well as convictions

for grand theft person (§ 487.2), and possession of narcotic controlled substance (Health and Safety Code § 11350), that Melendez served a separate term in state prison and did not remain free of prison custody and did not remain free of committing an offense resulting in a felony conviction during a period of five years after the conclusion of said term (§ 667.5(b).) (1 CT 188-191.)

A motion for severance of the parties was filed, but at the hearing on the motion, counsel for appellant stated he had no objection to a joint trial. (1 Supp. CT 184; 3 RT 473.) The trial of both defendants began with jury selection on March 18, 2003. (2 CT 396-398.) During jury selection, on April 4, 2003, both defendants objected to the prosecutor's peremptory challenges pursuant to *People v. Wheeler* (1979) 22 Cal.3d 258. (2 CT 440-442.) The court found a prima facie case as to three jurors, and asked the prosecutor to provide a basis for his challenges to the jurors. The trial court denied the motion after ruling that the prosecutor's reasons for excusing the jurors were non-discriminatory. (*Ibid.*) The jury was sworn on April 10, 2003, and the guilt phase portion of the trial commenced. (2 CT 450-452.)

The People rested their case-in-chief on April 16, 2003. (2 CT 460-461.) Melendez began his case-in-chief on April 22, 2003, calling three of his witnesses. Then Taylor began his case-in-chief on the same day. (2 CT 463-465.) Taylor rested his case the same day, and Melendez resumed his case-in-chief. (*Ibid.*) Melendez rested on April 29, 2003. Taylor then called a witness in rebuttal. Also, on April 29, the prosecutor gave his closing argument. (2 CT 475-476.) The defendants each gave their closing argument on April 30, 2003. (2 CT 477-479.) The jury was instructed and commenced deliberations on May 1, 2003. (2 CT 480-482.) On May 7, 2003, the jury returned guilty verdicts on all counts against Melendez, and

the special circumstances and enhancements were found true. (2 CT 487-489.) The jury found Taylor not guilty of the murder and attempted murder, and guilty of robbery with enhancements. (3 CT 620-621.)

The penalty phase began on June 3, 2003. (3 CT 715-717.) The prosecution presented witnesses in aggravation on June 3, June 4, and June 17, 2003. (3 CT 718-719, 736-737.) The defense presented their case in mitigation on June 17 and June 18. (3 CT 738-739.) On June 19, 2003, both parties gave closing arguments, the jury was instructed, and deliberations commenced. (3 CT 740-741.) On June 20, 2003, the jury reached its verdict of death. (3 CT 742-744.)

On August 18, 2003, the trial court denied the motions to modify the verdict and for a new trial and imposed a sentence of death. (4 CT 936-943.)

STATEMENT OF FACTS

Appellant, Angelo Melendez, and his co-defendant, LaTroy Taylor, were jointly tried for the murder of Koi Wilson, and the attempted murder of her boyfriend, Ricky Richardson. Neither appellant nor Taylor disputed that the shooting took place or that they were at Richardson's house on the night of the murder. Appellant testified that Taylor shot both Wilson and Richardson and that appellant had no inkling he was going to do so before it happened. Taylor did not testify, but both he and the prosecutor argued that Melendez was the shooter.

A. Guilt Phase

1. Reports of the crime scene and aftermath by law enforcement and medical personnel

In the early morning hours of December 13, 2000, police and emergency personnel were dispatched to 544 West Fifth St. in Stockton

after receiving a 911 call from Ricky Richardson saying that he had been shot by LaTroy who lived down the street. (11 RT 2796; People's Exhibit 48 [911 tape] Exhibit 49 [transcript].) He told the dispatcher that he had been shot and thought he was dying, gave directions to his house, and said that his baby daughter was in the house. (11 RT 2795.)

Officers and firefighters were dispatched around 1:07 a.m. Members of the fire department set up at a safe staging area near the scene and waited for police to clear them to enter. The ambulance unit with paramedics and EMTs were at the staging area by 1:08 a.m., and cleared to enter by 1:11 a.m. (10 RT 2538-2540.)

As the police officers arrived at the house, they did not see any cars leaving the scene. The front porch light was on.[3] When they entered the house, the officers could smell marijuana. (10 RT 2419.)

Once inside, the officers heard a baby crying and a man say he had been shot and needed help. (10 RT 2415, 2426.) Richardson and his fiancé, Koi Wilson, were found in the den, where there were packages of marijuana on the table and floor. (10 RT 2542.) Wilson was not responding when officers found her. (10 RT 2415.) Richardson was lying on the couch with a wound to his chest.[4] He was responsive and it appeared he had been vomiting. (10 RT 2416.) Officer Nelson found an infant in the southeast bedroom. The room looked like it had been ransacked; there was a cabinet with a broken lock. (10 RT 2417, 2642.) Another bedroom and the living room also looked like they had been

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[3] The light operated on a motion sensor and stayed on for about 10 minutes. (10 RT 2430.)

[4] Fire Captain Larry Long testified he recalled that Richardson was in the hallway when authorities entered the house. (10 RT 2541-2542.)

ransacked. (10 RT 2419.)

Jeff Young, a paramedic firefighter, arrived at the house within two minutes of receiving a report of a possible gunshot wound. (10 RT 2506, 2510.) Young examined Richardson, who was alert and oriented during the 14 minutes that Young attended to him before he was transported to the hospital by ambulance. (10 RT 2516, 2533.)

When Richardson arrived at the hospital he initially appeared alert and oriented. He knew his name, was aware of his surroundings and wanted to know if he was going to die. (10 RT 2480, 2491.) Surgery was immediately performed for a gunshot wound to the abdomen. (10 RT 2480.) The attending physician did not notice powder burns. (10 RT 2485.)

Dr. Daniel Kinikini performed exploratory surgeries on Richardson after his initial surgery on December 13 and repaired injuries as the result of the gunshot wound. (10 RT 2437-2451.) At the time of trial, Richardson was still paralyzed below the waist from the bullet wound. (10 RT 2451.)

Koi Wilson died from shock and hemorrhage from two gunshot wounds, one below the left breast and one on the left side. (10 RT 2553, 2560.) According to Dr. Robert Lawrence, the pathologist who performed the autopsy, he found no evidence that the wounds were inflicted at close range, but he did not wipe the area around the wound to check for soot or stippling. (10 RT 2554, 2569.) Based on the trajectory of the wounds, it appeared the shooter was off to Wilson's left-front when both shots were fired. (10 RT 2559.) The shooter could have been in the same place for the second shot, but the victim could have been bending over a little. (*Ibid.*) Based on the toxicology screens of her blood, Wilson used methamphetamine and possibly amphetamine in the hours before her death.

(10 RT 2565.)

Three spent casings from Speer .45 caliber ammunition were recovered from the den where the victims were found. (9 RT 2383-2385; 11 RT 2875.) All three casings were fired from the same firearm. (11 RT 2884.) Two bullets were also recovered: one in Wilson's right armpit and one from the interior couch cushion beneath her. (9 RT 2385.) The bullets were fired from the same gun, which was likely a .45 automatic. (11 RT 2900, 2903.)

There was a trail of fresh vomit which contained pizza outside the house. (9 RT 2395-2397.)[5]

2. Ricky Richardson's Version of Events

Ricky Richardson, a self-described producer of rap CDs and marijuana dealer[6], was at home with his fiancé, Koi Wilson, and their infant daughter on the night he was shot and Wilson was killed. (10 RT 2655, 2664, 2666, 2667.) At about 11:00 p.m., while he and Wilson were playing a video game and the baby was asleep in the back room, the doorbell rang and he went to answer it. (11 RT 2697.) He looked out the window and saw Taylor. When he opened the front door, he saw appellant. Richardson was not expecting either of them. (11 RT 2698.) Taylor and Richardson

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[5] A Dominos Pizza employee was working on December 12, 2000. He gave the police information about a delivery order received that night. (13 RT 3263-3266.) Trial counsel attempted to establish that Richardson ordered a pizza earlier in the evening than he testified to in order to impeach his credibility, but the trial court sustained an objection to the police officer's testimony about his conversation with the employee. (13 RT 3334-3342.)

[6] Richardson was convicted of possession for sale of marijuana in August 1999 and was on probation at the time of the shooting. (11 RT 2778.)

are good friends who see each other almost every day; they had been together earlier that day. (11 RT 2732.) Richardson had known appellant since he was young; appellant was a close friend of his father's. (11 RT 2696.)

Appellant asked to used the bathroom; Taylor went into the den and sat on the end of the couch to the right of Wilson and said he wanted some marijuana. (11 RT 2700-2701.) Richardson sat on Wilson's left side and the three of them smoked some marijuana while appellant was in the bathroom. Richardson gave Taylor a baggie of marijuana. (11 RT 2702-2703.) According to Richardson, Taylor was a drug dealer who sold crack on the streets. (11 RT 2733.)

Appellant came out of the bathroom and asked Taylor if he got what he came for. Appellant had his hands in the front pocket of his sweatshirt, where Richardson could see the butt of a gun. Richardson was about to get off the couch when he heard a "blat" sound. (11 RT 2705.) He was shot and fell back on the couch, holding his chest. (11 RT 2706.) Appellant had the gun fully extended in his right hand. Wilson was looking at Richardson. When his eyes rolled back, she fell on the couch, threw her hands up and started screaming. Appellant shot her. (11 RT 2707.) Richardson stayed on the couch, watching appellant who moved into the room from the doorway. (11 RT 2709.) Richardson heard three shots altogether, including the one that hit him. (11 RT 2710.)

Richardson did not lose consciousness, but pretended he was dead while he was watching Taylor and appellant. (11 RT 2754-2756, 2763.) He saw Taylor, who had been sitting on the other end of the couch, kneel in front of him and go through the dresser drawer under the television. (11 RT 2711.) Taylor went to the southeast bedroom at the back of the house and

Richardson could hear him rifling through things, and the baby crying. (11 RT 2712.) Appellant stepped back into the hallway with the gun still pointed. Richardson could see his arm and foot. (11 RT 2712.)

Richardson saw Taylor run through the hallway, headed toward the front door and heard someone screaming "hey"outside the door. He saw Taylor and another person of about the same size and build run to the back room and roll two safes out the door. (11 RT 2714.) Taylor told appellant to "make sure they dead." Appellant said, "oh yeah. They dead." (11 RT 2721.) About three to five minutes after he was shot, Richardson heard the men leave and a car drive away. (11 RT 2722.)

The safes, which had been in the cabinet in the southeast bedroom, measured about 14 by 18 inches. (11 RT 2772-2773.) There was $27,000 in one and three pounds of marijuana in the other. The money was from the sale of CDs; money from marijuana sales was kept in a drawer in the night stand. Another pound of marijuana was in the drawer in the den Taylor had gone through. (11 RT 2717-2718.) Another safe was broken and had nothing in it. (11 RT 2721.) In a statement to Detective Anderson six days after the shooting, Richardson said there was $20,000 in cash. He did not mention the marijuana because he did not want to admit to the police that he had it. (11 RT 2721.)

Richardson had a land line phone in the den and two cell phones, one of which he used to call 911. (10 RT 2668, 11 RT 2723.) Richardson denied he called someone to come take the drugs out of the house before calling 911. (11 RT 2725, 2783.) While he was talking to the dispatcher, Richardson began to choke and then vomited. (11 RT 2728.)

When the dispatcher asked him who shot him, Richard said "LaTroy." (11 RT 2796.) He did not name appellant as the shooter when

he was asked by the dispatcher more than once who shot him, nor did he tell the officer at the scene, Officer Gauthreaux, that appellant shot him. (11 RT 2797.) Richardson offered various explanations for this. He said LaTroy shot him because the "only thing going through his mind was LaTroy." (11 RT 2727.) He was angry and felt betrayed by Taylor, because if Taylor had not come to his house, appellant would not have been there. (11 RT 2726.) Later he named both LaTroy and Angelo because he thought the was going to die and thought he should give them both up. (11 RT 2727.) He lied when he told the dispatcher he did not know LaTroy's last name, because he realized he was not going to die and wanted to take revenge himself. (11 RT 2725.)

On December 19, 2000, Richardson was interviewed by Detective Anderson, while he was still in the hospital, but relatively alert. He said "Angelo" shot him and Taylor shot Wilson. (12 RT 2980, 2986.) Richardson described the gun Taylor had as a "nine or a .45, or something. (12 RT 2981.) During an interview on February 8, 2001, he said Angelo shot Wilson. (12 RT 2986.)

Richardson had no explanation for why he and Wilson were shot, although he believed that appellant was there because Taylor paid appellant to rob and kill Richardson. (11 RT 2769, 2805.) He saw Taylor with a gun – maybe a nine millimeter or a .380 – in his sweatshirt, but denied Taylor ever had it out. (11 RT 2766, 2807.) At the time he was shot, Richardson had over $600 in cash in each of his pants pockets. Neither his wallet nor any of this cash was taken when he was shot. (11 RT 2742.)

After the shooting, Richardson received letters from Taylor who also called him, said he had nothing to do with it and told Richardson not to come to court. (11 RT 2824.) Richardson threw away some of the letters.

(11 RT 2825.) Appellant also called Richardson's aunt and said he did not shoot him, that he would not shoot "Little Rick." (11 RT 2826, 2846.)

Richardson met Paul Tiwana a few days before he testified. He did not tell Tiwana that appellant was not the shooter.[7] (11 RT 2806.)

3. Taylor's Actions After the Shootings

Stacy Harris knew Taylor through her cousin, who had a child with him. (10 RT 2578.) Later on the same day as the shooting, Harris received a call from Taylor who asked Harris to drive him to St. Louis because he violated his probation and needed to leave town. (10 RT 2580-2581.)

At Taylor's direction, Harris and her boyfriend, DeJame Henderson, met Taylor, picked up a van and drove as far as Reno where they dropped Taylor at the Greyhound bus station. (10 RT 2599, 2583-2585.) Taylor had a black tote bag and an Old Navy bag with him. That bag had an odor, but they did not ask Taylor what was in it. (10 RT 2591-2594.) Taylor gave Henderson $500. (10 RT 2602.) Harris felt uneasy about driving Taylor, but insisted he did not threaten her or Henderson and denied that she told Detective Anderson otherwise. (10 RT 2582, 2587, 2588, 2622.)

Harris' testimony was impeached with her statement to Detective Anderson that Taylor had threatened her and her boyfriend if they did not drive him to St. Louis. (11 RT 2947.) Harris told Anderson that Taylor

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[7] Paul Tiwana reportedly had exculpatory information about appellant's role in the shooting. (12 RT 3207-3211.) Trial counsel alleged that Tiwana, who lived in Southern California, failed to appear in response to their subpoena after being threatened by Richardson and his father. The prosecutor disputed counsel's allegations. (13 RT 3343-3348.) Because of apparent problems with service of the out-of-county subpoena, appellant's counsel did not request a bench warrant for his appearance. (14 RT 3517-3520; 3606-3623.) Tiwana was not called to testify. (14 RT 3725.)

was hiding in the van when she got in and had two duffel bags with him. One bag smelled like marijuana. When Harris asked Taylor about it, he opened it up and showed her numerous bags of marijuana and bragged about how much of it he had. (11 RT 2949-2950; 12 RT 2977.)

Taylor was arrested by the FBI in St. Louis on January 1, 2003. (11 RT 2956.) Appellant was arrested in Seattle a few days later. (11 RT 2957.)

4. Defense case – Melendez

Officer Gauthreaux and his partner arrived at Richardson's house within two minutes of receiving a report over the radio and found Richardson and Wilson on the couch. (12 RT 3002, 3016.) The officer could see that Richardson had been shot, and it appeared that Wilson was dead. (12 RT 3007.) Officer Gauthreaux told Richardson to apply pressure to the wound. (12 RT 3001.) He asked Richardson, who was alert and oriented, who shot him and Richardson said LaTroy shot both he and his girlfriend. (12 RT 3002, 3004.) Richardson claimed he did not know LaTroy's last name, but said he lived across the street. LaTroy was black, and was with Angelo. In response to the officer's questions, Richardson provided his date of birth and his girlfriend's name. (12 RT 3003, 3004, 3011.) Richardson said, "I'm going to die. Please help me." (12 RT 3004.)

Tino Yarborough, Taylor's cousin and appellant's nephew, was at home in the early morning hours of December 13, 2000, when appellant came to his house. (12 RT 3111.) Appellant was mad, pacing around Yarborough's room. (12 RT 3113, 3163.) About 45 minutes later, Taylor came to the house and appellant went outside to talk to him. Yarborough heard noise, went outside holding a shotgun, and saw the two men tussling near a car. (12 RT 3115, 3118.)

Taylor had a gun that looked like a .45.[8] He had a brown plastic garbage bag and money in his hand which he tried to give to appellant. Appellant hit the money out of Taylor's hand onto the ground. (12 RT 3115-3117.) Appellant went inside the house and left Taylor and Yarborough on the porch. Yarborough gave Taylor his cell phone and keys to his car. (12 RT 3119.) Three days later, two guys returned the car; the cell phone was not returned. Appellant spent the night and was gone in the morning. (12 RT 3120.)

The night before he testified, Yarborough, who was in custody, received a note from Taylor under his cell door. (12 RT 3121, 3156.) In it, Taylor told him not to go "up there lying. If you do, I'll feel sorry for you" (12 RT 3154) which Yarborough interpreted "somewhat" as a threat (12 RT 3121).

Appellant testified. On December 13, 2000, Taylor, who is appellant's second cousin, called and asked if he wanted to go for a ride, drink beer and talk about a dispute the two men had been having over words Taylor said to appellant's girlfriend a few months earlier. This was the second or third night in a row Taylor had called. (13 RT 3388-3389.)

When Taylor arrived sometime after 9 p.m., a man appellant did not know was sitting in the passenger seat of the car. Appellant got in the back. They went to a liquor store and Taylor and the passenger went in and bought appellant a beer and themselves hard liquor. They drove around for about an hour and a half. (13 RT 3425, 3432.) Taylor was talking on his

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[8] Two to three weeks earlier, Yarborough borrowed a gun from Taylor for protection. (12 RT 3168, 3172.) He returned it after a few days. Yarborough did not know the brand of the gun or the kind of ammunition with which it was loaded. (12 RT 3172-3173.)

cell phone and loud music was playing. They ended up at a house on Fifth Street. Appellant stayed in the car while the passenger and Taylor went up to the door and spoke to someone. (13 RT 3390-3391.) The passenger stayed behind at the house and appellant got in the front seat. They drove down the street and ended up at Richardson's house, where Taylor said he was going to get some weed. (13 RT 3392.) Appellant's aunt and cousin lived about a block away from Richardson's house, but because he rarely visited them, he did not know this was where Richardson lived. (14 RT 3550.) Appellant stayed in the car while Taylor went in the house. When appellant got out of the car to urinate he saw someone wave him into the house. (13 RT 3393.)

As he got to the porch, appellant saw it was Richardson, who hugged him and called him uncle. Appellant was friends with Richardson and with his father, but he had not seen him in about a year and did not know this was his house. (13 RT 3392, 3433.) Appellant asked if he could use the bathroom and Richardson invited him in the house. (13 RT 3394.) Appellant sat on the couch in the living room while Richardson was locking the front door and then appellant went into the bathroom. (13 RT 3395.) He did not see Taylor in the living room. (13 RT 3434.)

Richardson went into the den. Appellant did not see a woman or a baby in the house. (13 RT 3395.) On his way to the bathroom, he looked into the back bedroom to see where Taylor was. (13 RT 3435.) He did not see Wilson. (13 RT 3435.)

While he was going into the bathroom he heard arguing between Richardson and Taylor, but thought they were just playing, talking loud. He was pulling down his zipper when he heard gunshots – one shot and after a few seconds, several more. (13 RT 3395-3396, 3436.) He came out of the

bathroom and saw Taylor standing in the doorway of the den, holding a pistol straight down by his side. Appellant asked him what the hell was going on and Taylor said, "It's going to be all right, cousin." Appellant said, "Bullshit," and ran out the front door. (13 RT 3397.)

Appellant was in shock as he ran down the street. He turned around and as he came back toward the car, Taylor was coming out the front door. Appellant grabbed him by the collar and slammed him to the ground in front of the house. Appellant asked Taylor why he shot Ricky and why did he need appellant to do "some shit like that." When Taylor said, "they're both dead," appellant asked who, because he was not aware the woman was in the house. Appellant punched Taylor in the face and chest and demanded that he drive him home. (13 RT 3399.)

While they were driving, appellant asked Taylor why he did it. Taylor said it would be all right and he would give appellant some of the money. Appellant said he did not want the money. They continued arguing and passed appellant's mother's house, where he had been staying. By the time he realized where he was, he was near his sister's house. He got out of the car, along with Taylor. Appellant hit Taylor in the mouth and told him to leave. (13 RT 3401.) Taylor had the gun in his lap while he was driving, but appellant did not try to get the gun away from him. (13 RT 3505.) Appellant was not afraid Taylor would shoot him because they were cousins. (13 RT 3446.)

Appellant knocked on his nephew Tino's window and the front door. Tino let him in and asked what was going on. (13 RT 3402.) Appellant walked around the house, upset, wondering how Taylor could have done what he did. Tino's sister woke up and got out of bed. About 30-35 minutes later, Taylor returned. Appellant went outside to "kick his ass."

(13 RT 3403-3404.) Taylor tried to give appellant some money, but appellant slapped his hand and he dropped some of it. Appellant picked it up while Taylor was a distance away, talking to Tino. Appellant went inside and Taylor eventually left. (13 RT 3405-3406.)

At daybreak, appellant walked back to his mother's house. (13 RT 3407.) He stayed there for several days, waiting for his girlfriend to be released from jail. They drove to Seattle, where they had planned to go even before the incident with Richardson. In Seattle, they stayed in motels and appellant worked as a temporary laborer. They were there for about five weeks before they were arrested for selling soap as a narcotic to an undercover officer.[9] (13 RT 3409.)

Appellant did not call 911 because Taylor said Richardson was already dead. He did not check on Richardson himself, and it did not occur to him to go back in when Taylor said he had shot two people because he was not thinking clearly. (13 RT 3453-3456.) Appellant did not contact the police after the shooting at Richardson's house because he had been threatened by members of Taylor's Sutter Street gang who he heard were looking for him. (13 RT 3410.) Appellant admitted he had been convicted of three felonies. (13 RT 3411.)

Detective Anderson took a taped statement from appellant while he was in custody in Seattle. (13 RT 3414.) On cross-examination by the prosecutor, appellant acknowledged discrepancies between his testimony on the statement, but explained he was confused about certain subjects they discussed and that the differences were not significant. (13 RT 3441-3443,

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[9] An investigator working for appellant tried unsuccessfully to locate and subpoena Sandra Turner, appellant's girlfriend. (14 RT 3568.)

3462.)

In October 2000, about two months before the shootings, a police officer was chasing Taylor. As he ran from the officer, Taylor reached under his shirt and threw something over a fence. The officer searched the area where he heard the item, which sounded like metal, hit the ground and found a .45 caliber handgun. (12 RT 3022-3023.) It was found to be loaded with Speer brand ammunition; the same brand and type of bullet as two bullets recovered from the crime scene in the present case. (12 RT 3030-3033; 13 RT 3256.)

Peter Barnett from Forensic Science Associates reviewed the forensic evidence in the case and visited the crime scene. (13 RT 3279-3281.) Barnett examined the .45 handgun, which is a Star pistol, and unexpended cartridges recovered in October 2000 during the chase of Taylor as well as the three fired .45 casings and bullets recovered at the scene of the shootings in the present case. (13 RT 3288-3292.) The bullets from the expended cartridges and unexpended cartridges were the same type – full metal jackets. The weapon recovered in October is rifled with six lands and grooves and a right-hand twist. (13 RT 3291.) Both bullets recovered at the scene were fired from a barrel with a left hand twist, meaning they could not have been fired from that weapon.[10] A comparison of the rifling dimensions on the bullets found at the scene with the dimensions of a Star pistol are sufficiently close to conclude that the bullets could have been fired with a Star pistol rifled with six lands and grooves and with a left-hand twist. (13 RT 3293.)

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[10] Because the weapon recovered in October was in police custody in December 2000, there was no suggestion that it was the weapon used. (13 RT 3372.)

Among the other items examined was Wilson's tank top which was found to have gunpowder on it, indicating that the muzzle of the gun was within at least four feet and probably closer when it was fired. (13 RT 3283.) There was some evidence of Wilson's hands being up when she was shot. (13 RT 3359.)

Richardson's jacket and shirt had no gunpowder particles, meaning that the gun was farther away. (13 RT 3285-3286.) It is possible that gunpowder residue on his clothing could have been lost during transportation to the hospital. (13 RT 3359.)

Based on the location of the spent cartridge casings, it is likely the gun would have been in the room when the shots were fired. Generally .45 caliber semi-automatic pistols eject casings to the right of the shooter, but it is difficult to be precise because of other variables including the possibility that the casings bounced off the walls. (13 RT 3353.)

5. Defense Case – Taylor

Dominga Delarosa bought a car from Taylor in the winter sometime before December 2000. She paid him $3500-4000. When she paid Taylor, he had a wad of $100 bills already in his pocket. (12 RT 3037-3039.)

Donza Murchison went with Taylor and Stacy Harris to buy a car. Taylor asked her to cosign for him, but her credit was bad, so the loan was denied. (12 RT 3050.)

Detective David Anderson was questioned about his interviews with Richardson on December 19, 2000 and February 8, 2001. In the December statement, Richardson said that somebody kicked at the door and Taylor pushed his way past him into the house followed by appellant; in February, he said he invited Taylor and appellant in because they were friends. (12 RT 3054-3055.) In December, Richardson said that $20,000 was taken, and

in February he said it was $27,000. (12 RT 3058.)

Taylor's investigator, Kenneth McGuire, served a subpoena duces tecum on Richardson seeking business records for his CD company. (12 RT 3067.) Richardson produced some business records, but never mentioned there had been records in the safes that were taken. (12 RT 3068.) Richardson did not keep bank records; the business basically broke even. (12 RT 3069.) McGuire went looking for the CDs in local stores; only one place knew about the CDs. (12 RT 3070.)

Dennis Jennings, Richardson's next door neighbor, knew Taylor and saw him at Richardson's house often. They appeared to be good friends. Jennings did not know about Richardson's drug dealing. (12 RT 3106.) He had never seen appellant before the day he testified. (12 RT 3108.) Jennings was questioned by police about the night of December 13. He did not hear fighting or gunshots and only became aware that anything was going on next door when he looked out and saw police activity and a body being wheeled out. (12 RT 3107.)

Larry Rhodes, a nephew of Rick Tanner, Ricky Richardson's father, was called as a witness by Taylor in rebuttal. (14 RT 3574.) He was interviewed by Detective Anderson at DVI where he was serving a prison sentence. (14 RT 3578.) Anderson wanted to talk to him about a note that allegedly came from appellant, but Rhodes refused to give it to him. (14 RT 3583.) He lied to Detective Anderson when he said appellant had told him that "he had shot his [Richardson's] black ass," because he was mad at appellant.[11] (14 RT 3582, 3585.) One of Taylor's attorneys and an

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[11] Appellant denied he told Rhodes he shot Richardson. (14 RT 3544.)

investigator came to see Rhodes and had a copy of Anderson's report with them. Rhodes denied that he told them if they subpoenaed him he would testify that what he told Anderson was a lie. (14 RT 3585-3586.) Rhodes also denied he tried to work out a deal for early release from Anderson, saying it was Anderson who offered him help in return for information about appellant. (14 RT 3582.)

Taylor's investigator, Kenneth McGuire, interviewed Rhodes who said he would take the Fifth if they subpoenaed him and if he was forced to testify, he would say that Anderson's report was a lie. He implied that he would make up testimony against Taylor. (14 RT 3596-3597.)

Detective Anderson was called as a witness by Taylor. He went to DVI to interview Larry Rhodes after he received a phone call from Rhodes' wife saying he wanted to talk about a homicide. (14 RT 3670.) Rhodes told Anderson appellant said "I shot his black ass," referring to Richardson, when they were out on the yard. (14 RT 3671.) Rhodes asked for early release in exchange for information. When Anderson refused, Rhodes said he would take the Fifth if he were called to testify. (14 RT 3672.) Rhodes showed Anderson a letter he received from appellant, but would not let Anderson take it with him or make a copy of it. (14 RT 3697.)[12]

Anderson was questioned by both counsel for Taylor and the prosecutor about the taped statement made by appellant in Seattle, to impeach his testimony with alleged inconsistencies. (14 RT 3674-3682 [Taylor]; 3683-3699 [prosecutor].)

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[12] Appellant's request to inform the jury of the contents of the note in which appellant said he was present at the time Richardson was shot, but was not the shooter, was denied. (14 RT 3705-3706; 3717-3722; see Argument III, *ante*.)

B. PENALTY PHASE

1. Prosecution Case in Aggravation

The prosecution presented evidence in aggravation of previous acts of violence and prior convictions, the two most serious of which appellant was involved in with an associate, Howard Gaines. Appellant had been convicted of assault with intent to commit murder, assault with a deadly weapon and dissuading a witness for his role in an incident occurring in September 1980, which resulted in the shooting by appellant's associate of a young woman, Lynette Denney, which left her paralyzed from the neck down and in a semi-coma. (16 RT 4136.) Gaines and appellant had taken Denney and another woman, Adela Jose, to a secluded area, where appellant threatened the women but it was Gaines who shot Denney. Evidence was presented through the testimony of the Stockton police officer who viewed the scene of the shooting (16 RT 4113-4115), the victim's mother who testified about Denney's condition (16 RT 4116-4126), and Adela Jose, a friend of the victim who was allegedly with her at the time of the shooting but who was unable to recollect the events of that day. (16 RT 4126-4135). Jose's preliminary hearing testimony was offered as a prior inconsistent statement. (16 RT 4225-4229.)

In another incident allegedly with Gaines in September 1980, two women, Christine Preciado and Yolanda Dawson, who had recently come forward for the first time, testified they were taken to a remote area where appellant and Gaines threatened them with guns unless they had sex with them. Gaines raped Dawson but appellant did not sexually assault Preciado. (17 RT 4327-4363;17 RT 4364-4383.)

Loretta Beck, a girlfriend of appellant's, was called to testify about an incident on November 18, 1988, which she did not recall. (16 RT 4139-

4143.) Stockton Police Officer Anthony Clayton then testified regarding Beck's statement at the time, given from the hospital, in which she stated that appellant, who was her boyfriend, had beaten her. (16 RT 4143-4145).

Raven Lee, another former girlfriend of appellant's, testified about a domestic dispute on May 24, 1988, in which appellant threatened her and her daughters and grabbed her by the throat. (16 RT 4146-4151.)

Victim impact testimony was presented by Koi Wilson's mother, Frankie Todd (16 RT 4211-4214), and Wilson's sister, Dorshea Cleveland (16 RT 4215-4224).

Evidence of three prior convictions was presented in aggravation: 1) shooting into an inhabited dwelling (1/22/80); 2) grand theft person (8/27/92); and 3) possession of cocaine (11/17/94). (16 RT 4224.)

2. Defense Case in Mitigation

Evidence of appellant's background and upbringing was presented through appellant's mother, Venesee Warmsley (17 RT 4385-4409), sister, Christina Frazier (17 RT 4431-4436), brother, Julio Melendez (17 RT 4437-4444), and half-sister, Sabrina Perry (17 RT 4415-4423). Talytha Melendez, appellant's daughter, testified about her relationship with appellant and stated that she loved him. (17 RT 4410-4414.) A friend, Gwen Taylor, also testified. (17 RT 4424-4427.) She and appellant's family members testified that they loved appellant, that he was kind and provided guidance to them.

Dr. Sammunkan Surulinathan, a psychiatrist at San Joaquin County Mental Health Service, testified that appellant had one brief visit with him on December 2000, in which appellant complained of depression and of hearing voices. He found no evidence of bizarre behavior and prescribed Prozac for depression and anti-psychotic medicine for the voices. (17 RT

4449-4461.)

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I.

THE PROSECUTION'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO STRIKE AFRICAN AMERICAN PROSPECTIVE JURORS FROM THE JURY VIOLATED APPELLANT'S RIGHTS TO EQUAL PROTECTION AND TO A JURY CONSISTING OF A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY

A. Introduction

No African Americans sat on appellant's jury. After the prosecutor struck each of the three African Americans in the jury venire, the defense objected under *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler*, *supra*, 22 Cal.3d 258. The trial court found a prima facie case of racial discrimination, which required the prosecutor to provide a race-neutral basis for each challenge. The prosecutor then proffered reasons which, as appellant will show below, were either not race-neutral or plainly pretextual. After nothing more than a perfunctory review of the prosecutor's stated reasons, the trial court denied the *Batson/Wheeler* motion.

Appellant's conviction and death sentence were thus obtained in violation of his rights to a fair trial by an impartial jury drawn from a representative cross-section of the community, due process of the law, equal protection and to reliable guilt and penalty verdicts, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States and Article 1, Sections 1, 7, 13, 15, 16 and 17 of the California Constitution. (*Snyder v. Louisiana* (2008) 552 U.S. 472; *Miller-El v. Dretke* (2005) 545 U.S. 231, 239-241; *Johnson v. California* (2005) 545 U.S. 162, 168; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-98; *People v. Johnson* (1989) 47 Cal.3d 1194, 1218; *People v. Wheeler*, *supra*,

22 Cal.3d at pp. 276-277.)

B. Appellant's Batson/Wheeler Motion

After the prosecutor used a peremptory challenge to excuse Juror M.J.[13] (7 RT 1821), appellant objected, citing *Batson* and *Wheeler*. Defense counsel pointed out that "Mr. J.[] is the third of three African Americans who so far out of the 90 or so people in the panels one and two, who made it into the box." (7 RT 1823.) Counsel emphasized that "all three of the African Americans have been struck." (*Ibid.*)

Appellant further argued that there was nothing in Juror M.J.'s' questionnaire that distinguished him from Caucasian jurors who were not struck. Nor was there any issue during voir dire "that would serve as any indication that Mr. J.[] would not be . . . an adequate and, in fact, a good juror." (7 RT 1823-1824.)

The other two African Americans struck were Jurors D. W. and S. C. (7 RT 1824.) Co-defendant's counsel, who joined in the motion, added that neither of these potential jurors gave answers that would indicate they would be anything but fair and impartial. (7 RT 1827.)

The prosecutor contended that the defense failed to establish a prima facie case, but appellant responded that "when every one [sic] black has been removed from the panel that that shows a pattern of removing black jurors from – the jury." (7 RT 1825.)

The court noted that Juror S.C. was challenged immediately upon entering the jury box and Juror M.J. was challenged before even getting into the box. (7 RT 1829.) Thus, the court "can't say that the People have been

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[13] The names of jurors who did not sit on appellant's jury have not been redacted from the record, but appellant will refer to them by their initials in the brief.

passing with a member of the challenged group in the box." (7 RT 1830.)

The court found a prima facie case and required the prosecutor to set forth reasons for exercising peremptory challenges against the three African Americans. (7 RT 1830.)

The prosecutor then provided purportedly racially-neutral reasons, stating that he did not want Juror D.W. to sit on the jury because he was court-martialed while in the Navy. (8 RT 1832.) In addition, Juror D.W.'s brother-in-law was serving six years in prison and, according to the prosecutor, Juror D.W. believed police officers corroborated false stories before testifying and that judges presume guilt. He had negative comments about the District Attorney and Public Defender. Other reasons for excusing Juror D.W. included that Juror D.W. stated he would not be able to follow the law in the penalty phase, and was afraid of jury retaliation. (8 RT 1833-1834.)

As for Juror S.C., the prosecutor noted she had been arrested for drugs, and her brother and nephew were both in state prison for robbery. Of particular concern was that Juror S.C. did not read newspapers or watch any news and the prosecutor stated his belief that "it's important to have a juror who sits on a death penalty panel to be aware of his or her surroundings and their place in the community." (8 RT 1834.) In addition, the prosecutor stated, Juror S.C. "had absolutely no feelings on the death penalty" and he "would be requesting people to go in there and actually have feelings on the death penalty one way or the other." (8 RT 1834-1835.)

According to the prosecutor, what was particularly significant for him was that Juror S.C. stated that she was a witness in an assault with a deadly weapon case and essentially had said the police officers were not telling the truth. (8 RT 1835.) She also delivered her answers in what the

prosecutor described as a "cavalier manner," indicating she was "entirely bored with the system." (*Ibid.*)

Codefendant's counsel noted that there were several other jurors who stated they did not read or watch the news, as Juror S.C. stated, but were not struck. (8 RT 1838.) Moreover, many others, like Juror S.C., did not express an opinion about the criminal justice system because of limited contact with it. (*Ibid.*) For example, Juror 7 left blanks in her questionnaire and when asked said she only had traffic tickets and had no contact – and therefore – no opinions about the justice system. (8 RT 1839.)

It was further argued that the prosecutor's characterization that Juror S.C. said police officers lie was false. Her questionnaire stated that a police officer is not different than she is. (8 RT 1838.) And when she testified as a witness, she did not say that the police lied, but that the officer's report of her statement differed from what she actually said. (8 RT 1839.)

The prosecutor struck Juror M.J., he said, because "he had no opinion about anything." (8 RT 1835-1836.) He had no opinion about how to determine if someone was telling the truth or about prosecuting attorneys, defense attorneys, the criminal justice system, about drugs, rap music or about the death penalty. The prosecutor also rated him low because "he'[d] killed before" when he served in Vietnam. (8 RT 1836.) The prosecutor stated that he had had a juror in another case who had taken a life during his military service and that juror ended up holding the jury out the longest and later said that "because he had taken a life before, the decision to take a life again personally caused him great distress." (8 RT 1837.) As defense counsel pointed out, however, the prosecutor never asked Juror M.J. about taking a life. (8 RT 1837-1838.)

The trial court rejected the *Batson* challenge. It found the basis for

striking Juror D.W. to be appropriate on the basis of his court-martial, having relatives in prison, and expressing a very negative attitude towards courts and lawyers. (8 RT 1841.)

With regard to Juror S.C., the court found her to be excludable because of "the way she said that the police tend to put words in your mouth or in her mouth anyway in regard to an incident that she observed. And it was obvious that she felt that the police are not to be trusted." In addition, she had relatives in state prison for felonies. "And it is true that her comment about never watching any news whether it be in the newspaper or on TV is probably a good reason for excluding anybody." (8 RT 1841.)

The trial court found Juror M.J. to be a "neutral juror" with regard to his questionnaire and for that reason was initially concerned about his exclusion. The court noted that he expressed no opinions whatsoever. He checked boxes without writing anything, which others had done, but "really did leave an absolute blank page with regard to no opinions." (8 RT 1842.) Ultimately the court found the prosecutor justified in excusing Juror M.J. based on the fact that he had taken a human life in combat and then expressed no opinion about the "effect on him or his ability to make a decision with regard to life or death in this case." (8 RT 1842)

Thus, the trial court found all three challenges were exercised on a nondiscriminatory basis. (8 RT 1843.)

As will be demonstrated below, the trial court erroneously found that the prosecutor had sustained his burden of justification, without conducting a constitutionally adequate evaluation of the prosecutor's proffered explanations for his peremptory challenges of the three African American jurors.

C. Applicable Legal Standards

Under the Fourteenth Amendment's Equal Protection Clause and the California Constitution, prospective jurors must not be peremptorily challenged because of their race. (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 98-99; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 276.) Even a single peremptory challenge made because of a prospective juror's race results in an error of constitutional magnitude and requires reversal. (*Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 476-477; *People v. Silva* (2001) 25 Cal.4th 345, 386.)

To prevail on a *Batson/Wheeler* motion, a defendant must first show that the prosecutor has peremptorily challenged one or more members of a cognizable group, and that the totality of the circumstances raises an inference that the challenge was racially motivated. If the defendant makes this prima facie showing, then the prosecutor has the burden of articulating legitimate, race-neutral reasons, supported by the record, for his peremptory challenges. Once the prosecution has satisfied this burden of production, the trial court must then proceed to a third step and determine, in light of the defendant's prima facie case and the prosecutor's proffered reasons, whether the defendant has proved purposeful discrimination. (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 477; *Johnson v. California*, *supra*, 545 U.S. at p. 168; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-98; *People v. Johnson*, *supra*, 47 Cal.3d at p. 1218; *People v. Silva*, *supra*, 25 Cal.4th at p. 386; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277, 280-282.)

This third and final step of the *Batson* analysis requires that the trial court determine whether the justifications offered by the prosecution are credible and more than just "a mere exercise in thinking up any rational basis" for the use of peremptory challenges. (*Miller-El*, *supra*, 545 U.S. at

p. 252.) The trial court has a pivotal role in evaluating *Batson* claims (*Snyder*, *supra*, 552 U.S. at pp. 476-477), and the evaluation can only be made after conducting a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." (*Batson*, *supra*, 476 U.S. at pp. 96-98, quoting *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 266.) In other words, the trial court must "evaluate meaningfully the persuasiveness of the prosecutor's . . . explanations." (*United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 969.)

This Court has interpreted *Batson* to require that the trial judge in considering a *Batson* objection, make a "'sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror.'" (*People v. Silva*, *supra*, 25 Cal.4th at p. 386, citations omitted.) In addition, "all of the circumstances that bear upon the issue of racial animosity must be consulted." (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 477; *Miller-El. v. Dretke*, *supra*, 545 U.S. at p. 239.)

Justifications that are found implausible after this inquiry will likely be deemed pretexts for purposeful discrimination. (*Snyder v. Louisiana*, *supra,* 552 U.S. at p. 485, citing *Purkett v. Elem* (1995) 514 U.S. 765, 768.) "The prosecution's proffer of a pretextual explanation naturally gives rise to an inference of discriminatory intent." (*Snyder*, *supra*, at p. 485.) For this reason, it is not required that a court "find all nonracial reasons pretextual in order to find racial discrimination. In fact, 'if a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed pretext for racial discrimination.'" (*Kesser v. Cambra* (9th Cir. 2005) 465 F.3d 351, 360; quoting *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830.) Thus, where *any* of the proffered reasons are not believable, discriminatory intent may be inferred. (*Snyder*,

supra, 552 U.S. at p. 485, emphasis added.)

Particularly relevant to the manner in which the prosecutor has exercised his peremptory challenges is a comparative analysis of the seated and stricken jurors. (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 485.) This is "a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." (*Turner v. Marshall* (9th Cr. 1997) 121 F.3d 1248, 1251.) As the United States Supreme Court plainly stated, "if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241.)

This Court recently confirmed that "evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons." (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1321, quoting *People v. Lenix* (2008) 44 Cal.4th 602, and citing *Miller–El, supra,* 545 U.S. at p. 241.)

D. All African Americans Were Struck By The Prosecutor

Appellant's jury consisted of eight Caucasians, two Latinos and one Asian. No African Americans sat on the jury because the three called to the box were struck by the prosecutor.

Although not dispositive, "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 342; see also *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1223 ["severely disproportionate exclusion of blacks from the jury venire is

powerful evidence of intentional race discrimination"].)

Moreover, "if a prosecutor articulates a basis for peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination." (*Hernandez v. New York* (1991) 500 U.S. 352, 363.) This Court has agreed that statistical evidence is relevant to show purposeful discrimination in the use of peremptory challenges: "For illustration, however, we mention certain types of evidence that will be relevant for this purpose. The party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280.)

Here, it was undisputed that of the roughly 90 prospective jurors there were only three African American jurors who were called to the jury box and all three were excused by the prosecutor. (7 RT 1823.) At the time of the *Batson/Wheeler* objection, the prosecutor had exercised 19 peremptory challenges (6 RT 1402, 1487, 1488, 1489; 7 RT 1555, 1556, 1625, 1626, 1627, 1712, 1713, 1714, 1771, 1772, 1773, 8 RT 1822), 3 of them on African Americans. Hence over 15% percent of his challenges (3 out of 19) excused African Americans – a percentage far large than the slightly over 3% of African Americans (3 out of 90) in the venire. As stated by the United States Supreme Court, "happenstance is unlikely to produce this disparity." (*Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 342.)

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E. The Prosecutor's Reasons For Striking The Three African American Jurors Were Improper and Pretextual

1. Juror D.W.

Wilson was a barber, married with three children. (11 CT 3128.) He noted on his questionnaire that he had been court-martialed. (11 CT 3130.) In addition, his brother-in-law was convicted of an offense for which he served six years. (11 CT 3133.) Juror D.W. felt the case was not handled fairly "because the officers (to me) quickly assumed he started the fight or argument." (*Ibid.*) Because of this experience, he believed the criminal justice system "[was] fair in some ways and others it's not." (*Ibid.*)

On the questionnaire, Juror D.W. also made relatively innocuous comments about criminal defense attorneys (if they know their client is guilty "it seems they're in it for the money"), prosecutors ("no need to badger . . . witnesses; just move on"), and judges ("I've seen two judges in action and one seems as if you are guilty before sentenced"). He also wrote that police officers "talk in groups before court to get each other on track." (11 CT 3134.)

As noted above, the prosecutor's reasons for striking Juror D.W. were that: (1) he was court-martialed while in the Navy; (2) his brother-in-law was serving time in state prison; (3) he believed police officers corroborated false stories before testifying and judges presume guilt; (4) he had negative comments about the District Attorney and Public Defender; (5) he stated that he would not be able to follow the law in the penalty phase; and (6) he was afraid of jury retaliation. (8 RT 1833-1834.)

The trial court accepted three of these reasons, finding the prosecutor's excusal of Juror D.W. to be appropriate on the basis of his court-martial, having relatives in prison, and expressing a "a very negative

attitude towards courts and lawyers." (8 RT 1841.)

The trial court erred in failing to carefully examine the record which inescapably would have led to the conclusion that each of the prosecutor's reasons was pretextual.

There was nothing about Juror D.W.'s court-martial that provided a legitimate basis to excuse him. Other jurors remained on the jury despite their legal problems in the more relevant civilian courts. Jurors 3 (6 RT 1300; 11 CT 3228) and Juror 4 (11 CT 3348) had DUI convictions, while Juror 6 suffered a misdemeanor and served time in county jail. (6 RT 1517-1518; 12 CT 3285.) (See *Miller-El v. Dretke*, *supra*, 535 U.S. at p. 241 [Reliance on a factor or characteristic that applies equally to minority and non-minority jurors is indicative of pretext].) As Juror D.W. made clear, he understood that the military justice system is quite different from the civilian system, and had no bias against the prosecution. (5 RT 1206-1207) It is noteworthy that the prosecutor asked Juror D.W. no questions about the circumstances surrounding the court-martial or how it would affect his ability to be a juror in this case. The fact that the prosecutor nevertheless cited the court-martial as a basis for striking Juror D.W. demonstrated his willingness to find pretextual reasons.

The second reason upheld by the trial court, that Juror D.W. had a brother-in-law who was in state prison, is not a legitimate reason to strike a juror, and its discriminatory impact on African Americans is discussed below. Notably, the prosecutor did not ask Juror D.W. any questions about whether his brother-in-law's situation would affect his ability to be an impartial juror. Furthermore, there were non-African American jurors who were not excused despite having relatives who had been incarcerated. Juror 5's nephew was convicted of a drug offense (11 CT 3266) and Juror 7's

brother and sister were convicted of drug and alcohol offenses. (12 CT 3304.) In addition, two Caucasian alternate jurors were accepted by the prosecutor despite the fact that one had a step-brother who stabbed someone while a juvenile (12 CT 3421) and another had a son in prison (12 CT 3443).

The prosecutor also distorted Juror D.W.'s comments about the criminal justice system. It is not true, as the prosecutor asserted – and the trial court accepted – that Juror D.W. had made negative comments about prosecutors, generally, much less about the prosecution in this case. He made clear that he had one very negative experience in New Orleans where he was falsely arrested for murder and then released. He made clear that that was a different District Attorney and would present no problem here. (6 RT 1294.)

The prosecutor's other reasons for striking Juror D.W. were not mentioned by the court but further demonstrate pretext. If, for example, the prosecutor believed that Juror D.W. could not follow the law at the penalty phase based on his questionnaire responses (see 11 CT 3139, 3144), the prosecutor should have questioned him further and sought to excuse him for cause. Certainly others who sat as jurors appeared equally if not more challenged with regard to following the law. Jurors 1 and 7 believed that a defendant should be required to prove his innocence and have to testify. (11 CT 3193; 12 CT 3306.) Juror 5 believed that the right to a jury trial should be selective depending on the seriousness of the crime. (7 RT 1579.) Juror 12 stated that mental health testimony had no place in the courts. (12 CT 3405.) And Juror 11 was unsure about following instructions on the presumption of innocence and the right not to testify, and admitted bias against victims because of their involvement in drugs.

(12 CT 3363-3364, 3385.)

Juror D.W. clarified his comments about police officers by stating that based on television shows that he watched he believed that there might be a few police officers who might be willing to lie. He made clear, however, that he would be willing to listen to the testimony of police officers and make his own determination whether any witness was telling the truth. (5 RT 1207-1208.) The prosecutor distorted what Juror D.W. actually said to make it appear that Juror D.W. did not trust police officers more generally, although this was not a ground considered by the trial court in rejecting appellant's *Batson* challenge.

Finally, the prosecutor exaggerated Juror D.W.'s statements about being afraid of retaliation if he sat on the jury, another ground not considered by the trial court but relevant to establishing pretext. (11 CT 3146; 6 RT 1292.) Juror D.W. said that a neighbor of his in New Orleans was on a jury in a "drive-by" case, and Juror D.W. saw his obituary three months later. Juror D.W. was emphatic that he had not received any threats in the present case and stated that he was "not really scared." (6 RT 1292-1293.)

2. Juror S.C.

Juror S.C. was employed and a mother of three. (5 CT 1293-1294.) She noted that she, her brothers and nephew had been arrested. Charges were dismissed against her; her brothers and nephew went to prison. (5 CT 1298.) Juror S.C. believed the criminal justice system handled the case fairly. (*Ibid.*) She had no negative feelings about attorneys, prosecuting attorneys, judges or police officers. (5 CT 1299.) She stated she was neutral on the death penalty. (5 CT 1308.)

As with Juror D.W., the prosecutor came up with a slew of reasons

for her excusal which upon careful examination – absent from the trial court's ruling – prove to be pretextual: (1) she had been arrested for drugs; (2) her brother and nephew were in state prison; (3) she did not read newspapers or watch the news on television; (4) she had no opinion about the death penalty; (5) as a witness in an assault case she stated the police did not tell the truth; and (6) her demeanor indicated she was bored. (8 RT 1834-1835.)

The trial court accepted the prosecutor's explanations with regard to her views about the police, the fact that she had relatives in state prison and her comment about not watching or reading the news. (8 RT 1841.)

The prosecutor's concern that prospective jurors had legal problems only manifested itself in connection with African American prospective jurors. So while the prosecutor cited the fact that Juror S.C. has been arrested as a reason for striking her – similar to the fact that Juror D.W. had been court-martialed – he had no problem keeping non-African American jurors on the panel who had similar issues. As noted above, Juror 3, 4 and 6 all had legal problems which were not a concern for the prosecutor.

Again, the prosecutor cited the fact that the juror's relatives served time in state prison which, as discussed below, is an improper consideration that, if accepted, would have a discriminatory impact on African Americans. Moreover, Juror S.C. plainly stated, as noted above, that she believed the cases were handled fairly.

The prosecutor's next reason – the fact that Juror S.C. did not watch or read the news – establishes that he would use any excuse as a pretext to exclude an African American. Juror S.C. stated she did not read the paper or watch news in the context of stating she had heard nothing about this case (5 CT 1302) – a factor that would make one a favorable juror. When

asked during voir dire, Juror S.C. said she watched TV crime dramas but did not read the paper, go on the internet or like the news because she did not have time. (7 RT 1756.) This is an unremarkable statement by a woman who was employed and the mother of three children. And while this was stated as a concern by the prosecutor, it must be noted that Juror 3 stated that she did not watch television or follow the news for the same reason as Juror S.C. – that she had no time. (5 RT 1226.) Juror 1 left blank on the questionnaire opinions about criminal justice system and feelings about criminal defense attorneys, prosecuting attorneys, judges, and police officers. (11 CT 3191.) Juror 11 who, as noted above, evinced uncertainty as to the ability to follow instructions, also left blank these questions calling for opinions about the criminal justice system, prosecutors, defense attorneys and judges. (12 CT 3362.) Jurors 1, 3 and 11, all Caucasian, were not struck.

Similarly, the prosecutor cited Juror S.C.'s lack of opinion about the death penalty, that she was neutral with no particular feelings one way or the other (7 RT 1755) – a position that would seem ideal for a prospective juror – while accepting such neutrality from Juror 3, who had no opinion about the death penalty either. (5 RT 1226.) Indeed the prosecutor noted earlier that several prospective jurors (including Juror 1 (5 RT 1168) and Juror 7 (8 RT 1839) expressed no opinions about the criminal justice system and viewed it as positive that jurors come into the case with an open mind and without preconceived notions. (6 RT 1311-1312.) However, an African American juror without preconceived notions was considered excludable on that basis.

The prosecutor badly mischaracterized Juror S.C.'s comments about the veracity of police officers suggesting, again, that this basis for excusal

was nothing more than pretext. In her questionnaire Juror S.C. made clear that she did not have any bias against the police. She stated that police officers are as truthful as anyone else: "a police officer is no different than myself. We both wear uniforms."[14] (5 CT 1297.) Nevertheless, the trial court found that "it was obvious that she felt that the police are not to be trusted" (8 RT 1841), a finding not at all borne out by a careful review of the record.

Juror S.C. was a witness to a crime. She was called outside by her daughters and observed a neighbor being beaten. The neighbor ran into her house, was chased and shot. Juror S.C. gave a statement to a police officer and when she testified in court realized that the police statement as to what she told him differed from what she remembered saying. (7 RT 1727.) She made clear that she did not believe the officer lied but just that the officer had a different recollection than she did. Juror S.C. stated that she did not draw from this experience any distrust of the police or the criminal justice system (7 RT 1728) and would be a fair juror (7 RT 1743). Significantly, Juror 4 voiced some reservations about police officers, stating there were some good cops and some bad cops. (11 CT 3337.)

The court made no finding as to the prosecutor's comments about Juror S.C.'s purportedly cavalier demeanor, and so this reason should not be considered on appeal. In *Snyder v. Louisiana*, *supra,* 552 U.S. at p. 477, the prosecutor articulated two reasons for having struck a black juror, one of which was that the juror appeared "nervous." The Supreme Court noted

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[14] Juror S.C. was not questioned about her employment. On her questionnaire, she said she was employed by SJRTD, which is the acronym for San Joaquin Rapid Transit District. (5 CT 1294; http://sanjoaquinrtd.com.)

that nervousness cannot be shown from a cold transcript, and that "deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike." (*Ibid.*) However, in that case, as here, the record failed to show that the trial judge actually made a determination regarding the juror's demeanor. As in the instant case, the trial judge was given more than one explanation by the prosecutor for his strike, and rather than making a specific finding on the record concerning the juror's demeanor, the trial judge simply allowed the challenge without explanation. Under these circumstances, the Supreme Court held that "we cannot presume that the trial judge credited the prosecutor's assertion that [the juror] was nervous." (*Ibid.*) Given the similar lack of specific findings on the part of the trial court in the instant case, this Court cannot presume that it credited the prosecutor's assertion that Juror S.C. was bored or cavalier in her responses during voir dire.

3. Juror M.J.

Juror M.J. was married with one child and worked as a truck driver. (8 CT 2153.) He noted that he served in the Marines from 1966-1968, during which time he took a human life. (8 CT 2154.) Having no personal experience with the criminal justice system he had no opinions about it. (8 CT 2157-2158.) He stated he was "neutral" on the death penalty and "moderately in favor" of life without possibility of parole." (8 CT 2166.) He expressed no further opinions about the death penalty on the questionnaire. (8 CT 2167.)

The prosecutor struck Juror M.J., he said, because Juror M.J. claimed not to be able to determine whether someone was telling the truth or not, and because of his lack of opinions about the criminal justice system, about the death penalty or other issues. The prosecutor also cited the fact that

Juror D.W. took a life when serving in Vietnam. (8 RT 1836-1837.)

The trial court believed Juror M.J. was a neutral juror based on his questionnaire. (8 RT 1841.) The court noted that Juror M.J. did not express any opinions on his questionnaire and appeared to check off boxes without writing anything down, which – as the court pointed out – was something others did as well. The court, however, accepted the prosecutor's reasons with regard to Juror M.J. having killed in combat but nevertheless having no opinion about the death penalty as legitimate. (8 RT 1841-1842.)

Juror M.J., however, did express his opinion with regard to the death penalty, stating he did believe in imposing the death penalty for murder. (7 RT 1785.) He was neutral on the issue of the death penalty but agreed that it should be imposed if warranted: "if you did the crime and the evidence is there." (7 RT 1814.) And he stated he was "pretty sure" he would be able to decide punishment at penalty phase. (7 RT 1815.) Juror M.J. stated he would be fair to both sides. (7 RT 1807.) Like others who sat as jurors, he had no opinion about the criminal justice system, the District Attorney or the Public Defender, and claimed to have no bias against either side. (7 RT 1814.)

As discussed above, the prosecutor was not concerned about removing jurors who were neutral about the death penalty and/or had no preconceived notions about the criminal justice system as long as they were not African American. (5 RT 1168 [Juror 1 left blank on questionnaire opinions about criminal justice system, defense and prosecuting attorneys, judges]; 5 RT 1226 [Juror 3 had no opinion on whether death penalty is imposed too often as opposed to too seldom]; 7 RT 1737 [Juror 7 left blank everything about opinions about criminal defense attorneys, prosecuting attorneys, judges and police officers; "I really haven't had any experience.

So I couldn't say one way or other"]; 11 CT 3362 [Juror 11 left blank these questions calling for opinions about the criminal justice system, prosecutors, defense attorneys and judges].)

Other reasons were clearly pretext. Juror M.J. said he did not know how to tell whether someone is telling truth, but when pressed believed he had the tools to do so. (7 RT 1811.) At least three sitting jurors stated they did not have the ability to discern if others were telling the truth: Jurors 2 (11 CT 3206), Juror 9 (6 RT 1315) and Juror 11 (12 CT 3377).

Juror M.J. served his country during the Vietnam War. He was a Marine who took another's life during combat. He stated that nothing about that experience would make him hesitate to serve as a juror in this case. (7 RT 1782-1784.) The prosecutor never asked Juror M.J. a question about his military service and what he later claimed to be a significant reason for excluding Juror M.J. – the reason accepted by the trial court as a non-pretextual basis for excluding a prospective juror whom the court otherwise believed was an unbiased juror.

This Court has previously held that "a prosecutor's failure to engage minority jurors 'in more than desultory voir dire, or indeed to ask them any questions at all' before striking them peremptorily, is one factor supporting an inference that the challenge is in fact based on group bias." (*People v. Turner* (1986) 42 Cal.3d 711, 727; citing *People v. Wheeler*, *supra*, 22 Cal.3d at p. 281.) The United States Supreme Court has affirmed this principle, recently holding that "the State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246.) Such is the case here.

F. The Prosecutor's Reliance On Jurors Having Relatives In State Prison As A Basis For Excusal Is Not A Non-Discriminatory Reason

The United States Supreme Court has held that the prosecutor's burden in step two is to come forward with a neutral explanation related to the case to be tried. (*Batson*, 476 U.S. at 98.) The Court clarified that a neutral explanation means an explanation based on something other than the race of the juror. (*Hernandez v. New York*, *supra*, 500 U.S. at 360.) "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." (*Ibid.*)

Here, the prosecutor's explanation was a surrogate for impermissible racial stereotypes. By relying on the fact that a juror had relatives in prison, the prosecutor was erecting a barrier that was more likely to screen out African American venire members. At the end of 2009, 29% of California's prison population were African Americans, who comprise only 6% of the state population. (California Department of Corrections and Rehabilitation data, 1990–2011; Census Bureau data, 2010.) At the end of 2010, African American males had an imprisonment rate that was nearly 7 times higher than white non-Hispanic males, and an estimated 7.3% of black males ages 30-34 were in state or federal prison. (U.S. Department of Justice, Bureau of Justice Statistics, 2012.)

The prosecutor's explanation here is reminiscent of the explanation of the prosecutor in *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, who struck a venire member because she lived in Compton, a predominately low-income, black neighborhood. (*Id.* at p. 821.) The Court found the explanation was not race-neutral.

In *Bishop*, the Ninth Circuit was guided by the United States Supreme Court's *Hernandez* decision. In *Hernandez*, the prosecutor had

used two peremptory challenges to exclude Latinos, stating that because they were bilingual they might not defer to the Spanish-language translator. (*Hernandez v. New York*, *supra*, 500 U.S. at pp. 356-357.) The high court rejected the argument that given the close relationship between Spanish-language ability and ethnicity in New York where the case was tried this justification concealed a race-based exclusion. (*Id.* at p. 360.) What saved the prosecutor's reasons in *Hernandez* was that "the prosecutor did not rely on language ability without more, but explained that the specific responses and the demeanor of the two individuals during *voir dire* caused him to doubt their ability to defer to the official translation of Spanish-language testimony." (*Ibid.*) Thus, unlike in *Bishop* – or here – "the prosecutor offered a race-neutral basis for these peremptory strikes." And, "[a]s explained by the prosecutor, the challenges rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals." (*Ibid.*)

Hernandez made clear, however, that it would "face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors." (*Hernandez v. New York*, *supra*, 500 U.S. at p. 371.) Such a case was one presented in *Bishop*. There, the prosecutor failed to provide a nexus between the jurors' characteristic and their "possible approach to the specific trial." (*U.S. v. Bishop*, *supra*, 959 F.3d at p. 825.)

> [T]he proffered reasons (that people from Compton are likely to be hostile to the police because they have witnessed police activity and are inured to violence) are generic reasons, group-based presuppositions applicable in all criminal trials to residents of poor, predominantly black neighborhoods. They amounted to little more than the assumption that one who lives in an area heavily populated by poor black people could

not fairly try a black defendant.

(*Id.* at p. 825.)

As the Ninth Circuit observed, "to strike black jurors who reside in such communities on the assumption they will sympathize with a black defendant rather than the police is akin to striking jurors who speak Spanish merely because the case involves Spanish-speaking witnesses." (*U.S. v. Bishop*, *supra*, 959 F.3d at p. 825.) Or, as here, akin to striking black jurors with relatives in prison on the assumption that they will be hostile to the prosecution.

In appellant's case, the prosecutor's reason for striking Juror D.W. and Juror S.C. would be applicable in all criminal trials to jurors with relatives in state prison. And given the disproportionate number of African American felons relative to the population, the prosecutor's justification, "referred to collective experiences and feelings that he just as easily could have ascribed to vast portions of the African American community." (*Bishop*, *supra*, 959 F.2d 825.) Ultimately, the reliance on having relatives in state prison "both reflected and conveyed deeply ingrained and pernicious stereotypes." (*Ibid.*)

Here, there was nothing about the fact that these two jurors had relatives in state prison that suggested an inability to be fair and impartial jurors in this case. Indeed, neither was even asked during voir dire whether the fact that their relatives were in prison would affect their view of the criminal justice system or the prosecution in this case. Similarly, in *Miller-El,* the prosecutor claimed to be concerned about the criminal histories of the families of two jurors. (*Miller-El v. Dretke*, *supra*, 545 U.S. at pp. 246, 250, fn. 8.) The court, however, did not find these reasons to be credible, noting that "the prosecution asked nothing further about the

influence [the first juror's] brother's history might have had on [him], as it probably would have done if the family history had actually mattered." (*Id.* at p. 246.) In these circumstances, the court held that a "failure to ask [questions on voir dire] undermines the persuasiveness of the claimed concern." (*Id.* at p. 250, fn. 8.)

To rule out jurors with relatives in prison constitutes a generic, group-based presumption applicable to a disproportionate amount of African Americans. Equating African Americans with relatives in prison to having an implicit bias against prosecutors and law enforcement ascribes a stereotype that is forbidden by *Batson*. (See *United States v. Bishop*, *supra*, 959 F.2d at p. 825.)

This is not to say that a juror's negative views about the criminal justice system forged by personal experience cannot be a valid basis for a peremptory strike. But here there was no link connecting such views relevant to the case to a specific juror or jurors. (*United States v. Bishop*, *supra*, 959 F.2d at p. 826.) Without such a connection, the prosecutor's explanation was not sufficiently race-neutral to satisfy step two.

When the prosecutor fails to provide a race-neutral explanation at step two, that failure becomes one of the relevant circumstances that the court considers in step three, when it decides whether the challenger established that the prosecutor acted with discriminatory intent. (*Yee v. Duncan* (9th Cir. 2006) 463 F.3d 893, 899; see also *Johnson v. California*, *supra*, 545 U.S. at p. 171, fn.6 [prosecutor's refusal to justify strike in step two is additional evidence of discrimination to be considered in step three].) Where the state fails to meet its burden of production in step two – either by failing to produce a race-neutral explanation or by producing an explanation that is not race-neutral – the prima facie showing from step one plus the

evidence of discrimination drawn from the state's failure to produce at step two "will establish purposeful discrimination by a preponderance of the evidence in most cases." (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692, 703.)

Here, the prosecutor's reason for striking Juror D.W. and Juror S.C. was not race-neutral, and thus establishes discriminatory intent in step three.

Even if this Court finds that the prosecutor's stated reason was race-neutral, it must find that the reason was pretextual. If a prosecutor's facially-neutral explanation results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination. (*Hernandez*, *supra*, 500 U.S. at p. 363.) The prosecutor's explanation that he struck Juror D.W. and Juror S.C. because they had relatives in state prison is such a pretext.

As noted above, African Americans constitute a disproportionate share of the prison population in the United States. If having a relative in state prison is a basis for exclusion, it demonstrates the pretextual nature of the explanation because it results in the disproportionate exclusion of African Americans.

The prosecutor's unsupported, stereotypical assumption that African Americans are unsuitable as jurors if they have relatives who have served prison time is impermissible. The Supreme Court has held that the Equal Protection Clause clearly prohibits "the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race." (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 98.)

Discrimination based on race cannot have a place in a prosecutor's decision to strike jurors from a criminal case. Evidence of even one

discriminatory motive should suffice to establish a *Batson* violation. It cannot be acceptable for a prosecutor to discriminate on the basis of race in discharging jurors, as long as it is not the only reason for the discharge. After all, "[t]he mere existence of discriminatory practices in jury selection casts doubt on the integrity of the whole judicial process." (*United States v. Degross* (9th Cir. 1990) 913 F.3d 1417, 1421, quoting *Peters v. Kiff* (1972) 407 U.S. 493, 502-503.)

G. Because the Trial Court Failed to Conduct the Required Evaluation of the Prosecutor's Proffered Reasons For Striking the Three Black Jurors, Its Findings Should Not Be Accorded Any Deference

As stated above, *Batson* calls for a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." (*Batson, supra*, 476 U.S. at pp. 96-98; *Village of Arlington Heights v. Metropolitan Housing Development Corp., supra*, 429 U.S. at p. 266.) Such inquiry allows the court to "evaluate meaningfully the persuasiveness of the prosecutor's" stated explanations." (*United States v. Alanis, supra*, 335 F.3d at p. 969.) Because step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility (*Batson*, 147 U.S. at p. 98, fn. 21), this Court has interpreted *Batson* to require that the trial judge in considering a *Batson* objection, make a "sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva, supra*, 25 Cal.4th at p. 386.) In addition, "all of the circumstances that bear upon the issue of racial animosity must be consulted." (*Snyder v. Louisiana, supra*, 552 U.S. at p. 476; *Miller-El. v. Dretke, supra*, 545 U.S. at p. 239.)

In this case, the reasons relied on by the prosecutor for striking all three jurors were facially discriminatory, unsupported by the record or

otherwise demonstrably pretextual. As established above, some of the alleged concerns noted by the prosecutor were equally present with non-African American jurors. Also telling was the prosecutor's failure to question the jurors about these concerns that were purportedly so significant that they formed the basis for excusal. However, in spite of the overwhelming evidence of the prosecutor's discriminatory intent, the trial court made no attempt whatsoever to evaluate whether the prosecutor's proffered reasons for striking the three black jurors were pretextual. The court did not ask a single substantive question of the prosecutor about any of the reasons offered, made no effort to verify that they were actually supported by the record, and also made no specific findings regarding the genuineness of each reason. The court simply ruled, in a cursory manner, that some of the proffered reasons were racially neutral. This is precisely the kind of finding that is not entitled to deference. (*Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 476-477.)

For example, the court accepted the prosecutor's reason for excusing Juror D.W. that he had been court-martialed without considering how this may have impacted Juror D.W.'s impartiality in a civilian trial, merely finding "it is true that he did go through a court-martial when he was in the military." (8 RT 1841.) Similarly, the court agreed with the prosecutor that "he does have relatives in prison" without determining whether this fact was relevant. (*Ibid.*; see also *ibid.* [court agreed that Juror S.C. had relatives in state prison for felonies).] And the trial court accepted the prosecutor's primary reason for excluding Juror M.J., the fact that he killed in combat, despite the fact that the prosecutor never asked Juror M.J. a question about this during voir dire.

Because the trial court herein completely failed to discharge its duty

to conduct a proper *Batson/Wheeler* analysis, its ruling is not entitled to deference from this Court. (*Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 476-477; *People v. Silva*, *supra*, 25 Cal.4th at p. 386; see also *People v. Hall* (1983) 35 Cal.3d 161, 168-169 [trial court declined any inquiry into or examination of the prosecutor's proffered explanation for challenging black jurors before denying *Wheeler* motion]; accord, *People v. Turner* (1986) 42 Cal.3d 711, 727-728 [trial court listened to prosecutor's reasons for challenging black jurors without question and then denied the motion without comment].)

H. Because the Prosecutor's Reasons for Challenging at Least One of the Black Jurors Was Racially Motivated, Reversal Is Required

The ultimate question to be resolved is whether "the record as a whole shows purposeful discrimination." (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 476; *People v. Silva*, *supra*, 25 Cal.4th at 384.) The exercise of even one improper challenge is sufficient to establish a constitutional violation. "[U]nder *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for striking some black jurors." (*People v. Fuentes* (1991) 54 Cal.3d 707, 715, quoting *People v. Battle* (8th Cir.1987) 836 F.2d 1084, 1086; see also *United States v. Gordon* (11th Cir. 1987) 817 F.2d 1538, 1514; *People v. Silva*, *supra*, 25 Cal.4th at p. 386; *People v. Montiel* (1993) 5 Cal.4th 877, 909.)

As appellant has demonstrated, the prosecutor's stated reasons for removing the three African American prospective jurors overwhelmingly manifest his discriminatory intent. Accordingly, for all of the reasons stated above, the trial court erred in denying appellant's *Batson/Wheeler* motion. (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 476.)

The unlawful exclusion of members of a particular race from jury selection constitutes structural error resulting in automatic reversal because the error infects the entire trial process. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 310, citing *Vasquez v. Hillery* (1986) 474 U.S. 254 [unlawful exclusion of members of the defendant's race from a grand jury constitutes structural error].) Reversal of appellant's conviction and death sentence are required, because the record clearly reveals the prosecution's purposeful discrimination against African American jurors, in violation of appellant's rights under the Equal Protection Clause of the federal Constitution (*Batson v. Kentucky*, *supra*, 476 U.S. 79), as well as the right under the California Constitution to a trial by a jury drawn from a representative cross-section of the community. (*People v. Wheeler*, *supra*, 22 Cal.3d 258.)

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II.

THE TRIAL COURT'S ERRONEOUS EXCLUSION OF A LETTER FOUND IN TAYLOR'S JAIL CELL WRITTEN BY "L.T." AND STATING THAT HE WAS ACTING AS A HIT MAN WHEN HE SHOT RICHARDSON AND WILSON VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND PENALTY DETERMINATION

A. Introduction

At a joint trial in which the two defendants claimed the other was the shooter, the trial court prevented appellant Melendez from presenting to the jury a writing in which co-defendant LaTroy Taylor claimed that he was a "hit man" who shot the victims. (2 CT 416.)

The trial court's erroneous ruling resulted in the exclusion of critical evidence in support of appellant's defense that it was Taylor, not appellant, who shot Wilson and Richardson and denied appellant his rights under the Fifth, Sixth and Fourteenth Amendments to the federal Constitution to present a defense and to confront the evidence against him. Because the evidence was critical to the issue of appellant's personal culpability, he was also deprived of a reliable and non-arbitrary determination of guilt, death eligibility and penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

B. Proceedings Below

In a pretrial motion, appellant moved to admit a document found in the cell of LaTroy Taylor in which the author, "L.T.," claimed he was a "hit man." (2 CT 412-416.)[15] The document was received from the

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[15] The handwritten document, which was attached to trial counsel's motion, is set forth here with spelling and punctuation as it appears in the original and illegible words indicated in brackets:

prosecutor as part of discovery after it was found during a routine search of Taylor's cell. (8 RT 1865; 2 Supp.CT 479-480.)

Appellant sought admission of the letter under Evidence Code section 1220 because "it tends to show that defendant Melendez is not the killer of Koi Wilson, but that LaTroy Taylor is." (2 CT 413.)

Taylor objected to admission of the evidence in a written motion and at the hearing on the motion argued that the words were nothing more than lyrics that required speculation to give them any meaning, that the document had not been authenticated, and that it would be "very prejudicial to admit this on their theory . . . that it's some kind of admission from Mr.

> I am a hi? ma? duty was to k up the mob bitch nigga from out south open his mouth
> L.T. AKA Papa [illegible] I had a disput with these bitch niggas gett so rich nigga's cause I'm a ride or [illegible] for the [illegible] nigga. It's nothing personal I was just doing my job. I am a hit man duty was to kill up the ~~mob~~ bitch but nigga from out South open his mouth all in the family but lost his wife damn near his kid. We was soul playa playas always fuccin hoes we use to fly first class to flip new clothes pop x bendin the corners on dubs. Smoke a zip right before we go in the club. Ice burg fits grills shinin like glass we use to tag team high 5 on that ass all in the club pissin out hella [illegible] style and [illegible] teach these young hoes how to perform mouth sex but instead you had to go against the grain like [illegible] child saying my name to me and my cut dog straight [illegible] the most I had to set up shop all in a different coast feds was up on me but the South nigga wanted me the most if the popos wasn't invade I be posted on yo porch with my miny madd in my [illegible] vest up throwin up that [illegible] It was young dome full of cum should of cleard my mess up go getta incognito nappy head [illegible] Just call me tyron I am taking care of bizz even if you at home. L [illegible] the dome out the door left the house next morning my nigga hit me said it was on

Taylor . . . [or] that it was even authored by Mr. Taylor." (2 Supp.CT 479-480; 8RT 1871-1872.)

At the hearing on the motion, counsel for appellant argued the admissibility of the letter by explaining the connection between references in the letter and the facts of the case:

> What we're doing with respect to those similarities is to show that there is a connection between this lyric that was found in his cell and this case. ¶ And to the extent that he makes admissions that he is the person who was the killer, then I think it's admissible against him as an admission.

(8 RT 1867.)

The court expressed skepticism about counsel's argument, stating, "Nobody ever suggested that this was a revenge type slaying because of some kind of information slipped to the police, or something like that." (8 RT 1869; see also 1870 ["But that sounds to me like speculation . . . other than your thinking that, there's nothing that I've seen that would indicated that that's true or that you can support in any way"].)

In response to the court's inquiry, the prosecutor stated he did not intend to introduce the document at the guilt phase, but said it was possible he might introduce it at the penalty phase. (8 RT 1865.) At the hearing, the prosecutor took no position on the issue. (8RT 1873.)

The trial court denied admission of the writing on the grounds that counsel had failed to make a sufficient offer of proof, but added, "the thing that convinces me about this is the very fact the DA is not offering this." (8 RT 1873.)

C. The Trial Court Abused its Discretion By Refusing to Admit Into Evidence LaTroy Taylor's Admission That He Was the Shooter

Rulings on the admission and exclusion of evidence on relevance

and section 352 grounds are reviewed for abuse of discretion. (*People v. Avila* (2006) 38 Cal.4th 491, 578; see *People v. Hovarter* (2008) 44 Cal.4th 983, 1004 [under abuse of discretion standard, "'trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice'"].)

The trial court's stated reasons for excluding the proffered evidence were that it was not sufficiently authenticated and that the contents did not appear to be "related" to the case. The court was wrong on both counts; exclusion of the evidence was an abuse of discretion.

1. The Document Was Properly Authenticated

The trial court erred in finding that the document had not been properly authenticated because of a lack of evidence that Taylor wrote it.

Authenticity of a writing is a preliminary fact which is an ultimate jury question. (Evid. Code, § 403, subd. (a)(3).) The foundation of authentication is laid by the introduction of evidence sufficient to sustain a finding. (Evid. Code, § 1400; 2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, § 7, p. 140.) "In other words, the preliminary fact of authenticity is first determined by the judge in ruling on admissibility, but is then subject to redetermination by the jury. [Citations.]" (2 Witkin, *supra*, at p. 140.)

"The court should exclude the proffered evidence only if the 'showing of preliminary facts is too weak to support a favorable determination by the jury.'" (*People v. Lucas* (1995) 12 Cal.4th 415, 466, citing 3 Witkin, Cal.Evidence (3d ed. 1986) § 1716, p. 1675.)

The trial court abused its discretion in ruling that appellant had not met the threshold showing for admission of the evidence. Contrary to

counsel's argument and the court's ruling, writings can be authenticated based on their location and content; the proponent need not prove that the handwriting is that of the author. In *People v. Olguin* (1994) 31 Cal.App.4th 1355, rap lyrics found in co-defendant Mora's house were admitted against both defendants at trial. The lyrics were handwritten on yellow paper. One song referred to its composer as Mora's gang moniker, the second one to a possible nickname. The songs referred to gang membership and disk-jockeying, something Mora did part time. (*Id.* at p. 1372.)

On appeal, Mora argued the rap lyrics were inadequately authenticated. The court noted that Evidence Code section 1414 does not limit the means by which a writing can be authenticated, and that the list set forth in sections 1410-1421 is not exclusive. (*People v. Olguin, supra*, 31 Cal.App.4th at pp. 1372-1373.) The court held that "both the content and location of these papers identified them as the work of Mora." (*Id.* at p.1373.)

In *People v. Gibson* (2001) 90 Cal.App.4th 371, the defendant, who was charged with pimping, challenged admission of two manuscripts seized from defendant's hotel room and her home, both of which were written in the first person and described operating a prostitution business, on the ground that they were not properly authenticated. (*Id.* at p. 383.) Despite the lack of evidence that the defendant wrote or typed the manuscripts, and the lack of defendant's fingerprints on the documents, the trial court found sufficient circumstantial evidence, based on where they were found, that the defendant possessed them. The contents of the manuscripts were, according to the trial court, "tantamount to an admission or confession of sorts," (*ibid.*) as are the contents of the writing in the present case.

Citing *People v. Olguin*, the Court of Appeal noted that "circumstantial evidence, content and location are valid means of authentication," and found that references to the author being "Sasha," one of the defendant's aliases, and the fact that the locations where the items were seized were both residences of defendant was sufficient authentication. (*People v. Gibson*, *supra*, 90 Cal.App.4th at p. 383; see also *People v. Smith* (2009) 179 Cal.App.4th 986, 1002 [circumstantial evidence, location and content sufficient to authenticate enrollment forms of non-testifying victims in securities fraud case].)

Similarly, in the paper that was found in LaTroy Taylor's cell, the author L.T. wrote in the first person, and the contents clearly refer to Richardson, with whom Taylor was formerly friendly, as well as many other aspects of the case, discussed in greater detail below. Taylor's counsel argued that it "could have been a letter that was received. Could have been something that was obtained from another inmate." (8 RT 1872.) As noted by the court in *Gibson*, however, "no evidence showed that th[is] item[] belonged to anyone else." (*People v. Gibson*, *supra*, 90 Cal.App.4th at p. 383.) Thus, the court erred in finding the document was not properly authenticated.

2. The Writing was Admissible Under Evidence Code section 1220 as an Admission by Taylor

The writing was admissible against Taylor under Evidence Code section 1220 which provides an exception to the hearsay rule for statements "offered against the declarant in an action to which he is a party." The letter identifies "L.T." as a "hit man" whose "duty was to kill up the bitch nigga from out south." (2 CT 416.) Appellant offered the statements as evidence of Taylor's consciousness of guilt and to prove circumstantially

that it was Taylor and not he who shot Richardson and Wilson. (*People v. Robinson* (2000) 85 Cal.App.4th 434, 445 [defendant's statement to his girlfriend threatening particular conduct was admissible under Evidence Code section 1220 to demonstrate consciousness of guilt and as circumstantial evidence of defendant's conduct after murder].)

3. The document was relevant

The trial court's ruling that the document was inadmissible because there was insufficient evidence showing that it "is really related to this case in the sense that its is a – a concealed or a – an indirect confession" (8 RT 1873), was also erroneous. "No evidence is admissible except relevant evidence." (Evid. Code, § 350.) Evidence is relevant if it has "*any* tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210, italics added.) Evidence is relevant if it tends logically, naturally and by reasonable inference to establish a material fact, such as identity, intent or motive. (*People v. Lee* (2011) 51 Cal.4th 620, 642.) Evidence is relevant if it tends to prove an issue before the jury, even though it may be weak. (*People v. Freeman* (1994) 8 Cal.4th 450, 491.) "Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.)

Here, the evidence was relevant to support appellant's position that it was Taylor who shot Richardson and Wilson because he was carrying out a job as a hit man. The authorities cited in appellant's motion in support of admission of the letter are directly on point. In *People v. Kraft* (2000) 23 Cal.4th 978, the trial court admitted a handwritten document which the prosecution claimed was a coded list of the defendant's victims, a so-called "death list." The defendant objected to admission of the list citing, inter

alia, the hearsay rule and lack of relevancy, and undue prejudice from the reference to uncharged crimes. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1032-1033.) The trial court concluded that the prosecution's interpretation of the list was reasonable, that it was admissible under Evidence Code section 1220, and that its probative value outweighed any prejudice flowing from its admission. (*Id.* at p. 1033.) The court found that the entries on the list, considered in the context of the evidence of the corresponding murder counts, warranted admission of the list and determined that the jury could give the list whatever weight it thought appropriate. (*Ibid.*)

This Court upheld the trial court's ruling, finding the list was relevant under Evidence Code section 210 to prove defendant's awareness of certain characteristics of the charged murders. This Court compared certain entries on the list with other evidence in the case. For example, the prosecution claimed that an entry "Portland Hawaii," referred to a victim who was a resident of Oregon who previously lived in Hawaii, and who was wearing a shirt with "Local Motion," and "Hawaii," when his body was found. Defendant claimed reimbursement from his employer for travel expenses to Portland, Oregon around the time the victim's body was found. (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1034.)

Based on this Court's holding in *Kraft*, in determining whether the document found in LaTroy Taylor's cell was an admission that he was the person who shot Wilson and Richardson, the trial court could "properly consider all available evidence pertaining to the [letter]." (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1034.) At the hearing on the motion, counsel for appellant set forth the numerous references in the letter that established that the author was referring to the shooting of Richardson and Wilson. As counsel argued, "this letter or this song lyrics starts out at the top, 'L.T.'

which happens to be Mr. Taylor's initials," and continues:

> . . . he talks about he was just doing his job. He's a hit man. His duty was to kill for the mob.[16] "That nigga from out south opened his mouth." Mr. Richardson lives out south. "All in the family business." That is dope dealing, which I think is the Richardson family business. ¶ "He lost his wife." That is, Koi Wilson was killed. "Damn near his kid." His child was almost taken away by CPS. That's a proceeding that has happened since that time. ¶ Then he goes back, he goes on to talk about the things that they used to do together, going to clubs and so forth, describing his relationship with Ricky Richardson. ¶ He goes on later to indicate that – that he had to set up shop in a different coast. The feds was on me. He was dealing drugs in St. Louis, Missouri, when he was arrested for the crime in this case. And he was arrested by the FBI, which I think is the reference to the feds.

(8 RT 1867.)

Neither the prosecutor nor Taylor's counsel disagreed with counsel's interpretation of the references in the letter. Nevertheless, the trial court excluded the evidence because of a lack of "foundational evidence to show at this point that [the letter] actually is related to the facts of this case." (8 RT 1873.) The trial court found an insufficient nexus because appellant had not proved that Taylor was carrying out a gang hit: "At this point, there's been no offer . . . to show that the attack on Mr. Richardson was made because he was spilling the beans on somebody or was informing on somebody . . . there isn't [sic] enough things that fit here, I don't think." (8 RT 1873.)

The trial court's analysis was flawed: admission of the evidence was

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[16] Counsel was presumably using "mob" interchangeably with "gang," based on documentation received from the prosecutor pursuant to a pretrial discovery request showing that Taylor had been validated as a gang member. (8 RT 1862.)

not contingent on appellant proving that the shooting was in retaliation for Richardson's actions against the gang. The issue before the court was whether the evidence offered by appellant was relevant on the material question of which of the codefendants was the shooter. This Court in *People v. Freeman*, *supra*, 8 Cal.4th 450, discussed the test for relevancy in criminal cases. Two eyewitnesses to a robbery testified that defendant placed the stolen property into a plastic garbage bag. Defendant argued that admission of evidence of a bag found in a car allegedly belonging to him was irrelevant because it was not identified as the bag used in the robbery and because it was such a common item. (*Id.* at pp. 490-491.)

In rejecting defendant's argument, this Court observed that evidence that defendant possessed a bag similar to one used by the shooter tended to show that defendant was the shooter. "Standing alone the inference may have been weak, but that does not make the evidence irrelevant." (*People v. Freeman*, *supra*, 8 Cal.4th at p. 491.) This Court referred to *People v. De La Plane* (1979) 88 Cal.App.3d 223, which was cited by Taylor in his argument against admission of the letter. (8 RT 1871.) In *De La Plane*, the court admitted over defendant's relevance objection evidence of an axe handle found in the house in which defendant was arrested. The only evidence connecting the handle to the crime was expert testimony that it "*could* have caused" the victim's wounds. (*People v. De La Plane*, *supra*, at p. 239, original italics.) The Court of Appeal held that evidence of the weapon found in defendant's possession was relevant on the theory "that a trier of fact may reasonably draw an inference from defendant's possession of the weapon . . . to the fact that he used [it] to commit the offense – a disputed fact of consequence in the action." (*Ibid.*) In the same way that the plastic bag in *Freeman* and the axe handle in *De La Plane could have*

been related to the crimes, the letter found in Taylor's cell *could have* referred to Taylor's role in the crimes and thus was relevant and admissible.

The nexus between the statements in the letter and the facts of the case is certainly as strong as in the cases discussed above and not "pure speculation," as characterized by the trial court (8 RT 1873) and Taylor. Calling the letter simply "poetry or rap lyrics," Taylor's counsel argued its admission would lead to unwarranted speculation: "everyone's going to have to speculate what this is about. Is this a confession? Is it an admission? Is it just a song?" (8 RT 1871.) While in some cases lyrics might not establish their author's true state of mind or reflect their actions, here Taylor's "communications . . . were not ambiguous or equivocal." (*People v. Zepeda* (2008) 167 Cal.App.4th 25, 35.) The author of this letter identified himself as a hit man whose job it was to kill his friend: "It's nothing personal I was just doing my job." (2 CT 416.)

In *People v. Von Villas* (1992) 11 Cal.App.4th 175, also cited by appellant in his motion in support of admission of Taylor's letter (2 CT 413), the defendant's wife was found in possession of a note written by her at her husband's direction. The note, which the Court of Appeal characterized as containing entries "which the prosecution determined were incriminatory," were far more cryptic than those in the letter found in Taylor's cell. The Court of Appeal found there was sufficient evidence before the trial court to "warrant the reasonable conclusion that the contents of the note represented admissions of Von Villas that were properly admissible under Evidence Code section 1220." (*Id.* at pp. 232-233.)

Taylor's identity as the shooter was certainly not speculative: Richardson named him as the person who shot him the first three times he was asked. Moreover, as discussed in detail below, there were several

aspects of the case – including why Richardson initially named Taylor as the shooter and later changed his mind – that were explained by the letter. The statements in the letter go to the central issue of the case: who was responsible for the death of Koi Wilson and the attempted murder of Ricky Richardson. It is hard to imagine evidence more relevant than an admission by one of the two defendants charged with those crimes that it was he; the trial court abused its discretion by excluding the letter.

4. Admission of the evidence was not prejudicial to Taylor or the prosecutor, but its exclusion was highly prejudicial to appellant

Appellant recognizes that Evidence Code section 352 "is not limited by its terms to disputes by opposing parties; it may become applicable to parties on the same side of an action when their interests are adverse to each other." (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1007, fn. 10.) However, Taylor's argument that the evidence should be excluded because it was too prejudicial reflects a misconception of what constitutes undue prejudice under Evidence Code section 352. "The prejudice that section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*People v. Zapien* (1993) 4 Cal.4th 929, 958, internal quotes and citations omitted.)

The letter proffered by appellant tended to show that Taylor was the shooter, evidence that was obviously contrary to his defense, but which cannot be characterized in any way as inflammatory. "[T]he test for prejudice under Evidence Code section 352 is not whether the evidence in question undermines the defense or helps demonstrate guilt, but is whether the evidence inflames the jurors' emotions, motivating them to use the information, not to evaluate logically the point upon which it is relevant, but

to reward or punish the defense because of the jurors' emotional reaction." (*People v. Valdez* (2012) 55 Cal.4th 82, 145, citing *People v. Doolin* (2009) 45 Cal.4th 390, 439.)

Under this definition, it cannot be said that Taylor's admission was unduly prejudicial to his case under section 352. There is no argument that admission of the evidence was prejudicial to the prosecution – the district attorney offered no objection to the evidence. (8 RT 1873.) The prejudice to appellant's case from its exclusion, on the other hand, was significant.

D. Exclusion of the Evidence Violated Appellant's Federal Constitutional Rights

Apart from constituting state law error, the refusal to admit this evidence was an independent violation of appellant's Fifth, Sixth, and Fourteenth Amendment rights to put on a defense and to a fundamentally fair jury trial in accordance with due process of law. (*Washington v. Texas* (1967) 388 U.S. 14, 18-19; *Miller v. Angliker* (2nd Cir. 1988) 848 F.2d 1312, 1323 [state law cannot diminish defendant's federal constitutional right to present evidence in his favor].)

The fact that the self-incriminatory statement being offered here was in the form of an admission does not alter the nature of the constitutional violation. The constitutional rights at issue contemplate both the presentation of live witnesses and the right to place before the jury secondary forms of evidence such as hearsay or prior testimony. (*Rosario v. Kuhlman* (2nd Cir. 1988) 839 F.2d 918, 924.)

The trial court's erroneous exclusion of evidence that Taylor admitted that he was the shooter violated appellant's Fifth and Fourteenth Amendment right to due process and his Sixth Amendment right to compulsory process. A defendant's right to due process and compulsory

process includes the right to present witnesses and evidence in his own defense. (*Washington v. Texas* 388 U.S. (1967) 14, 18-19.) "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies . . . This right is a fundamental element of due process of law." (*Id.* at p. 19.) The right of the defendant to present witnesses in his defense includes the right to have the jury hear the testimony those witnesses are called to give. (*Rock v. Arkansas* (1987) 483 U.S. 44, 55.) These rights are also guaranteed by the California Constitution. (*People v. Cudjo* (1993) 6 Cal.4th 585, 638 (disn. opn. of Kennard, J.)

Appellant recognizes that the right to present defense witnesses and testimony at trial is not absolute, and in appropriate circumstances may have to "'bow to accommodate other legitimate interests in the criminal trial process.'" (*Michigan v. Lucas* (1991) 500 U.S. 145, 149, quoting *Rock v. Arkansas*, *supra*, 483 U.S. at p. 55, and *Chambers v. Mississippi* (1973) 410 U.S. 284, 295.) However, the state may not arbitrarily deny a defendant the ability to present testimony that is "'relevant and material, and . . . vital to the defense.'" (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867, quoting *Washington v. Texas*, *supra*, 388 U.S. at p. 16.) Moreover, a state may not apply a rule of evidence "mechanistically to defeat the ends of justice." (*Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302.)

The court's exclusion of the evidence was based on the prosecutor's position: "The thing that convinces me about this is the very fact the DA is not offering this." (8 RT 1873.) The court's reliance on the prosecutor's not offering the evidence was improper, however, because that decision was

not based on a determination that the letter was not relevant, but rather that it did not fit in with the prosecutor's theory of the case.

In *Holmes v. South Carolina* (2006) 547 U.S. 319, the Supreme Court held that an evidence rule that limited the defendant's ability to introduce evidence of third-party guilt if the prosecution had introduced forensic evidence that, if believed, strongly supported the defendant's guilt, denied defendant a fair trial. The high court observed that, "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." The rule applied in *Holmes* violated a criminal defendant's right to have "a meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 689-609." The court's action in the present case – excluding the evidence because it was not consistent with the prosecutor's theory – had precisely the same effect. The question for the court was whether the evidence was relevant and otherwise admissible. As appellant has demonstrated, it was both.

The exclusion of this evidence, particularly in light of Taylor's and the prosecutor's arguments, discussed below, rendered the trial fundamentally unfair and was not harmless beyond a reasonable doubt. In addition to the constitutional violations cited above, the exclusion of this evidence also violated appellant's Eighth Amendment right to a reliable, individualized and non-arbitrary sentencing determination. The error deprived the jury of evidence which reasonably could have persuaded it to believe appellant's testimony; this error therefore was critical not only to its determination of guilt, but also to its determination to impose the death penalty.

In *Green v. Georgia* (1979) 442 U.S. 95, the United States Supreme

Court vacated a death sentence based on the trial court's refusal to allow the defendant to introduce evidence at the penalty phase of his trial of an admission by the separately tried codefendant, Moore, that he killed the victim when the defendant was not present. (*Id.* at p. 96.) The confession had been introduced at Moore's trial, at which he was convicted and sentenced to death. (*Id.* at p. 97.)

The trial court's ruling was based on a state hearsay law, which the high court held could not be used to exclude the proffered evidence. (*Green v. Georgia*, *supra*, 442 U.S. at p. 97.) The excluded evidence in *Green* was deemed "highly relevant to a critical issue in the punishment phase of trial," and the court found that "substantial reasons existed to assume its reliability." (*Ibid.*) The statement was made spontaneously to a close friend, there was ample corroborating evidence – the evidence was sufficient to procure a death sentence for the codefendant – and the State considered the evidence reliable enough to use it against Moore at his trial. (*Ibid.*)

Similarly, in the present case, the excluded evidence was highly relevant to the issue of appellant's culpability. As discussed below, the reason why it was not used by the prosecutor against Taylor was not a lack of reliability or relevance, but rather was because of the trial strategy adopted by the prosecutor that appellant, not Taylor, was the shooter. Exclusion of the evidence denied appellant "a fair trial on the issue of punishment," (*Green v. Georgia*, *supra*, 442 U.S. 95) and requires reversal of the death judgment.

Even if this court were to find the error to be state-law error, the remedy is reversal if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."

(*People v. Watson* (1956) 46 Cal.2d 818, 836.) A "probability" in this context does not mean more likely than not, but merely a reasonable chance. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; cf. *Strickland v. Washington* (1984) 466 U.S. 668, 693-694, 697, 698 ["reasonable probability" means "probability sufficient to undermine confidence in the outcome"].) Here, the court's error was sufficient to undermine confidence in the case's outcome. Had the jury been presented with the evidence sought, appellant could have presented a coherent theory of why Ricky Richardson initially – and accurately – named LaTroy Taylor as the shooter, but later changed his story to blame appellant.

Therefore, whether the court's failure to permit the evidence violated appellant's federal constitutional right to present a defense (so that *Chapman* governs), or contravened state law (so that *Watson* applies), the error was prejudicial and requires reversal. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

E. The Trial Court's Error Was Prejudicial and Requires Reversal of the Convictions and Penalty

Where, as here, the trial court has violated appellant's constitutional rights by excluding crucial defense evidence, the error is harmless only if it appears beyond a reasonable doubt that it did not contribute to the jury's verdict. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [applying harmless error analysis to erroneous ruling excluding evidence].) Respondent cannot meet this burden.

Even under the *Watson* test for state law error, the court's erroneous ruling also mandates reversal. It is reasonable to believe that there would have been a different result if this evidence had been admitted, and the

Watson test has been met. (See *People v. Elize* (1999) 71 Cal.App.4th 605, 616 [*Watson* test met when there is reasonable chance result would have been different].)

The jury was deprived of available evidence highly relevant to its tasks of assessing appellant's credibility and deciding his guilt. The evidence of Taylor's admission that he was the shooter was obviously vital to appellant's defense. Here, as in *People v. Cudjo*, *supra*, 6 Cal.4th 585, "[t]he success of this defense depended in large measure on providing the jury with sufficient reasons to credit defendant's explanation and to doubt the contrary version" presented by the prosecution and Taylor." (*Id.* at p. 642, disn. opn. of Kennard, J.) There was no better evidence available to appellant to prove his case. The trial court's erroneous ruling excluding evidence that Taylor had admitted he was the shooter "eviscerated this defense." (*Ibid.*)

As shown by their verdict acquitting Taylor of the murder and attempted murder, the jury in this case was prepared to believe that one of the two codefendants was the shooter and the other knew nothing about the shooting before it happened. Had appellant been permitted to present evidence that Taylor admitted he shot Wilson and Richardson, there is a reasonable likelihood the jury would have found appellant rather than Taylor to be not guilty of the murder and attempted murder.

The prosecution's position was that both defendants were guilty of the murder and attempted murder, on the theory that they went to the house with the shared intent to rob and kill Richardson and Wilson. In his closing argument, the prosecutor characterized it as "a fairly straightforward drug/murder rip-off case." (14 RT 2343.) This version of events had appellant as the shooter and Taylor as an aider and abettor based on his

knowledge that Richardson kept large amounts of drugs and money in the house, and his ability to get inside the house because of his friendship with Richardson.

Appellant testified that Taylor shot both victims and that when appellant accompanied Taylor to Richardson's house, he had no prior knowledge that Taylor planned to do so. Without evidence of Taylor's admission, however, appellant was deprived of the most critical piece of evidence he could have put forth in his own defense. The statements made by Taylor in the letter went to the heart of the most contested issues at trial, i.e., whether or not appellant was the actual killer or, if he was an aider and abettor of a planned robbery, whether he knew that Taylor planned to shoot Richardson and Wilson. Taylor's statement that the shooting was a planned "hit" answered the first question definitively and cast considerable doubt on the second. Indeed, Taylor's role as a hit man answers all of the questions asked by the parties and makes far more sense than the scenario put forth by the prosecution.

Evidence that the attack on Richardson and Wilson was a gang hit carried out by Taylor, renders the prosecutor's argument that appellant was an aider and abettor highly unlikely because there was no evidence that appellant knew of Taylor's plan before they entered the house, and nothing whatsoever to suggest that appellant intended to assist Taylor in his "job."

The prosecution's case that appellant was the shooter was complicated by several facts, not the least of which is that the first three times Richardson was asked who shot him – by the dispatcher, Officer Gauthreaux, and Detective Anderson – he named Taylor, and not appellant. (11 RT 2800, 2803.)

None of the reasons offered by Richardson in his testimony and

argued by the prosecutor for why he originally named Taylor as the shooter made any sense. Richardson testified that he told the dispatcher that LaTroy shot him and that he did not know LaTroy's last name because Taylor "betrayed" Richardson by bringing appellant to the house to kill Richardson and Wilson. (11 RT 2725-2726.) He felt most betrayed by Taylor. (11 RT 2726.) He told the dispatcher that "'Troy" shot him "Because that's the only thing that was going through my mind at the time, was LaTroy." (11 RT 2726.) "The reason I kept saying LaTroy was because I felt like he shot me, you know, because I trusted him. And that's why I kept – that name, that just wouldn't – when I woke up, I was still saying LaTroy because it was just in my – it was just registered in my head that he was the one who set that up." (11 RT 2800.)

It defies reason to believe that Richardson would feel more anger toward the person who was responsible for bringing the shooter to his house than the person who killed his fiancé and tried to kill him. Nevertheless, in keeping with the theory that appellant was the shooter, the prosecutor argued that Richardson's "demonstrable animosity" toward Taylor, as compared to appellant, proved that Taylor was telling the truth when he accused appellant of being the shooter. (15 RT 3917.) The prosecutor argued that even though Richardson "really hates" Taylor and "wants [him] to die," (15 RT 3918) the fact that he did not name Taylor as the shooter at trial, "goes to show that he's going to tell it like it happened. And no matter how angry he is at Mr. Taylor he's not going to make Mr. Taylor any more guilty than he actually is" (15 RT 3919). As the prosecutor well knew, however, there was a far more logical explanation for why Richardson felt more hatred toward Taylor than appellant.

It was not until the interview with Detective Anderson on February

8, 2001, that Richardson said that appellant was the shooter. (12 RT 2804.) Richardson initially told Detective Anderson that after he unlocked the security door and front door, somebody kicked at the door and Taylor pushed his way past Richardson and appellant followed. (12 RT 3054.) By February, Richardson's story had changed: this time he told Anderson that he opened the door for Taylor and appellant to come in because he was friends with Taylor. (12 RT 3054.) Richardson's changing story is consistent with Taylor being a "hit man" for a gang. Taylor or other members of the gang may have threatened Richardson not to name Taylor as the shooter, or Richardson may have decided on his own that naming Taylor was risky.[17]

As a result of his trial strategy, on this issue as well as others that arose during trial, the prosecutor was forced to stake out a position in line with Taylor and against appellant, even when it was not one a prosecutor would usually take, or when it was contrary to common sense, because it was consistent with the chosen strategy.[18] Referring to the letter found in Taylor's cell, the court remarked that, "normally this would be the sort of thing I suppose that the . . . prosecution might want to get into evidence."

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[17] According to Richardson's testimony, Taylor sent him "numerous letters, different types of letters" through the mail while Taylor was in jail. (11 RT 2824.) Some he threw away and some he kept. (11 RT 2825.) Taylor also called him "numerous times. Talking shit, I should say." (11 RT 2824.)

[18] The court commented on this phenomenon. (See, e.g., 8 RT 1879-1880 [court observes that prosecutor is not offering evidence of Taylor's possession of .45 caliber gun two months earlier "because it doesn't fit with the DA's theory that it was Mr. Melendez, actually, that pulled the trigger"].)

(8 RT 1864.) Indeed, in any other case in which the identity of a murderer was a question, there can be no doubt that the prosecutor would seize on an admission by the defendant in which he offered evidence not only of his identity, but also his motive for the shooting.

Indeed, given the prosecutor's strategy it is not surprising that the prosecutor did not seek to admit this evidence at the guilt phase of trial because the writing was tantamount to a confession that both the plan and the execution were Taylor's not appellant's. If the jury believed this was the case, then appellant would be acquitted. The trial court's rulings, on this and other evidentiary issues[19], allowed the prosecution and Taylor, allied in their efforts to prove that appellant was the shooter, to present a distorted version of the facts to the jury.

In his opening statement, Taylor's attorney told the jurors they did not have to determine "why did this happen," and that they "may never know why Angelo Melendez went in that bathroom and came out." (9 RT 2349.) Richardson was asked by Taylor's counsel, "And you don't have any explanation for why this would happen; is that correct?" He answered, "Yes." (11 RT 2769.) In his closing argument, Taylor's attorney went so far as to argue, "[T]here is no evidence that LaTroy Taylor and Ricky Richardson were having some rival drug dealer war . . . it was exactly to the contrary" (15 RT 3844), knowing full well that the letter found in Taylor's cell directly contradicted that statement.

The prosecutor challenged the jury to come up with a "legitimate"

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[19] See Argument III, *ante*, which addresses the trial court's rulings admitting statements by Taylor inculpating appellant, while exculpating himself, and the refusal to permit appellant to introduce evidence calling into question the truth of an alleged admission to witness Larry Rhodes.

reason for appellant and Taylor to be together that night, and if they could not, then the only conclusion the jurors could draw is that they had to be together for the "illegitimate purpose . . . to get together and commit this robbery." (15 RT 3921.) He went on to bemoan the lack of information about why they were together that night, and to conclude, "Have no clue. Don't care. *If I had information about that, we'd give it to you.* Don't know. Don't care. Irrelevant. But that's the only reason. There's no legitimate reason. Mr. Taylor can't argue one, and Mr. Melendez tried and failed miserably." (15 RT 3921-3922, italics added.) In fact, of course, Taylor's letter offered the reason why he went to Richardson's house that night.

Taylor's attorney tried to cast doubt on Richardson's claim that Taylor committed a robbery by pointing out that large amounts of money and drugs were left behind after the victims were shot. (15 RT 3841; see also, 3845 [calling this a "pretty poor robbery" based on "all the things that were left behind"].) The more reasonable explanation for Taylor's failure to remove the money from Richardson's pockets or the marijuana from the floor near Wilson's feet is that this was not a robbery, but a gang hit.

Evidence that Taylor was acting as a hit man made sense of a crime that the prosecutor and Taylor claimed was inexplicable, but the jurors did not have the information because Taylor and the prosecutor argued to keep it from them.

The prejudice from the trial court's ruling excluding the letter was compounded by the erroneous admission of portions of a letter from Taylor delivered to appellant's witness, Tino Yarborough, in which Taylor proclaimed his innocence while implicating appellant in the shootings. In addition, the trial court erroneously excluded evidence that would have

corrected the misleading impression left by a witness called by Taylor to whom appellant allegedly admitted that he shot Richardson. (See Argument III, *ante*.) Taken together, these errors resulted in a distorted record that implicated appellant as the shooter, while keeping from the jury critical evidence that called that version of events into serious doubt.

The admission of a key participant in the case that he committed the crime at issue was too significant to remove from the jury's consideration. Appellant was entitled to present this evidence and it was a critical piece of the complete picture of what may have occurred at Ricky Richardson's house on the night he and Koi Wilson were shot. As such, its removal from the jury's consideration was not harmless error. It is not possible to conclude that the guilty verdict in appellant's trial "was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

The erroneous exclusion of this evidence also violated appellant's Eighth Amendment right to a fair and reliable sentencing hearing. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638, fn. 13 [greater reliability required in capital cases], citing *Gardner v. Florida* (1977) 430 U.S. 349, 357-358 (plur. opn. of Stevens, J.); accord, *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plur. opn. of Burger, C.J.); *Woodson v. North Carolina* (1976) 428 U.S. 280, 304-305 (plur. opn. of Stewart, J.).)

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III.

THE TRIAL COURT'S EVIDENTIARY RULINGS RESULTED IN 1) THE ERRONEOUS ADMISSION OF STATEMENTS BY TAYLOR IMPLICATING APPELLANT IN THE SHOOTINGS WHILE EXONERATING HIMSELF AND 2) THE IMPERMISSIBLE EXCLUSION OF A STATEMENT BY APPELLANT THAT CREATED THE MISLEADING IMPRESSION THAT APPELLANT HAD CONFESSED TO THE KILLINGS AND VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, TO PRESENT A DEFENSE AND TO A RELIABLE PENALTY DETERMINATION AND REQUIRE REVERSAL OF THE CONVICTIONS AND DEATH JUDGMENT

A. Introduction

The trial court, faced with two evidentiary rulings that were, essentially, the mirror image of each other, made erroneous rulings as to both, and as to each, to appellant's detriment.

Tino Yarborough, called as a witness on behalf of appellant, testified that the night before he came to court he received a letter from codefendant Taylor while they were both in custody in the jail. Yarborough felt threatened by part of the letter in which Taylor told him not to go "up there lying. If you do, I'll feel sorry for you." (12 RT 3154.)

At the behest of Taylor and the prosecutor[20], and over defense objection, the trial court admitted the entire letter which contained

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[20] While the prosecutor characterized his position as "not objecting" to admission of the note, he offered his opinion in support of introducing it, arguing that it would be impossible to "unring the bell" after Yarborough's testimony regarding threats by Taylor and receipt of the note. (12 RT 3150.)

statements by Taylor that he was not responsible for shooting Ricky Richardson and Koi Wilson, and blaming appellant. Because Taylor did not testify, the court's ruling allowed Taylor to present self-serving statements without being subject to cross-examination, and resulted in the admission of evidence highly prejudicial to appellant.

Later in the trial, during Taylor's case, the court was confronted with a nearly identical evidentiary decision, except this time it was appellant who asked the court to admit the remainder of a conversation. Detective Anderson interviewed Larry Rhodes, who was in custody at the same facility as appellant before the trial began. Anderson testified that Rhodes told him that appellant admitted shooting Ricky Richardson. In the course of the same conversation, however, Rhodes showed Anderson a letter from appellant in which he admitted he was present at the time of the shooting, but claimed that he had no idea that Taylor was going to shoot the victims. The trial court excluded evidence of the letter, ruling that it was self-serving hearsay by appellant, and not admissible, even to dispel the misleading impression left by the evidence of his alleged admission to Rhodes.

The trial court's erroneous rulings denied appellant his federal constitutional rights to present a defense and to confront the evidence against him. (U.S. Const., 5th, 6th & 14th Amends.) Because the evidence was critical to the issue of appellant's personal culpability, he was also deprived of a reliable and non-arbitrary determination of guilt, death eligibility and penalty. (U.S. Const., 5th, 6th & 14th Amends.)

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B. The Trial Court Erred in Admitting the Entire Letter From Taylor to Yarborough

1. Factual Background – Taylor's Note to Yarborough

Tino Yarborough, who is related to both appellant and codefendant Taylor,[21] was called as a witness by appellant and testified to seeing both defendants on the night of the shooting. (12 RT 3112.) Taylor and appellant came to Yarborough's house separately: appellant came first and knocked on Yarborough's bedroom window; 45 minutes later Taylor came and did the same. (12 RT 3113-3114.) Before Taylor arrived, appellant was pacing around Yarborough's room. (12 RT 3113.)

When Taylor knocked at his bedroom window, Yarborough went to the door to let him in and saw that he had a garbage bag and a gun, which Yarborough described as a .45.[22] (12 RT 3114-3116.) Appellant and Taylor went outside. After a minute, Yarborough heard something and went outside where he saw the two men "tussling." (12 RT 3115.) Taylor was trying to give appellant money, but appellant knocked it out of Taylor's hand and he fell to the ground. They both picked up the money and Taylor put it in the bag. (12 RT 3116.) The argument lasted a couple of minutes. (12 RT 3119.)

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[21] Yarborough testified that Taylor is his "second or third" cousin and appellant is his uncle. (12 RT 3112.)

[22] Trial counsel wanted to show the witness the .45 caliber gun taken from Taylor the month before the shooting – which was being held by the prosecutor in his office – to see if it was the same type of weapon as Yarborough saw Taylor with that night. Taylor's objection, on unspecified grounds, joined by the prosecutor who stated, "We're not giving him a quiz," was sustained by the court, who stated: "Yeah, that's not the way to do it." (12 RT 3122.)

Yarborough gave Taylor the keys to his car and his cell phone. (12 RT 3119.) The car was returned by two men about three days later. (12 RT 3120.) Appellant stayed at Yarborough's house that night, but was gone when he woke up in the morning. (12 RT 3120.)

After Yarborough testified to the foregoing evidence on direct examination, he was asked by appellant's counsel if he had "received any threats from Mr. LaTroy Taylor about this case?" and answered, "Somewhat." When asked to explain, Yarborough said he had a letter. Trial counsel asked if Taylor had given it to him and Yarborough answered, "Yes. I'm in the hole right now, and a trustee slid it under my door." Taylor's attorney's objection that the answer was non-responsive was sustained, and the jury was admonished to disregard it. (12 RT 3121.)

Yarborough was asked if he had "received any personal threats from" Taylor, and answered that Taylor had not said anything to him personally. In response to counsel's question, "Are you saying the only thing that's happened is somebody slid something under your cell door?" Yarborough answered, "That and at night he talked." (12 RT 3121.) In response to Taylor's counsel's hearsay objection, the court clarified that Taylor had said nothing to the witness himself. (12 RT 3121-3122.) Yarborough was asked if he was trying to cover up for either defendant, both of whom were relatives of his, and he answered no. (12 RT 3123.)

During a recess, the court ordered Yarborough to turn over the letter, which was examined by the prosecutor and Taylor's counsel. (12 RT 3142-3143.) Counsel for Taylor asserted that the letter "appears to be anything but a threat." (12 RT 3146.) The court stated its opinion that "it would be very hard pressed to construe [the letter] as a threat." (12 RT 3149.)

Taylor's attorney argued that because the witness's answer that he

had been threatened "somewhat," and had received a letter from Taylor still stood in the record, either the letter should be admitted or the court should strike the answer regarding threats. (12 RT 3148.) Taylor's counsel suggested introducing the letter so as to dispel any speculation by the jury that it contained a threat. (12 RT 3150.) The prosecutor argued in favor of admitting the note: "they [the jury] want to know what it is. And they're being told you can't know what it is, don't think about it. That's impossible." (12 RT 3150)

The court stated its intention to admit the letter, but mistakenly assumed that appellant would introduce it. (12 RT 3150 ["And, obviously, Mr. Panerio, Mr. Melendez asked for it, so we're going to introduce the note, folks"].) Counsel said they did not want to introduce it and stated their belief that the only relevant part was the last sentence which reads, "I'll be sorry for you if you do." Over counsel's objection, the court ruled that because "the problem was created by Mr. Melendez . . . he's going to have to live with it now," and if Taylor's counsel introduced it, "we'll hear the whole thing." (12 RT 3151.)

Taylor's counsel questioned Yarborough about the letter, which he said had been slid under his cell door the night before. (12 RT 3153, 3156.) He felt threatened by the line that said, "Don't go up there lying. If you do I'll feel sorry for you, little cousin." (12 RT 3154.)

Yarborough testified that, while the letter told him to tell the truth, "his [Taylor's] truth is his side." (12 RT 3155.) In addition to testimony about the letter, Yarborough revealed in response to a question from Taylor's attorney, that Taylor had said he had "seen the paperwork" about Yarborough coming to court to testify as a witness for appellant and that Taylor "got the paperwork and he send [sic] it to everybody that's in the

hole." (12 RT 3157.) Thus, not only was Taylor able to have the letter delivered to Yarborough, he also let other inmates in the jail know that Yarborough was going to testify against him.

Taylor's counsel elicited from Yarborough the exculpatory statements in the letter: "Mr. Taylor told you in that letter he didn't have anything to do with this, didn't he?" Yarborough answered yes. Counsel then asked about the statements implicating appellant: "He told you Mr. Melendez did this in the letter?" Yarborough said he didn't care who did it, but counsel pressed him about what the letter said, "That's what Mr. Taylor was saying, it was Mr. Melendez, your uncle that did this?" Yarborough said "Yes." (12 RT 3154-3155.)

After this, the prosecutor had the witness read the entire letter into the record:

> On top it says Real Talk. It says, boy they wasn't lying when they said family will be the first one to get ya. Little cuzzo. You know your uncle did that . . . bullshit. He is trying to blame me for something I didn't do. Real talk on my kids when you got into it – when you got into it out there, who was there for you? Me. I gave you heats and everything. I was supposed to be at home two and a half years ago. If Angelo was my real cousin – if Angelo was my real cousin, Rick ain't saying I did it. So why is Angelo saying I did? Cold nigga – cold nigga, don't hop on that stand lying cuzzo. I got that Mexican chunky coming to court saying what you told him – what you told him. I know you're trying to help your uncle, but you're fucking your cousin at the same time. I love you little nigga, but don't go up there lying. If you do, I'll feel sorry for you little cousin. Real talk, love you little cuzzo.

(12 RT 3165.)

Yarborough testified that he felt threatened by the lines in the letter in which Taylor said, "don't go up there lying. If you do, I'll feel sorry for

you little cousin." (12 RT 3154.) These statements were admissible on the issue of Yarborough's credibility; the rest of the letter, in which Taylor exonerates himself and blames appellant was not. The court's reason for admitting the whole letter – that appellant opened the door to admission of the letter and "had to live with it" – is not legally justified.

2. Evidence of Yarborough's Fear of Taylor was Admissible on the Issue of his Credibility

Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. (*People v. Burgener* (2003) 29 Cal.4th 833, 869; see generally Evid. Code, § 780.)[23] An explanation of the basis for the witness's fear is likewise relevant to his credibility and is well within the discretion of the trial court to admit. (*People v. Feagin* (1995) 34 Cal.App.4th 1427, 1433.)

This Court has recently held that in order to introduce evidence of a witness's fear, it is not necessary to first show that their testimony was inconsistent with prior statements or otherwise suspect. (*People v. Valdez* (2012) 55 Cal.4th 82, 135, 136 & fn. 33, citing *People v. Mendoza* (2011) 52 Cal.4th 1056, 1086, disapproving *People v. Yeats* (1984) 150 Cal.App.3d 983, and *People v. Brooks* (1979) 88 Cal.App.3d 180.)

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[23] Evidence Code section 780, provides in pertinent part: Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [¶] . . . (f) The existence or nonexistence of a bias, interest, or other motive. . . . (j) His attitude toward the action in which he testifies or toward the giving of testimony.

Yarborough's credibility was certainly attacked, however. The prosecutor attempted to impeach Yarborough with the fact that during his direct examination he did not mention that Taylor had a gun until counsel asked him, after he had testified about what happened that night. (12 RT 3124-3125.) The prosecutor aggressively cross-examined Yarborough, accusing him of "playing the game," while questioning him about the facts of his criminal convictions which include evading and lying to police officers. (12 RT 3125-3127.) The prosecutor accused Yarborough of lying "if it serves your purpose," questioned his credibility based on how long it took him to give a statement to appellant's investigator, and expressed skepticism that he had not discussed his testimony with appellant. (12 RT 3127-3128.)

Taylor's counsel also cross-examined Yarborough about his contacts with appellant's investigator and his refusal to speak to Taylor's investigator, and accused him of bias in favor of appellant. (12 RT 3155-3161.)

Evidence that Yarborough was testifying even though he felt threatened by Taylor's letter was relevant to his credibility. As stated by the court in *People v. Olguin* (1994) 31 Cal.App.4th 1355,

> A witness who testifies despite fear of recrimination of any kind by anyone is more credible because of his or her personal stake in the testimony. Just as the fact a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility [citation] the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility.

(*Id.* at pp. 1368-1369.)

As noted, both Taylor's counsel and the court expressed their opinion that the letter did not constitute a threat. (12 RT 3146.) Taylor's

counsel conceded, however, that Yarborough might interpret it as a threat. (12 RT 3149.) Moreover, it was for the jurors to decide whether or not this was a reasonable interpretation of the letter and to use the evidence in evaluating Yarborough's credibility. In addition to the letter, the jurors could also consider the evidence that Taylor told other inmates in the jail that Yarborough was going to testify for Melendez. This action, arguably designed to brand Yarborough as a snitch and possibly endanger his safety in custody, coupled with the statements made in the letter delivered to Yarborough the night before he was to testify, could certainly be construed as threatening. The fact that Yarborough came to court and testified despite the threats was clearly relevant to his credibility.

In addition, when evaluating a witness's credibility, the jury looks not just at the witness's claim that he is fearful, but at the underlying basis for the fear. As the court in *Olguin* held, the jury is entitled to know,

> not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness' fear. A witness who expresses fear of testifying because he is afraid of being shunned by a rich uncle who disapproves of lawyers would have to be evaluated quite differently than one whose fear of testifying is based upon bullets having been fired into her house the night before the trial.

(*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1369.)

Here, the jury had testimony about the nature of Yarborough's fear when Taylor's attorney questioned him about how he viewed the letter from Taylor:

> Q: [By Mr. Agbayani] Did you – so, going back to this note for a minute, the threat to you is if you don't tell the truth, something might happen to you?

A: Nah. Threat to me is, I feel sorry for you. I mean, it wasn't not really necessary [sic] a threat, but, I mean, if you want to take it as a threat, then I guess – you know, I mean.

Q: Okay.

A: I mean, you know. I mean, you take it how you wanna take it, "I'll feel sorry for you," you know. If I said that to you, how would you take it? "I'll feel sorry for you," how would you take it?

Q. Well, if I was telling the truth – is that how you took it, that if you didn't tell the truth –

A: I'm telling the truth. So, his definition of the truth – I don't know what his definition of the truth is, his side of the story, you know.

(12 RT 3158.)

Thus, the jurors had Yarborough's own assessment of Taylor's words, and could use the evidence to judge his credibility however they wished. In fact, as the prosecutor argued, the note could be used to impeach Yarborough by arguing that his interpretation of the note as a threat could mean that he was "slanting his testimony." (12 RT 3150.) The jury could also consider Yarborough's negative response to trial counsel's question, asking if "anyone made you any promises or threatened you for testifying here today." (12 RT 3123.) Taylor – and the prosecutor, who aligned his position with Taylor's – had ample opportunity to argue their interpretation of Taylor's letter.

Appellant was entitled to present the portion of Taylor's letter that Yarborough felt was threatening on the issue of his credibility without opening the door to admission of irrelevant and prejudicial evidence.

3. The Remainder of the Letter Was Inadmissible

The statements in the letter from Taylor which Yarborough considered threatening were properly admitted as non-hearsay evidence relevant to Yarborough's credibility under Evidence Code section 780. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 869.) The remainder of the letter, which included self-serving hearsay statements by Taylor for which there was no exception, was not admissible unless Taylor subjected himself to cross-examination. (*People v. Gurule* (2002) 28 Cal.4th 557, 605; *People v. Edwards* (1991) 54 Cal.3d 787, 820.)

The trial court believed that, by attempting to introduce a portion of the statement that constituted a threat to Yarborough, appellant opened the door to admission of the entire statement, presumably under Evidence Code section 356, as suggested by Taylor's counsel. (12 RT 3151.) When appellant's counsel objected to admission of "the part where Mr. Taylor is allowed to testify, essentially, that he didn't do it," the court stated, "I agree. But you guys are the ones that introduced it. And when you introduced it you knew the whole thing would come in, if he was going to put that part of it in." (12 RT 3151-3152.)

Evidence Code section 356 is known as California's "statutory version of the common law rule of completeness." (*People v. Parrish* (2007) 152 Cal.App.4th 263, 269, fn. 3.) The statute provides that when one party puts into evidence one part of a conversation or statement, the remainder of the conversation or statement is admissible "'"provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence . . . ."'" (*People v. Zapien* (1993) 4 Cal.4th 929, 959, citing *People v. Hamilton* (1989) 48 Cal.3d 1142, 1174, original italics.)

However, Evidence Code section 356 "is indisputably 'subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced.'" (*People v. Williams* (1975) 13 Cal.3d 559, 565, citation and internal quotation omitted.) The statute allows inquiry into otherwise inadmissible matter only when it relates to the same subject and is necessary to make the already introduced conversation understood. (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192.) "The rule is not applied mechanically to permit the whole of a transaction to come in without regard to its competency or relevancy . . . ." (Witkin, Cal.Evidence (2d ed.1996) § 320, p. 283.) A ruling under Evidence Code section 356 is reviewed for abuse of discretion. (*People v. Parrish*, *supra*, 152 Cal.App.4th at p. 274.)

As stated by the court in *People v. Gambos*, *supra*, 5 Cal.App.3d 187,

> By its terms section 356 allows further inquiry into otherwise inadmissible matter only, (1) where it relates to the same subject, and (2) it is necessary to make the already introduced conversation understood. Thus it has been held: the court must exclude such additional evidence if not relevant to the conversation already in evidence [Citations]; the new evidence must shed light on that which is already admitted [citation]; and it must be necessary to make the earlier conversation understood or to explain it [Citations.]

(*Id.* at p. 193.)

Here, the only portion of the letter relevant to Yarborough's testimony regarding threats from Taylor were the statements, "I love you little nigga, but don't go up there lying. If you do, I'll feel sorry for you little cousin." (12 RT 3165.) The rest of the letter, which included statements by which Taylor implicated appellant and denied culpability –

"You know your uncle did that bullshit," and "If Angelo was my real cousin, Rick ain't saying I did it. So why is Angelo saying I did?"– cannot be said to have sufficient connection to the threatening statement that they were admissible under section 356.

The trial court's ruling, which was essentially automatic – the court told appellant's counsel "when you introduced it you know the whole thing would come in, if he was going to put part of it in" (12 RT 3152) – was an abuse of discretion.

"Application of Evidence Code section 356 hinges on the requirement that the two portions of a statement be 'on the same subject.'" (*People v. Vines* (2011) 51 Cal.4th 830, 861.) In *Vines*, the defendant attempted to introduce a portion of a witness's statement describing what happened during a robbery murder, but which mentioned the participation of only one other perpetrator and not the defendant. Because the witness's statement contained statements that the defendant also participated, this Court held that admission of the whole statement was required under Evidence Code section 356 to avoid the "misuse of evidence" proposed by the defendant. (*Ibid.*)

Similarly, in *People v. Parrish*, *supra*, 152 Cal.App.4th 263, the trial court allowed the prosecution to introduce statements elicited from an accomplice that the defendant possessed a gun that he provided to another confederate in the course of a robbery murder, after the defendant had presented statements from the accomplice designed to corroborate his testimony that he believed he would be killed if he refused to participate in the robbery. (*Id.* at pp. 270-271.) Under Evidence Code section 356, the "subject" of the evidence proffered by the defendant was whether he was coerced into participating in the robbery. Because the witness's statement

contained other statements from which a contrary inference could be drawn, i.e., that the defendant participated in the robbery willingly, to exclude them would allow the defendant to present "a misleading picture" of the witness's statement. (*Id.* at p. 276.)

The "subject" here was Taylor's warning to Yarborough not to lie when he testified, otherwise "I'll feel sorry for you." A reasonable interpretation of Taylor's statements was the one drawn by Yarborough, namely that if he did not testify to Taylor's "version of the truth," there would be consequences. From these statements, the jury could reasonably infer that Yarborough had been threatened, but was testifying anyway. The remainder of the note was admissible only if it contained information that dispelled the inference that Taylor was threatening Yarborough for testifying. Taylor's assertion that appellant was the shooter did not shed light on the subject of the warning to Yarborough, nor was it necessary to make the warning understood or to explain it. Exclusion of the remainder of the note would not have been misleading.

On the other hand, admission of the note resulted in extremely damaging evidence against appellant, to which he had no recourse. As stated by the court in *Gambos*, discussing in case under the earlier Code of Civil Procedure section 1854,

> It was certainly never intended that under the guise of said section there may be lugged into the record of a case a mass of irrelevant and incompetent testimony which might have a tendency to militate seriously against the rights of the party against whom it was admitted.

(*Id.* at p. 193, citing *People v. Mahach* (1924) 65 Cal.App. 359, 382.) This precisely describes the effect of the court's ruling in the present case.

The remainder of the letter was not admissible for the purpose of

"placing [Taylor's] statements into context," as this Court ruled in *People v. Harris* (2005) 37 Cal.4th 310, 335.) Simply because Taylor had, as Yarborough noted, "his version of the truth," which he did not want Yarborough to contradict, he was not entitled, under the guise of Evidence Code section 356, to put before the jury his claim that he was not responsible for shooting the victims, but appellant was. Under the court's reasoning, a non-testifying defendant could send a threatening message to a witness and include exculpatory statements, confident that evidence of the threat would be offered, thus leading the way to admission of the exculpatory statements, not subject to cross-examination.

Moreover, Taylor's statement implicating appellant was inadmissible under *People v. Aranda* (1965) 63 Cal.2d 518, 530-531, in which this Court held that in a joint trial, extrajudicial statements of one defendant must be redacted to delete any implicating reference to the other defendant, and *Bruton v. United States* (1968) 391 U.S. 123, which held that admission of the codefendant's confession with its statements incriminating the defendant violated the defendant's right of cross-examination secured by the Confrontation Clause.

In *People v. Lewis* (2008) 43 Cal.4th 415, the trial court denied a motion to sever. As a result, defendant's statements admitted at the joint trial were redacted to remove references to his codefendants. On appeal, defendant argued that the trial court's ruling preventing him from cross-examining witnesses as to the omitted portions of his statements violated Evidence Code section 356. This Court held that "limits on the scope of evidence permitted under Evidence Code section 356 may be proper when, as here, inquiring into the 'whole on the same subject' would violate a codefendant's rights under *Aranda* or *Bruton*. (*Id.* at p. 458, citing

People v. Ervin (2000) 22 Cal.4th 48, 87.)

4. The Court's Error Violated Appellant's State and Federal Constitutional Rights, and Was Prejudicial

This Court has held that the test to apply to the state law error in the admission of hearsay is that of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Duarte* (2000) 24 Cal.4th 603, 618-619.) Although appellant asserts below that the error was one that impacted his rights under the federal constitution, application of the *Watson* test for state law error also mandates reversal. It is reasonable to believe that there would have been a different result if this evidence had not been admitted, and the *Watson* test has been met. (See *People v. Elize* (1999) 71 Cal.App.4th 605, 616 [*Watson* test met when there is reasonable chance result would have been different].)

The erroneous admission of Taylor's statements violated appellant's right under the confrontation clause of the Sixth Amendment to the federal constitution. As previously discussed the statements were admitted in violation of *People v. Aranda*, *supra*, 63 Cal.2d at pp. 530-531, and *Bruton v. United States*, *supra*, 391 U.S. 123. This Court held in *People v. Vines*, *supra*, 51 Cal.4th 830, that admission of certain portions of a witness's out-of-court statement to police implicating defendant after the defendant introduced other portions of the same statement did not violate the United States Supreme Court decision in *Crawford v. Washington* (2004) 541 U.S. 36. Echoing the decision of the court in *People v. Parrish*, *supra*, 152 Cal.App.4th 263, this Court likened Evidence Code section 356 to the rule of forfeiture, in that it does not purport to be an alternative means of determining reliability, but is based on equitable considerations and thus evidence admitted under that section is not made inadmissible by *Crawford*.

(*People v. Vines*, *supra*, 51 Cal.4th at p. 862.)

This case differs from *Vines*, *Parrish* and the cases upon which those decisions rely because appellant did not "seek to use the hearsay exception for declarations against penal interest as a shield, to introduce exculpatory parts of an unavailable declarant's statements, while simultaneously using the confrontation clause as a sword to exclude the parts that inculpate the defendant." (*People v. Vines*, *supra*, 51 Cal.4th at pp. 862-863, citing *State v. Selalla* (2008) 2008 S.D. 3, 744 N.W.2d 802, 818; *U.S. v. Moussaoui* (4th Cir. 2004) 382 F.3d 453, 481-482.) Here, appellant introduced only that portion of Taylor's letter that contained statements perceived by Yarborough as threatening, for the non-hearsay purpose of enhancing the witness's credibility. As such, there were no analogous equitable considerations.

As previously discussed, the jurors had ample evidence based on Yarborough's own testimony to enable them to assess his credibility. Because the remainder of the letter was not relevant to the issue of Yarborough's fear of Taylor, it was irrelevant and inadmissible, and the error in its admission was not cured by the court's limiting instruction. The jury was instructed:

> Certain evidence was admitted for a limited purpose. ¶ Evidence of the contents of a letter produced in court by witness Tino Yarbrough [sic] was not admitted for the truth of the matters stated in the letter, but only on the question of the truthfulness of Mr. Yarbrough's [sic] testimony that the letter contained a threat. ¶ Do not consider this evidence for any purpose except the limited purpose for which it was admitted.

(3 CT 611;15 RT 3950.)

As noted by the decisions in *Aranda* and *Bruton*, a limiting instruction is not necessarily adequate to avoid prejudice to the accused.

Indeed, both cases explicitly held that the instructions given were defective and did not prevent reversal of the convictions involved. As stated by the high court in *Bruton*, "Despite the concededly clear instructions to the jury to disregard [the codefendant's] inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all." (*Bruton v. United States, supra*, 391 U.S. at p. 137; see also *People v. Aranda, supra*, 63 Cal.2d at p. 527.)

The prejudice from the admission of statements by Taylor denying his guilt while implicating appellant, without having to subject himself to cross-examination is apparent. Appellant did everything he could to convince the jury that he was not the shooter and that he did not aid and abet Taylor in the crimes, by testifying and calling Yarborough to corroborate portions of appellant's testimony. His efforts were prejudicially undermined by the trial court's ruling, which was compounded by the trial court's error in excluding evidence of appellant's letter to Larry Rhodes, discussed in the next section.

C. The Trial Court Erred in Excluding Evidence of the Remainder of the Conversation Between Rhodes and Anderson in Which Appellant Denied Knowledge that Taylor was Going to Shoot the Victims

1. Factual Background – Testimony from Larry Rhodes and Detective Anderson Regarding the Letter from Appellant

In LaTroy Taylor's case he called as a witness Larry Rhodes, whose uncle is Ricky Richardson's father, Ricky Tanner, to testify about an alleged admission made by appellant that Rhodes reported to Detective David Anderson. (14 RT 3575.) Rhodes testified that Anderson came to

see him in prison because he heard that Rhodes had a note that "supposedly came from" appellant. (14 RT 3579.) Rhodes, who testified at trial that he no longer had the note, refused to give it to Anderson. (14 RT 3580, 3583.) Rhodes lied when he told Detective Anderson that appellant told him, referring to Ricky Richardson, "Yeah, I shot his black ass." (14 RT 3582.) He lied because he was mad at appellant and felt betrayed. (14 RT 3585.) Rhodes denied that he ever saw appellant at DVI. (14 RT 3588.)

After Rhodes testified that the statement was a lie, Taylor called Detective Anderson to testify about his interview with Rhodes. In May 2001, Detective Anderson spoke to Rhodes at Deuel Vocational Institute where Rhodes was in custody. (14 RT 3578-3579.) According to Anderson, Rhodes told him that appellant made a statement to him while they were both out on the yard at DVI that "I shot his black ass," referring to Ricky Richardson. (14 RT 3671.) Anderson also testified that at the beginning of the interview Rhodes handed him a note that he said was from appellant which Anderson read and returned to Rhodes. (14 RT 3700-3701.) According to Anderson, Rhodes refused to let Anderson keep the note or make a copy of it. (14 RT 3701.) Anderson did not attempt to make a copy of it because he "read it and learned the information from it, and that was that." (*Ibid.*; see also 14 RT 3704 "I didn't think it was an issue. I read it, exactly what it said, what was in it"].)

2. The Court Committed Reversible Error by Refusing to Admit the Letter from Appellant to Rhodes Thereby Creating a Version of the Conversation Between Rhodes and Anderson That Was Misleading and Resulted in a Trial That Was Fundamentally Unfair

Because Detective Anderson did not make a copy or seize the letter from Rhodes, and Rhodes claimed he no longer had the letter, the only

evidence of what it said came from Anderson's report, which was summarized by appellant's counsel. According to counsel, in the note appellant "admits that he was present when the shooting occurred, but he had no idea that LaTroy was going to shoot. He apologized to Larry, as well as Ricky's family. He stated that he would not do such a thing because he loves them as family." (14 RT 3719.) Counsel's recitation of the contents of the letter was not disputed by the parties and is consistent with references to the letter made by the court and the parties.

a. The Letter was Admissible Under Evidence Code Section 356

In an attempt to dispel the misleading impression created by Detective Anderson's testimony regarding his conversation with Rhodes, counsel for appellant sought to introduce the contents of the letter Rhodes showed to Anderson:

> I'd like to get the content of the note in. And, basically, um, the note was brought in by co-counsel. Just like this note that was brought in when I brought it in concerning Tino Yarborough. The jury's heard about this note. They can only speculate what the note is about, combine that with the supposed admission. They are thinking the note corroborates the admission when, quite frankly, this note said, I wasn't involved. He admits he was present when the shooting occurred, but he had no idea LaTroy was going to shoot.

(14 RT 3705.)

The court ruled that the letter was inadmissible "because it's a statement you're offering of your own client. It's not an admission, doesn't come in under any other hearsay exception." (14 RT 3705.)

Counsel noted:

> I think it's part of the same whole conversation where he's talking to Mr. Rhodes, and Mr. Rhodes says that Angelo told him that he shot Ricky. This – it's all based around this letter

> in which Angelo said, I did not shoot Ricky. ¶ If we don't bring that in, we're going to give the jury an extremely false impression what this is about, and that's a violation of Mr. Melendez' [sic] due process.

(14 RT 3705.)

The court stated, "I'm going to sustain the objection [sic]." (*Ibid.*) Taylor's counsel and the prosecutor, who had not lodged an objection at that point, joined the discussion. Taylor's counsel argued that they did not have the letter that was shown to Anderson, as they did with Tino Yarborough's letter. The prosecutor argued that the letter was not associated with the verbal statement appellant allegedly made to Rhodes. Further, he argued, "The notes, they're like several layers of hearsay." The court reiterated its ruling. (14 RT 3706.)

As trial counsel argued, the basis for admission of the letter was the same as that relied upon by the court in admitting the Tino Yarborough letter.[24] The court recognized appellant's concerns about the misleading impression created by testimony about the letter from appellant: "I do see the point, that now that the letter has been brought up and thrown around so much, the jury is conceivably left with the impression that somehow there was something in the letter that – to corroborate Rhodes' statement to Detective Anderson, but that it's being kept out of evidence because of

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[24] Trial counsel did not specifically reference Evidence Code section 356 in making his argument in favor of admission of the letter. Nevertheless, counsel's argument that "it's part of the same whole conversation where [Anderson's] talking to Mr. Rhodes," (14 RT 3705) fairly informed the court and the prosecutor that he was invoking the rule of completeness under section 356. (See *People v. Partida* (2005) 37 Cal.4th 428, 435.)

some evidentiary problem or another."[25] (14 RT 3718.)

Inexplicably, however, the court refused to apply the same reasoning to appellant's request as it earlier had to Taylor's, when it held that by introducing a portion of Taylor's statement to Yarborough, appellant opened the door to admission of the entire statement. Here, Taylor introduced part of the conversation between Rhodes and Anderson concerning appellant's alleged admission to shooting Ricky Richardson and appellant sought to introduce the remainder of the conversation.

The argument by Taylor's counsel that the situation differed from the Yarborough note because they did not have the physical letter from appellant is unavailing. As noted, Detective Anderson's testimony that he memorialized the content of the letter in his report and the recitation of the report by appellant's counsel was unchallenged by any of the parties.[26] (14 RT 3718- 3719.)

As previously discussed, the rule embodied by Evidence Code section 356 is designed to correct any misleading impression given by introducing only a portion of a statement or writing. (*People v. Arias* (1996) 13 Cal.4th 92, 156; *People v. Pride* (1992) 3 Cal.4th 195, 235.)

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[25] Indeed, this was precisely the argument made by the prosecutor in arguing that Taylor's note to Yarborough should be admitted. In response to the court's suggestion that it admonish the jury not to consider Yarborough's testimony about the threat, the prosecutor noted: "I don't think you can unring that bell . . . everybody wanted to know what [the note] was . . . And they're being told you can't know what it is, don't think about it. That's impossible." (12 RT 3150.)

[26] The prosecutor agreed with the court's statement: "Detective Anderson has just testified he knew what the letter said." (14 RT 3718-3719.)

Thus, if a party's oral admissions, for example, have been introduced into evidence, he may show other portions of the same interview or conversation, even if they are self serving, which "have some bearing upon, or connection with, the admission . . . in evidence." (*People v. Arias, supra,* 13 Cal.4th at p. 156, citing *People v. Breaux* (1991) 1 Cal.4th 281, 302; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1174.) In effect, Evidence Code section 356 operates as an exception to the hearsay rule. (See 1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 2008) Admissions and Confessions, §§ 3.4, 3.6, pp. 84, 95-86; see also *People v. Williams* (1975) 13 Cal.3d 559, 565 [suggesting that hearsay rules do not apply to statements admitted under section 356.].)

Counsel for Taylor objected on hearsay grounds and argued, "It's a backhanded way of trying to get in a self-serving declaration." (14 RT 3717.) The trial court's exclusion of the letter from appellant on the ground that it was inadmissible hearsay is directly contrary to its overruling of appellant's identical objection to admission of the remainder of Taylor's letter to Yarborough. Trial counsel objected that "Mr. Taylor is allowed to testify, essentially, that he didn't do it," but the court ruled that the remainder of the letter came in because, by proffering a portion of the note, appellant "knew the whole thing would come in." (12 RT 3152.)

Further, it was not a valid objection that the remainder of the conversation was self-serving because Evidence Code section 356 applies to admissions and confessions in criminal cases (*People v. Crowl* (1938) 28 Cal.App.2d 299, 307–308, 82 P.2d 507) and applies even if the omitted portions of the conversation are self-serving (*People v. Hansen* (1933) 130 Cal.App. 217, 220; see *Rosenberg v. Wittenborn* (1960) 178 Cal.App.2d 846, 851–853.)

> It is an elementary rule of law that when admissions of one on trial for the commission of a criminal offense are allowed in evidence against him, all that he said in that connection must also be permitted to go to the jury, either through cross-examination of the witness who testified to the admissions or through witnesses produced by the accused. The fact that declarations made by the accused were self-serving does not preclude their introduction in evidence as a part of his whole statement, provided they are relevant to, and were made on the same occasion as the statements introduced by, the prosecution. (29 Am.Jur.2d, Evidence, § 599, pp. 654–655, fns. omitted.)

(*People v. Douglas* (1991) 234 Cal.App.3d 273, 285.)

Douglas involved a joint trial, during which defendant's statement was redacted so as to avoid *Bruton/Aranda* issues. During trial, however, it became clear that the statement as redacted created a misleading impression that the defendant admitted using a knife against the victim when, in fact, he repeatedly denied using the knife. The trial court sustained the co-defendant's hearsay objections when defendant attempted to elicit additional portions of his statements. (*People v. Douglas*, *supra*, 234 Cal.App.3d at p. 284.) The Court of Appeal reversed defendant's conviction, finding that the trial court's rulings under section 356 were "clearly erroneous." (*Id.* at p. 285.)

In *People v. Harrison* (2005) 35 Cal.4th 208, the prosecution was permitted to elicit from a police officer portions of a statement of a witness, after the defendant had presented testimony from the officer regarding other parts of the same statement. On appeal, defendant argued that the parts of the statement elicited on cross-examination were "inadmissible hearsay." (*Id.* at p. 239.) In rejecting the claim, this Court held that "once defendant had introduced a portion of Johnson's interview with Sergeant Voznik into

evidence, the prosecution was entitled to introduce the remainder of Johnson's interview to place in context the isolated statements of Johnson related by Voznik on direct examination." (*Ibid.*, citing *People v. Zapien*, *supra*, 4 Cal.4th at p. 959.)

As trial counsel pointed out, it was Taylor's attorney who brought up the issue of the letter during direct examination of their witness, Rhodes. Appellant was "simply trying to . . . clarify it, so it does not create a false impression." (14 RT 3721.) This is exactly the purpose of Evidence Code section 356, to "prevent the use of selected aspects of a conversation . . . so as to create a misleading impression on the subjects addressed." (*People v. Arias*, *supra*, 13 Cal.4th at p. 156.) Here, the proffered statement at issue was part of the same conversation between Rhodes and Detective Anderson and clearly had some bearing upon or connection with the admitted portion. The trial court abused its discretion in excluding the evidence under Evidence Code section 356.

b. If the Letter Itself Was Not Admissible Under Evidence Code section 356, the Trial Court Erred in Refusing to Allow Appellant to Question Detective Anderson In Order to Dispel the Misleading Impression Created by His Testimony

Appellant's counsel continued to express concern that the record as it stood was misleading about the contents of the note. As counsel observed, "I think where it stands now is we have – impression that the jury has is that the letter corroborates this statement Rhodes made, when in fact it doesn't. It says the exact opposite." (14 RT 3717.) While the initial request was for admission of testimony by Detective Anderson about the actual contents of the letter, which he had memorialized in his report, after the court refused to allow the evidence, counsel proposed alternative means of questioning

Anderson so as to dispel the misleading impression left by his testimony regarding appellant's alleged admission to Rhodes. The trial court's rejection of every one of counsel's suggestion was unreasonable and unsupported by law.

Counsel proposed calling Detective Anderson and asking him "whether Mr. Melendez admitted shooting Ricky Richardson in the letter." (14 RT 3717.) In response to a hearsay objection by Taylor's counsel, the court observed that the proposed question did not call for material offered for the truth of the matter stated, but only asked if the letter contained anything incriminating. The court agreed that the jury might speculate that the letter corroborated Rhodes's statement to Detective Anderson. (14 RT 3718.) The prosecutor argued that the letter contained an admission as well as the denial that he shot Richardson. (14 RT 3719.) The trial court observed that the letter contained exculpatory statements as well as an admission – that appellant was present – which precluded Detective Anderson from stating that the letter did not contain an admission. (14 RT 3719.)

Nevertheless, the court ruled that because the letter also contained an admission – appellant admitted he was present when the shooting occurred – Detective Anderson could not testify that the letter did *not* contain an admission. (14 RT 3719.) Counsel clarified that they "just want to ask him [Anderson] if he [appellant] indicated in the letter that he had shot Ricky." (14 RT 3720.)

The trial court denied appellant's request and said it would rely on CALJIC No. 1.02 which admonishes the jurors not to assume to be true any insinuation suggested by a question asked of a witness. (14 RT 3722.)

Counsel tried again: "Your Honor, may we ask this question . . .

Was there anything in the letter that was inconsistent with what Mr. Melendez told you in his statement?" (14 RT 3722.) The court rejected the suggestion because it asked for the witness's opinion and would be "impossible to cross-examine." (*Ibid.*)

Despite the court's concession that it "[could] see certainly the . . . logic behind it," the court rejected the request because "under 352, it's going to create too much prejudice, more than any probative effect, because . . . it makes it impossible to cross-examine about it and hear what actually was said in the letter. And, so, it really makes it impossible for me to decide how to handle it." (14 RT 3722.)

The trial court erred in rejecting counsel's request to ask Detective Anderson if the letter contained an admission by appellant that he shot Ricky Richardson. The question did not call for an answer beyond yes or no. It was not an attempt to elicit information whether appellant *denied* shooting Richardson, simply whether he admitted it. A negative response would have answered the question the jury undoubtedly had: did appellant say the same thing in the letter that he allegedly said to Larry Rhodes. All counsel was attempting to do was to remove that question from the jurors' minds. The court's ruling which prevented them from doing so was erroneous.

Nor was the fact that in the letter appellant admitted he was present during the shooting a proper basis to preclude the proposed question regarding appellant's denial that he shot Richardson. Counsel's position was not that they should be able to exclude the admission from the letter, in fact, the issue was never ruled upon because it was not offered by the prosecution or Taylor's counsel.

The prosecutor, after having failed at the time to object to the

testimony of either Rhodes or Anderson referring to the letter as having come from appellant (14 RT 3700), argued that it had not been properly authenticated. (14 RT 3719, 3722, 3723.) This position was contrary to one he had taken earlier, however. In arguing against admission of the letter, the prosecutor claimed it was unnecessary because the jury would be able to glean from Detective Anderson's reaction to reading the letter that it did not contain an admission: "If you had an individual actually admitting in words in a letter that he had shot someone, then I don't think . . . Detective Anderson would have given it back, *especially since the letter came from the defendant.*" (14 RT 3717, italics added.)

Similarly, despite Taylor's counsel's argument in response to counsel's request to question Detective Anderson, that "Mr. Melendez is the only person who can authenticate [the letter]" (14 RT 3720), during his questioning of Rhodes, counsel for Taylor also referred to the letter as "this note that Angelo Melendez wrote." (14 RT 3583.)

As noted, when Detective Anderson testified that the letter he was shown by Rhodes was from appellant, neither Taylor nor the prosecutor questioned its authenticity, nor objected to the testimony on this ground. At that point, it was advantageous to them to have the letter, which was purportedly passed from appellant to Rhodes, associated with the conversation during which appellant made the alleged admission. It was only when appellant attempted to correct this misleading impression that the prosecutor and Taylor objected. Having failed to object to the testimony, the authentication objection was waived. (Evid. Code, § 353.)

None of the reasons offered by the court for preventing appellant from establishing through Detective Anderson's testimony that the letter from appellant did not contain an admission that he did not shoot

Richardson was valid. The court's erroneous ruling resulted in the exclusion of critical evidence.

3. The Court's Errors Were Prejudicial

The court failed to explain how admitting evidence of the contents of the letter – comprising merely a few statements by Detective Anderson – would have been unduly prejudicial, consumed excessive time or confused the issues and mislead the jury. (See Evid. Code, § 352.) The opposite was true. No prejudice would have resulted if the complete statement had been admitted. The exclusion, however, resulted in substantial, unwarranted prejudice to the defense.

It is reasonably probable that appellant would have obtained a more favorable result had the court not erred in applying sections 352 and 356 by excluding the letter from appellant. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The court's error allowed the jury to be presented with a misleading account in which appellant, contrary to his testimony, admitted that he shot Ricky Richardson.

The prejudicial effect of the exclusion of this evidence must also be considered in conjunction with the trial court's ruling admitting Taylor's hearsay statements implicating appellant and exonerating himself, as discussed in Section B., *post*, as well as the erroneous exclusion of the admission by Taylor that he was the shooter, as set forth in Argument II, *post*.

The trial court's state law error admitting highly damaging and misleading evidence on an issue that precluded appellant from presenting relevant evidence directly related to his theory of defense, denied appellant his federal constitutional right to due process because it rendered his trial fundamentally unfair. (See *People v. Partida*, *supra*, 37 Cal.4th at pp. 435,

439.) Where the exclusion of evidence in this case was so grave as to implicate defendant's fundamental constitutionally protected federal due process rights the *Chapman* harmless error standard applies. The exclusion of this evidence cannot be said to be harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Appellant's convictions must be reversed.

In addition, the trial court's rulings – admitting highly prejudicial evidence against appellant while excluding exculpatory evidence also violated appellant's Eighth Amendment right to a fair and reliable sentencing hearing. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638, fn. 13 [greater reliability required in capital cases], citing *Gardner v. Florida*, 430 U.S. 349, 357-358 (plur. opn. of Stevens, J.); accord, *Lockett v. Ohio, supra,* 438 U.S. at p. 604 (plur. opn. of Burger, C.J.); *Woodson v. North Carolina* (1976) 428 U.S. 280, 304-305 (plur. opn. of Stewart, J.).)

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IV.

THE TRIAL COURT'S ERROR ALLOWING TAYLOR'S COUNSEL TO QUESTION APPELLANT ABOUT GANG AFFILIATION VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL AND RELIABLE PENALTY DETERMINATION AND REQUIRES REVERSAL OF THE CONVICTIONS AND DEATH JUDGMENT

A. Introduction

The trial court erroneously overruled appellant's objection to cross-examination of appellant by Taylor's counsel concerning his membership in the Black Guerrilla Family prison gang. The evidence was not relevant to the charges against appellant and its admission constitutes an abuse of discretion. The only purpose for Taylor's questions was to suggest appellant's criminal disposition and to engender bias and fear in the jury by associating him with a prison gang. The court's error rendered appellant's trial fundamentally unfair, and the penalty determination unreliable in violation of appellant's rights under the Eighth and Fourteenth Amendments to the federal Constitution.

B. Proceedings Below

Appellant testified that he did not contact the police about the shooting because he was threatened by Taylor's Sutter Street gang members. He was told that "people" were looking for him from "Sutter Street." (12 RT 3410.) At first appellant thought nothing of it, but after talking to his girlfriend, who thought they should leave and go to Seattle because of the fact that the Sutter Street boys were looking for him, appellant agreed to go. (12 RT 3410-3411.)

During cross-examination by Taylor's attorney, appellant was asked about his fear of Taylor and the members of the gang.

Q: [Ms. Fialkowski] . . . Now, is that because they were members of what you thought were [sic] a gang?

A: [Appellant] I didn't thought [sic] they were a gang. I knew they were gang members. They carry guns. I don't.

Q: Okay. Now, you knew they were gang members because you were a long-time member of the Black Guerrilla Family, right?

A: About 20 some years ago, right.

Q: Okay. So, that was – you were a gang member, and so you –

Mr. Panerio: Your Honor, I'm going to object at this point. We need to approach the bench.

The Court: Overrule. [sic]

Mr. Panerio: I am objecting. It will be a continuing objection, Your Honor.

The Court: Okay. Overrule. [sic].

Q: [Ms. Fialkowski] You were a gang member at one point, but you weren't any longer, so that's why you were scared of these kids?

A: That's not the reason why I was scared of them. I was scared of them because of what they told me.

(14 RT 3541-3542.)

C. The Trial Court Abused its Discretion by Admitting Irrelevant and Prejudicial Evidence of Appellant's Past Gang Membership

The potential prejudicial effect of evidence of gang membership has long been recognized by courts in California. (*People v. Albarran* (2007) 149 Cal.App. 4th 214, 223, and cases cited therein.) This Court has condemned the introduction of gang evidence if it is only tangentially relevant to the charged offenses. (*People v. Cox* (1991) 53 Cal.3d 618, 660,

disapproved of on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 450, fn. 8.) In cases such as this one, which do not involve gang enhancements, this Court has held evidence of gang membership should not be admitted if its probative value is minimal. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) Here, because the evidence had no probative value, it was inadmissible.

As a general rule, evidence of gang membership is only admissible when it is logically relevant to some material issue at trial other than character trait evidence. Evidence Code section 210 defines relevant evidence as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Gang evidence may be relevant to establish the defendant's motive, intent or other issues related to the charged offense, but it "should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449, citations omitted.)

Because evidence of appellant's past membership in the Black Guerrilla Family gang, did not have any "tendency in reason" to prove a disputed fact, i.e., the identity of the person who committed the charged offense, it was not relevant. (*People v. Perez* (1981) 114 Cal.App.3d 470, 477-478.) "[A]dmission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." *(People*

v. Williams (1997) 16 Cal.4th 153, 193.)

Because of the potentially inflammatory impact on the jury of gang evidence, the trial court must carefully scrutinize gang-related evidence before admitting it. (*People v. Albarran*, *supra*, 149 Cal.App.4th at p. 224; *People v. Williams*, *supra*, 16 Cal.4th at p. 193; *People v. Carter* (2003) 30 Cal.4th 1166, 1194.) The trial court in the present case failed to subject the gang evidence to the requisite scrutiny.

During pretrial proceedings, counsel for appellant requested discovery from the prosecution regarding Taylor's membership in a gang as "relevant to motive in the shooting of the victims in this case." (2 CT 422.) The court ordered discovery of the material and the prosecutor agreed to comply. (8 RT 1863.) Taylor's counsel asked that before any such evidence was mentioned that an Evidence Code section 402 hearing be held, "because it is old." (*Ibid.*) The court agreed to the request and noted, "I, at this point, don't see any relevance or any possible admissibility." (*Ibid.*) The trial court's decision was presumably based on the fact that the defendants were not charged with gang-related enhancements and no allegations of gang affiliation had been made by the prosecution against either defendant.[27] Thus, evidence of appellant's gang membership was neither relevant nor admissible for the same reasons the court believed Taylor's gang affiliation to be so.

Appellant's affiliation with the Black Guerrilla Family was not relevant to the question of who shot Richardson and Wilson. The evidence did not demonstrate motive or intent or any other factor permissible under

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[27] Taylor's gang affiliation was relevant to the issue of the admissibility of the letter found in Taylor's cell in which he identifies himself as a "hit man," as set forth in Argument II, *post*.

Evidence Code section 1101, subdivision (b), such as common scheme or plan, identity, or knowledge. Indeed, Taylor's counsel made no attempt to establish a proper basis for admission of the gang evidence, and the trial court did nothing more than overrule appellant's objection without offering a basis for its decision. Thus, the evidence was erroneously admitted only to show appellant's disposition to commit the charged crimes. (Evid. Code, § 1101, subd. (a).)

Nor was the evidence relevant to appellant's credibility. Appellant's testimony that he left town because he was afraid after hearing about threats from Taylor's Sutter Street gang members was not impeached by the fact that he had an affiliation with a prison gang 20 years earlier.

D. Admission of Gang Evidence Was Prejudicial

Taylor's counsel was fully aware of the prejudicial effect of gang evidence, having asked the trial court for a hearing on the admissibility of any such evidence that might be proffered by appellant. Instead of seeking judicial approval of similar questions of appellant on the subject, however, they simply went ahead with the inquiry.

The erroneous admission of evidence identifying appellant as a "long-time member of the Black Guerrilla Family," (14 RT 3541) was so serious as to violate appellant's federal constitutional rights to due process, rendering his trial fundamentally unfair. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Partida*, *supra*, 37 Cal.4th at p. 439 ["[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair."].)

Evidence of appellant's affiliation with a notorious prison gang was undeniably prejudicial. The Black Guerrilla Family is one of five prison gangs recognized by the California Department of Corrections and

Rehabilitation, and thus deemed to pose a "serious threat to the safety and security of California prisons." Prison-gang culture has been described as "violent and murderous." (*Johnson v. California* (2005) 543 U.S. 499, 502; *In re Furnace* (2010) 185 Cal.App.4th 649, 656-657.) The jurors' awareness of the BGF can also be assumed – as it likely was by Taylor's counsel. As noted by Justice Thomas in his dissenting opinion in *Dawson v. Delaware* (1992) 503 U.S. 159,

> Jurors do not leave their knowledge of the world behind when they enter a courtroom and they do not need to have the obvious spelled out in painstaking detail. Just as defense counsel may assume when introducing mitigating evidence that a jury understands the nature of a church choir, a softball team, or the Boy Scouts, so too may a prosecutor assume when rebutting this evidence that a jury knows the nature of a prison gang.

(*Id.* at p. 171, disn. opn. of Thomas, J.)

To determine whether an error "so infected the trial with unfairness as to make the resulting conviction a denial of due process" requires an "examination of the entire proceedings in [the] case." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643; see *Estelle v. McGuire*, *supra*, 02 U.S. at p. 72 [judging challenged instruction in the context of the instructions as a whole and the entire trial record]; *Darden v. Wainwright* (1986) 477 U.S. 168, 182 [considering prosecutor's improper argument in the context of defense counsel's argument, the trial court's instructions and the overwhelming evidence of guilt on all charges].)

As discussed in detail in Argument II, *post*, both the prosecutor and Taylor were at a loss to explain certain glaring problems with making the case that appellant was the shooter. These include Richardson's naming Taylor as the shooter the first three times he was asked, and the lack of any

motive for appellant to assault Richardson and Wilson. The prosecution cannot show that the erroneous admission of evidence that appellant was a member of such a notorious gang did not fill in the blanks for the jury left by the lack of evidence showing that appellant and not Taylor was the shooter. Thus, in the end, it cannot be said that "the guilty verdict actually rendered in [the] trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Even under the state law standard of *People v. Watson*, *supra*, 46 Cal.2d at p. 836, the error was prejudicial, given the questionable nature of the testimony of Ricky Richardson identifying appellant as the shooter. The prejudice from admission of gang evidence was exacerbated by the effect of erroneous rulings that resulted in the exclusion of evidence showing that Taylor was a "hit man" for a gang (see Argument II, *post*); the erroneous admission of Taylor's statements implicating appellant and exonerating himself (see Argument III, *post*); and the erroneous exclusion of evidence calling into question the alleged admission by appellant made to Larry Rhodes (*ibid.*).

In addition, the erroneously-admitted gang evidence violated appellant's Eighth Amendment right to a fair and reliable sentencing hearing. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638, fn. 13 [greater reliability required in capital cases], citing *Gardner v. Florida*, 430 U.S. 349, 357-358 (plur. opn. of Stevens, J.); accord, *Lockett v. Ohio, supra,* 438 U.S. at p. 604 (plur. opn. of Burger, C.J.); *Woodson v. North Carolina* (1976) 428 U.S. 280, 304-305 (plur. opn. of Stewart, J.).)

E. Conclusion

The erroneous admission of evidence of appellant's affiliation with a prison gang resulted in prejudice that requires reversal of the convictions

and penalty determination.

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V.

THE TRIAL COURT PREJUDICIALLY ERRED, AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY-MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE-MURDER IN VIOLATION OF PENAL CODE SECTION 187

At the conclusion of the guilt phase of the trial, the trial court instructed the jury on first degree premeditated murder (CALJIC No. 8.20; 3 CT 627; 15 RT 3956), and on felony murder as to Koi Wilson. (CALJIC No. 8.21; 3 CT 692; 15 RT 3957.) The jury found appellant guilty of murder in the first degree. (3 CT 686.)

Appellant contends that the instructions on first degree murder were erroneous, and the resulting convictions of first degree murder must be reversed. It is appellant's contention that the information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder, thus he could not be convicted of first degree murder.

Count 1 of the information accused appellant and Taylor of: "the crime of MURDER, in violation section 187 of the Penal Code, a FELONY, was committed by LATROY SHANTI TAYLOR, AND ANGELO MICHAEL MELENDEZ, who at the time and place last aforesaid, did willfully and unlawfully and intentionally and with malice aforethought murder KOI WILSON, a human being." (1 CT 183-184.) Both the statutory reference ("section 187 of the Penal Code") and the description of the crime ("murder") establish that appellant was charged exclusively with second degree malice-murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section

189.

Penal Code section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[28] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[29]

Because the information charged only second degree malice-murder in violation of section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) which charges that specific offense.

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[28] Subdivision (a) of Penal Code section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

[29] At the time of the alleged murder in appellant's case, section 189 read as follows: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death is murder of the first degree. All other kinds of murders are of the second degree."

(*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, 107-108, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought.' (Pen. Code, sec. 187.) Murder, thus defined, includes murder in the first degree and murder in the second degree.[30] It has many times been

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[30] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v.*

> decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

However, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that section 187 was *not* "the statute defining" first degree felony-murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe *section 189* as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, emphasis added, fn. omitted.)

Moreover, in rejecting the claim that *Dillon* requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter, supra,* 15 Cal.4th at p. 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord *People v. Box* (2000) 23 Cal.4th 1153,

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Bradford (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony-murder rule. A crime cannot both include another crime and be included within it.

1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder, murder during the commission of a felony, or murder while lying in wait, and *Dillon* expressly held that the first degree felony-murder rule was codified in section 189. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472.) Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes." (*People v. Nakahara, supra,* 30 Cal.4th at p. 712.) First degree murder of any type and second degree malice-murder clearly *are* distinct crimes. (See *People v. Hart, supra,* 20 Cal.4th at pp. 608-609 [discussing the differing elements of those crimes]; *People v. Bradford, supra,* 15 Cal.4th at p. 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[31]

The greatest difference is between second degree malice-murder and

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[31] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements* for conviction. This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that '[t]he elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, at pp. 502-503 (dis. opn. of Schauer, J.), original emphasis.)

first degree felony murder. By the express terms of section 187, second degree malice-murder includes the element of malice (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder. (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189, and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense." (*Id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury-trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, emphasis added, citation omitted.)[32]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree

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[32] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. Therefore, those facts should have been charged in the information. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict appellant of murder without finding the malice which was an essential element of the crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1034-1035.) Therefore, appellant's convictions for first degree murder must be reversed.

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VI.
THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS, IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON THE THEORY OF FIRST DEGREE MURDER

A. Introduction

The trial court instructed the jury on first degree premeditated murder (CALJIC No. 8.20; 36 CT 627), and on felony murder. (CALJIC No. 8.21; 3 CT 3957.) However, the court did not instruct the jury that it had to agree unanimously on the same type of first degree murder before convicting appellant.

The failure to require the jury to agree unanimously on a theory of first degree murder deprived appellant of his rights under Sixth, Eighth and Fourteenth Amendments and their state constitutional analogs to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, to a verdict of a unanimous jury, and to a fair and reliable determination that he committed a capital offense.

Appellant acknowledges that this Court has rejected the claim that a jury cannot return a valid verdict of first degree murder without first agreeing unanimously as to whether the defendant committed a premeditated murder or a felony murder. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1221; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395.) Appellant submits the issue deserves reconsideration in light of the charges and facts of this case.

B. Felony Murder Does Not Have the Same Elements as Premeditated and Deliberate Murder

Due process requires that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant

has been charged. (*In re Winship* (1970) 397 U.S. 358, 364.) Although each state has great latitude in defining what constitutes a crime, once it has set forth the elements of a crime, it may not remove from the prosecution the burden of proving every element of the offense charged. (See *Sandstrom v. Montana* (1979) 442 U.S. 510, 524; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704.)

In *Schad v. Arizona* (1991) 501 U.S. 624, the defendant challenged his Arizona murder conviction where the jury was permitted to render its verdict based on either felony murder or premeditated and deliberate murder. The Supreme Court reaffirmed the general principle that there is no requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict. (*Id.* at p. 632, citing *McKoy v. North Carolina* (1990) 494 U.S. 433, 439.) *Schad* acknowledged, however, that due process does limit the states' capacity to define different courses of conduct or states of mind as merely alternative means of committing a single offense. In finding that Schad was not deprived of due process the Court relied on Arizona's determination that under their statutory scheme "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element." (*Schad, supra*, 501 U.S. at p. 637.) "If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, *rather than independent elements of the crime*, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." (*Id.* at p. 636, italics added.) Thus, where a state has determined that the statutory alternatives are independent elements of the crime, *Schad* suggests that due process is violated if there is not unanimity as to all the elements.

California has followed a different course than Arizona. The various forms of first degree murder are set out in Penal Code section 189. These include not only felony murder but also murder perpetrated by other means.[33]

This Court has consistently held that the elements of first degree premeditated murder and first degree felony murder are not the same. In *People v. Dillon* (1983) 34 Cal.3d 441, this Court first acknowledged that "[i]n every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime." (*Id.* at p. 475.) The Court then declared that "in this state the two kinds of murder [felony-murder and malice-murder] are not the 'same' crimes and malice is not an element of felony murder." (*Id.* at p. 476, fn. 23.) The Court further observed:

> It follows from the foregoing analysis that the two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. . . . [This is a] profound legal difference. . . .

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[33] At the time of the alleged murder in appellant's case, section 189 read as follows: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death is murder of the first degree. All other kinds of murders are of the second degree."

(*Id.*, at pp. 476-477, fn. omitted.)

In subsequent cases, this Court retreated from the conclusion that felony murder and premeditated murder are not the same crime (see, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 712 [holding that felony murder and premeditated murder are not distinct crimes]), but it has continued to hold that the elements of those crimes are not the same. Thus, in *People v. Carpenter*, *supra*, 15 Cal.4th at page 394, this Court explained that the language from footnote 23 of *People v. Dillon*, *supra*, quoted above, "meant that the *elements* of the two types of murder are not the same" (original emphasis). Similarly, this Court has declared that "the elements of the two kinds of murder differ" (*People v. Silva* (2001) 25 Cal.4th 345, 367) and that "the two forms of murder [premeditated murder and felony-murder] have different elements." (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1131).

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 819.) One consequence "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." (*Ibid.*) The analysis is different for facts which are not elements in themselves but rather theories of the crime – alternative means by which elements may be established. The Supreme Court in *Richardson v. United States*, *supra*, 526 U.S. at p. 817, explained this distinction and also showed why *Schad* is inapplicable in the present case. In *Richardson*, the Court cited *Schad* as an example of a case involving *means* rather than *elements*:

> The question before us arises because a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime. *Schad v. Arizona*, 501 U.S.

> 624, 631-632, ... Where, for example, an element of robbery is force or the threat of force, some jurors may conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement -- a disagreement about means -- would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely that the defendant had threatened force.

(*Richardson v. United States*, *supra*, 526 U.S. at p. 817.)

Comparison of the elements of the crimes at issue is the traditional method used by the United States Supreme Court to determine if the crimes are different or the same. The question first arose as an issue of statutory construction in *Blockburger v. United States* (1932) 284 U.S. 299, when the defendant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections described different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact that the other does not.

(*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockburger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment (*United States v. Dixon* (1993) 509 U.S. 688, 696-697), the Sixth Amendment right to counsel (*Texas v. Cobb* (2001) 532 U.S. 162, 173), the Sixth Amendment right to trial by jury, and the Fifth and Fourteenth Amendment rights to proof beyond a reasonable doubt. (*Monge*

v. California (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.);[34] see *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 (lead opn. of Scalia, J.).)

By contrast, and as shown above, this case involves two forms of murder which California has determined are not merely separate theories of murder, but contain separate elements. Felony murder requires the commission of or attempt to commit a felony listed in Penal Code section 189 and the specific intent to commit that felony; malice murder does not. (Pen. Code, §§ 187, 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.)

Therefore, it is incongruous to say, as this Court did in *People v. Carpenter*, *supra*, that the language in *People v. Dillon*, *supra*, on which appellant relies, "*only* meant that the *elements* of the two types of murder are not the same." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, first italics added.) If the elements of malice murder and felony murder are different, as *Carpenter* acknowledges is true for felony murder, then malice murder and felony murder are different crimes. (*United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

Examination of the elements of a crime is also the method used to determine which facts must be proved to a jury beyond a reasonable doubt.

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[34] "The fundamental distinction between facts that are *elements* of a criminal offense and facts that go only to the *sentence* provides the foundation for our entire double jeopardy jurisprudence – including the 'same elements' test for determining whether two 'offence[s]' are 'the same,' see *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and the rule (at issue here) that the Clause protects an expectation of finality with respect to offences but not sentences. The same distinction also delimits the boundaries of other important constitutional rights, like the Sixth Amendment right to trial by jury and the right to proof beyond a reasonable doubt." (*Monge v. California*, *supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.), original italics.)

(*Monge v. California, supra,* 524 U.S. at p. 738 (dis. opn. of Scalia, J.); see *People v. Sakarias* (2000) 22 Cal.4th 596, 623.) Moreover, the right to trial by jury attaches even to facts that are not "elements" in the traditional sense if a finding that those facts are true will increase the maximum sentence that can be imposed. "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476, 490.)

When the right to jury trial applies, the jury's verdict must be unanimous. The right to a unanimous verdict in criminal cases is secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163, 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693), and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488)

Because this is a capital case, the right to a unanimous verdict is also guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See *Schad v. Arizona* (1991) 501 U.S. 624, 630-631 (plur. opn.) [leaving this question open].) The purpose of the unanimity requirement is to ensure the accuracy and reliability of the verdict (*Brown v. Louisiana* (1980) 447 U.S. 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352), and there is a heightened need for reliability in the procedures leading to the conviction of a capital offense. (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama* (1980) 447 U.S. 625, 638). Therefore, jury unanimity is required in capital cases.

This conclusion cannot be avoided by recharacterizing premeditation

and the facts necessary to invoke the felony-murder rule as "theories" rather than "elements" of first degree murder. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 160, citing *Schad v. Arizona*, *supra*.) There are three reasons why this is so.

First, in contrast to the situation reviewed in *Schad*, where the Arizona courts had determined that "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element" (*Schad v. Arizona*, *supra*, 501 U.S. at p. 637), the California courts have repeatedly characterized premeditation as an element of first degree premeditated murder. (See, e.g., *People v. Thomas* (1945) 25 Cal.2d 880, 899 [premeditation and deliberation are essential elements of premeditated first degree murder]; *People v. Gibson* (1895) 106 Cal. 458, 473-474 [premeditation and deliberation are necessary elements of first degree murder]; *People v. Albritton* (1998) 67 Cal.App.4th 647, 654, fn. 4 [malice and premeditation are the ordinary elements of first degree murder].) The specific intent to commit the underlying felony has likewise been characterized as an element of first degree felony murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258, 1268 (conc. opn. of Kennard, J.).)

Moreover, this Court has recognized that it was the intent of the Legislature to make premeditation an element of first degree murder. In *People v. Steger* (1976) 16 Cal.3d 539, the Court declared:

> We have held, "By conjoining the words 'willful, deliberate, and premeditated' in its definition and limitation of the character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require *as an element of such crime* substantially more reflection than may be involved in the mere formation of a specific intent to kill. [Citation.]"

(*Id.* at p. 545, emphasis added, quoting *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.)[35]

As the United States Supreme Court has explained, *Schad* held only that jurors need not agree on the particular means used by the defendant to commit the crime or the "underlying brute facts" that "make up a particular element," such as whether the element of force or fear in a robbery case was established by the evidence that the defendant used a knife or by the evidence that he used a gun. (*Richardson v. United States*, *supra*, 526 U.S. at p. 817.) This case involves the elements specified in the statute defining first degree murder, not the means or the "brute facts" which may be used at times to establish those elements.

Second, no matter how they are labeled, premeditation and the facts necessary to support a conviction for first degree felony murder are facts that operate as the functional equivalent of "elements" of the crime of first degree murder and, if found, increase the maximum sentence beyond the penalty that could be imposed on a conviction for second degree murder.

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[35] Specific intent to commit the underlying felony, the mens rea element of first degree felony murder, is not specifically mentioned in Penal Code section 189. However, ever since its decision in *People v. Coefield* (1951) 37 Cal.2d 865, 869, this Court has held that such intent is required (see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 346, and cases there cited; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), and that authoritative judicial construction "has become as much a part of the statute as if it had written [*sic*] by the Legislature." (*People v. Honig* (1996) 48 Cal.App.4th 289, 328; see also *Winters v. New York* (1948) 333 U.S. 507, 514; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 839) Furthermore, section 189 has been amended and reenacted several times in the interim, but none of the changes purported to delete the requirement of specific intent, and "[t]here is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433, citations and internal quotation marks omitted.)

(Pen. Code, §§ 189, 190, subd. (a).) Therefore, they must be found by procedures that comply with the constitutional right to trial by jury (see *Blakely v. Washington* (2004) 542 U.S. 296, 302-305]; *Ring v. Arizona* (2002) 536 U.S. 584, 603-605; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 494-495), which, for the reasons previously stated, include the right to a unanimous verdict.

Third, at least one indisputable "element" is involved. First degree premeditated murder does not differ from first degree felony murder solely because the former requires premeditation while the latter does not. The crimes also differ because first degree premeditated murder requires malice while felony murder does not. "'The mental state required [for first degree premeditated murder] is, of course, a deliberate and premeditated intent to kill with malice aforethought. (See . . . §§ 187, subd. (a), 189.)'" (*People v. Hart*, *supra*, 20 Cal.4th at p. 608, quoting *People v. Berryman* (1993) 6 Cal.4th 1048, 1085; accord *People v. Visciotti* (1992) 2 Cal.4th 1, 61.) Thus, malice is a true "element" of murder.

Accordingly, it was error for the trial court to fail to instruct the jury that it must agree unanimously on whether appellant had committed a premeditated murder, or a felony murder. Because the jurors were not required to reach unanimous agreement on the elements of first degree murder, there is no valid jury verdict on which harmless error analysis can operate. The failure to so instruct was a structural error, and reversal of the entire judgment is therefore required. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

Furthermore, this was not simply an abstract error. There is nothing to suggest that the jury unanimously agreed the crimes were either premeditated murder or felony murder. In fact, the prosecutor argued that

both theories applied and made no reference to a finding of unanimity as to one theory or the other. (14 RT 3787.)

The prosecution presented evidence in support of two different forms of murder, and argued both to the jury. The court should have required the jurors to unanimously agree, if they could, on one of the two forms in order to convict appellant. Because the court failed to do so, the first degree murder conviction must be reversed.

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VII.

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT AND PREJUDICIAL PRIOR-CRIMES VICTIM IMPACT EVIDENCE

A. Introduction

The Notice of Penalty Phase Evidence filed by the prosecutor stated his intention to present evidence under Penal Code section 190.3, factor (a) "Circumstance of the Crime of Which Defendant is Charged" [hereafter, "factor (a)"]. The evidence included "those witnesses permitted under *Payne v. Tennessee* (1991) 501 U.S. 1277." (2 CT 292.) Appellant filed a motion in limine to exclude victim impact evidence, "except as to family members personally present during the crime or immediately afterward, as to the direct effects on them." (3 CT 708-711.)

In addition, the prosecutor listed several arrests and convictions under Penal Code section 190.3, factor (b) [hereafter "factor (b)"]. One of the incidents alleged under factor (b) involved the shooting of Lynette Denney in 1980, for which appellant was convicted of Penal Code sections 217, 12022.7, 245 and 136, subdivision (b). (2 CT 292-294.)

Trial counsel objected to evidence regarding Denney's present state – she was comatose and a quadriplegic – on the grounds that "would be getting into victim impact statement on other crimes, which is other than the capital crime in this case." (15 RT 4077; see also 16 RT 4096-4097 [arguing that no victim impact testimony should be permitted concerning any other crimes].)

The prosecutor proposed to have Denney's mother testify about her condition in order to prove that her daughter was the victim of the incident alleged under factor (b). (15 RT 4078-4079.)

Trial counsel objected to evidence concerning Denney as

impermissible victim impact evidence, and as more prejudicial than probative. (16 RT 4098.) Trial counsel also objected to the testimony being presented by Denney's mother rather than a doctor, because to have her "explain to the jury what the condition of her daughter is is just going to be visceral, have nothing to do with medicine, more like just kind of visceral description of her in a vegetative state." (16 RT 4103.) The court overruled the objection, noting that whomever testified there would be "some emotional impact. That can't be avoided." (16 RT 4103.)
The trial court overruled counsel's objection and found that Denney's physical condition as a result of the incident was relevant. (16 RT 4098-4099.) The court also ruled that the prosecutor could "bring in anybody that is a percipient witness to her injury." (16 RT 4100.) The court found the evidence did not constitute victim impact evidence, but was "clearly relevant under factor (b)." (16 RT 4101.)

Joyce Lynette Denney testified that in 1980, she and her husband read an article in the local newspaper that a girl had been found dead on Daggett Road. (16 RT 4118-4119.) Their daughter, Lynette, had gone out with a friend, and Ms. Denney assumed that they had missed each other coming and going the day before. (16 RT 4119-4120.) Because her husband had an "odd feeling" Ms. Denney called the police to ask about the found girl. The police asked her to describe the sweater her daughter was wearing. Ms. Denney's testified, "I'll never forget the feeling in her [sic] stomach because she had my class sweater on . . . and I knew it was her right away." (16 RT 4120.)

The police came and took her to the hospital where she saw her daughter unconscious in a coma. Her head was huge from having been shot "in the head twice, at point-blank range in the neck." (16 RT 4118, 4120.)

Lynette was in the hospital for 11 months, and her mother stayed there with her for 15 hours a day. She came out of the coma for ten weeks, during which she was able to communicate. (16 RT 4121.) She lapsed back into the a "semi-coma," as a quadriplegic, a state in which she remained at the time of trial. (16 RT 4122.)

Ms. Denney complained to the insurance company about Lynette's care at the hospital until it was agreed that she could take her daughter home and care for her there. For the past 23 years, Lynette had 24 hour a day nursing care, including IPV treatments every hour for respiratory. (16 RT 4122.) This was required because she "had a trach [sic] that they put in in the hospital when they did the lobotomy." (16 RT 4123.) Her mother described the hourly treatments as "unpleasant . . .like falling off a monkey bar and having your wind knocked out of you." (*Ibid.*)

Lynette had been fed for the past 20 years a dietary supplement through a gastronomy tube, which comes from the stomach and is connected to a feeding bag on a slow drip. She was moved by the nurses every two hours. (16 RT 4123.) They used to be able to take her outside, but over the years, Ms. Denney has become physically unable to move her and Lynette developed allergies, so she longer went out. (*Ibid.*)

Lynette was given about 17 different medications, including anti-seizure medication. According to her mother, however, the medication was not effective and she was in pain because she suffered from frequent seizures. (16 RT 4124-4125.) All Ms. Denney could do was "try to comfort her until she stops. Her eyes will go into staring, and sometimes she'll raise her hands up" in an involuntary response. (16 RT 4125.)

Lynette responded to questions by blinking. (16 RT 4125.) About ten years earlier, she lost a kidney, so she had to drink a lot of water and

cranberry juice to flush the remaining kidney. She urinated through a Foley catheter and wore a diaper. (16 RT 4125-4126.) There was no prognosis for her recovery. (16 RT 4126.)

B. Prior-Crimes-Victim-Impact Evidence Was Improperly Admitted

Subdivision (b) of section 190.3 provides for the consideration of: "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." The rationales of *Payne v. Tennessee* (1991) 501 U.S. 808, and *People v. Edwards* (1991) 54 Cal.3d 787, in allowing evidence of victim impact as part of the circumstances of the capital crime, are entirely inapplicable in the context of a defendant's other violent criminal activity.[36] Consequently, there is no basis for interpreting subdivision (b) as including such evidence with respect to prior crimes.

Other state courts have excluded such evidence as irrelevant and inappropriate. In *People v. Hope* (Ill. 1998) 702 N.E.2d 1282, the Illinois Supreme Court concluded *Payne* "clearly contemplates that victim impact evidence will come only from a survivor of the murder for which the defendant is presently on trial, not from survivors of offenses collateral to the crime for which defendant is being tried." (*Id.* at p. 51.) The court expressly agreed with the defendant's argument that "[t]he jury's highly subjective decision whether to impose death should be unfettered by

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[36] With the possible exception being other criminal activity actually charged and proven as a separate offense in the current capital proceedings and "related" to the capital crime. (See, *People v. Alvarez* (1996) 14 Cal.4th 155, 244, fn. 41, [recognizing that the "circumstances of the crime" under factor (a) would not include other crimes for which a defendant was convicted in a consolidated trial on the capital charges unless the other crime "was deemed related thereto . . . ."].)

emotionally-charged victim impact evidence that concerns something as collateral as a prior offense for which the defendant is not being sentenced." (*Id.* at p. 53.)

The Nevada Supreme Court reached the same conclusion in *Sherman v. State* (Nev. 1998) 965 P.2d 903, 914, holding "that the impact of a prior murder is not relevant . . . and is therefore inadmissible during the penalty phase." The Court explained that "evidence of the impact which a previous murder had upon the previous victim is not relevant to show" the damage done by the current capital offense. (*Ibid.*)

Similarly, in *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, the Tennessee Supreme Court "reiterate[d] that victim impact evidence of another homicide, even one committed by the defendant on trial, is not admissible." (*Id.* at p. 889, fn. 11, citing *State v. Bigbee* (Tenn. 1994) 885 S.W.2d 797, 813.)

Likewise, in *State v. White* (Ohio 1999) 709 N.E.2d 140, 154, the Ohio Supreme Court held that evidence of the impact of a non-capital murder (i.e., second degree murder as a lesser offense of capital murder) and attempted aggravated murder were not admissible at the penalty phase of defendant's trial because the judge, not the jury, is responsible for determining the appropriate sentence for those convictions, although defendant was convicted of those crimes in the same trial which resulted in his conviction on the capital murder.

In addition, in *People v. Dunlap* (Colo. 1999) 975 P.2d 723, 744-745, the Colorado Supreme Court relied on the decision of the Illinois Supreme Court in *People v. Hope*, *supra*, 702 N.E.2d 1282, 1289, in holding that evidence of "the perceptions of the victims" of defendant's prior crimes was not admissible at the penalty phase, and requiring the

exclusion of evidence describing the previous victims' fear and nervousness during those crimes, and a victim's emotional state following a previous aggravated robbery.

The Texas Court of Criminal Appeals reached a similar conclusion in *Cantu v. State* (Tex. Cr. App. 1997) 939 S.W.2d 627, 637, holding that it was error to present victim impact evidence concerning the non-capital murder, sexual assault and robbery of a teenage girl in the same incident as the capital murder of another girl, because the former girl was "not the 'victim' for whose death [defendant] has been indicted and tried, and *Payne* does not contemplate admission of such evidence as permissible under the Eighth Amendment."

Appellant is mindful of this Court's decisions rejecting the argument that victim impact evidence should not be permitted under subdivision (b) of section 190.3, but urges the Court to reconsider this holding.. (See, e.g., *People v. Price* (1991) 1 Cal.4th 324, 479; *People v. Clark* (1990) 50 Cal.3d 583, 625-626; *People v. Virgil* (2011) 51 Cal.4th 1210, 1276; *People v. Jones* (2012) 54 Cal.4th 1, 72-73.)

C. The Victim Impact Evidence Should Have Been Excluded under Evidence Code Section 352 as More Prejudicial than Probative

Emotional victim impact evidence which is likely to provoke arbitrary or capricious action violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, sections 7, 15, 17, and 24 of the California Constitution. (See, *Gregg v. Georgia* (1976) 428 U.S. 153, 189 ["where 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"]; *Gardner v.*

Florida (1977) 430 U.S. 349, 358 ["It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"].) Such evidence must also be excluded under Evidence Code section 352 because its probative value is substantially outweighed by the danger of undue prejudice.

In *People v. Edwards*, *supra*, 54 Cal.3d 787, this Court emphasized the unacceptable risk of prejudice resulting from excessively emotional victim impact evidence:

> Our holding does not mean that there are no limits on emotional evidence and argument. In *People v. Haskett*, *supra*, 30 Cal.3d at page 864, we cautioned, "Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.

(*Id.* at p. 836.) This passage appears to urge trial courts to carefully weigh evidence of victim impact under Evidence Code section 352 before admitting it.

Here, the trial court abused its discretion in permitting the highly emotional and unduly prejudicial testimony of Ms. Denney, evidence that was bound to intensify natural feelings of sympathy for the victim and her family and may have encouraged a desire for retribution against appellant inviting an emotional and purely subjective response. The evidence was far more prejudicial than probative and should have been excluded for this

reason.

D. The Error was Prejudicial and Requires Reversal of Appellant's Death Sentence

The highly emotional content of the victim impact evidence erroneously admitted in the penalty trial created an atmosphere of prejudice in which emotion prevailed over reason. (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 189.) Appellant was deprived of his rights under the federal constitution, as well as rights guaranteed to him under California law. Accordingly, the error must be reviewed under the standard set forth in *Chapman v. California*, *supra*, 381 U.S. at p. 24), holding that reversal is mandated unless the state can show that the error was harmless beyond a reasonable doubt. When a violation of the constitution occurs in the penalty phase of a capital case, a reviewing court must proceed with special care. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258 ["[T]he evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer."].) In evaluating the effects of the error, the reviewing court does not consider whether a death sentence would or could have been reached in a hypothetical case where the error did not occur. Rather, the court must find that, in that particular case, the death sentence was "surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279.) The State cannot satisfy this standard here.

Unlike the testimony in *People v. Jones*, *supra*, 54 Cal.4th 1, which this Court held was "not the type of evidence that would evoke an emotional response from the jury," the extended, detailed and graphic testimony of Lynette Denney's mother, was precisely that. The brief testimony in *Jones* regarding the victim's inability to work and continued psychiatric treatment, is a far cry from the ten pages of testimony in the

present case, in which Ms. Denney described not only her daughter's 23-year ordeal, but her own as well as her husband's.

It is also of consequence that the evidence was stressed by the prosecution during closing argument. Generally, the significance the prosecutor assigns to erroneously admitted evidence is considered in assessing the evidence's prejudicial impact. (See, *e.g.*, *People v. Minifie* (1996) 13 Cal.4th 1055, 1071-1072; *People v. Patino* (1984) 160 Cal.App.3d 986, 995 [no prejudice where prosecutor does not dwell upon the evidence improperly admitted].) Here the prosecutor emphasized the evidence, and encouraged the jurors to vote for the death penalty because of it:

> Unfortunately, we can't hear from Lynette Denney. Lynette Denney is trapped in a body and has been trapped in a body for 23 years. Her mother believes she knows, and you don't know whether that's good or bad. [¶] You don't know whether to draw some faith from that or whether to believe that's even more of a tragedy. [¶] You don't know whether to say ignorance is bliss or whether you can – you can say any morsel of life is worth it, any aspect of life. [¶] 'Cause Lynette Denney has been fighting for 23 years to stay alive. I don't know if I could. I mean, there's a hard, hard fight. and that takes down a lot of people with you. A lot of people. [¶] And much like Ricky she can't enjoy the simple things in life. But at least Ricky will become semi-proficient. Looked pretty good in the wheelchair. Has to be lifted up to testify. [¶] Luckily he's living in an age where we kind of push handicapped access. But she, she can't become proficient at anything except staring and hopefully dreaming, maybe being able to live in her thoughts.

(17 RT 4531-4532.)

The erroneously admitted prior-crimes-victim-impact testimony in this trial was emotionally powerful and excessive and was used effectively by the prosecutor in closing argument. And while this was not the only

aggravating evidence presented against appellant, there can be no question that it was the most devastating. The trial court's error in admitting the evidence cannot be regarded as harmless and, consequently, appellant's death sentence must be reversed.

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VIII.

EVIDENCE OF APPELLANT'S PAROLE VIOLATIONS SHOULD HAVE BEEN EXCLUDED AS IRRELEVANT AND BECAUSE ITS ADMISSION ALLOWED THE JURORS TO CONSIDER IN THEIR PENALTY DETERMINATION EVIDENCE THAT WAS NOT ADMISSIBLE AS AGGRAVATION AND WHICH THEY WERE NOT REQUIRED TO FIND TRUE BEYOND A REASONABLE DOUBT IN VIOLATION OF APPELLANT'S STATE AND FEDERAL RIGHTS

A. Introduction and Factual Background

Over defense counsel's objection, the prosecutor was permitted to introduce at the penalty phase irrelevant and highly prejudicial evidence showing that appellant's parole had been violated on multiple occasions.

People's Exhibit 57, which consists of documents related to a prior conviction for assault with intent to commit murder, assault with a deadly weapon and dissuading a witness, was admitted into evidence. (16 RT 4136.) Thereafter, however, the court and counsel discussed the document and trial counsel objected to those portions of the documents that contained information about appellant's parole violations as irrelevant. (16 RT 4201.)

When the prosecutor opined that those pages might be relevant to cross-examine a defense expert who "has done a timeline," the court deferred ruling on appellant's objection. (16 RT 4201.) The court noted that People's Exhibit 58 contained the same information as Exhibit 57, except for appellant's picture, and it was admitted. (16 RT 4201-4202.) In fact, Exhibit 58 did not contain the parole violation pages at issue here. (3 CT 755-776.)

After the defense case, the court and parties again discussed the admissibility of Exhibit 57. Trial counsel argued that the parole information was irrelevant, and that the jury need only be provided with the

abstract that showed the felony convictions. (17 RT 4466.)

The prosecutor argued that the parole documents were relevant to impeach the testimony of Gwen Taylor, a defense witness who testified at the penalty phase. (17 RT 4467.) Taylor testified that she had known appellant since she was 14 years old, and that when she was older, they had a romantic relationship. (17 RT 4425, 4429, 4430.) The prosecutor argued that his interpretation of her demeanor and the way she answered his questions,

> seemed to indicated that she did not want to get Mr. Melendez in further trouble by testifying that he had a sexual or romantic relationship with her . . . during her minority, which would have been 1977 to 1981. Which means that any type of relationship that she had with him had to occur 1981 and subsequent to that point. Unfortunately, though . . . she knew that Mr. Melendez was incarcerated during that period of time.

(17 RT 4467.)

The trial court admitted the parole evidence as "relevant . . . to her credibility certainly." The court went on to add, "I don't see any prejudice to them because everybody knows that the defendant was in prison. And there's nothing in these records that . . . in any way reflects badly on him. So I don't see any prejudice to it." (17 RT 4468.) As shown below, the trial court was mistaken on both counts.

The exhibit showed that appellant was sentenced to 11 years in prison on April 20, 1982, for convictions of assault with intent to commit murder, assault with a deadly weapon and attempting to prevent or dissuade a witness. (3 CT 747 [abstract].) For the purpose of proving the prior conviction under Penal Code section 190.3, factor (c), this was the only relevant evidence for the jury.

In addition to the abstract of judgment, however, People's Exhibit 57

also contained documents showing multiple instances when appellant was released on parole, rearrested and returned to custody. Appellant was paroled in January 1987, and arrested one month later in February. (3 CT 751-752.) He was returned to custody for 10 months, released in December 1987. In December 1988, appellant was arrested, then reinstated on parole. In January 1989, his parole was revoked and he was returned to custody for 12 months. He was released in January 1989. (3 CT 752.) In January 1990, appellant was arrested, and in February his parole was revoked and he was given five months. (*Ibid.*) He was released in June 1990. In August, he was arrested, his parole was revoked and he was returned to custody for six months. He was released in February 1991, after which he was discharged from parole. (3 CT 753.)

This evidence was inadmissible because it was irrelevant, the probative value of evidence regarding his parole status was outweighed by its prejudicial effect, and it was inadmissible as non-statutory aggravating evidence. Admission of this evidence violated appellant's federal constitutional right to due process under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and analogous sections of the California Constitution rendering his penalty trial fundamentally unfair and requiring reversal of the conviction, special circumstances and death judgment. (*People v. Partida, supra*, 37 Cal.4th at p. 439.)

B. Evidence of Appellant's Parole Violations Was Irrelevant and Inadmissible

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) The trial court abused its discretion when it permitted the prosecutor to introduce the pages of Exhibit 57 that showed that appellant had been violated and returned to custody four times during the course of his parole for one of his prior felony convictions.

Proof of the conviction was admissible under Penal Code section 190.3, factor (c), as evidence of a prior felony conviction, but the history of appellant's parole was not because it was not relevant to prove the prior. Therefore, the prosecutor put forth another theory of admissibility, upon which the court based its ruling, but one that is not supported by the record.

As noted, Gwen Taylor testified that she met appellant through her church in 1977 when she was "about" 14 years old. (17 RT 4425.) He acted like a godfather to her son, who was born in 1978, and guided Taylor through troubled times when she was young. (17 RT 4426.) On cross-examination, the prosecutor asked Taylor if she and appellant lived together. Taylor testified that she lived at appellant's mother's house at various times. (17 RT 4428-4429.) Taylor said she and appellant had a "dating relationship" at one point. (17 RT 4429.) In response to the prosecutor's question about when it "bec[a]me romantic," Taylor said, "Probably about the time I was 20 it was really intimate." (17 RT 4430.)

The prosecutor claimed that the parole documents tended to impeach Taylor's credibility regarding how old she was when she had a "romantic" relationship with appellant. The record, however, belies both the factual basis for the prosecutor's claim, as well as the prosecutor's true motive for offering the evidence.

First, the prosecutor's assumption that Taylor was lying in order to hide the fact that appellant had a sexual relationship with her when she was a minor is not supported by the record. While it is true that appellant was in custody from the time of his arrest in 1980 until he was first paroled in 1987, that fact does not preclude the possibility that he and Taylor had a "romantic" or even an "intimate" relationship during that time. The prosecutor never asked Taylor whether the relationship was sexual or

physically intimate. Nor did the prosecutor make any attempt to clarify exactly how old Taylor was when the relationship began. Instead, it appears the prosecutor's intent was to leave the record vague so as not to interfere with his ability to argue innuendo rather than fact.

As an afterthought, the prosecutor also argued that the prison documents showed that appellant was not within the sphere of influence of his stepfather, Lundy Perry, during the time that he was in prison. (17 RT 4468-4470.) At no time, however, did appellant present evidence or argue that he was under Lundy's sphere of influence while he was in prison. (See, e.g., 17 RT 4398 [testimony of appellant's mother that he followed Perry around when he 14 years old].)

The prosecutor's apparent motive was to get before the jury evidence that appellant had repeatedly violated his parole by committing new crimes. The prosecutor knew that the jury was concerned about appellant's performance on parole based on the question asked during the guilt phase: "May we request information re: Angelo Melendez parole: was he on at time of crime." (3 RT 674.) Thus, in his penalty phase closing argument, he invited the jury to "peruse" the "documents" submitted to "address" both factor (b) and factor (c); documents which contained information about the parole violations. (17 RT 4528-4529.)

C. The Jury's Penalty Determination Was Not Properly Confined to Consideration of Aggravating Evidence Under the Statutory Factors and Instances of Violent Criminal Activity that Were Proved Beyond a Reasonable Doubt

The prosecution may not present aggravating evidence showing the defendant's bad character unless the evidence is admissible under one of the factors listed in Penal Code section 190.3. (*People v. Avena* (1996) 13 Cal.4th 394, 439.) "Evidence of defendant's background, character, or

conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and [would] therefore [be] irrelevant to aggravation." (*People v. Boyd* (1985) 38 Cal.3d 762, 774.) "Thus, [aggravating] evidence irrelevant to a listed factor is inadmissible . . . ." (*Id.* at p. 775.)

The documentation of appellant's parole violation did not include information about the nature of the violation. Thus, the violations could have been for non-violent or even technical violations, such as failing to report or submit to a drug test. Therefore, the evidence was clearly not admissible under factor (b) as evidence of other violent criminal activity by the defendant, and should not have been considered by the jury in their penalty determination.

D. The Evidence Was Prejudicial

Because appellant was entitled under state law to have the aggravating evidence introduced against him in the penalty trial limited to the factors enumerated in section 190.3 (*People v. Boyd, supra,* 38 Cal.3d at p. 775), the admission of evidence unrelated to the statutory factors in aggravation violated his right to due process under the Fourteenth Amendment of the United States Constitution. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 746 ["[c]apital sentencing proceedings must of course satisfy the dictates of the Due Process Clause"].) This error further violated appellant's federal constitutional rights under the Fifth, Eighth, and Fourteenth Amendments to a fundamentally fair and reliable penalty trial based on a proper consideration of relevant sentencing factors and undistorted by improper, nonstatutory aggravation. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, quoting *Zant v. Stephens* (1983) 462 U.S.

862, 884-885 [death penalty cannot be predicated on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process"].)

The trial court was mistaken when it found that the parole violation evidence was not prejudicial "in any way." (17 RT 4468.) As previously noted, the jurors in this case had specifically asked about appellant's parole status during the guilt phase. This was obviously an area of concern for them, and the prosecutor exploited that concern by introducing evidence of appellant's repeated parole violations. For this reason, the state cannot show that the error was harmless beyond a reasonable doubt under *Chapman v. California, supra,* 386 U.S. at p. 24. Similarly, the error cannot be deemed harmless under the standard for state-law error at the penalty phase. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448 [reversal of penalty required if "there is a 'reasonable possibility' such an error affected a verdict"].)

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IX.

THE TRIAL COURT'S REFUSAL TO CONDUCT A PHILLIPS HEARING BEFORE ADMITTING EVIDENCE OF A VIOLENT CRIME WHICH THE PROSECUTION WAS UNABLE TO PROVE WAS COMMITTED BY APPELLANT RESULTED IN THE ADMISSION OF HIGHLY PREJUDICIAL EVIDENCE AT THE PENALTY PHASE OF TRIAL

A. Introduction and Factual Background

Prior to the start of the penalty phase, the defense moved for a hearing on the admissibility of evidence of incidents proffered under Penal Code section 190.3, factor (b). (15 RT 4075.) The trial court refused the request, stating, "Well, that's for the jury to decide whether or not there is sufficient evidence to prove beyond a reasonable doubt. . . . So I think as long as the jury is properly instructed, that's up to them to decide." (15 RT 4076.)

Thereafter, the prosecutor presented evidence of a 1978 incident. Rita Marie Moppins, whose maiden name was Brown, testified that she was at a party when she was shot in the leg, resulting in its amputation. (16 RT 4137.) Her stepbrother, Robert Brown, was hit by the bullet when it went through Moppin's leg. (16 RT 4138.) Moppins did not see who shot her and did not know how the shooting happened. (16 RT 4138.) Moppins testified she did not know appellant. (*Ibid.*)

The prosecutor was unable to present evidence to connect appellant to the shooting of Moppins. According to the prosecutor, Robert Brown was dead at the time of trial, and Debra Brown, Moppins's stepsister, who was also present at the time Rita was shot, refused to testify. (16 RT 4299.) The prosecutor told the court that appellant was originally charged with, inter alia, assault with a deadly weapon under Penal Code section 245 and

brandishing a weapon under section 417 and plead to a misdemeanor 417 and 12031, but the records had been destroyed by the time of appellant's trial. (16 RT 4303.)

Defense counsel asked the court to strike the evidence and instruct the jury not to consider the evidence. (17 RT 4445-4447.) The court did so, but the court's action came too late to avoid the significant prejudice to appellant as a result of the erroneous admission of Moppins's testimony.[37] The court's actions resulted in a violation of appellant's Eighth Amendment right to a reliable determination of penalty and Fourteenth Amendment right to due process and require reversal of the death penalty.

B. The Trial Court Erred in Refusing to Hold a *Phillips* Hearing

In *People v. Boyd* (1985) 38 Cal.3d 762, 778, this Court held that before a jury may consider evidence of unadjudicated conduct in aggravation, the prosecution must prove all the elements of the conduct beyond a reasonable doubt. The Court stated that this requirement "necessarily implies that the trial court will not permit the penalty jury to consider an uncharged crime as an aggravating factor unless a 'rational trier of fact could have found the essential elements of the crime beyond a

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[37] The court told the jury,

> You may recall Rita Moppins-Brown [sic]. She was the lady that testified she had lost her leg and had an artificial leg. The Court has granted a motion to strike that – all that testimony, that witness's testimony. So I'm going to admonish you to disregard all the testimony of Rita Moppins-Brown [sic]. Tear it out of you notes, pretend it never existed. You may not consider that testimony in making your decision in this phase of the case, so that – that testimony is stricken from the record.

(17 RT 4463.)

reasonable doubt.'" (*Ibid.*, citing *People v. Johnson* (1980) 26 Cal.3d 557, 576.)

In *People v. Phillips* (1985) 41 Cal.3d 29, this Court further noted the many problems which such evidence may present and suggested that "in many cases it may be advisable for the trial court to conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element of the other criminal activity." (*Id.* at p. 72, fn. 25.)

The erroneous admission of evidence of the Rita Mopping shooting was raised by the defense in the motion for new trial. In denying the motion, the court stated,

> Of course, the defendant is correct that the testimony should never have been admitted. However, there was no objection raised until after the testimony was introduced, and no request for an Evidence Code section 402 hearing. Moreover, once it was realized that the prosecutor could not deliver the necessary evidence linking the defendant to that crime, the Court admonished the jury to disregard Brown's testimony. While this may not have been foreseeable for either counsel, or by either counsel, the Court finds that any prejudice was neutralized by the Court's instruction to the jury.

(17 RT 4581.)

In fact, however, the defense *did* request a 402 hearing, seeking to prevent exactly what happened with Rita Moppins. Trial counsel argued that for,

> any incident where there's no conviction . . . we would like an offer of proof before we get into those. Because the Court knows he [the prosecutor] has to prove these beyond a reasonable doubt. And there's a problem of prejudice there if you get halfway through it.

(15 RT 4075.) The court denied the request. (15 RT 4076.)

The court was aware of the proper procedure for determining the

admissibility of factor (b) testimony as evidenced by the hearing ordered to hear the testimony of Christine Preciado and Yolanda Dawson. These witnesses came forward during the penalty trial and claimed they had been the victims of an unreported crime by appellant and Howard Gaines in 1980. Before they were permitted to testify, the witnesses were questioned by counsel for both sides about the facts of the alleged incident. (16 RT 4160-4189; 4246-4251; 4255-4271.) As stated by the court, the purpose of the hearing held outside of the presence of the jury was "for determining whether the witness can offer evidence admissible in this portion of the proceedings." (16 RT 4186.)

Had the court granted the defense request for a *Phillips* hearing, it would have become apparent that the prosecutor could not prove that appellant was the person who shot Rita Brown Moppins. Indeed, when the prosecutor revealed his inability to prove that appellant was the perpetrator, the court stated to the prosecutor, "before offering that, you should have had some way of linking it up." (16 RT 4306.)

C. The Error Was Prejudicial

Because of the trial court's error, the jury heard testimony from a young woman who, as an innocent bystander at a party, lost her leg to a gunshot wound, testimony the jury should never have heard. The state cannot show that the error was harmless beyond a reasonable doubt under *Chapman v. California, supra,* 386 U.S. at p. 24. Similarly, the error cannot be deemed harmless under the standard for state-law error at the penalty phase. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448 [reversal of penalty required if "there is a 'reasonable possibility' such an error affected a verdict"].)

As defense counsel pointed out to the court, this was precisely the reason why they requested a 402 hearing "to stop this situation from

possibly happening." (16 RT 4301.) Respondent will undoubtedly cite counsel's statements that he thought "this can be cured by the Court. All we can do at this point is tell the jury this hasn't even met the threshold to get to you." (*Ibid.*) Counsel also noted, however, "obviously it's prejudicial." (*Ibid.*)

The court's admonition was not adequate to undo the damage caused by the erroneous admission of Moppins's testimony. Not only is it difficult for jurors to "unring the bell" after hearing such harmful evidence, here, the damage was exacerbated by the trial court's failure to admonish the jury not to speculate about the reason why the testimony was stricken.

The penalty phase evidence presented by the prosecution included testimony from two witnesses, Christine Preciado and Yolanda Dawson, testified that appellant threatened to kill their families if they reported the crimes. (16 RT 4265.) Moreover, it was the prosecutor's stated belief that other witnesses feigned a lack of memory of appellant as the perpetrator of violent acts against them. (See, e.g., 16 RT 4193-4194 [court admits prior statement of witness after finding untrue claim of lack of recollection].) The jury likely thought the same about Rita Moppins: when she claimed she did not see who shot her, the jury undoubtedly believed that she was afraid to identify appellant as her assailant, and the court's admonition did nothing to dispel that belief.

The trial court's error in failing to prevent the jury from hearing inadmissible and highly prejudicial evidence violated appellant's Eighth Amendment right to a fair and reliable sentencing hearing and requires reversal of the death judgment. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638, fn. 13 [greater reliability required in capital cases], citing *Gardner v. Florida*, 430 U.S. 349, 357-358 (plur. opn. of Stevens, J.);

accord, *Lockett v. Ohio, supra,* 438 U.S. at p. 604 (plur. opn. of Burger, C.J.); *Woodson v. North Carolina* (1976) 428 U.S. 280, 304-305 (plur. opn. of Stewart, J.).)

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X.

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criterion requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens, supra,* 462 U.S. at p. 878.)

California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, section 190.2 contained 21 special circumstances (one of which – murder while engaged in felony under subdivision (a)(17) – contained 12 qualifying felonies).

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Penal Code Section 190.3(a) Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 17 RT 4501.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. In this case, for instance, the prosecutor argued the manner, motive, and

location of the murder, the impact of the murder on Wilson's family, friends and community, all as aggravating "circumstances of the crime" under factor (a). (17 RT 4525-4528.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

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C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of other criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. In fact, in his penalty phase closing argument, the prosecutor further advised the jurors

> Unlike the guilt phase, however, there's no proof aspect in determining your decision. You don't have to find that the defendant deserves one sentence over another sentence beyond a reasonable doubt.

(15 RT 4508.)

Blakely v. Washington (*Blakely*) (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (*Ring*) (2002) 536 U.S. 584, 604, and *Apprendi v. New Jersey* (*Apprendi*) (2000) 530 U.S. 466, 478, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury first had to make several factual findings: (1) that aggravating factors were present; (2) that the aggravating

factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 23ACT: 7011-7012; 15RT: 3081-3083.) Because these additional findings were required before the jury could impose the death sentence, *Blakely*, *Ring* and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson, supra,* 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the due process clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a

reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (17 RT 4501, 4547), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant

is entitled to jury instructions that comport with the federal Constitution and thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. 584. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are

entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 17 RT 4504.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. at p. 584 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this

claim. (*People v. Anderson, supra,* 25 Cal.4th at pp. 584-585.) Here, the prosecution presented extensive evidence of unadjudicated criminal activity allegedly committed by appellant, including domestic violence, assault with intent to commit murder and attempted sexual assault. (17 RT 4504.)

The United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington, supra,* 542 U.S. 296, *Ring v. Arizona, supra,* 536 U.S. 584, and *Apprendi v. New Jersey, supra,* 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward.*

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; 17 RT 4547.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and

directionless. (See *Maynard v. Cartwright, supra,* 486 U.S. at p. 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs that they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens, supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias, supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

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6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a verdict of life imprisonment without the possibility of parole is required, tilts the balance of forces in

favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

8. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life

and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.), and his right to the equal protection of the laws (U.S. Const. 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, factors (d) and (g); 17 RT 4501) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (See, e.g., CALJIC No. 8.85, factors (d) [mental or emotional disturbance], (e) [victim participation], (f) [moral justification], (g) [duress or domination], (i) [age of defendant], (j) [minor participation].) The trial court denied appellant's request to omit those factors from the jury instructions (17 RT 4474-4486), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of appellant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (17 RT 4501.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Imposition of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions

against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require intercase proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes in violation of the equal protection clause. To the extent that there may be differences between capital defendants and noncapital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a noncapital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423.) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider them.

H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments,

or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (See, e.g., *People v. Cook* , *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

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XI.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming arguendo that this Court concludes that none of the errors in this case was sufficiently prejudicial, by itself, to require reversal of appellant's conviction and death sentence, the cumulative effect of the many errors that occurred below, taken together or in any combination, nevertheless requires reversal of appellant's convictions and sentences. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may "so infect[] the trial with unfairness" as to violate due process and require reversal. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at pp. 642-643; *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 302-303; *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty judgments in capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error]; *Parle v. Runnells* (9th Cir. 2007) 505 F.3d 922, 927-928 [principle that cumulative errors may violate due process is "clearly established" by Supreme Court precedent].)

The death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244 [cumulative effect of penalty phase errors prejudicial under state or federal constitutional standards]; *People v. Brown, supra,* 46 Cal.3d at p. 463 [applying reasonable possibility standard for reversal based on cumulative error].)

In this case, as set out in arguments II and III, the trial court's erroneous rulings resulted in the exclusion of evidence of admissions made by Taylor that it was he, and not appellant, who shot and killed Koi Wilson and attempted to kill Ricky Richardson. At the same time, the court allowed Richardson and the prosecutor to present distorted evidence to the jury which suggested – wrongly – that appellant had admitted to being the shooter. The jury was thus presented with a highly misleading version of events, which resulted in appellant's convictions of murder and attempted murder, while acquitting Richardson of both crimes.

Moreover, the jury was erroneously told that appellant was the member of a violent prison gang – evidence that was wholly irrelevant, but highly prejudicial. (Argument IV.)

Because all of the convictions were significant aggravating circumstances, on which the prosecution placed great emphasis in arguing for the death penalty, these errors also undermined the reliability of the penalty verdict and require reversal of the death sentence.

The reliability of appellant's death sentence was undermined not only by the guilt phase errors discussed above, but by the combined effect of the erroneous admission of evidence of appellant's parole violations (argument VIII above) and the testimony of Rita Brown Moppins, which should never have been heard by the jury (argument IX above).

These errors, combined with the guilt-innocence phase errors discussed above, and the other errors raised in this brief, deprived appellant of a fundamentally fair and reliable sentencing determination, requiring that his death sentence be vacated.

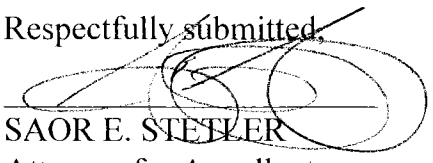
Accordingly, the cumulative effect of all of the errors set out herein requires a reversal of all of appellant's convictions and sentences.

CONCLUSION

For the foregoing reasons, appellant's convictions and sentence of death must be reversed.

Dated: June 27, 2013

Respectfully submitted,



SAOR E. STETLER
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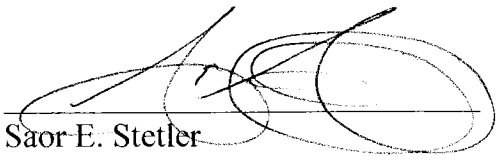
CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 8.630 (b)(2) & (4))

I, Saor E. Stetler, am the attorney appointed to represent appellant, Angelo Michael Melendez, in this automatic appeal. I conducted a word count of this brief using my office's computer software. On the basis of that computer-generated word count, I certify that this brief is 49,739 words in length excluding the tables and certificates.

Dated: June 27, 2013



Saor E. Stetler

PROOF OF SERVICE BY MAIL

I, Saor E. Stetler, the undersigned, declare:

That I am a citizen of the United States of America, over the age of eighteen years, and not a party to the within cause.

On this date I served on the following interested parties, a copy of:

APPELLANT'S OPENING BRIEF

by placing a true copy thereof enclosed with postage thereon fully prepaid, in the United States Mail at Mill Valley, California, addressed as set forth below:

Mary L. Jameson Deputy Clerk Supreme Court of California 350 McAllister St. San Francisco, CA 94102-4783	Valerie Hriciga California Appellate Project 101 Second St. San Francisco, CA 94105
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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.

Executed this 28th day of June, 2013 at Mill Valley, California.

SAOR E. STETLER