IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	Cal. Sup. Ct. No. S138474
Plaintiff and Respondent,	San Diego County Superior Court No. SCE230405
vs. Eric Anderson	
Defendant and Appellant.	

Automatic Appeal From The Judgment Of The Superior Court Of The State Of California, In And For The County Of San Diego, The Honorable Lantz Lewis, Presiding

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This is an automatic appeal from conviction and judgement of death, and is authorized by Penal Code section 1239.

STATEMENT OF THE CASE

A fourth amended complaint charged appellant Eric Anderson with the murder of Steven Brucker (Pen. Code, § 187 subd. (a)) (Count I) and conspiracy to commit a crime, residential robbery and residential burglary (Pen. Code, § 182, subd. (a)(1)) (Count II), the crimes occurring on or about April 14, 2003. Brandon Handshoe, Apollo Huhn and Randy Lee were named as co-defendants on both counts. (1 CT 29-31.) The complaint also charged appellant with two counts of residential burglary occurring on January 3, 2003 and April 9, 2003 (Pen. Code, §§ 459, 460) (Counts III, IV). (1 CT 28-34.)

The complaint alleged in Count I that appellant committed the crime while engaged in a robbery and burglary (Pen. Code, § 190.2, subd. (a)(17)) and personally used and discharged a firearm proximately causing great bodily injury and death (Pen. Code, § 12022.53, subd. (d)). It alleged in Count II that appellant personally used a firearm, handgun (Pen. Code, § 12022.5, subd. (a)(1)). (1 CT 30, 33.) The complaint also alleged appellant suffered three prior convictions that qualified as strikes (Pen. Code, §§ 1170.12, subd. (a)-(d); 667, subd. (b)-(i)), two of which constituted serious felonies (Pen. Code, §667, subd. (a)(1)), and served a prior prison term

(Pen. Code, § 667.5, subd. (a)). (1 CT 35-36.) Appellant pled not guilty and denied the special allegations. (9 CT 1740.)

An information was later filed containing the same allegations as in the fourth amended complaint, changing the date of the burglary alleged in Count III to January 8, 2003, and charging appellant with possession of firearm by a felon occurring on April 14, 2003 (Pen. Code, § 12021, subd. (a)(1)) (Count V), and grand theft of a firearm, occurring between April 14, 2003 and May 16, 2003 (Pen. Code, § 487, subd. (d)) (Count VI). (1 CT 106-114.)

Appellant again pled not guilty and denied the special allegations. (9 CT 1774.) The trial court granted appellant's motion to dismiss Count VI (Pen. Code, § 995). It denied appellant's motion to sever the trial; but it allowed Huhn to have a separate jury. (9 CT 810, 1788; 3 RT 600-6-600-9, 600-31.)

During jury voir dire, Handshoe changed his plea to guilty. The defense's motion for mistrial and continuance were denied. (10 RT 1601-10; 13 RT 2226-28.)

After the prosecution rested its case, the trial court granted the defense's motion to strike overt acts one through five (Pen. Code, § 1118.1). (25 RT 4461; 26 RT 4463.) The trial court also acquitted Lee of conspiracy (Pen. Code, §1118.1). (26 RT 4598.)

A jury found appellant guilty as charged, the murder being first-degree, and the special allegations true. (9 CT 1928-34.) In a jury-waived proceeding the trial court found appellant guilty on Count V. (9 CT 1926; 15 RT 2282; 33 RT 5443-44.) Appellant waived a jury trial on the alleged priors and the trial court found the priors allegations true. (33 RT 5435-36; 34 RT 5464-65.)[1]

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[1] The jury found Lee not guilty of murder. (33 RT 5430.) Huhn's jury found him guilty of murder and conspiracy to commit a crime (residential

For the penalty phase, appellant requested that his counsel not present mitigating evidence and testified on his behalf, asking the jury to sentence him to death. (9 CT 1943-44; 35 RT 5507, 5623.) The jury returned a penalty verdict of death. (9 CT 1950, 1952; 37 RT 5723.)

On October 28, 2005, the trial court denied appellant's motions for new trial, to modify the sentence from death to life without possibility of parole, and to act as a 13th juror and independently reweigh the evidence and strike the death penalty. The trial court also denied appellant's motion raising the contention that his sentence was cruel and unusual punishment. (9 CT 1953-54; 38 RT 5737-38, 5743-45.)

The trial court sentenced appellant to death for the murder. On the remaining counts and allegations, appellant was sentenced as follows: a) on Count I, 35 years-to-life composed of 25 years-to-life for the Penal Code section 12022.53, subdivision (d) enhancement plus five years for each of appellant's two serious felony priors; b) on Count II, 39 years-to-life composed of 25 years-to-life under the strikes law for the underlying offense plus four years for the Penal Code section 12022.5, subdivision (a) enhancement plus five years for each of appellant's two serious felony priors, all stayed under Penal Code section 654; c) on Counts III and IV, 35 years-to-life composed of 25 years-to-life under the strikes law for the underlying offense plus five years for each of appellant's two serious felony priors; and d) on Count V, 25 years-to-life under the strikes law for the offense, stayed under Penal Code section 654. The trial court added one year for appellant's prison prior, credited him 824 actual days custody

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robbery, burglary), and that he was armed with a firearm (Pen. Code, § 12022, subd. (a)(1)). The jury also found the special circumstance allegation true. (Pen. Code, § 190.2, subd. (a)(17).) (9 CT 919-23.)

credits, and ordered him to pay victim restitution and a restitution fine of $10,000 under Penal Code section 2085.5. (9 CT 1954-55; 38 RT 5754-58.)

A Commitment Order was filed. (9 CT 1955; 38 RT 5758.)

STATEMENT OF FACTS

GUILT TRIAL

A. Prosecution Case

1. Background

Stephen Brucker lived at 8134 Medill Avenue in April of 2003.[2] (15 RT 2382.) A driveway and entryway from Medill Avenue provide access to the house. (15 RT 2434.) Only one way exists for cars to access the home from this street. Pedestrians have access from Medill Avenue by stairs leading down to the entryway by the driveway. (15 RT 2435.) A walkway leads to the front door. (15 RT 2429.)

Brucker's son, Eric Brucker, lived with his father. Eric and Lee were friends beginning in middle school. Lee often visited Eric at the house. (15 RT 2382, 2384-85.) In 1996 or 1997, Lee worked at Cajon Speedway for Eric's uncle. (15 RT 2389.) Brucker kept a locked safe in the bedroom of Eric's brother. (15 RT 2385-86.) The safe was four feet wide and eight feet tall, weighed 800 pounds and had a combination lock. (15 RT 2398.) According to Eric, Lee knew where the safe was kept. (15 RT 2386.) The

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[2] Unless otherwise indicated, all date references pertaining to the shooting refer to the year 2003.

safe contained jewelry and no more than two thousand dollars. (15 RT 2387, 2402.)

At the time of the shooting, Valerie Peretti was Huhn's girlfriend. She was four or five months pregnant with their baby. (16 RT 2498-99, 2569-70.) She met appellant at Handshoe's home just before the day Brucker was shot. (16 RT 2497.) Peretti knows appellant by his nickname "Stressed Eric." A tattoo with this nickname was on his arm. (16 RT 2497-98.)

Peretti went to the desert with Huhn and Lee in the summer of 2002. (16 RT 2523.) During the trip, Lee said there was a safe in El Cajon that contained two million dollars. (16 RT 2523-25.) Lee said if he had that chunk of change he could buy anything on the menu. He mentioned receiving 15 percent of the safe's money. (16 RT 2526-28.) Lee suggested Huhn take the money. (16 RT 2529-30.) That same summer while at Rios Canyon Manor, Lee told Handshoe that he knew of a house down the street where a large amount of money was kept. (22 RT 3764-65.) Handshoe did not know what house or who lived there. (22 RT 3766.) Lee also mentioned a safe containing a million dollars. He encouraged Handshoe to do a robbery. (22 RT 3766-68, 3772, 3774.) He offered to drive Handshoe by the place he thought about robbing; but he never did. (22 RT 3782.)

In early 2003, Zachary Paulson, Lee, and Handshoe met in Lee's blue Cadillac. (17 RT 2865.) Lee said he knew the nephew of the owner of Cajon Speedway who had one million dollars in a safe. (17 RT 2866, 2868.) Lee suggested they steal it and do a robbery. They could hold the older man hostage. (17 RT 2869-70.) Lee wanted 15 percent of the proceeds. (17 RT 2870-71.)

About one month later, Paulson met again in Lee's car with Huhn, Handshoe and Lee. (17 RT 2871-72.) Lee again said he knew the nephew of the owner of Cajon Speedway who had a substantial amount of money in

a safe. Lee said they should rob him and that he wanted 15 percent. (17 RT 2872-73.)

Shortly before the shooting, Paulson, Handshoe, Huhn, appellant, Erik Swanson and Jake Lowe met at Handshoe's mobile home. (17 RT 2876-77.) Handshoe introduced appellant as someone who did tattoo work. (17 RT 2878.) Huhn said he could open the safe. Appellant said he could hold the guy hostage and pistol whip him if necessary. Handshoe said he could keep watch. (17 RT 2879.)

According to Handshoe, he used methamphetamine with appellant a few times prior to the shooting. (23 RT 3945, 3953.) Appellant had a temper and when he had a gun he turned into a "mad man." (23 RT 3946.) Prior to the shooting, Handshoe had not seen appellant fire a gun. (23 RT 3946.)

2. The Shooting

Peretti testified at trial about events on the day of the shooting at Handshoe's mobile home. On April 14, she was there between 12:30 p.m. and 1:00 p.m. (16 RT 2500.) Huhn, Handshoe and appellant were there. (16 RT 2502.) Appellant was in the living room handling about eight black guns in a duffle bag. The guns were of varying sizes and were semi-automatics. (16 RT 2504-05, 2507-08.) Appellant had another bag containing clothes, gloves, and beanies. (16 RT 2508.) He wore a salt and pepper colored hairpiece and thick glasses. (16 RT 2509-10, 2519.) Handshoe said they planned to rob someone. (16 RT 2535-36.) Appellant and Handshoe talked about "how they were going to go do this." (16 RT 2510.) Appellant mapped out the surrounding cars and the doorway. Appellant said a red car or truck and a white car or truck would be there. (16 RT 2512-14.) He also told Handshoe he would stand by while

Handshoe went inside for the safe. Appellant told Huhn to keep watch. (16 RT 2515.) Handshoe and Huhn talked of shopping with the money. (16 RT 2516.)

At some point Huhn and Handshoe donned gloves from appellant's duffel bag. (16 RT 2519.) Handshoe had a small silver .22 caliber gun. (16 RT 2537-38.) Appellant pulled out a semi-automatic gun, cocked it back and said: "[L]et's do this fast." (16 RT 2533-34.) Huhn, Handshoe and appellant left in appellant's Bronco with appellant driving. The Bronco was older, dark brown, had a second color on top and a tire on the back; it looked like that shown in Prosecution Exhibit No. 20. (16 RT 2520-22.) Peretti stayed at the mobile home for 30 minutes. When Huhn returned, he appeared scared and upset. (16 RT 2523.)

i. Handshoe's Testimony

Handshoe testified for the prosecution. (22 RT 3749.) According to his testimony, before leaving for Brucker's house appellant was "jacking" rounds out of a black .45 caliber gun saying, "we're going to go do this right." (22 RT 3793, 3913.) Handshoe had a silver .25 caliber semi-automatic in his pocket which appellant supplied a couple days before the shooting. (22 RT 3793-94.) At Brucker's property Handshoe sat in the car at the end of the driveway. (22 RT 3751-53.) He had a walkie talkie to alert the others if someone came to the house. (22 RT 3754.) Appellant and Huhn exited the car and went to the door. Appellant had the black .45 caliber gun tucked under his arm and wore a baseball cap and a grayish silver wig. Handshoe did not see Huhn with a gun. Handshoe could not see the door from where he was. (22 RT 3755-56, 3761-62.) A couple minutes later Handshoe heard a gunshot and saw Huhn and appellant return to the

Bronco. (22 RT 3757-58.) Appellant drove them away from the property and said things went wrong and he shot the guy. (22 RT 3758-59.) Appellant warned the others that if they said anything, they would be next. (22 RT 3761.)

Handshoe went with Huhn and appellant to the Brucker home because he knew Huhn needed the money. Also, he was scared of appellant. Yet, appellant did not threaten him into committing the burglary. (22 RT 3791-92.)

3. Police Investigation

At Brucker's property, a white jeep and red truck were parked in the driveway. (15 RT 2425.) Blood was on the walkway as well as casings - a Federal .45 automatic shell casing was in the front entry, south of the front door. (15 RT 2430; 18 RT 3008-10.) Inside the house, Brucker, still alive, told Deputy Miller that he heard someone at the front door. At the door, he saw two white males. Brucker told them to leave his property. (17 RT 2823.) The males said something and Brucker opened the screen door and repeated himself. One of the males then shot Brucker in the chest. (17 RT 2823-24.) Brucker described the shooter as in his 30s with a salt and pepper colored full beard, dark clothes, and black and white baseball cap. The other man was in his 20s. (17 RT 2825.) The shooter said: "Fuck you" before shooting him. (17 RT 2841.)

Brucker died from the bullet wound to his chest. (17 RT 2826; 18 RT 3056, 3059.) Appellant was identified as a suspect on April 17. (26 RT 4594-95.) His Bronco was impounded on May 13. (22 RT 3666-67.) Between May 13 and June 3, 2005 the car was started about five times. (22 RT 3668.)

4. Vehicle Sightings

On April 9, John Durrett, assistant manager at Rios Mobile Home Park, saw Huhn and appellant in the park. Durrett told Huhn he had to leave because Huhn's father who lived at the park did not want him around. Durrett noted the license plate number of their car, a brown Bronco. Appellant followed Durrett on Rios Canyon Road. Appellant seemed angry. (18 RT 3022-24, 3069-74, 3081.)

Ken Leonard was at a grading job off Medill the day of the shooting. A dark Bronco cut him off while Leonard was about to make a turn off of Medill. Two people were inside the Bronco. The driver may have been wearing a baseball cap. (18 RT 2979-80, 2982.)

Stephanie Kehrer lived in the area at the time of the shooting. At about noon on April 14 she took her bike to Brucker's house and asked him to pump up the tires. He obliged. (18 RT 2996-97.) Later when she rode her bike in the neighborhood she saw a black truck. (18 RT 2998.)

Penny Hartnett lived down the hill from Brucker's house. The day of the shooting, she heard a loud car pass by. The car was a brown Bronco with a beige bottom. It looked similar to the car shown in Prosecution Exhibit No. 20, appellant's Bronco. (15 RT 2442; 18 RT 2999-3000.)

Around 5:00 p.m. on the day of the shooting, Dustin Vangorkum heard a car pass by his house on Aurora Street next to Medill. The car looked like appellant's Bronco (Pros. Ex. No. 20). It had distinctive wheels and tires, and a loud exhaust. (18 RT 3083-87.)

In April, Megan Guisti lived on Medill. On April 14 she was riding her bike in the area and heard sirens. She saw a tan Bronco pass by in the street. (19 RT 3258-59.) Inside the Bronco was someone wearing sunglasses and

with a mustache. (19 RT 3259-60.) The car she saw did not look like appellant's car shown in Prosecution Exhibit No. 20. The one in the exhibit is much darker. (19 RT 3260.)

5. Post-Shooting

Charlene Hause had known appellant for three years. She was his girlfriend from January through March. (21 RT 3571-72.) At the end of April, appellant visited her driving a white truck. He usually drove his Bronco. (21 RT 3573.) Appellant said he was using the white truck because his Bronco was familiar to others. Also, he was leaving San Diego. He looked different because he had shaved off his mustache. (21 RT 3574-75.) Appellant looked the same at his trial as he looked two years ago but for different glasses. (21 RT 3614.)

6. Cell Phone Evidence

a. April 13 Calls

On April 13, six calls were made from appellant's cell phone to Handshoe's home. They started at 12:05 a.m. and continued to 9:24 a.m. Cell site start locations ranged from Poway in the early morning hours to Lakeside for the later call. (20 RT 3304-06.) Handshoe's home was called again at 12:53 p.m. from a cell site location at 4740 Clairemont Mesa Boulevard, and at 4:28 p.m. and 5:30 p.m. with a cell site location at Mount Woodson in Ramona. The Peretti home was also called just before 4:30 p.m. from Mount Woodson. (20 RT 3307-08.)

b. April 14 Calls

On April 14, more calls were made from appellant's cell phone. Handshoe's number was called at 8:37 a.m. from El Cajon, and at 10:39 a.m. with a Mast Boulevard cell site location. At 12:09 p.m. Swanson's number was called with a cell site location of 9448 Quail Canyon Road. At 2:57 p.m. James Stevens' cell phone was called with a cell site location in Lakeside. (20 RT 3316-18; 23 RT 4004; 24 RT 4172.) At 3:22 p.m. Stevens' cell phone was called again. The cell site was in Poway. (20 RT 3318.) At 4:57 p.m. the Handshoe home was called with a cell site location of Spring Canyon and Reisling in Poway. (20 RT 3319.) At 10:01 p.m. and a few minutes later, calls came from Handshoe's home with an unknown cell site location. (20 RT 3319-20.) Between 10:10 p.m. and 10:58 p.m., three calls were made to the Handshoe home from Poway and Santee. (20 RT 3320-21.) At 11:43 p.m. a call was made to Stevens' cell number with a cell site location in Lakeside. (20 RT 3321.)

c. April 15 Calls

On April 15, additional calls were made from appellant's cell phone. From 9:38 a.m. to 4:50 p.m., Stevens' cell phone was called four times, the first call from 14050 Carmel Ridge Road, the next from 15805 Bernardo Center Drive, the following call from Mount Woodson and the last call from Poway Road. (20 RT 3322-23.)

d. Additional Calls Between Appellant's Cell Phone And Peretti's Home

On April 8, three calls were made between appellant's cell phone and Peretti's home between 9:33 p.m. and 10:54 p.m. (20 RT 3326.) On April 10, calls were made at 8:46 a.m. and 10:00 a.m. (20 RT 3326-27.)

e. Additional Calls Between Appellant's Cell Phone And The Handshoe Home

Calls between appellant and the Handshoe home occurred on April 8 (one call), April 9 (one call), April 10 (two calls), April 11 (two calls) and April 12 (six calls). (20 RT 3327-29.) On April 16 one call occurred and on April 17 three calls occurred. (20 RT 3331-32.)

7. Apostoli Burglary

The Apostolis lived by the trailer park where Huhn and Lee lived. (17 RT 2739.) Michael Apostoli has known Lee for ten years. Lee worked for Apostoli to pay off a debt. (21 RT 3549-50.) Apostoli kept a safe in the bedroom of his home. It contained a .44 Magnum revolver, ammunition, a gold diamond ring and a diamond necklace. In mid-January he realized the safe was gone. (21 RT 3551-52.) After Apostoli confronted Lee, Lee initially denied stealing anything; but the next day he admitted taking the safe. (21 RT 3553-54.) Lee said that Robbie Forchette took the safe out of the house and Huhn helped him open it. (21 RT 3555-56.)

8. Appellant's Alleged Plans For Escape From Custody And Uncharged Bad Acts

On May 16, Oregon police trooper Johnson stopped a white F-150 for speeding. (23 RT 4060-61.) The driver, appellant, did not have a license and identified himself as James Stevens. Inside the car under the driver's seat Johnson found a handcuff key, tools for making identification laminates, a shotgun and a .22-caliber pistol. Appellant was arrested. (23 RT 4062-66.)

Roman Snapp was appellant's cellmate in Harney Correctional Facility in Oregon. He first met appellant in June, 2003. (23 RT 4008.) Appellant told Snapp that escaping would be easy because the jail was small and only two deputies worked at night. (23 RT 4010.) Appellant asked Snapp where the jail was located in the town. Snapp drew appellant a rough sketch of the town. (23 RT 4010-11.) Appellant showed Snapp a small brass handcuff key that he kept in a sock under his mattress and suggested an escape plan. Another cellmate, James Thomas, would take out one guard and appellant would take out the other. They would strip and tie them. (23 RT 4013-15, 4032-34.) Appellant said a .22 caliber gun would not do much damage and he did not want to be killed by police shooting at him. (22 RT 4036.) Appellant's plan entailed locking officers in the cell and taking their keys, money and guns, and stealing a police car. He said if the police stopped them and guns were in the car, they would shoot. After a disagreement with appellant, Thomas told the deputies about the escape plan. (23 RT 4036-37.) Thomas also disclosed another escape plan appellant had: appellant would pretend he fell and hit his head, Thomas would yell for the guards and when they came, Thomas and appellant would beat them. (23 RT 4043.)

John Pasquale also shared a cell with appellant. (24 RT 4150-51.) Appellant talked about escaping and thought of putting the top bunk bed on top of Pasquale and calling the guard for help. When the guard entered,

they would take his keys and escape in the deputy's vehicle. (24 RT 4151.) Appellant's plan for escape included pounding the guard's head into the wall. One time when Pasquale and appellant were walking to the courtroom, they saw a guard with his gun out and back to them. Appellant said he should have grabbed his gun, shot him and run. Appellant showed Pasquale a small brass handcuff key that he put in his mouth when taken to court. (24 RT 4151-52.)

According to Pasquale, appellant said that one time he and another person were by a golf course. A male with a Porsche was nearby. Appellant wanted to rob him but appellant's companion did not. So, appellant shot at him for not cooperating. Appellant also shot at a white car because its driver offended him. (24 RT 4255-56, 4259.)

Before his true identity was discovered, appellant was booked at the Harney Jail under the name of James Stevens. A search of his car produced a laminated card showing the name Stevens. The person in the photo could have been appellant. (23 RT 4081-82, 4084-85.) Other items found included four sheets of paper showing different signatures, white out, a glue stick, a magnifying glass, pen-type items, blank self-laminating cards, notary labels, a passport book, a book entitled "Counterfeit I.D. Made Easy," a certificate of baptism with the names of James Steven Hall, Steven Lee Hall and Ruth Ann Powell handwritten in ink on it, a photocopy of a certificate of live birth in the name of Raoul Guivera, blank baptism forms, different seal stamps and a digital camera. (23 RT 4086-93.)

On July 3, appellant's cell was searched. (23 RT 4094.) Items found included a penciled map of the town of Burns in Harney County near the courthouse, a razor's plastic safety cap, bent plastic, three razor blades inside a deck of cards, and two handcuff keys, one in his sock and the other wrapped in tissue. (23 RT 4095-98.)

Paulson testified at appellant's preliminary hearing in December of 2003. (17 RT 2864.) In February of 2005, Paulson and appellant were housed in the same jail cell. Appellant was part of a group that dragged Paulson into a cell and beat him. (17 RT 2863-64.)

9. Additional Evidence On The Brucker Shooting

Handshoe went to Rory Fay's house after the shooting. He did not mention what happened. Fay was under the influence of drugs at the time. At some point, Handshoe showed Fay a gun. Fay provided him with a shoebox and Handshoe put the gun in the dumpster. The gun was silver with a wood handle. (22 RT 3700-02, 3716.) Appellant picked up the bags from Handshoe's home. He was driving a white F-150. (23 RT 3947, 3949.)

Following Handshoe and Lee's arrests, they were put on a jail transport bus. Lee told Handshoe that if he told the truth and said Lee was not involved in the shooting, Lee would look after Handshoe's family and put money on his books. (22 RT 3787-88; 23 RT 3934.)

In August of 2004, Julio Navarette was housed in the same jail module with Lee. On the Brucker shooting, Lee said no one was to be killed, that it was supposed to be just a robbery. Navarette agreed to a fifteen-year sentence in exchange for testimony for other cases prior to disclosing information on the Brucker shooting. (21 RT 3642-43.)

Investigator Baker interviewed Travis Northcutt in September of 2004. (24 RT 4167-68.) Prior to the shooting, Northcutt, appellant and Stevens were roommates in a condo in Poway. (20 RT 3504-06.) Northcutt told Investigator Baker appellant said something big would happen, a big hit involving a safe. Appellant asked Northcutt if he wanted to be included. (24

RT 4169.) Northcutt also told Investigator Baker that one time when watching the television with Stevens and appellant, a newscast came on about the Cajon Speedway owner's murder. Appellant told Northcutt to "keep his fucking mouth shut," he was the third person to know of appellant's involvement, and if he did not keep quiet, he would be next. (24 RT 4169-70.) Northcutt said he saw appellant wearing a goofy hairpiece and that he usually drove the Bronco. (24 RT 4170.)

Patricia Colgan has visited Handshoe's mobile home several times. A few months prior to the shooting, someone visited Handshoe's home and told her to leave. The person was doing a tattoo. (18 RT 3112-14, 3116.)

Karen Barnes is a neighbor of Handshoe. Appellant visited there frequently starting a few months prior to the shooting. (19 RT 3267-69.) Erik Swanson knew Huhn and Handshoe and visited Handshoe's mobile home. (17 RT 2855-56.) Appellant visited John Michels at his mobile home at 14360 Rios Canyon Road about six times during the year of the shooting. (21 RT 3567-69.) About two years before the shooting, appellant visited there about the same number of times. (22 RT 3685-89.) Appellant and Michels would discuss artwork or make tattoos. (22 RT 3689.) In late 2002 and early 2003 Shanah Gilham lived with Michels in the Rios Canyon Mobile Home Park. (20 RT 3467.) Appellant came over about ten times but never when Lee was there. (20 RT 3468.) According to Gilham, appellant drove a Harley, a white dodge truck and a brown Ford Bronco. (20 RT 3470.) His nickname is Stressed Eric. (20 RT 3491.)

According to Raymond Thomas who rented the Poway condo to appellant in 2003, appellant drove a motorcycle and Bronco. The Bronco sounded normal. (21 RT 3617-18.) The week of April 24, Thomas discovered appellant took a Ford F-150 that Thomas partly owned. (21 RT 3618.)

A modified exhaust system is louder than a stock one. A car with a hole in the exhaust system would be louder than one without the hole. (24 RT 4295.)

10. The Bell Burglary

In January, Arlene Bell lived on 10789 Lupin Way in La Mesa. On January 8, she returned home in the afternoon and found a glove in the driveway and a trashcan pushed against the bathroom window. Inside the house, things were in disarray. (19 RT 3169-70.) Items missing included two silver coins and jewelry boxes, one made in Poland. (19 RT 3171.) While the deputy was investigating the burglary at the house, a cell phone rang. (19 RT 3171-73.) Bell found it downstairs. She had not seen the phone before and gave it to the deputy. (19 RT 3173.) Appellant was the subscriber to the phone.

Appellant's house was searched on April 24. Inside was Bell's jewelry box with the Poland sticker with the coins. Appellant's credit cards and identification card were inside one of the jewelry boxes. (19 RT 3220-26.)

On April 24, Stevens was found in violation of his parole for possessing stolen property. (27 RT 4811.) Appellant's parole agent received a voicemail from appellant on May 1. Appellant was upset that Stevens was returned to custody for possessing stolen property. Appellant said the property was his. (21 RT 3628-30.)

11. The Dolan Burglary

Dennis Dolan lives at 23745 Japatul Valley Road in Alpine. (19 RT 3162.) On April 9, Dolan left his house in the morning and returned that

evening to find the glass in the rear door was broken. (19 RT 3158.) A rubber medical glove was in the driveway. (19 RT 3159-60, 3217.) Cash, a .22 caliber Ruger gun, a locket and wedding band with "Jenny" inscribed on it were gone. (19 RT 3158, 3165-67.)

On the day of the burglary, off-duty police officer Matthew Hansen was home; he lived across from Dolan. (19 RT 3193.) He heard Dolan start his truck and drive off. Thirty minutes later he heard another vehicle drive in Dolan's driveway. (19 RT 3194.) Hansen did not pay much attention. When the truck emerged, Hansen noticed it because its sound was like a propane truck. (19 RT 3194-96.) It was a full-size, older model Bronco, dark brown with a tan top, roof rack and off road wheels with chrome rims. The car looked like that shown in Prosecution Exhibit No. 20 except for the roof rack. (19 RT 3196-97.) The next morning Hansen saw what looked to be the same car at Interstate 8 and Lake Jennings Road. (19 RT 3198-99.) Hansen followed it and noted the license plate number. (19 RT 3199-3200.) Later, Hansen identified the registered owner of the car as appellant. (19 RT 3201.)

At the end of April, appellant gave Hause's mother the ring that belonged to Ms. Dolan and had been taken from her house. (19 RT 3166; 21 RT 3606-07, 3609; Pros. Ex. No. 44.)

B. Defense Case

1. Identification Of The Perpetrator

Brucker described the shooter as having salt and pepper colored hair. Brucker did not mention any glasses. (17 RT 2836.) A news article from April 24 described suspects for the Brucker homicide as two women

between 17 and 25 years old. (26 RT 4583.) The suspect car was described as a gray Toyota Forerunner or raised truck. (26 RT 4583.) In another news article on May 10, Detective Goldberg was reported to have said that the investigation was wide open. (26 RT 4584-85.)

Theresa Coke, appellant's grandmother, lives in Lakeside. Between 2001 and 2003, she had contact with appellant weekly. (27 RT 4867, 4869.) Appellant looked as he did in Defense Exhibit M. He began wearing tinted glasses after his release from prison. (27 RT 4870, 4872.) Coke never heard appellant referred to as Stressed Eric. (27 RT 4872.) Appellant drove several cars. He sometimes would visit Coke in a white pickup truck. (27 RT 4873.) Appellant drove the white truck in April. (27 RT 4874.) The last time Coke saw appellant he was driving the white truck. (27 RT 4874.)

Patricia Colgan first saw appellant at the preliminary hearing. She did not see appellant at Handshoe's trailer; but she did see Erik the drug dealer, Tommy Hunter, Jake Lowe, Andrew Martin, Tyler Wiley, Peretti and Paulson. (18 RT 3121-27, 3131, 3148.) At the preliminary hearing in December, Colgan said she saw someone at Handshoe's trailer named Erik, but this person was not appellant. (18 RT 3148.) Colgan also saw Ronnie Densford at Handshoe's trailer. Densford was in his 30s and had brown hair and a goatee. (18 RT 3129-30.) He lived close to Handshoe and fixed cars. He also drove several cars. (18 RT 3128-29.)

Ingrid Nielsen has known appellant for 14 years and loaned him money to buy two trucks. Appellant paid her monthly. Payments were due the 15th of every month. (27 RT 4860-62.) Appellant paid her on April 15. (27 RT 4863.) According to Nielsen and appellant's parole agent, appellant looked like as shown in Defense Exhibit M; appellant had a mustache and wore tinted glasses. (27 RT 4839-40; 4864-65.)

Karen Barns learned of appellant's name through the media. More than one older person was at Handshoe's place. Appellant looks different than the person she remembered. She remembered someone being six feet tall with collar length hair and unshaven. (19 RT 3273-76.)

Stevens met appellant while in prison in 1996. (27 RT 4747.) Stevens' criminal history includes convictions for auto theft in 1986, 1987, 1992, and 1993, a conviction for escape from 1986, and a 1996 conviction for robbery with use of a firearm. (27 RT 4800-01.) Stevens usually drove a white Ford-F150 truck. Occasionally he drove a full-size Bronco. (27 RT 4723.)

Jeffrey Gardner, owner of a construction company, employed Stevens for five projects from February to April. He employed appellant on April 15. That day appellant worked with Stevens on a project in Rancho Bernardo. (27 RT 4718, 4720, 4722, 4725.) He seemed calm, like he always is. (27 RT 4730.) Appellant and Stevens arrived at the job site at 7:30 a.m. that morning. The F-150 truck was there too. (27 RT 4726-27.) When Stevens picked up their checks the next day, he drove the Ford Bronco. (27 RT 4732.) During Gardner's contact with appellant from 2001 through 2003, he did not see appellant with a shaved head. Appellant never had more facial hair than a mustache and usually wore tinted glasses. (27 RT 4733-34.)

Stevens did construction work with appellant for two and a half years. (27 RT 4750.) Stevens never saw appellant with a shaved head or more facial hair than a mustache. Appellant started wearing tinted glasses after he was released from prison. (27 RT 4751-53.) Stevens never heard appellant use the name Stressed Eric. Stevens first heard of the name in 1999 from a cartoon. He thought of using the name Stressed Eric for appellant's tattoo business. He designed a business card for appellant. (27 RT 4754-56.)

While Stevens lived with appellant he never saw him with any wigs, hairpieces or false beards. (27 RT 4762-63.)

Stevens was never in a room with appellant when coverage of Brucker's homicide was aired on TV and appellant told someone to "shut the fuck up." In mid-April, Stevens saw news coverage on the Brucker homicide. Appellant was not with him at the time. (27 RT 4763.)

Stevens acquired a white Ford F-150 after he was paroled. While living with Stevens, appellant drove a small pickup truck, a mid-sized Dodge, a Ford Bronco and a Harley-Davidson motorcycle. (27 RT 4763-64.) Stevens sometimes drove the Bronco and appellant sometimes drove the F-150. Stevens had his own set of keys for the Bronco. It was not unusual for Stevens to leave his tools in the Bronco. (27 RT 4764-65, 4767.)

On April 14, appellant used Stevens' truck. Stevens contacted appellant about obtaining his truck so he could drive to a job the next day. (27 RT 4769.) Stevens did not notice anything unusual about appellant's behavior that day. Appellant spent that night at the condo. The following day Stevens brought his tools to the job site; he kept most of them in a toolbox in the Ford F-150. (27 RT 4773.)

Defense Investigator Roehmholdt obtained photographs of Ford Bronco models between the years of 1985 to 1995. (24 RT 4308-09.) Roehmholdt showed Vangorkum a photo of a Bronco that was not appellant's Bronco. Vangorkum said that was the car he saw the day of the shooting. He said he would "place money on it." (24 RT 4313-14.)

According to Leonard, the Bronco he saw was black and higher than the car showed in Prosecution Exhibit No. 20. (18 RT 2987-89.) The driver was Hispanic, 20 to 30 years old. (18 RT 2990.)

When Vangorkum saw the Bronco, it was on Amelia Street, 75 yards from where Vangorkum was. Vangorkum thought the Bronco was from the

late 1970s or early 1980s. A tire was on the back. (18 RT 3090, 3098-3100.)

The impound lot is uncovered, leaving the Bronco exposed to rain. (22 RT 3670-71.) For appellant's trial, a tow truck brought the Bronco from the lot to the courthouse. A hook on a pulley attached to the undercarriage of the car and the Bronco was pulled up on the truck. (22 RT 3671.) Prior to this time, the last time the Bronco was started was on February 17, 2005. (22 RT 3672-73.)

According to forensic investigator Forrest Folck, the exhaust of a car sounds different when modified. (24 RT 4283, 4285.) Modifying an exhaust system elicits a more robust or pulsating sound. A defective exhaust sounds monotone and sometimes backfires. (24 RT 4289.) A muffler nullifies the exhaust pulsations as the exhaust leaves the cylinder, diminishing the noise. (24 RT 4286.) An exhaust system can be defective from overuse, rust or impact. (24 RT 4286-87.) Folck examined the Bronco on February 17, 2005. (24 RT 4289-90.) The exhaust system was stock; but the muffler had a hole in the front. (24 RT 4291.) According to Folck, the exhaust system on appellant's car does not sound like a modified exhaust system. (24 RT 4294.) Also, the body of the Bronco had not been lifted off the suspension. (27 RT 4661.)

DMV records from a search of all Bronco models, 1985 through 1995, registered as of April 7, 2004 in east San Diego and Poway, showed 1501 Broncos in Alpine, El Cajon, Lakeside and Santee, and 559 in La Mesa, Lemon Grove and Poway. (27 RT 4843-44, 4851-52.)

2. Handshoe's Testimony

Handshoe was arrested on May 14. (22 RT 3798.) He pled not guilty to murder and faced a possible sentence of life without possibility of parole. (22 RT 3800.) For two years Handshoe and his lawyer worked on a plea bargain. (22 RT 3801.) On April 11, 2005, Handshoe had his attorney arrange a free talk with the district attorney's office; the district attorney would hear Handshoe's information and decide if it could be used. Handshoe was offered 22 years in exchange for his testimony. Handshoe declined, holding out for 15 years. The agreement reached provided for a term of 17 years for a manslaughter conviction. (22 RT 3803-06, 3809.) As part of the agreement, Handshoe had to agree he would confirm the statement he provided on April 11, 2005 was true. (22 RT 3807.) The agreement would be violated if Handshoe did not tell the truth or refused to testify. (22 RT 3808.)

During the talks in 2002 with Lee, Handshoe heard about a house with money. Specifics were not mentioned. (22 RT 3903, 3906-07.) Handshoe never thought the crime would be done. (22 RT 3907.)

In April, Handshoe used half a gram of methamphetamine every other day. Swanson was his supplier and friend. Handshoe used methamphetamine with Huhn, Paulson and Tommy Hunter. Handshoe brought Swanson stolen goods in exchange for drugs. (22 RT 3811-15.)

Handshoe met appellant through Huhn two days before the Brucker shooting. (22 RT 3826-27.) Handshoe never saw appellant with Lee. (22 RT 3910.) Handshoe and appellant tried to burglarize another house a day or two before the Brucker shooting in the same neighborhood. Appellant rammed the door and the alarm sounded, scaring them off. Handshoe found the .45 caliber gun appellant used during the Brucker shooting in a house in Spring Valley that Handshoe and appellant burglarized. (22 RT 3828-30.)

On the Brucker shooting, Handshoe did not know they would be going to Brucker's house. (22 RT 3833-34.) Appellant came over with a bag of disguises. (22 RT 3911.) Handshoe provided appellant with a piece of paper and saw appellant drawing on it. He found out during the preliminary hearing a map was found and concluded appellant must have been drawing a map. (22 RT 3835-37.) Handshoe did not remember appellant threatening him, Huhn or Peretti. (22 RT 3839.) Handshoe smoked methamphetamine while the others discussed a burglary. (22 RT 3839-40, 3912.) The burglary was not planned. (22 RT 3912-13.)

Handshoe had either a .22 caliber or .25 caliber gun during the burglary. (22 RT 3862.) When Handshoe left the mobile home, he sat in the back of the car and Huhn sat in front. Peretti was mistaken when describing Handshoe as sitting in front. (22 RT 3866.) Leaving Brucker's house, they went up Medill and towards Aurora, not down Amelia. (22 RT 3867.)

When Handshoe encountered Lee after the shooting, Lee disclosed that Brucker was killed and asked if Handshoe was involved. Handshoe said he was not. (23 RT 3995-96.)

Handshoe has a temper that prompted fights while in and out of custody. (23 RT 3975-76.) While in jail, Handshoe was prescribed medication after seeing the psychiatric nurse. He is still taking some of it. (22 RT 3855-56.)

3. Paulson's Testimony

Paulson did not think Lee was serious during the first meeting in the car. Paulson was high on drugs at the time. (17 RT 2893-94.) Brucker's name was never mentioned. No one mentioned the house or street. (17 RT 2895.) During the second meeting in Lee's car, Paulson, Handshoe, and Huhn were high on drugs. (17 RT 2898-99.) No agreement was reached. (17 RT

2902.) During the January and February discussions, Paulson did not hear anyone agree to anything. They were just rambling, motivated by the need for methamphetamine. (17 RT 2960-61.) During the meeting in April with Paulson, Handshoe, Huhn, appellant and Jake Lowe, drugs were traded for a computer. (17 RT 2884-85.) They discussed a robbery; but no one said who would be robbed or where it would happen. Paulson thought the robbery was to fund their continued drug use. (17 RT 2888.) At the time, Paulson was high on drugs. (17 RT 2928.)

Paulson told detectives in June that the robbery was Ricky's idea. They told Paulson he was probably wrong and the person was not Ricky but Randy. (17 RT 2891-92.)

Paulson had seen Erik Swanson about five times, including the time at Handshoe's trailer in early April. (17 RT 2930-31.) At this time, although the subject of robbing someone came up, there was no mention of any wigs, ski masks, beards or map. (17 RT 2935-36.) Handshoe and Huhn said they would share the money with Paulson and Jake Lowe. (17 RT 2940.)

At the time of appellant's trial, Paulson was on parole. He admitted to car thefts. (17 RT 2908-09.) In 2003, Paulson and Handshoe were often using drugs. Paulson has been treated for medical or psychiatric issues. He sometime hears voices and is delusional. (17 RT 2906-07.)

4. Valerie Peretti's Trial Testimony And Interviews With The Police

At the time of the shooting, Peretti was 15 years old. (16 RT 2555.) Peretti ran away from home twice. She used methamphetamine and marijuana with Huhn. (16 RT 2557, 2559.) Handshoe and Huhn were close

friends, like brothers. (16 RT 2560.) Handshoe's life revolved around drugs. (16 RT 2565-66.) Handshoe was close friends with Paulson who also used drugs. (16 RT 2561, 2566.) The methamphetamine they used could have been purchased from Erik Swanson, a drug dealer who lived not far from Pecan Park Mobile Home Park where Handshoe lived. (16 RT 2567-68.)

Peretti first met appellant on April 13 at Handshoe's house. (16 RT 2601.) At the time, he had a shaved head. (16 RT 2627.) She had spoken to appellant before on the phone when he called her house looking for Huhn. (16 RT 2602.) Peretti knew appellant as a tattoo artist. Appellant owed Huhn some tattoo work. (16 RT 2602-03.) Huhn talked about trying to introduce appellant to Handshoe because Handshoe wanted tattoos. (16 RT 2604.) Peretti did not think it unusual to see appellant at Handshoe's home on April 13. (16 RT 2606-07.)

On the day of the shooting when Handshoe answered his door, he seemed under the influence. (16 RT 2618.) While at Handshoe's home, Peretti smoked marijuana. (16 RT 2706.) Peretti told Detective Goldberg on May 12 that appellant's hairpiece was a "nasty-looking shiny brown color." (16 RT 2623.) Appellant also wore a dark hat. (16 RT 2622-23.) She first saw appellant when he came out of the back bedroom. He was not wearing a shirt and wore the wig, hat and gloves. (16 RT 2625.) When Huhn, Handshoe, and appellant left the mobile home, one bag was left containing clothes, gloves and ski masks. (16 RT 2632-34.) Peretti thought the glasses appellant wore were part of a disguise. (16 RT 2707.) After the shooting and Handshoe had returned to the mobile home, Peretti and Huhn went to McDonald's and then shopped. (16 RT 2645.)

Following the shooting, Peretti and Huhn saw a flier about the homicide. (16 RT 2578-79.) The flier described the suspect's car as a dirty Bronco

with a tan top and dark body, possibly black, with oversized tires, a spare tire on the back and a loud exhaust system. The suspects were described as two white males, one in his 30s with a salt and pepper colored beard wearing a black and white baseball cap and dark clothes. The other white male was in his 20s. The reward listed was $1000 and offered by Crime Stoppers. (16 RT 2581-82.) Peretti discussed the reward with her parents and Huhn. (16 RT 2587, 2892.) On May 1, Huhn was arrested for auto theft while with Peretti. Although interviewed about the stolen car, Peretti did not disclose anything about the Brucker shooting. (16 RT 2583, 2586.) Peretti's father contacted Crime Stoppers and told Peretti to talk to the police, pressuring her to cooperate. (16 RT 2684, 2598.) On May 12, he arranged Peretti's first talk with the sheriff's department about the Brucker shooting. (16 RT 2593.)

Peretti knows Colgan. She did not remember Colgan visiting the mobile home. (16 RT 2561-62.) Peretti used to be friends with Patricia Ritterbush. They went their separate ways when Peretti became pregnant. Ritterbush was pregnant the same time Peretti was. (16 RT 2573.) Peretti never used drugs in front of her after January 3. She never saw her while pregnant. (16 RT 2573-74.) While alone in the mobile home waiting for Huhn to return from Brucker's home, Peretti called Ritterbush. Ritterbush said she was bleeding and did not have insurance. Peretti told her to go to a hospital. Peretti is positive Ritterbush had a miscarriage. (16 RT 2648-50.)

Peretti lied in many of her statements to the police about Huhn's involvement. (16 RT 2646-47.) Peretti did not tell Investigator Baker on June 10 appellant threatened Huhn and Handshoe prior to the shooting. (24 RT 4205.) The first time she mentioned any threats was on November 26. (24 RT 4207.) During the same interview, Peretti first disclosed that in the

summer of 2002 the topic of stealing money from the Brucker home was discussed. (24 RT 4215.)

Deputy Serritella interviewed Peretti twice in May. (27 RT 4666.) She said she saw just one gun on April 14 in Handshoe's mobile home and it was a .38 caliber gun. (27 RT 4668.) She said when alone in the mobile home she talked with Ritterbush on the phone. (27 RT 4668-69.) She did not have Ritterbush's phone number and that Ritterbush was in Texas, having moved there to live with her aunt after her baby died. (27 RT 4669-70.) Deputy Serritella asked Peretti to supply him with a phone bill with Ritterbush's number. He never heard back from her. (27 RT 4674.)

Detective Goldberg interviewed Peretti on May 12. Peretti described the wig appellant wore as an ugly dark shiny brown color. (26 RT 4626-28.) Detective Goldberg did not ask her to describe what appellant looked like and did not show her a photo lineup showing different people. (26 RT 4628-29.) He did show her a series of four photos of the same person, appellant, on one page. (26 RT 4630-32.) Peretti told him she recognized the glasses; she saw them while appellant drew the diagram and thought they were fake. (26 RT 4632.)

As to an altercation between Peretti and Ritterbush at the 7-11 store near Peretti's apartment complex, Peretti claimed she had been assaulted. But, she had no visible marks. (27 RT 4885-86.) Investigator Baker reviewed the video and saw Peretti walking from the direction of her apartment to where Ritterbush and her companion walked after leaving the store. (28 RT 4946.) This occurred a couple minutes before the clerk looked out the store's doors in the direction Ritterbush had gone. (28 RT 4936, 4945.)

5. Patricia Ritterbush's Testimony

Ritterbush was friends with Peretti. (26 RT 4548.) In late 2002, early 2003 Peretti used methamphetamine and marijuana. (26 RT 4551-53.) Ritterbush has never had a miscarriage; her son was born on October 2. She never told Peretti in April about being concerned over having a miscarriage, not having insurance, needing to go to the hospital or that she had a miscarriage. (26 RT 4554-55.) Ritterbush lived in Texas in 1999 but did not move back there in the spring of 2003 to live with her aunt. She never told Peretti that she was leaving San Diego for Texas because of a miscarriage. (26 RT 4556.) Peretti is a liar. Many times she invented stories about things that did not happen. (26 RT 4557.)

The day before testifying in appellant's case, Ritterbush and her boyfriend saw Peretti at the mall. Peretti said she wanted to talk to her about Ritterbush telling others about Peretti's drug use. (26 RT 4563.) Ritterbush said she had nothing to say to Peretti. Peretti became mad and threatened Ritterbush; she said she would hurt her and get the Peckerwoods gang on Ritterbush's boyfriend. (26 RT 4564-65.) Over the last two days Peretti called Ritterbush's house. Ritterbush did not return the calls. (26 RT 4566.)

6. Bell Burglary

Detective Fiske walked around the complex of appellant's condo on April 17 and saw appellant's Bronco parked outside without anything covering it. (19 RT 3230-31.) On April 24, around 6:00 a.m., Fiske again saw appellant's car parked in the same space in plain view. Appellant was not present at the condo; but his roommate Stevens was. (19 RT 3232-33.) The jewelry box from Poland and coins were in Stevens' bedroom. (19 RT 3234.)

7. Dolan Burglary

Although Hansen could not see Dolan's driveway, he could see where the driveway accessed Japatul Road. (19 RT 3203.) Hansen did not see the driver of the car on April 9. (19 RT 3204.) Hansen followed the car he saw on April 10 because he thought it was similar to the one he saw the day before. (19 RT 3205.) The car was loud, possibly having a loud or defective muffler or missing one. The car also could have had a modified exhaust. (19 RT 3210.) According to Hansen, appellant has longer hair now than he did on April 10. He also has smaller, lighter shaded glasses now. (19 RT 3206.)

8. Additional Evidence

Brucker told the police who came to his house after the shooting that neither of the two males at the door asked for money. (17 RT 2837-38.)

During the parole search at the condo on Robinson, appellant was not there and had the F-150 truck. (27 RT 4799-4800.)

During Stevens' interview with Detective Goldberg, Goldberg told Stevens that his friend was going to die by death penalty and it was Stevens' responsibility to save him from this. (27 RT 4818-19.) Goldberg asked Stevens about the phone calls on April 14, asking what appellant told Stevens. Stevens responded that if appellant had said anything unusual he would have remembered it, that he did not know what appellant said. (27 RT 4820-21.) Goldberg asked Stevens how he would feel in a decade knowing his partner was sitting on death row and Stevens abandoned the

chance to spare his life. (27 RT 4823.) Stevens said appellant did not tell him anything. (27 RT 4823.)

Appellant and Stevens shared a phone plan and sometimes shared phones. (27 RT 4828, 4770.)

When Gilham lived in the Rios Canyon Mobile Home Park with Michels, appellant would give tattoos to Michels and hand out his business cards there. (20 RT 3467, 3474-76, 3488-89.)

One casing was found 11 inches from the door and one foot, three inches to the right of the door. (18 RT 3017.) There were no signs of close firing. The shooter was several feet away from Brucker when he shot the gun. (18 RT 3062.)

Brucker's son, Eric, had several high school friends come to his house to visit. (15 RT 2382, 2394.) Most of Eric's friends knew Brucker opened Cajon Speedway. (15 RT 2394-95.)

When Brucker's wife left the house on the day of the shooting, the last time she saw Brucker, he told her to pick up a cashier's check for $12,500. (15 RT 2408-09.)

On April 24, appellant told Hause that he was leaving San Diego because of a parole violation. Appellant continued to call her every month after he left. (21 RT 3581-82.)

Navarette was awaiting sentence on his own case during appellant's trial. (21 RT 3645.)

Forchette spoke to Investigator Baker after Handshoe's arrest in June. Forchette said he knew Huhn, Lee and Handshoe. He said he did not know appellant. (22 RT 3731-32.) In Forchette's second interview with Baker, Baker asked him about the safe theft from the Apostoli home. Forchette was read his *Miranda* rights. He thought he was a suspect. (22 RT 3733-

34.) Investigator Baker asked Forchette questions about appellant. After first saying he did not know him, Forchette said he met him in February at Handshoe's house. Forchette described him as Spanish looking. He based his identification on pictures he saw in the paper after Handshoe's arrest. (22 RT 3741-42.)

According to Snapp, appellant did not talk to him about escaping. (23 RT 4025.) When housed with appellant, Snapp faced trial on four counts of rape. He took a plea bargain on June 16. (23 RT 4026.)

According to Thomas, the handcuff key was silver. At the time of appellant's trial, Thomas was serving a sentence on an offense other than what he was in custody for in 2003. (23 RT 4038-39, 4042.)

Pasquale was in custody in Oregon for stealing a car in Colorado. He was caught in Oregon and held on an extradition warrant. (24 RT 4153.) Pasquale was in a cell with appellant for about a week. (24 RT 4153.) Although Pasquale has never met Handshoe or seen him, he tried to arrange an agreement with the district attorney's office handling appellant's case. He wrote the district attorney claiming he had no doubt of Handshoe's guilt in this case and asked the district attorney to contact the prosecutor in Colorado. (24 RT 4156, 4158-59.) While in Colorado, Pasquale refused to speak to a defense investigator from San Diego unless a person from the district attorney's office was present. (24 RT 4160.) Pasquale has several burglary and other theft related convictions. (24 RT 4161-62.)

According to Investigator Baker, Northcutt was angry with appellant for giving him bad tattoos. (24 RT 4182.) Northcutt could not specify when he heard appellant say something big would happen involving a safe; he just offered a time frame between mid-December 2002 and April of 2003. (24 RT 4183.) Northcutt said the hairpiece he saw appellant wear was brown. He did not mention a salt and pepper color. (24 RT 4184.) When

Investigator Baker told Northcutt he might be asked in court what appellant said about gathering a group for something big involving a safe, Northcutt said that maybe he made that up, that appellant did not say this. (24 RT 4190.) Northcutt did not get along well with appellant. (20 RT 3515.) Northcutt was under the influence each time he spoke with Baker. (20 RT 3519.) When Baker contacted him in April of 2005, Northcutt did not want to talk to him. He went into the bathroom and closed the door. (20 RT 3519.)

Paulson was in and out of custody from October of 2002 until May of 2003. When arrested on May 9 for driving a stolen car, he told the investigator he was with "Apollo Hung" and "Brandon Hankley." (26 RT 4479-82.) Paulson was prescribed Lithium between 1999 and 2000. He continued to take medication while in custody in June of 2003. (26 RT 4483.)

The reward for information on Brucker's shooting was initially $1000, later increased $9000 by Brucker's family. (26 RT 4515-16.) A tip was received on April 17, and $10,000 was authorized in May. (26 RT 4517-19.) Peretti's father received the reward money of $10,000 and Peretti received immunity for testifying in this case. (16 RT 2653.)

No law enforcement record for the week before April 14 existed for a burglary committed around that time in the Dictionary Hill area of east county, San Diego. (28 RT 4911.)

Steven Wadler testified he represented appellant in 1995. He advised appellant to plead guilty to two nonviolent theft-related felonies. Wadler also told him any future criminal conduct that constituted a felony would result in a potential 25 years-to life-sentence. (26 RT 4605-07.)

C. Prosecution's Rebuttal

On June 12 around 4 p.m., the clerk at the 7-11 store on East Bradley in El Cajon saw two females fighting outside the store. (27 RT 4692-93.) Deputy Larson took a report for brandishing a firearm or weapon in a threatening manner. (27 RT 4882-84.) A video at the 7-11 showed Ritterbush at the counter making a purchase and standing next to a black male with an earring and scarf on his head. (28 RT 4920-21, 4924-25.) They left the store and walked north. (28 RT 4926.) After the store clerk went to the door and looked north, Peretti walked south towards her apartment building. (28 RT 4927.)

PENALTY TRIAL

A. Prosecution Case

1. Branson Incident

Julie Branson was at Harbison and Arnold on July 2, 1995 when a white truck passed by her and about 12 shots were fired at her car. (35 RT 5526, 5528.) The truck had a sliding rear window. (35 RT 5540.)

Appellant was arrested at a map stop on Interstate 8. A .22 caliber gun was under the driver's seat. (35 RT 5561-64.) Two expended .22 caliber shell casings were recovered from the bed of the pick-up truck and one was found inside the truck. (35 RT 5556.) Appellant's companion, Dean Wall, was found with a .357 Smith and Wesson in his waistband. (35 RT 5564-66.) Also inside the car, on the car seat, was a box of .22 bullets, about 32 rounds. A full box of .22 caliber ammunition was in a briefcase. Eight .22 caliber rounds were inside the magazine and loose .22 caliber rounds were on the floorboard. (35 RT 5570.)

According to Wall, while he was in the truck with appellant, appellant shot at Branson, putting his arm out the back window, after she moved her car in front of him. Wall shut the window and tried to shoot her tire. (35 RT 5574-75.) Wall used his .357 Magnum and appellant used the .22 caliber gun. Branson did not provoke the shooting. (35 RT 5575.) When Branson first passed by, appellant said something like: "that fucking bitch, who does she think she is?" (35 RT 5576.) When appellant was in custody in Harney County with Pasquale, he said he shot at a white car because the driver aggravated him. Appellant said he and another person were en route to rob someone in a Porsche at a golf course. (35 RT 5544-45.)

2. Appellant's Criminal History

On March 20, 1995, appellant was convicted of one count of residential burglary and one count of possession of stolen vehicle in Case No. ERC10808. (35 RT 5557.) On July 25, 1995 he was convicted of two counts of residential burglary in Case No. ECR11741. (35 RT 5557.)

B. Defense Case

1. Paul Mason's Testimony

Paul Mason was in local custody in 2003. (35 RT 5614.) For a time he was Huhn's cellmate. Huhn told him they went to rob the victim and when he approached the door, he did not think the victim was home. Huhn said he shot Brucker five or six times and that Handshoe went with Huhn to the door. (35 RT 5615-16.) Mason also testified at the preliminary hearing that Huhn admitted doing the shooting. (35 RT 5618-19.)

2. Branson Incident

According to Branson, the white truck did a U-turn and was driving the opposite direction from Branson. The passenger in the truck shot at her. (35 RT 5535-36, 5538.)

The .357 was loaded but the .22 caliber gun was not; the magazine was separated from the handgun and on the floorboard, six or seven inches away from the gun. (35 RT 5568-69.)

When arrested, Wall told the police officers he did not know anything about the shooting. Wall lied when he told Officer Larson that he saw appellant stick his hand out the driver's window and that must be when the shots were fired. Wall told many lies to the officers that day. (35 RT 5585-87.) Wall also lied to Investigator Baker in an interview on August 11, 2003 when he told him appellant grabbed Wall's gun, leaned across him and fired out the passenger window at the car. (35 RT 5591-92.) The first time Wall admitted firing a gun at Branson's car was in an interview with Investigator Baker and the district attorney on June 8, 2004. (35 RT 5593.) Wall was charged with the shooting. The charge was dismissed as part of a plea bargain. (35 RT 5590-91.)

While still on parole for burglary, Wall was arrested, charged and convicted of another burglary in 1998. (35 RT 5594.)

3. Appellant's Testimony

Appellant instructed his attorney to not present mitigation evidence. (35 RT 5507.) Appellant testified that he was innocent and the jury's verdict

was wrong. He also told the jury: "I really despise all of you and your decision. . . Give me the death penalty." (35 RT 5623.)

ARGUMENT

I. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING DEFENSE COUNSEL'S REQUEST FOR A SEVERANCE OF THE TRIAL

A. Procedural History

Counsel for Lee, Mr. Roake, sought to sever his case from the other defendants. According to him, the case against his defendant was weak and he would be acting as a second prosecutor, arguing the other defendants committed the crimes. (4 RT 670-71.) Defense counsel for appellant joined in the motion. He argued Lee made statements that under the alleged plan no one was supposed to die, the homicide was unrelated to the plan, it was a Hells Angeles hit, and that Lee had nothing to do with what happened. (4 RT 672-74, 676-78.) Counsel for appellant said the defenses were mutually exclusive. (4 RT 679.)

The prosecution contended there was no evidence of anyone other than these defendants responsible for the crime and the cases should not be severed. (4 RT 684-85.)[3]

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[3] Earlier, the prosecution asked for a third jury for Lee. The trial court denied the request, finding redaction of the statement would suffice. (3 RT 600-259-63.)

The trial court said if the statements of the prosecution witnesses (Navarette and Jason Scaparo) were used, they would have to pass "*Aranda Bruton*[4] muster." (4 RT 685.) The prosecution said it probably would not use Scaparo as a witness and suggested a third jury. The statement that Lee made, that they wanted to rob the victim but no one was supposed to be killed, was critical evidence. (4 RT 687-88.) The trial court decided the alleged antagonistic defenses did not create any prejudice, and if the trials were severed, exonerating testimony would not be offered. The trial court denied the motion to sever. (4 RT 689-91.)

Later, defense counsel for appellant complained of the unfairness of the trial court's decision not to sever the trials. Roake and Ms. Rosenfeld, counsel for Huhn, were acting as the second and third prosecutors in the case. (23 RT 3928-29.)

The trial court denied appellant's subsequent motion for new trial based on the trial court's denial of the motion to sever. (38 RT 5735.)

B. The Trial Court Erred In Denying The Defense's Motion To Sever; Reversal Is Required

A trial court has the discretion to order separate trials. (Pen. Code, § 1098.) Relevant factors for consideration include prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, the possibility that at a separate trial a codefendant would give exonerating testimony, or conflicting defenses. (*People v. Coffman* (2004) 34 Cal.4th 1, 40.) As to antagonistic defenses, the conflict exists when the acceptance of one party's defense precludes the other party's acquittal. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1296.) Severance also may be necessary when there is a serious risk that a joint trial would compromise a

[4] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. U.S.* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476]

specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence. (*People v. Coffman, supra,* 34 Cal.4th 1, 40.)

Decisions addressing the analogous problem of severance of counts are instructive in determining whether to sever the trials. In the context of severance of counts, the court must decide whether the realistic benefits from a consolidated trial are outweighed by the likelihood of substantial prejudice to the defendant. (*People v. Keenan* (1988) 46 Cal.3d 478, 500.) In determining the degree of potential prejudice, the court should evaluate whether: a) consolidation may cause introduction of damaging evidence not admissible in a separate trial; b) any such otherwise inadmissible evidence is unduly inflammatory; and c) the otherwise inadmissible evidence would have the effect of bolstering an otherwise weak case. (*Id.*)

Although the Legislature has expressed its preference for joint trials (Pen. Code, § 1098; *People v. Boyde* (1988) 46 Cal.3d 212, 231-32), the trial court has the discretion to grant a severance of the trial. (*People v. Coffman and Marlow* (2004) 34 Cal. 4th 1, 40.) Severance may be warranted, for example, on grounds of prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts or conflicting defenses. (*Id.*) Severance may also be required when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Id.*, quoting *Zafiro v. United States* (1993) 506 U.S. 534, 539 [113 S. Ct. 933, 122 L. Ed. 2d 317].)

Regardless of the state law governing severance, a joint trial violates the federal constitution if it results in prejudice so great as to deny the defendant due process, a fair trial. (*United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8 [106 S. Ct. 725, 88 L. Ed. 2d 814]; *People v. Greenberger*

(1997) 58 Cal.App.4th 298, 343 [a reviewing court may reverse a conviction where because of the consolidation a gross unfairness has occurred depriving defendant of a fair trial, due process of law].) Although antagonistic defenses are not prejudicial per se (*Zafiro, supra,* 506 U.S. at p. 538], such inconsistent positions combined with other factors in this case resulted in an unfair trial for appellant.

Here, the trial court decided not to sever the trial although Lee and appellant had antagonistic defenses. Should the jury have believed Lee's defense that appellant committed the crimes, not Lee, jurors would have necessarily rejected appellant's defense that he was not at the scene. (4 RT 679.) In ruling as it did, the trial court erred, implicating appellant's constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (*People v. Massie* (1967) 66 Cal.2d 899, 913; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amends. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

In *People v. Massie, supra,* 66 Cal.2d 899, co-defendant Vetter argued the trial court erred in denying his request for a separate trial. According to the Court, the propriety of the denial of severance turned on whether the incriminating portions of defendant Massie's confessions could have been properly deleted. (*Id.* at pp. 914, 919.) According to the Court, the character of Massie's statements would leave no doubt even if Vetter's name had been deleted, Massie referred to the same individual throughout the confessions. Once Vetter's identity was otherwise established by evidence linking the defendants together before and after the crime and by other relevant testimony, the jury would not have had difficulty filling in the deletions in the confession. Since the incriminating portions of the

confessions could not have been effectively deleted, the *Aranda*[5] rules left the trial court only the option of severance. Its denial of Vetter's motion constituted error. (*Id.* at p. 919.)

Here too, the trial court erred. At the outset, Lee's defense was that appellant was the mastermind behind the crimes and Lee had no part in it. (15 RT 2336; 29 RT 5158-59.) The jury's acceptance of Lee's defense, finding he was not guilty of murder, meant that jurors rejected appellant's version of what happened, that appellant was not there and had no part in the crimes. (30 RT 5190-96, 5233-43; 33 RT 5430.) Additionally, two of the most crucial witnesses in the prosecution's case, Peretti and Handshoe, supported the theory that appellant, not the other defendants, was the mastermind of the crimes. With counsel for Huhn and Lee supporting the credibility of these witnesses, the trial appeared to have three prosecutors instead of one against appellant –clearly unfair to appellant. These being the circumstances, the trial court should have severed the cases. Its failure to do so implicated appellant's constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (*Beck v. Alabama, supra,* 447 U.S. 625, 637-638; U.S. Const. Amend. V, XIV; Cal. Const. Art. I, §§ 7, 15; contrast *People v. Carasi* (2008) 44 Cal.4th 1263, 1297 ["classic" case for joinder where statements made by each defendant did not implicate the other and if credited, would have been mutually exculpatory].)

As to prejudice, the error was not harmless under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705], the standard for federal constitutional error, whether the error is harmless beyond a reasonable doubt, or the standard followed in *People v. Massie, supra,* 66 Cal.2d 899 whether there is a reasonable probability the defendant would have obtained a more favorable result absent the error. (*Id.* at pp. 922-23.)

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[5] *People v. Aranda* (1965) 63 Cal.2d 518

The evidence against appellant was unconvincing. It was built on the testimony of three untrustworthy teenage witnesses. Peretti was not credible, being an accomplice herself, drug user and giving inconsistent testimony about, among other things, Huhn's involvement, appellant's hairpiece, Ritterbush, and the guns at the mobile home. Her father ended up with the reward money of $10,000 from Crime Stoppers, and she received immunity for testifying. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2559, 2646-50, 2653; 2706, 26 RT 4626-28, 4551-55; 27 RT 4668.) Peretti's father contacted Crime Stoppers and told Peretti to talk to the police, pressuring her to cooperate. (16 RT 2684, 2598.) He arranged Peretti's first talk with the sheriff's department about the Brucker shooting. (16 RT 2593.)

Handshoe also was not believable. He was a heavy drug user at the time of the shooting, admitted guilt in the case and vied for the best deal he could from the prosecution. (22 RT 3801-06, 3809, 3811-15.) Paulson lacked credibility as well. He had a criminal history and was a mentally unstable drug addict. (17 RT 2906-09.) The jury appeared unsure about the testimony of Peretti, Handshoe and Paulson; jurors asked for readbacks of their testimony. (7 CT 1464, 1466-67.) This factor by itself suggests the error was prejudicial. (*People v. Markus* (1978) 82 Cal.App.3d 477, 480, disapproved on other grounds in *People v. Montoya* (1994) 7 Cal.4th 1027 [court held based on jury's question it appeared jury was seriously considering the defense presented].)

Further, there were many Broncos in the area. DMV records from a search of Broncos, model years 1985 through 1995 and registered as of April 7, 2004 in east San Diego and Poway, showed 1501 Broncos in Alpine, El Cajon, Lakeside and Santee, and 559 in La Mesa, Lemon Grove and Poway. (27 RT 4843-44, 4851-52.) When shown a photo of a Bronco

that was not appellant's Bronco, Vangorkum said that was the car he saw the day of the shooting and he would "place money on it." (24 RT 4313-14.)

Increasing the prejudice was the importance of credibility in the case since the prosecution and defense gave divergent views of the shooting. According to the prosecution, appellant shot Brucker during a robbery and burglary. (30 RT 5319.) According to the defense, appellant was not a perpetrator. The teenage witnesses gave false testimony and no credible independent evidence implicated appellant in the crimes. (30 RT 5190-96, 5233-43.) So, the outcome of the case depended on who the jury believed. It was essential for appellant to be seen before jurors as presumptively innocent. (*People v. Davis* (1965) 233 Cal.App.2d 156, 162.) Lee's defense, absolving himself of any blame to make appellant a perpetrator, diminished this presumption and appellant's credibility before the jury.

There was prejudice too at the penalty phase of the trial, a reasonable possibility that the jury would have rendered a different verdict absent the error. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) There, appellant told the jury to give him the death penalty. (35 RT 5623.) That demand combined with a guilt phase trial with appellant pointed to as the mastermind of the crimes by the prosecutor, Lee and Huhn, supporting as they did the testimony of Peretti and Handshoe, and the jury allowed to consider this in the penalty phase (CALJIC No. 8.85; 8 CT 1642), there was minimal, if any chance, the jury would have chosen a penalty less than death. As the jury also knew of Handshoe's plea deal with the prosecution and found Lee not guilty of murder (33 RT 5430), jurors likely sought to punish appellant for the crimes to reflect his increased culpability. The risk that jurors engaged in a comparative, not individual, punishment assessment cannot be allowed in a

capital case where the Eighth Amendment demands a heightened need for reliability in the determination that death is the appropriate punishment. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340 [105 S. Ct. 2633, 86 L. Ed. 2d 231]; see *Lockett v. Ohio* (1978) 438 U.S. 586, 605 [98 S. Ct. 2954, 57 L. Ed. 2d 973].) The result was an unfair and unreliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., art. I, §§ 7, 15, 17.)

In short, the error was not harmless at both the guilt phase and penalty phase of the trial. The judgment should be reversed.

II. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING DEFENSE COUNSEL'S REQUEST FOR A SEVERANCE OF COUNTS

A. Procedural History

Along with seeking to sever appellant's case from that of the other defendants, defense counsel sought to sever the non-capital offenses. According to counsel, the April 9, 2003 and January 2003 burglaries were not cross-admissible. Evidence appellant was arrested in Oregon with a gun taken during the April burglary of Dolan's house was irrelevant because that gun was not used to shoot Brucker. (4 RT 692-93, 696-98.) Evidence of other burglaries also was extremely prejudicial. (4 RT 700-01.)

The prosecution argued cross-admissibility was not necessary. The crimes were of the same class since the murder was based on an attempted residential burglary. Also, one of the charges was conspiracy; showing that the co-conspirators associated with each other in the car used for the shooting was important. Additionally, appellant's car was identified leaving

the Dolan property and appellant was identified driving it. (4 RT 702-05.) As to the Bell burglary, the prosecution pointed to evidence that appellant's phone was dropped at the Bell property and property from that burglary was found in the home appellant shared with Stevens. (4 RT 707.)

The trial court decided the defense failed to carry its burden. Counts I through IV were the same class of crime and someone seeing appellant in the same car supported the prosecution's claim that appellant's Bronco was used for the Brucker crimes. Further, the offenses were not inflammatory. (4 RT 710-13.)

B. The Trial Court Erred In Denying The Defense's Motion To Sever Counts III and IV

When the offenses charged are of the same class, joinder is proper. However, a trial court may in its discretion order that different offenses or counts set forth in the information be tried separately. (Pen. Code, § 954; *People v. Kraft* (2000) 23 Cal.4th 978, 1030.) The benefits of joinder can be conservation of judicial resources and public funds. (*People v. Bean* (1988) 46 Cal.3d 919, 939.) Yet, pursuit of these benefits cannot deny a defendant his or her right to a fair trial. (*Newman v. Superior Court* (1986) 179 Cal.App.3d 377, 382-83; *People v. Smallwood* (1986) 42 Cal.3d 415, 427, disapproved on other grounds in *People v. Bean* (1988) 46 Cal.3d 919.) Joinder creates a significant risk the jury will convict the defendant on the weight of the accusations or accumulated effect of the evidence. (*People v. Smallwood, supra,* 42 Cal.3d 415, 427, fn. 8.)

A party seeking severance must "clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*People v. Davis* (1995) 10 Cal.4th 463, 508.)

"Cross-admissibility suffices to negate prejudice, but it is not essential

for that purpose. Although we have held that cross-admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice." (*People v. Bradford* (1997)15 Cal.4th 1229, 1316, citations omitted; Pen. Code, § 954.1.)

As to cross-admissibility of evidence, the highest degree of similarity is required to prove identity. The uncharged misconduct and the charged offense must share common features that are sufficiently distinctive to support the inference the same person committed both acts. (*People v. Soper* (2009) 45 Cal.4th 759, 776 and fn.9; *People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

In determining potential prejudice from a joint trial, relevant factors for consideration include whether any of the charges are unduly inflammatory or a weak case will be unfairly bolstered by its joinder with other charges. (*People v. Arias* (1996) 13 Cal.4th 92, 127.) Additional relevant factors are whether one of the charges is a capital offense or if the joinder of the charges converts the matter into a capital case. (*People v. Soper, supra,* 45 Cal.4th 759, 775.) A party seeking severance must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial. (*People v. Arias, supra,* 13 Cal.4th 92, 127.)

Although a trial court's improper denial of a defendant's motion to sever counts does not alone violate the federal constitution, misjoinder rises to the level of a constitutional violation when the prejudice to the defendant is so great as to deny that defendant his or her fundamental rights to due process, a fair trial. (*United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8 [106 S.Ct. 725, 88 L.Ed.2d 814]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.) Even if the ruling was correct when made, the judgment must be

reversed when the defendant shows that joinder actually resulted in gross unfairness amounting to a denial of due process. (*People v. Arias* (1996)13 Cal.4th 92, 127.)

In appellant's case, evidence as to the burglaries was inadmissible in a separate trial on Counts I and II. The burglaries were a different class of crimes based on different incidents, both unrelated to the shooting of Brucker. Further, the evidence pertaining to the burglaries did not help the jury decide a key issue for the murder, whether appellant was a perpetrator, unless jurors used it as evidence of criminal propensity. On this latter point, evidence as to the burglaries was inflammatory. Jurors were likely to believe appellant was predisposed to commit crimes and improperly infer based on this he was a perpetrator in the other crimes. The trial court erred in failing to sever the burglary counts, implicating appellant's constitutional rights to due process, a fair trial, and to a fair and reliable guilt determination. (*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083-86; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 454[6]; *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 139-40; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. I, §§ 7, 15.)

In *Williams v. Superior Court, supra,* 36 Cal.3d 441, witnesses placed the defendant and other assailants at the scene where a person was killed by weapons. Nine months later an eyewitness observed the defendant driving a van containing at least two other occupants. The van pulled up beside a boy

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[6] In *Price v. Superior Court* (2001) 25 Cal.4th 1046, the Court pointed out that Article I, section 30(a) ["This Constitution shall not be construed by the courts to prohibit the joining of criminal cases . . .."] was adopted by initiative as part of Proposition 115 along with Penal Code section 954.1, providing that evidence need not be cross-admissible before offenses may be jointly tried. The Court did not resolve whether that article was intended only to limit the holding of *Williams, supra.* (*Id.* at pp. 1070-71.)

standing on the curb. The witness then saw an arm come out of the window on the driver's side holding what looked like a handgun. The boy was shot. Another witness thought the driver was the shooter. Different weapons were used in each crime. The defendant moved to sever the counts and the trial court denied the request. (*Id.*, at pp. 445-46.)

The Court found the trial court erred. If the trials were to be severed, the prosecution might try to introduce evidence relating to one of the shootings at the trial involving the other incident on the grounds that such evidence would be probative of the killer's identity. The evidence could not be admissible on this basis since there were not enough similarities between the shootings to justify the inference if the defendant did one shooting he must have done the other. Also, there was no evidence the same weapon was used in the fatal assaults and the two episodes did not show a common plan. (*Id.* at pp. 449-50.)

The Court further decided there was prejudice. Evidence of gang membership - the sole distinctive factor allegedly common to each incident – could have a prejudicial, if not inflammatory effect on the jury in a joint trial. The implication gangs were involved and the allegation that the defendant was a gang member might lead a jury to cumulate the evidence and conclude he must have participated in some way in the murders or that involvement in one shooting necessarily implied involvement in the other. (*Id.* at p. 453.)

The Court also pointed out the danger that the jury would aggregate all of the evidence, though presented separately in relation to each charge, and convict on both charges in a joint trial. Joinder would make it difficult not to view the evidence cumulatively. The two cases could become in the jurors' minds one case which would be considerably stronger than either viewed separately. (*Id.* at pp. 453-54.)

In *People v. Coleman* (1981) 116 Cal.App.3d 129, police were called to a school at 18th and Church Streets to investigate the death of Shirley. The defendant's prints were found at the scene. A few months later, Denisha, a minor, left another school. The defendant approached and touched her genitals and breast area. The next day, another minor, Denise, left a different school. On her way home, the defendant pretended he was a police officer and said she was under arrest. He drove her to a park where he committed various sex crimes against her. (*Id.,* at pp. 133-34.) The defense sought to sever charges relating to Shirley from the sex crimes against the two minors. The trial court denied the request, finding evidence of the crimes against the minors could be introduced in a trial on the charges involving Shirley. Thus, the defendant would derive little or no benefit from severance. (*Id.* at pp. 133, 136.)

The appellate court held the trial court erred. It found the probative value minimal of the crimes against the minors in a trial involving the crimes pertaining to Shirley. The only distinctive features shared by the crimes were they were committed around midday and had some association with schools. According to the appellate court, the fact that they shared these features and were sex-related did little to suggest they were committed by the same person. The prosecution's suggestion that Shirley may have been slapped around, an attempt to connect that crime with the defendant's alleged threat to slap Denise, was speculation, not supported by the evidence. (*Id.* at pp. 137-38.)

The appellate court further found the prejudice would be great if the crimes against the minors were introduced in a trial of the murder. Evidence of sex crimes with young children is especially likely to inflame a jury. When confronted with direct evidence of the defendant's propensity to commit sex crimes, the jury would be challenged to decide the murder case

exclusively on evidence related to that crime. This difficulty would be exacerbated by the fact that the murder case consisted primarily of circumstantial evidence. If a juror had reasonable doubt about the identity of the murderer, the juror could find it difficult to maintain that doubt with direct evidence of repulsive crimes against minors committed by the defendant. (*Id.* at p. 138.)

Additionally, according to the appellate court, a joint trial would gain little for the prosecution other than the prejudicial effect of other-crimes evidence which could not otherwise be admitted. There would be little or no duplication of evidence in a severed trial because the offenses were not connected in their commission. Trial on the charges related to the minors would be short since evidence consisted of the victims' testimony. (*Id.* at p. 139.)

Similarly, here, the trial court erred in denying the defense's request to sever the burglary counts. First, the evidence was not cross-admissible. On this point, evidence a defendant committed an offense, although inadmissible to demonstrate a defendant's disposition to commit crimes, may be admitted to establish, among other things, identity or intent. To demonstrate a distinctive modus operandi for purposes of proving identity, the evidence must disclose common marks or identifiers that considered separately or in combination support a strong inference the defendant committed both crimes. (Evid. Code, § 1101; *People v. Bradford* (1997) 15 Cal.4th 1229, 1316.) Here, there were no distinctive identifiers other than the sighting of a Bronco. As to that, there were many Broncos in the area. DMV records from a search of Broncos, model years 1985 through 1995, and registered as of April 7, 2004 in east San Diego and Poway, showed 1501 Broncos in Alpine, El Cajon, Lakeside and Santee, and 559 in La Mesa, Lemon Grove and Poway. (27 RT 4843-44, 4851-52.)

Additionally, the crimes were committed at different times and places. Several months spanned one of the burglaries and the murder. Also, the crimes occurred in different locations, albeit close to each other, and reflected different conduct by the perpetrator. The Dolan and Bell burglaries did not involve an assault or murder or occupied building. As to the Bronco sighting (19 RT 3196-97), assuming appellant was the driver, this did not mean appellant also committed the other crimes. (Compare *People v. Bean* (1988) 46 Cal.3d 919, 937-38 [Court held factors of crimes did not establish unique modus operandi; although both sets of crimes occurred in same neighborhood, involved similar conduct by defendant and had a motive of theft, there were differences between them].)

Also, there was potential prejudice. The very real danger existed that the jury would aggregate all of the evidence, though presented separately, and convict appellant of the murder and conspiracy offenses based on all of it. The jury would likely conclude because appellant appeared to be predisposed towards committing crimes, he likely committed the murder and conspiracy too. Further, the prosecution did not have a strong case against appellant. Its primary witnesses were teenagers who lacked credibility and were pursuing deals from the prosecution. Adding the burglaries to evidence against appellant might have been just enough to convince jurors that appellant was probably guilty of murder and conspiracy. (Compare *People v. Smallwood* (1986) 42 Cal.3d 415, 430, disagreed with in *People v. Bean* (1988) 46 Cal.3d 919 ["This 'weakness' factor was present here. . . There was no eyewitness to that shooting. . . . testimony described only some ambiguous conduct on Smallwood's part. . . Such thin evidence must necessarily have been bolstered by allowing the jury to receive evidence of the unrelated Dunbar homicide."].) That the jury could infer appellant's criminal propensity from evidence relating to the

burglaries to strengthen the prosecution's case on the other counts was an impermissible result, depriving appellant of a fair trial. (*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083 [court concluded joining of indictments deprived Bean of a fair trial, the jury relying on the evidence supporting the stronger charges to strengthen the case against him on the weaker charges].)

> "It is much more difficult for jurors to compartmentalize damaging information about one defendant derived from joined counts, than it is to compartmentalize evidence against separate defendants joined for trial. Studies have shown that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case." (*U.S. v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322, citation omitted.)

Moreover, joining the counts gained little for the prosecution other than the prejudicial effect of other-crimes evidence not otherwise admissible. Also, it was not as if judicial economy would have resulted from joined counts. There would have been little or no duplication of evidence in a severed trial because the offenses were not connected. A trial on the burglary charges would have been short.

In sum, the trial court erred in not severing the burglary counts. The error violated appellant's constitutional rights to due process, a fair trial, and to a fair and reliable guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. I, §§ 7, 15.)

C. Reversal Is Required

A retrospective review of the evidence produced at trial is necessary to determine whether the joinder was prejudicial. (*People v. Smallwood, supra*, 42 Cal.3d at p. 431.) Here, such review shows the joinder was prejudicial, there was a reasonable chance, more than an abstract possibility, that if the offenses were tried separately, the result would have been different. (*People v. Smallwood, supra,* 42 Cal.3d at p. 433 [reversal for trial court's denial of severance motion].)

The evidence against appellant was not overwhelming. It was based on the testimony of three untrustworthy teenage witnesses. Peretti was not credible, being an accomplice herself, drug user and giving inconsistent testimony about a variety of subjects. Her father claimed the reward money of $10,000 and she received immunity for testifying. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2559, 2646-50, 2653; 2706, 26 RT 4626-28, 4551-55; 27 RT 4668.) Peretti's father contacted Crime Stoppers and told Peretti to talk to the police, pressuring her to cooperate. (16 RT 2684, 2598.) He arranged Peretti's first talk with the sheriff's department about the Brucker shooting. (16 RT 2593.)

Handshoe also was not believable. He was a heavy drug user at the time of the shooting, admitted guilt in the case and vied for the best deal he could from the prosecution. (22 RT 3801-06, 3809, 3811-15.) Paulson lacked credibility as well. He had a criminal history and was a mentally unstable drug addict. (17 RT 2906-09.) The jury appeared unsure about the testimony of Peretti, Handshoe and Paulson; jurors asked for readbacks of their testimony. (7 CT 1464, 1466-67.) This factor by itself suggests the error was prejudicial. (*People v. Markus*, *supra,* 82 Cal.App.3d 477, 480.)

Further, there were many Broncos in the area. DMV records from a search of Broncos, model years 1985 through 1995, and registered as of April 7, 2004 in east San Diego and Poway, showed 1501 Broncos in

Alpine, El Cajon, Lakeside and Santee, and 559 in La Mesa, Lemon Grove and Poway. (27 RT 4843-44, 4851-52.) When shown a photo of a Bronco that was not appellant's Bronco, Vangorkum said that was the car he saw the day of the shooting and he would "place money on it." (24 RT 4313-14.)

So, given the lack of a strong case against appellant, had the jury not heard the evidence of the burglary offenses, portraying him as a seasoned criminal, jurors may not have assumed he was inclined to commit crimes and thus likely to be a perpetrator in the other crimes.

Even if this Court finds no prejudice at the guilt phase of the trial, there still was prejudice at the penalty phase of the trial, a reasonable possibility that the jury would have rendered a different verdict had the error not occurred. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) The jury was allowed to consider evidence from the guilt phase in the penalty phase. (CALJIC No. 8.85; 8 CT 1642.) Hearing testimony relating appellant's burglary offenses, showing him as an experienced criminal, and testimony that designated him as the mastermind of the crimes, there was almost no possibility the jury would have decided on a less severe penalty. Jurors likely thought that because appellant had committed other crimes on top of murder and conspiracy, he should be punished to the maximum extent possible to reflect his greater criminal conduct. The result was an unfair and unreliable penalty determination requiring the judgment to be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

III. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING THE DEFENSE'S MOTION TO EXCLUDE EVIDENCE OF APPELLANT'S UNCHARGED BAD ACTS, INCLUDING ITEMS FOUND IN HIS POSSESSION THAT IMPLICATED HIM IN CRIMINAL ACTIVITY, THEREBY VIOLATING HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL AND FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

A. Procedural History

The defense sought to exclude evidence of appellant's flight and plans to escape from jail. Counsel argued the evidence was not relevant to consciousness of guilt because appellant did not leave the county or try to escape due to the Brucker homicide. He left to avoid being found in violation of parole for possessing stolen property and potentially getting a 25 years-to-life sentence. The homicide occurred on April 14. Appellant stayed in San Diego at his home and was not considered a suspect at this time. On April 24th his parole officer called about a parole search to be done and appellant knew stolen property was in his condo, the discovery of which could result in a parole violation. (6 RT 1031-33.) Counsel also contended that to explain the reason appellant fled would necessitate disclosure of his criminal history. The jury would then hear appellant had at least two prior strike convictions and could receive a 25 years-to-life sentence. The evidence was prejudicial and should be excluded under Evidence Code section 352. (6 RT 1030-31, 1033.)

The prosecution argued the evidence was relevant to show appellant's consciousness of guilt as appellant changed vehicles, driving the white truck instead of the Bronco, and changed his appearance by shaving off his mustache. (6 RT 1035-36.)

The trial court found the evidence relevant to consciousness of guilt and denied the defense's motion. (6 RT 1037-38.)

Defense counsel then asked the trial court to limit what evidence the prosecution could present. (6 RT 1039-40.) According to counsel, evidence of items found in appellant's car and details as to his escape attempt went far beyond evidence necessary to establish consciousness of guilt and was prejudicial. (6 RT 1040-41.)

The trial court disagreed and allowed the prosecution to present the evidence. (6 RT 1042.)

The jury heard testimony disclosing the following:

On May 16, Oregon police trooper Johnson stopped a white F-150 for speeding. (23 RT 4060-61.) The driver, appellant, did not have a license and identified himself as James Stevens. Inside the car under the driver's seat, Johnson found a handcuff key, tools for making identification laminates, a shotgun and a .22-caliber pistol. Appellant was arrested. (23 RT 4062-66.)

Roman Snapp was appellant's cellmate in Harney Correctional Facility in Oregon. He first met appellant in June of 2003. (23 RT 4008.) Appellant told Snapp that escaping would be easy because the jail was small and only two deputies worked at night. (23 RT 4010.) Appellant asked Snapp where the jail was located in the town. Snapp drew appellant a rough sketch of the town. (23 RT 4010-11.) Appellant showed Snapp a small brass handcuff key that he kept in a sock under his mattress, and suggested an escape plan. Another cellmate, Thomas, would attack one guard and appellant would attack the other. They would strip and tie them. (23 RT 4013-15, 4032-34.) Appellant said a .22 caliber gun would not do much damage. Also, he did not want the police to shoot and kill him. (22 RT 4036.) Appellant's plan entailed locking officers in the cell and taking their keys, money and guns,

and stealing a police car. He said if the police stopped them and guns were in the car, they would shoot. After a disagreement with appellant, Thomas told the deputies about the escape plan. (23 RT 4036-37.) Thomas also disclosed another escape plan appellant had: appellant would pretend he fell and hit his head from a broken bed, Thomas would yell for the guards and when they came, Thomas and appellant would beat them. (23 RT 4043.)

John Pasquale also shared a cell with appellant. (24 RT 4150-51.) Appellant talked about escaping and thought of putting the top bunk bed on top of Pasquale and calling the guard for help. When the guard entered, they would take his keys and escape in the deputy's vehicle. (24 RT 4151.) Appellant's plan for escape included pounding the guard's head into the wall. One time when Pasquale and appellant were walking to the courtroom, they saw a guard with his gun out and back towards them. Appellant said he should have grabbed his gun, shot him and ran. Appellant showed Pasquale a small brass handcuff key that he put in his mouth when taken to court. (24 RT 4151-52.)

Before his true identity was discovered, appellant was booked at the Harney Jail under the name of Stevens. A search of his car produced a laminated card showing the name of James Stevens. The person in the photo could have been appellant. (23 RT 4081-82, 4084-85.) Other items found included four sheets of paper showing different signatures, white out, a glue stick, a magnifying glass, pen-type items, blank self-laminating cards, notary labels, a passport book, a book entitled "Counterfeit I.D. Made Easy," a certificate of baptism with the names of James Steven Hall, Steven Lee Hall and Ruth Ann Powell handwritten in ink on it, a photocopy of a certificate of live birth in the name of Raoul Guivera, blank baptism forms, different seal stamps and a digital camera. (23 RT 4086-93.)

On July 3, appellant's cell was searched. (23 RT 4094.) Items found included a penciled map of the town of Burns in Harney County near the courthouse, a razor's plastic safety cap, bent plastic, three razor blades inside a deck of cards, and two handcuff keys, one in his sock and the other wrapped in tissue. (23 RT 4095-98.)

The jury was instructed with CALJIC No. 2.52. That instruction provided as follows:

> "The flight of of [sic] a person after the commission of a crime, or preparations by a person to escape from custody after he is accused of a crime, are not sufficient standing alone to establish guilt, but are facts which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. Whether or not evidence of flight or preparations to escape show a consciousness of guilt as to any particular count, and the significance to be attached to such circumstances, are matters for your determination." (CALJIC No. 2.52; 8 CT 1598.)

B. The Trial Court Erred In Denying The Defense's Motion To Exclude Evidence Of Appellant's Flight, Escape Plans, And Items Found In His Possession Implicating Him In Criminal Activity

"An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." (*Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [88 S.Ct. 1620, 20 L.Ed.2d 476]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384.) "Inclusion of relevant evidence is tantamount to a fair trial. Similarly, exclusion of prejudicial evidence can safeguard the defendant's rights as much as that of the prosecution." (*People v. Delarco* (1983)

142 Cal.App.3d 294, 305-06; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7.)

Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*People v. Garceau* (1993) 6 Cal.4th 140, 177, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93; Evid. Code § 210.)

A defendant's flight from the police can be relevant to show a defendant's consciousness of guilt even when the flight occurs days after the offense (see *People v. Arias* (1996) 13 Cal.4th 92, 127-128; *People v. Neely* (1993) 6 Cal.4th 877, 896-97) or absent evidence the defendant knew he or she was charged with the crimes at issue. (*People v. Mason* (1991) 52 Cal.3d 909, 941-42.) Even when the defendant must admit other uncharged crimes to explain the flight, the other crimes go to the weight, not the admissibility of the evidence. (*Id.* at p. 942.)

Like evidence of flight, evidence that a defendant planned an escape tends to demonstrate a consciousness of guilt. (*People v. Williams* (1988) 44 Cal.3d 1127, 1144.) Yet, evidence of force during an escape could have a prejudicial effect, outweighing any probative value of the evidence. (*People v. Odle* (1988) 45 Cal.3d 386, 403, abrogated on other grounds as stated in *People v. Prieto* (2003) 30 Cal.4th 226.)

A trial court has the discretion under Evidence Code section 352 to exclude otherwise admissible evidence if the prejudicial effect of the evidence outweighs its probative value. (Evid. Code § 352; *People v. Ramos* (1997) 15 Cal.4th 1133, 1170.) Prejudice refers to evidence that tends to evoke an "emotional bias" against a party. (*People v. Wright* (1985) 39 Cal.3d 576, 585.) "[D]iscretion should favor the defendant in cases of doubt because in comparing prejudicial impact with probative value the balance 'is particularly delicate and critical where what is at stake

is a criminal defendant's liberty.'" (*People v. Delarco, supra,* 142 Cal.App.3d 294, 306, citing *People v. Lavergne* (1971) 4 Cal.3d 735, 744.)

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1125-26.) A reviewing court will find the trial court abused its discretion when, considering all the circumstances, there is a clear showing that court exceeded the bounds of reason. (*People v. Martinez* (1998) 62 Cal. App.4th 1454, 1459.) A trial court's decision need not be irrational to constitute an abuse of discretion. (See *People v. Jacobs* (2007) 156 Cal.App.4th 728, 737 ["Although irrationality is beyond the legal pale it does not mark the legal boundaries which fence in discretion."].)

1. Flight

In this case, the trial court erred in admitting evidence of appellant's flight. This evidence was not relevant to show his consciousness of guilt because the evidence demonstrated appellant left the county for reasons other than the Brucker shooting. The evidence also was highly prejudicial since to rebut it, the defense had to present evidence of appellant's prior crimes. The only purpose of the evidence was to show appellant as a dangerous criminal, with a propensity to commit crimes, undoubtedly evoking an emotional bias against him. In admitting the evidence, the trial court also violated appellant's constitutional rights to due process, a fair trial, and to a fair and reliable guilt determination. (*Bruton, supra,* 391 U.S. 123, 131, fn. 6; *McKinney v. Rees, supra,* 993 F.2d 1378, 1384; *Beck v. Alabama, supra,* 447 U.S. 625, 637-638; *People v. Delarco, supra,*

142 Cal.App. 3d at pp. 305-06; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15; *People v. Mason, supra*, 52 Cal.3d at pp. 941-42.)

In *People v. Mason, supra,* 52 Cal.3d 909, between March of 1980, and December of the same year, the defendant robbed and strangled four Oakland residents: Picard, Jennings, Brown, and Lang. In January of 1981, four weeks after murdering Lang, the defendant fled from Alameda County sheriff's deputies in a vehicle chase. The next month, the defendant was arrested. The prosecution proved the defendant murdered Picard, Jennings, Brown, and Lang primarily through his own admissions. Several weeks before he was arrested, the defendant confessed on tape to the four murders. After he was arrested, the defendant provided details about the crimes. (*Id.* at pp. 919, 924.) The trial court admitted evidence of the automobile chase to show consciousness of guilt. The defendant argued the evidence should have been excluded under Evidence Code section 352 as unduly prejudicial. The Court disagreed. (*Id.* at p. 941.) It found four weeks not so remote that it diminished the probative value; "a guilty person does not lose the desire to avoid apprehension for offenses as grave as multiple murders after only a few weeks." (*Id.*) The Court rejected the argument that the flight must occur when it appeared the defendant knew of the charges. Also, although the evidence forced him to admit uncharged crimes to explain the flight, the existence of other crimes explaining the flight goes to the weight, not the admissibility, of the evidence. (*Id.* at pp. 941-42 and fn. 11.) The Court found on these facts, the inference the defendant fled to avoid apprehension for the murders of Picard, Jennings, Brown, and Lang was at least as strong as the inference that he fled to avoid apprehension for uncharged murders, occurring four days after and two weeks before the murder of Lang, one in a different jurisdiction and over 100 miles from the place from which the defendant had fled. Any danger of undue prejudice

did not outweigh the evidence's probative value. (*Id;* compare *People v. Rogers* (2012) 57 Cal.4th 296, 334 [no error giving flight instruction where defendant committed three murders in three different states over the course of six weeks and after each murder he fled with the victim's property, inferentially so after Gallagher's murder, finally being apprehended after a high-speed chase through four towns ending with police cruisers ramming his vehicle].)

Here, however, different circumstances exist. The evidence did not show appellant's consciousness of guilt. First, the evidence did not suggest that appellant thought he was considered a suspect when he left San Diego. There was no high-speed automobile chase involving the police or the police trying to apprehend him. Appellant left town more than a week after the shooting and on the day his condo was searched. He told Hause he was leaving to avoid a parole violation. Appellant's condo contained stolen property from the Bell burglary and based on his prior strike convictions, he faced a potential life sentence should he have been found in violation of another offense because of the property. At the time appellant left town, the police were looking for two women involved in an altercation with Brucker prior to his death and a Toyota Pre-Runner or Stadium pickup. (6 CT 1145; 19 RT 3220-26, 3234; 21 RT 3581-82; 26 RT 4606-07.) So, unlike in *People v. Mason, supra,* 52 Cal.3d 909, where multiple inferences could have been made, here, only one real inference could be made, that appellant left San Diego to avoid the consequences of his criminal behavior unrelated to the shooting. (Contrast *People v. Neely* (1993) 6 Cal.4th 877, 886, 896-97 [where defendant prior to arrest was recognized as suspect in charged crime, court found no error in admission of evidence of his flight from the police after the crime].)

Also, in appellant's case, the admission of the evidence was particularly prejudicial since in order to rebut the inference of consciousness of guilt, appellant had to essentially admit to having committed the uncharged crimes. Courts have recognized the substantial prejudicial effect inherent in evidence of a defendant's other crimes. (*People v. Calderon* (1994) 9 Cal.4th 69, 79; *People v. Valentine* (1986) 42 Cal.3d 170, 179, disapproved on other grounds in *People v. Bouzas* (1991) 53 Cal.3d 467 ["it is equally prejudicial in all, since it [fact of a defendant's prior conviction] discloses ex-felon status without further elaboration."].) The evidence presents "the serious danger that the jury will conclude that defendant has a criminal disposition and thus probably committed the presently charged offense." (*People v. Calderon, supra,* 9 Cal.4th 69, 75, citation omitted.) The uncharged crimes here were no less inflammatory, portraying him as a dangerous criminal, bent on committing even more offenses.

2. Appellant's Planned Escape And Items Found In His Possession

Like evidence of flight, evidence that a defendant planned an escape tends to demonstrate a consciousness of guilt. (*People v. Williams* (1988) 44 Cal.3d 1127, 1143-44.) Here, however, evidence of appellant's escape plans and property found in his possession was not relevant to any issue in the case. He was not arrested and held in Oregon for Brucker's murder. Further, the evidence was exceptionally prejudicial, showing him as a criminal, inclined to stealing the identities of others and using violence, exactly the type of person who would commit the current offenses. (*People v. Thompson* (1980) 27 Cal.3d 303, 317, citations omitted ["[T]he jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor."]; contrast *People v.*

Kipp (2001) 26 Cal.4th 1100, 1126 [no abuse of discretion in admitting evidence of defendant's escape; no overt violence used in the escape as defendant only briefly resisted when reentering his cell].)

Simply put, because evidence of appellant's flight and escape plans was irrelevant to the issue of consciousness of guilt for the Brucker shooting and was extremely prejudicial, the trial court erred in admitting it, thereby violating appellant's constitutional rights to due process, a fair trial and fair and reliable guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

C. The Error Was Prejudicial

Because the trial court's error implicated appellant's constitutional right to a fair trial, the reversible error test set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] applies. This test provides that the appellate court must reverse a conviction unless the error is proven harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at pp. 23-24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Under this test, or even the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, whether there is a reasonable probability the defendant would have obtained a more favorable outcome absent the error (*id.* at p. 836), the judgment should be reversed.

First, the evidence was highly inflammatory and likely influenced the jury against appellant. Hearing of appellant's prior crimes and escape plans, including the things found in his possession, jurors would have been challenged to presume appellant was anything other than an experienced criminal.

The probable bias against appellant likely affected the verdict. The prosecution lacked a strong case against him. It was built on the testimony of three untrustworthy teenage witnesses. Peretti was not credible, being an accomplice to the crime, drug user, and giving inconsistent testimony about, among other things, appellant's disguise, Ritterbush, the guns at the mobile home, and Huhn's involvement. Also, her father ended up with the reward money of $10,000 for information provided on the investigation and she received immunity for testifying in this case. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2559, 2646-50, 2653, 2706; 26 RT 4626-28, 4551-55; 27 RT 4668.) Peretti's father contacted Crime Stoppers and told Peretti to talk to the police, pressuring her to cooperate. (16 RT 2684, 2598.) He arranged Peretti's first talk with the sheriff's department about the Brucker shooting. (16 RT 2593.)

Handshoe also was not believable. He was a heavy drug user at the time of the shooting, admitted guilt in the case and tried to obtain the best deal he could from the prosecution. (22 RT 3801-06, 3809, 3811-15.) Paulson lacked credibility as well as he admitted to prior crimes and was a mentally unstable drug addict. (17 RT 2906-09.) The jury appeared to question the testimony of Peretti, Handshoe and Paulson; jurors asked for readbacks of their testimony. (7 CT 1464, 1466-67.) This factor by itself suggests the error was prejudicial. (*People v. Markus*, *supra,* 82 Cal.App.3d 477, 480.)

Further, many Broncos existed in the area. DMV records from a search of all Broncos, model years 1985 through 1995, registered as of April 7, 2004 in east San Diego and Poway, showed 1501 Broncos in Alpine, El Cajon, Lakeside and Santee, and 559 in La Mesa, Lemon Grove and Poway. (27 RT 4843-44, 4851-52.) Investigator Roehmholdt showed Vangorkum a photo of a Bronco that was not appellant's Bronco. Vangorkum said that

was the car he saw the day of the shooting. He said he would "place money on it." (24 RT 4313-14.)

Increasing the prejudice was the importance of credibility in the case since the prosecution and defense gave divergent views of the shooting. According to the prosecution, appellant shot Brucker during a robbery and burglary. (30 RT 5319.) According to the defense, appellant was not a perpetrator. The teenage witnesses did not testify truthfully and there was no credible independent evidence that implicated appellant in the crimes. (30 RT 5190-96, 5233-43.) The outcome of the case depended on who the jury believed. Thus, it was essential for appellant to be seen before jurors as presumptively innocent. (*People v. Davis* (1965) 233 Cal.App.2d 156, 162.)

So, given the inflammatory nature of the evidence, the lack of a strong prosecution case, and the importance of credibility in the case, the error was not harmless beyond a reasonable doubt. Also, it was not improbable that had the evidence been excluded, appellant would have obtained a more favorable outcome. (*People v. Alcala* (1984) 36 Cal.3d 604, 635-36.)

Even if there was an equal balance of reasonable probabilities, the judgment should still be reversed for such balance "necessarily means that. . . 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. Rowland* (1968) 262 Cal.App.2d 790, 798, citation omitted.) Yet, should this Court find it impossible to accurately state the effect on the jurors of the trial court's error, reversal is still required. (*People v. Spearman* (1979) 25 Cal.3d 107, 119.)

This argument aside, if this Court finds no prejudice at the guilt phase of the trial, there still was prejudice at the penalty phase of the trial, a reasonable (i.e., realistic) possibility that the jury would have rendered a

different verdict had the error not occurred. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) There, the jury was allowed to consider evidence presented at the guilt phase of the trial. (CALJIC No. 8.85; 8 CT 1642.) Evidence showing appellant as criminally oriented and disposed towards committing violent crimes if not incarcerated, jurors likely believed appellant should be punished to the maximum extent. This resulted in an unfair and unreliable penalty determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

In sum, the error was prejudicial at both the guilt and penalty phase of the trial. The judgment should be reversed.

IV. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING THE DEFENSE'S MOTION TO PRECLUDE HANDSHOE'S TESTIMONY, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

A. Introduction

Handshoe testified for the prosecution pursuant to an agreement with the prosecution. The trial court erred in not precluding his testimony because his agreement compelled him to testify to conform to his earlier statement. The error violated appellant's constitutional rights to due process, a fair trial, and fair and reliable guilt and penalty determination. (*People v. Riel* (2000) 22 Cal. 4th 1153, 1179; *People v. Allen* (1986) 42 Cal. 3d 1222, 1151-52; *Beck, supra,* 447 U.S. 625, 637-638; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

Following Handshoe's change of plea, the defense sought to exclude his testimony at trial. According to the defense, Handshoe's plea bargain was conditioned on the truthfulness of his statement to the police in violation of *People v. Medina* (1974) 41 Cal.App.3d 438 and *People v. Garrison* (1989) 47 Cal.3d 746. The combination of this condition and his promise to testify truthfully bound him to testify in accordance with his pretrial statement. (7 CT 1427-30.) The trial court found Handshoe's agreement did not require him to do more than tell the truth. (13 RT 2233-34.) At a later hearing on the subject, the trial court found the overriding clause in the agreement was to tell the truth with no specification of what version of events constituted the truth. The trial court found nothing in its inquiry suggested truthfulness would be measured by his confirmation that what he previously said on April 11, 2005 was true. The trial court decided it would not exclude Handshoe's trial testimony. (15 RT 2275-76.) The defense raised the issue again in appellant's motion for new trial which the trial court denied. (8 CT 1674-75; 38 RT 5735.)

The plea agreement between Handshoe and the district attorney dated May 11, 2005 specifying a total term at 85 percent of 17 years read in relevant part as follows:

> "Defendant agrees that he will cooperate by providing information to law enforcement officers and by testifying in any and all proceeding relating to Eric Anderson, Apollo Huhn and Randy Lee, including but not limited to the April 14, 2003 murder of Stephen Brucker and any other criminal matter filed against the above-listed defendants.
>
> On April 11, 2005 defendant gave a taped statement to investigators regarding his knowledge of the circumstances surrounding the attempted robbery/burglary and murder of Stephen

Brucker. Defendant confirms that his statement is true and accurate as to his observations, actions and the actions of Eric Anderson, Apollo Huhn and Randy Lee. . .

Overriding all else, it is understood that this agreement extracts from Brandon Handshoe an obligation to do nothing more other than to plead guilty to the listed crimes and to tell the truth. **At all times the defendant shall tell the truth, and nothing other than the truth, both during the investigation and on the witness stand. Defendant shall tell the truth no matter who asks the questions – investigators, prosecutors, judges or defense attorneys.** It is further understood that defendant shall lose the benefits of this agreement for any intentional deviation from the truth, and if a false statement occurs while he is on the witness stand, he shall be subjected to prosecution for perjury.

This agreement is automatically voided if Brandon Handshoe violates his obligation to tell the truth or refuses to testify in any grand jury or court proceeding." (43 CT 9008-09, bold in original; Pros. Ex. No. 66.)

Handshoe testified that he arranged a free talk on April 11, 2005 with the district attorney's office, the purpose of which was for the prosecutor to see if he had useful information. (22 RT 3803-04.) He initially turned down an offer for 22 years, holding out for 15 years, and agreeing to 17 years. Before taking the plea bargain, Handshoe had to agree the statement he provided on April 11, 2005 was true. (22 RT 3805-07.) Handshoe was unaware of the provision that he would lose the benefits of the agreement for any intentional deviation from the truth and that if he gave a false statement while testifying he would be subject to perjury prosecution. Handshoe knew of the provision that the agreement would be automatically

voided if he violated his obligation to tell the truth or refused to testify. (22 RT 3808.)

B. The Trial Court Erred In Denying The Defense's Motion To Exclude Handshoe's Testimony

A prosecutor may grant immunity to one jointly charged with a crime upon the condition that he or she testify fully and fairly as to the facts involved. (*People v. Green* (1951) 102 Cal.App.2d 831, 838-839.) Yet, when the grant of immunity places the witness under a strong compulsion to testify a particular way, the testimony is tainted by the witness's self-interest and its admission denies the defendant a fair trial. (*People v. Garrison* (1989) 47 Cal.3d 746, 768; *People v. Medina, supra*, 41 Cal.App.3d at p. 455; *People v. Jenkins* (2000) 22 Cal.4th 900, 1010.) The same principle applies to plea agreements. (*People v. Allen* (1986) 42 Cal.3d 1222, 1252, n. 5 ["Although we have never directly addressed the issue, it seems clear these principles are equally applicable when the accomplice testimony is obtained pursuant to a plea agreement rather than a grant of immunity."].) Such a strong compulsion may be created by a condition that the witness not materially or substantially change his or her testimony from the tape-recorded statement already given to law enforcement. (*People v. Boyer* (2006) 38 Cal.4th 412, 455.) This Court has upheld the admission of testimony subject to grants of immunity that suggested the prosecution believed the prior statement to be the truth, and where the witness understood his or her obligation was to testify fairly. (*Id.*)

"What is improper is not that what is expected from the informant's testimony will be favorable to the People's case, but that the testimony must be confined to a predetermined formulation. . .." (*People v. Meza* (1981) 116 Cal.App.3d 988, 994.) "[T]he admissibility of testimony of a witness

who has been offered immunity must turn on the facts of each case." (*People v. Manson* (1976) 61 Cal.App.3d 102, 134.)

> "[We] review the record and reach an independent judgment whether the agreement under which the witnesses testified was coercive and whether defendant was deprived of a fair trial by the introduction of the testimony, keeping in mind that generally we resolve factual conflicts in favor of the judgment below." (*People v. Jenkins, supra,* 22 Cal.4th at p. 1010.)

In this case, the testimony was inadmissible because it compelled Handshoe to testify in a particular way, i.e., to conform to his April 11, 2005 statement. The trial court erred in allowing the testimony to be presented to the jury, thereby violating appellant's constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (*People v. Medina, supra,* 41 Cal.App.3d at p. 456; *Beck, supra,* 447 U.S. 625, 637-638; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

In *People v. Medina, supra,* 41 Cal.App.3d 438, three witnesses testified under a grant of immunity subject to the condition that they would not give testimony that materially differed from their tape-recorded statements previously given to law enforcement officers. The language used in the orders applicable to two of the witnesses was subject to the conditions that "the witness not materially or substantially change her testimony from her tape-recorded statement already given to the law enforcement officers on May 10, 1972, and not resort to silence, whether or not under order of contempt, nor feign lapse of memory to at least that much given in the aforementioned tape-recorded statement, for otherwise this order of immunity will be void and of no effect." (*Id.* at pp. 442, 450.) The convictions were reversed on the appellate court's finding that the error involved in the use of such tainted testimony violated the fundamental right

to a fair trial. The court found that the immunity agreements went far beyond simply requiring that the witnesses testify fully and fairly as to their knowledge of the facts out of which the charges arose. (*Id.* at pp. 442, 450, 456.)

Similarly, here, Handshoe testified under an agreement that he would plead guilty to lesser charges and receive a reduced sentence in exchange for cooperating and testifying at appellant's trial. Handshoe confirmed in the agreement his statement to the police on April 11, 2005 was true, essentially verifying this was his version of events and it was the truth. Handshoe also promised in the agreement to tell the truth as a prosecution witness. (43 CT 9008-09.) What these agreement provisions meant was that Handshoe's testimony was not to differ from his April 11th statement or else the benefits to him from the agreement would be lost and he would be subject to a perjury prosecution. Thus, Handshoe was under a strong compulsion to testify to conform to his April 11th statement. His testimony was tainted by his self-interest and should not have been admitted.

Appellant's case may be distinguished from *People v. Boyer, supra,* 38 Cal.4th 412. There, the immunity agreement stated: "this immunity does not extend to any false testimony that may be given under oath by [him] in this case, which testimony would make [him] subject to prosecution for perjury." Further, "the witness has represented that [his] testimony … will be in substance as follows: Consistent with the tape recorded statements given to Fullerton Police Department, Detective Lewis, on December 17, 1982, … and December 20, 1982." (*Id.* at p. 455.) At the preliminary hearing, the magistrate explained to Kennedy that under the agreement he could be prosecuted for perjury if discovered that he lied. During cross-examination of Kennedy at the retrial, defense counsel asked Kennedy whether it was explained to him in court proceedings concerning the

immunity agreement "that if your testimony was inconsistent with what you had been telling the District Attorney ... that all bets were off and you could be prosecuted for this case again." Kennedy replied, "Yes." On redirect, however, the prosecutor asked Kennedy whether "you [were] ever told anything by a member of the District Attorney's office other than to testify truthfully," and whether "you [were] ever told what to testify to or how to testify." Kennedy answered both questions "no." (*Id.*) This Court decided Kennedy's testimony was not made inadmissible by his prior immunity agreement. According to this Court, the grant of immunity to Kennedy, by its terms, was based on his truthful testimony, which Kennedy himself represented would be in accordance with his prior statements. Thus, the agreement simply reflected the parties' mutual understanding that the prior statements were the truth, not that Kennedy must testify consistently with those statements regardless of their truth. Kennedy so confirmed on stand. (*Id.* at pp. 456-57.)

Here, however, different circumstances exist. Before taking the plea bargain, Handshoe had to agree that the statement he provided on April 11, 2005 was true. He testified to this during appellant's trial. (22 RT 3806-07.) Counsel asked him: "you had to agree before you could take the 17-year plea bargain, you had to agree that the statement you have provided to them on April 11th was a true statement; is that right?" Handshoe answered: "Yeah." (22 RT 3807.) So, unless he agreed to this, there would be no plea agreement. Thus, unlike the witness in *People v. Boyer, supra,* Handshoe's deal was contingent on him agreeing that his April 11, 2005 statement was true, and that his testimony would not deviate from this statement. (Contrast *People v. Garrison* (1989) 47 Cal.3d 746, 768-770 [Court declined to accept premise that the witness' bargain was conditioned on the truthfulness of his prior statements; there was no request that Roelle

confirm the accuracy of his assertions, agreement provided that Roelle would testify truthfully at Garrison's trial, and that Roelle already truthfully stated to the investigating detectives what happened in this case and Roelle's counsel advised court that Roelle had passed a polygraph examination showing that he had been truthful]; *People v. Reyes* (2008) 165 Cal.App.4th 426, 434 [court rejected challenge to co-defendant's testimony; "by its terms the interview provision did not qualify or restrict Vidales's agreement to testify truthfully, nor did it direct that he testify in conformity with his interview."]; *People v. Fields* (1983) 35 Cal.3d 329, 360 [Court rejected defendant's contention that testimony of Gail should have been excluded, finding the specific bargain was to testify as a witness for the prosecution as to the truth of those events that occurred]; *People v. Allen, supra,* 42 Cal.3d 1222, 1254 [Court found no violation of *Medina* rule by plea agreement where witness not told or led to believe that he would receive benefit of plea bargain only if his testimony conformed with his prior statement to police]; *People v. Gurule* (2002) 28 Cal.4th 557, 616-17 [plea agreement did not violate *Medina* rule where Garrison did not agree to testify in conformity with a prior statement and instead agreed to cooperate with law enforcement and provide truthful statements]; *People v. Adcox* (1988) 47 Cal.3d 207, 239 [plea agreement not coercive as nothing suggested Tillery was told or led to believe her plea bargain would remain in force only if she testified in conformity with her statements to the police].)

In short, the trial court erred in admitting Handshoe's testimony. The agreement compelled Handshoe to testify in accordance to what he told the police on April 11. As tainted testimony, its admission violated appellant's constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct.

2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

C. The Error Was Prejudicial

Because the trial court's error in admitting Handshoe's testimony implicated appellant's constitutional right to due process, a fair trial, the reversible error test set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] applies. This test provides that the appellate court must reverse a conviction unless the error is proven harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at pp. 23-24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Under this test, or even the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, whether there is a reasonable probability the defendant would have obtained a more favorable outcome absent the error (*id.* at p. 836), the judgment should be reversed.

First, the evidence was not inconsequential. It was the only testimony the prosecution had that put appellant directly at the crime scene. This case is not unlike *People v. Medina, supra,* 41 Cal.App.3d 438, where the court found the trial court's error in allowing the accomplice testimony was prejudicial. According to the court, aside from the deprivation of the constitutional right to a fair trial, the tainted evidence was the only evidence conceivably influencing the jury to reach a guilty verdict. (*Id.* at p. 456.) Similarly, here, Handshoe's testimony was the evidence that placed appellant in his Bronco driving to the Brucker residence, exiting the car with gun in hand, returning after the gunshots and admitting to having shot the man – testimony that may well have convinced the jury to convict him. (22 RT 3755-59, 3761-62.)

Increasing the harm was the factor that credibility was important in appellant's case. The prosecution and defense gave opposite views of the shooting. According to the prosecution, appellant shot Brucker during a robbery and burglary. (30 RT 5319.) According to the defense, appellant was not a perpetrator. The teenage witnesses did not testify truthfully and there was no credible independent evidence that implicated appellant in the crimes. (30 RT 5190-96, 5233-43.) So, the outcome of the case depended on who the jury believed. Testimony putting appellant at the crime scene as the shooter was bound to have an adverse effect on appellant's credibility, decreasing the chances the jury would believe the defense.

Additionally, the prosecution's case against appellant was not strong. Its witnesses were not credible. Peretti was an accomplice and drug user, giving inconsistent testimony about, among other things, appellant's hairpiece, Ritterbush, and the guns at the mobile home. She also lied about Huhn's involvement. Her father received the reward money of $10,000, and she received immunity for testifying in this case. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2559, 2646-50, 2653, 2706; 26 RT 4626-28, 4551-55; 27 RT 4668.) Peretti's father contacted Crime Stoppers and told Peretti to talk to the police, pressuring her to cooperate. (16 RT 2684, 2598.) He arranged Peretti's first talk with the sheriff's department about the Brucker shooting. (16 RT 2593.) Paulson lacked credibility as well. He had a criminal history and was a mentally unstable drug addict. (17 RT 2906-09.) The jury appeared unsure about the testimony of Peretti, Handshoe and Paulson; jurors asked for readbacks of their testimony. (7 CT 1464, 1466-67.) This factor by itself suggests the error was prejudicial. (*People v. Markus, supra,* 82 Cal.App.3d 477, 480.)

Further, many Broncos were in the area. DMV records from a search of all Broncos, model years 1985 through 1995, registered as of April 7, 2004

in east San Diego and Poway, showed 1501 Broncos in Alpine, El Cajon, Lakeside and Santee, and 559 in La Mesa, Lemon Grove and Poway. (27 RT 4843-44, 4851-52.) Investigator Roehmholdt showed Vangorkum a photo of a Bronco that was not appellant's Bronco. Vangorkum said that was the car he saw the day of the shooting. He said he would "place money on it." (24 RT 4313-14.)

So, given the importance of Handshoe's testimony to the prosecution and the lack of credibility of the prosecution's main witnesses against appellant, the error was not harmless beyond a reasonable doubt. Also, it was not improbable that had the evidence been excluded, appellant would have obtained a more favorable outcome. (*People v. Alcala* (1984) 36 Cal.3d 604, 635-36.) Even if there was an equal balance of reasonable probabilities, the judgment should still be reversed for such balance "necessarily means that. . . 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. Rowland* (1968) 262 Cal.App.2d 790, 798, citation omitted.) Yet, should this Court find it impossible to accurately state the effect on the jurors of the trial court's error, reversal is still required. (*People v. Spearman* (1979) 25 Cal.3d 107, 119.)

This argument aside, if this Court finds no prejudice at the guilt phase of the trial, there still was prejudice at the penalty phase of the trial, a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error not occurred. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) In that part of the trial, the jury was allowed to consider evidence presented at the guilt phase. (CALJIC No. 8.85; 8 CT 1642.) Testimony from Handshoe about appellant's role in the crimes may well have been what persuaded the jury to decide he was not only guilty but the most culpable defendant and should

be punished the maximum extent possible. This undermined appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

In sum, the error was prejudicial at both the guilt and penalty phase of the trial. The judgment should be reversed.

V. THE TRIAL COURT PREJUDICIALLY ERRED IN EXCLUDING DEFENSE EVIDENCE SUPPORTING APPELLANT'S DEFENSE THAT HE WAS NOT A PERPETRATOR, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, TO PRESENT A DEFENSE, AND TO A FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

A. Introduction

The defense sought to present evidence of third-party culpability through the testimony of Andrea Finch. She testified she was a friend of Huhn, Lee and Handshoe. She met them through her ex-boyfriend Ronnie Densford. Densford was her boyfriend for eight years beginning in 1992. She also knew Paulson because he used to live by her. (26 RT 4610-13.) After defense counsel began asking her about Densford, the prosecution objected. In chambers, the trial court asked for an offer of proof. (26 RT 4613-14.) Defense counsel said Densford was a good friend of Handshoe, Huhn and Finch and his home was a common meeting area for that group. During the time Handshoe and Huhn visited Densford's house, they had access to weapons, e.g., large caliber guns, disguises, and vehicles. Finch had seen Densford with Huhn and Handshoe showing off a large caliber pistol. (26

RT 4614-16.) Further, Densford was a mechanic, having access to different types of vehicles. Counsel also said even after Finch split with Densford, she would see him at his house until the summer of 2002. (26 RT 4615-16.) The trial court did not see the relevance given the Brucker shooting occurred in 2003; the relationship between Finch and Densford extended only through summer of 2002. (26 RT 4616.) The defense moved for a new trial alleging as a basis the trial court's ruling, arguing that the trial court's ruling denied appellant his constitutional right to due process, to present evidence for his defense. (8 CT 1676-79.) The trial court denied the motion. (38 RT 5736-37.)

The trial court erred because the evidence was important in supporting appellant's defense that he was not a perpetrator; it showed that Handshoe and Huhn could have obtained disguises and firearms from Densford, not appellant. The error violated appellant's constitutional rights to due process, a fair trial, to present a defense, and to a fair and reliable guilt and penalty determination. (*Beck, supra,* 447 U.S. 625, 637-638; U.S. Const. Amends. V, VI, VIII, XIV; Cal. Const. Art. I, §§ 7, 15, 17.)

B. The Trial Court Erred In Excluding Evidence Supporting Appellant's Defense He Was Not A Perpetrator

A defendant has the constitutional rights to due process and to present a defense. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302 [93 S.Ct. 1038, 35 L.Ed.2d 297, 312-13] ["The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."]; U.S. Const. Amends. V, VI, XIV; Cal. Const. Art. 1, § 7.) The right to present a defense includes the right to offer supporting evidence. (*In re Martin* (1987) 44 Cal. 3d 1, 29 ["The right to

offer [evidence] 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."].)

Yet, only relevant evidence is admissible. (Evid.Code, §§ 210, 350.) All relevant evidence is admissible unless excluded under the federal or state Constitutions or by statute. (Evid.Code, § 351; *People v. Benavides* (2005) 35 Cal.4th 69, 90.) The test of relevance is whether the evidence "tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive." (*People v. Benavides, supra*, 35 Cal.4th at p. 90.) The trial court has broad discretion in determining the relevance of evidence. (*People v. Crittenden* (1994) 9 Cal.4th 83, 132.)

The trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

Here, the excluded evidence was especially relevant. Given identity was a crucial issue in the case, i.e., whether appellant was one of the perpetrators, evidence supporting his defense that he was not involved was essential. Testimony disclosing there were persons other than appellant from whom Handshoe and Huhn could have obtained firearms, disguises and a Bronco made it less likely jurors would have rejected appellant's defense and assumed he was a perpetrator. The several months between the end of Finch's relationship with Densford and the Brucker shooting was an insignificant factor given the alleged conspiracy began as early as 2002. (16 RT 2523.) The trial court erred in its ruling, violating appellant's constitutional rights to due process, a fair trial, to present a defense, and to a fair and reliable guilt determination. (*Green v. Georgia* (1979) 442 U.S. 95, 97 [99 S.Ct. 2150, 60 L.Ed.2d 738]; *Chambers, supra,* 410 U.S. 284, 298-302 [93 S.Ct. 1038, 35 L.Ed.2d 297] [the exclusion of hearsay evidence denied defendant due process in that it deprived the defendant of

the right to present a defense]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, VI, XIV; Cal. Const. Art. I, §§ 7, 15.)

C. The Error Was Prejudicial

Because the trial court's error in excluding probative defense evidence is of federal constitutional dimension, implicating as it does a criminal defendant's fundamental rights to due process and to present a defense, the reversible error test set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] applies. (*People v. Taylor* (1980) 112 Cal. App.3d 348, 366 [*Chapman* standard for trial court's failure to admit relevant evidence].) This test provides that the appellate court must reverse a conviction unless the error is proven harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at pp. 23-24.) Under this standard, or even the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, whether it is reasonably probable a more favorable result to the defendant would have occurred absent the error (*id.* at p. 836), the judgment should be reversed.

Here, the excluded evidence bolstered appellant's defense that he was not a perpetrator. It showed another source for the Bronco, disguises and guns used in the Brucker shooting. In this respect, the Bronco, disguises and guns could have been explained by testimony that Densford was a good friend of Handshoe and Huhn, and his home was a common meeting area for that group. Densford was a mechanic, having access to different types of vehicles. Finch had seen Densford with Huhn and Handshoe showing off a large caliber pistol. When Handshoe and Huhn visited Densford's house, they had access to guns, disguises, and vehicles. (26 RT 4614-16.)

Also, credibility was a crucial factor in the case since the prosecution and defense gave different views of the shooting. According to the prosecution, appellant shot Brucker during a robbery and burglary. (30 RT 5319.) According to the defense, appellant was not a perpetrator. The teenage witnesses did not testify truthfully and there was no credible independent evidence that implicated appellant in the crimes. (30 RT 5190-96, 5233-43.) Thus, the case outcome depended on who the jury believed. Evidence rebutting the connection between appellant and the items used for the Brucker shooting would have enhanced the believability of appellant's defense. (Compare *People v. Roberson* (1959) 167 Cal.App. 2d 429, 432; *People v. Hernandez* (1977) 70 Cal.App.3d 271, 279, 282; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

Additionally, the prosecution's case against appellant was not strong. Its main witnesses were not credible. Peretti was an accomplice and drug user, giving inconsistent testimony on a number of subjects and lying about Huhn's involvement. Her father received the reward money and she received immunity for testifying. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2559, 2646-50, 2653, 2706; 26 RT 4626-28, 4551-55; 27 RT 4668.) Handshoe also was not believable. He used drugs at the time of the shooting, admitted guilt in the case and tried to obtain the best deal he could from the prosecution. (22 RT 3801-06, 3809, 3811-15.) Paulson had a criminal history and was a mentally unstable drug addict. (17 RT 2906-09.) The jury was not convinced; jurors asked for readbacks of their testimony. (7 CT 1464, 1466-67.) This factor by itself suggests the error was prejudicial. (*People v. Markus, supra,* 82 Cal.App.3d 477, 480.)

Further, evidence pertaining to appellant driving a Bronco did not prove anything. Many Broncos existed in the area. DMV records from a search of all Broncos with model years 1985 through 1995 and registered as of

April 7, 2004 in east San Diego and Poway, showed 1501 Broncos in Alpine, El Cajon, Lakeside and Santee, and 559 in La Mesa, Lemon Grove and Poway. (27 RT 4843-44, 4851-52.) Vangorkum was shown a photo of a Bronco that was not appellant's Bronco. Vangorkum said that was the car he saw the day of the shooting and he would "place money on it." (24 RT 4313-14.)

In short, the trial court's error was not harmless beyond a reasonable doubt. The excluded evidence was necessary for appellant's defense, the case outcome depended on a credibility determination and the jury was undecided. Also, it was not improbable that absent the trial court's error, appellant would have obtained a more favorable outcome. (*People v. Alcala* (1984) 36 Cal.3d 604, 635-36.) Even if there was an equal balance of reasonable probabilities concerning the effect of the trial court's error, the judgment should still be reversed for such balance necessarily means that 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. Rowland* (1968) 262 Cal.App.2d 790, 798.) Yet, should this Court find it impossible to accurately state the effect on the jurors of the trial court's error, reversal is still required. (*People v. Spearman* (1979) 25 Cal.3d 107, 119.)

If this Court finds no prejudice at the guilt phase of the trial, there still was prejudice at the penalty phase of the trial, i.e., a realistic possibility the jury would have rendered a different verdict absent the error. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) In that part of the trial, the jury was allowed to consider evidence presented at the guilt phase of the trial. (CALJIC No. 8.85; 8 CT 1642.) Evidence showing that there was another source for the Bronco, guns and other items used in the crimes could have persuaded jurors to conclude

appellant was not a perpetrator. The erroneous ruling violated appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

VI. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING THE DEFENSE'S REQUEST TO TEST A PRIMARY WITNESS FOR THE PROSECUTION, PERETTI, TO DETERMINE IF SHE WAS UNDER THE INFLUENCE OF DRUGS WHILE TESTIFYING BASED ON HER DEMEANOR IN COURT, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, TO CONFRONT ADVERSE WITNESSES, TO PRESENT A DEFENSE, AND TO A FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

A. Procedural History

During Peretti's testimony, defense counsel told the trial court she was concerned Peretti was under the influence while testifying based on her demeanor. According to counsel, Peretti was "constantly leaning, constantly locking her jaw, and is scratching herself. Given what I know of her history, I think it is – it would be quite likely that she is under the influence. And I think if she is, that the jurors would have a right to know about that." (16 RT 2546.) Counsel for Lee told the trial court the jury should see Peretti's demeanor; so "I would ask the court to be circumspect in asking her, as it did, to sit up and sit up straight, because I think it's actually creating a false image as to what she really is doing as a witness." (16 RT 2547.) The trial court asked if there was an objection to asking Peretti to speak up; Mr. Roake said that would be fine. The prosecution

contended no authority existed to order Peretti to have a drug test. The trial court denied the defense's request for a drug test. (16 RT 2547.)

B. The Trial Court Erred In Denying The Defense's Request To Test Peretti To Determine If She Was Under The Influence Of Drugs While Testifying Because There Was Probable Cause And Positive Results Were Relevant To Her Credibility

The state and federal Constitutions guarantee a criminal defendant the right to confront and cross-examine adverse witnesses. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [106 S.Ct. 1431, 89 L.Ed.2d 674]; U.S. Const., Amend. VI; Cal. Const., art. I, §15.) Central to the Confrontation Clause is the right of a defendant to examine a witness's credibility. (*Davis v. Alaska* (1974) 415 U.S. 308, 316 [94 S.Ct. 1105, 39 L.Ed.2d 347].) A defendant's constitutional right to confront adverse witnesses is violated when the cross-examination would have produced a significantly different impression of the witness's credibility. (*People v. Dement* (2011) 53 Cal.4th 1, 52.) As a fundamental element of due process of law, a criminal defendant must be afforded a meaningful opportunity to present a complete defense, subject to the limitations imposed by the rules of evidence. (*People v. Lucas* (1995) 12 Cal.4th 415, 464; U.S. Const. Amend. V, VI, XIV; Cal. Const., art. I, §§ 7, 15.)

A witness' drug intoxication may be a basis for impeaching his or her credibility. (*People v. Melton* (1988) 44 Cal.3d 713, 737.) It may even render the witness incompetent to testify. (*People v. Manson* (1976) 61 Cal.App.3d 102, 137.) A defendant must be allowed to explore fully any issue of the witness' competence or credibility by cross-examination subject to the witness' right against self-incrimination and against unwarranted bodily intrusion by agents of government. (*People v. Melton* (1988) 44

Cal.3d 713, 737; *Rochin v. California* (1952) 342 U.S. 165, 172-74 [72 S.Ct. 205, 96 L.Ed. 183]; U.S. Const. Amend. IV, V, VI, XIV.) Nonparties have rights equal to that of a party against unreasonable bodily searches. (*People v. Melton, supra,* 44 Cal.3d at p. 738.)

Before a court can order an intrusion beneath the body's surface, it must find the existence of probable cause to believe it will uncover material evidence. It then must weigh the degree of intrusion against the likelihood and importance of recovering the evidence. (*People v. Earp* (1999) 20 Cal.4th 826, 882; *People v. Melton* (1988) 44 Cal.3d 713, 738; *People v. Scott* (1978) 21 Cal.3d 284, 293.) The reviewing court evaluates the existence of probable cause by considering the totality of the circumstances. (*People v. Earp, supra,* 20 Cal.4th at p. 883.)

Here, there was probable cause for a drug test on Peretti. Her testimony disclosed she used drugs. She had used methamphetamine and marijuana with Huhn and was using on the day of the shooting at the trailer. (16 RT 2559, 2706.) Peretti also testified she bought methamphetamine and stole marijuana from her parents. (16 RT 2567, 2569.) She claimed to have stopped using methamphetamine as of January 3, 2003; but she smoked marijuana after that date. (16 RT 2570-71.) Ritterbush testified that in late 2002 and early 2003 Peretti used methamphetamine and marijuana. (26 RT 4551-53.) During Peretti's testimony, defense counsel told the trial court that Peretti was constantly leaning, locking her jaw, and scratching herself, and it was likely she was under the influence. (16 RT 2546.) This case is unlike *People v. Melton, supra,* 44 Cal.3d 713 where the Court found no probable cause for drug testing.

In *People v. Melton, supra,* 44 Cal.3d 713, at the end of the first day of cross-examination, defense counsel requested the court to order Boyd to have a blood or urine test for narcotics. Counsel pointed out that Boyd had

come to court that day wearing dark glasses, "appeared to have extremely heavy eyelids," and "was slow in his responses." (*Id.* at pp. 736-37.) The trial court thought Boyd's demeanor was due to being distraught at being a witness against his former lover. The court ordered the prosecutor to have an expert investigator administer a pupillary response test to Boyd. It declined to require chemical testing. The next day, the prosecutor reported that a pupillary test to Boyd was done and the investigator concluded Boyd was not under the influence of drugs. Over the defendant's renewed objection of inadequate testing, the court again expressed its view that Boyd just had "distraught lover's status" and had not been under the influence of anything during his previous day's testimony. (*Id.* at p. 737.)

The Court found the record did not establish probable cause to believe that Boyd was testifying under the influence of drugs. Defense counsel did not even raise the subject in his cross-examination of Boyd. While counsel expressed suspicion that Boyd's demeanor indicated drug use, the prosecutor and the trial judge, both of whom had equal opportunity to observe, strongly disputed this conclusion. The trial court made clear its perception that Boyd's heavy eyelids and slow responses were due to his reluctance to testify against his former love interest. Nonetheless, out of caution, the trial court allowed Boyd to undergo an external examination for signs of drug use and intoxication, the result being negative. There was no error. (*Id.* at pp. 738-39.)

By contrast, here, there was substantial testimony detailing Peretti's history of drug use and counsel told the court she looked under the influence while testifying. What counsel described appeared to be symptoms of current drug use. (16 RT 2546, 2559, 2570-71, 2706; 26 RT 4551-53.) The trial court did not make a specific finding that Peretti did not look under the influence. Also, there was no other reasonable

explanation for her demeanor. Further, it was not as if a preliminary drug assessment was done that suggested further testing would be unnecessary. Nothing was done to determine if Peretti was under the influence. Finally, the degree of intrusion was minimal when compared against the likelihood and importance of obtaining evidence relevant to the jury's determination of her credibility as a witness.

In short, the trial court erred. Probable cause existed to determine if Peretti was under the influence of drugs while testifying. Also, given the jury's determination of her credibility was an important issue in the case, any intrusion to her was outweighed by the importance of recovering evidence bearing on the issue. The trial court's error implicated appellant's constitutional rights to confront adverse witnesses and due process, a fair trial, to present a defense, as well as to a fair and reliable guilt determination. (*Delaware v. Van Arsdall, supra,* 475 U.S. 673, 679; *Davis v. Alaska, supra,* 415 U.S. 308, 316; *People v. Lucas* (1995) 12 Cal.4th 415, 464; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, VI, XIV; Cal. Const., Art. I, §§ 7, 15.)

C. The Error Was Prejudicial

Because the trial court's error in denying the defense's request to test Peretti for being under the influence of drugs while she was testifying is of federal constitutional dimension, implicating as it does a criminal defendant's federal constitutional rights, the reversible error test set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] applies. This test provides that the appellate court must reverse a conviction unless the error is proven harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at pp. 23-24.) Under this standard, or the standard set forth

in *People v. Watson* (1956) 46 Cal.2d 818, whether it is reasonably probable a more favorable result to the defendant would have occurred absent the error (*id.* at p. 836), the judgment should be reversed.

First, the case outcome depended on the jury's resolution of credibility since the prosecution and defense gave divergent views of the shooting. According to the prosecution, appellant shot Brucker during a robbery and burglary. (30 RT 5319.) According to the defense, appellant was not a perpetrator. The teenage witnesses did not testify truthfully and there was no credible independent evidence that implicated appellant in the crimes. (30 RT 5190-96, 5233-43.) Evidence minimizing Peretti's credibility would have enhanced the believability of appellant's defense. Peretti testified about events occurring prior to the shooting at the trailer, e.g., that appellant helped plan the crimes, assigned duties, pulled out a gun and said: "let's do this fast" and brought disguises. (16 RT 2512-15, 2533-34.) If not believing this testimony, jurors would have been hard-pressed to find evidence of appellant planning anything prior to the crimes. (Compare *People v. Roberson* (1959) 167 Cal.App. 2d 429, 432; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

Also, the prosecution did not have a solid case against appellant. Its case was built on the testimony of three untrustworthy teenage witnesses. Peretti was not credible, being an accomplice and drug user and giving inconsistent testimony on a number of things, e.g., appellant's disguise, Ritterbush, the guns at the mobile home and Huhn's involvement. Peretti's father also received the reward money and she received immunity for testifying in this case. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2559, 2646-50, 2653, 2706; 26 RT 4626-28, 4551-55; 27 RT 4668.)

Handshoe also was not believable. He was a heavy drug user at the time of the shooting, admitted guilt in the case and vied for the best deal he

could from the prosecution. (22 RT 3801-06, 3809, 3811-15.) Paulson lacked credibility as well. He admitted to having committed crimes and was a mentally unstable drug addict. (17 RT 2906-09.) Jurors were not convinced by the testimony of Peretti, Handshoe and Paulson; they asked for a readback of it. (7 CT 1464, 1466-67.) This factor by itself suggests the error was prejudicial. (*People v. Markus*, *supra,* 82 Cal.App.3d 477, 480.)

Further, there were many Broncos in the area. DMV records from a search of all Broncos models years 1985 through 1995, registered as of April 7, 2004 in east San Diego and Poway, showed 1501 Broncos in Alpine, El Cajon, Lakeside and Santee, and 559 in La Mesa, Lemon Grove and Poway. (27 RT 4843-44, 4851-52.) Vangorkum was shown a photo of a Bronco that was not appellant's Bronco. Vangorkum said that was the car he saw the day of the shooting. He said he would "place money on it." (24 RT 4313-14.)

In short, the trial court's error was not harmless beyond a reasonable doubt. The excluded evidence was crucial for appellant's defense because the case outcome depended on a credibility determination. Had drug testing shown Peretti was under the influence, it would have severely minimized her credibility. Also, it was not improbable that absent the error, appellant would have obtained a more favorable outcome. (*People v. Alcala* (1984) 36 Cal.3d 604, 635-36.) Even if there was an equal balance of reasonable probabilities concerning the effect of the trial court's error, the judgment should still be reversed for such balance necessarily means that 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. Rowland* (1968) 262 Cal.App.2d 790, 798.) Yet, should this Court find it impossible

to accurately state the effect on the jurors of the trial court's error, reversal is still required. (*People v. Spearman* (1979) 25 Cal.3d 107, 119.)

This argument aside, if this Court finds no prejudice at the guilt phase of the trial, there still was prejudice at the penalty phase of the trial, i.e., a realistic possibility the jury would have rendered a different verdict absent the error. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) In that part of proceedings, the jury was allowed to consider evidence presented in the guilt phase of the trial. (CALJIC No. 8.85; 8 CT 1642.) Should the jury have used evidence that Peretti was under the influence to reject her testimony, this might have resulted in the jury concluding appellant did not plan and was not the mastermind behind any crime. Any decreased culpability he had may well have resulted in the jury deciding that a penalty of death was not the appropriate penalty. The erroneous ruling violated appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, § 7, 15, 17.)

VII. THE TRIAL COURT PREJUDICIALLY ERRED IN GRANTING THE PROSECUTION'S REQUEST TO HAVE THE JURY VIEW AND LISTEN TO APPELLANT'S BRONCO TWO YEARS AFTER THE SHOOTING, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

A. Procedural History

The prosecution sought to have appellant's Bronco towed from the sheriff's site in Santee and brought to the courthouse for a demonstration

before the jury. Defense counsel said the loudness of the car was never an issue; the issue was the source of its sound, a defective muffler or a modified exhaust system. (21 RT 3591-92.) Investigator Baker recently saw the car on May 24, 2005 and found the muffler was rusted and wire was used to hold it in place. The car was stored outside for the last two years and its motor had not been running. With the weather conditions and accelerated muffler deterioration, the car would not sound like it did in 2003. (21 RT 3592-94.) The prosecution asserted witnesses testified about the loudness of the car and the jury would benefit by hearing its sound. (21 RT 3593-94.) The trial court found the evidence "a tidbit of circumstantial evidence." It was relevant to testimony that the Bronco had unique characteristics. (21 RT 3696.)

Later, defense counsel asked how the car would be transported. The prosecution said it would be put on a flat bed tow truck, that there was a pulley system that hooked under the car. Defense counsel reminded the court that a wire attached the muffler. (21 RT 3656-57.) Counsel said the conditions of this experiment were dissimilar to conditions at the time of the shooting. Back then, the car was traveling at 25-35 miles per hour on an elevated street and seen by witnesses from 75 yards away. In the last two years the car had been sitting outside at the sheriff's lot in all types of weather. The conditions were so dissimilar that it was misleading to the jury. (22 RT 3659-60.) The prosecution claimed this would not be an experiment as the car would be started so jurors could hear its sound. The trial court said the prosecution was just trying to show the car had a defective exhaust system. (22 RT 3661.) Defense counsel asserted that the purpose was to corroborate Vangorkum's testimony. The trial court disagreed. (22 RT 3661.) Defense counsel added Vangorkum never heard the car motor running and idling. He heard the car moving along a street at

about 25-35 miles per hour. So, what the prosecution was trying to show was not relevant. (22 RT 3662.) The trial court decided foundational testimony would be given prior to the demonstration to the jury. (22 RT 3662-64.)

Detective Goldberg testified he impounded appellant's Bronco at the sheriff's lot on May 13, 2003. The car had been there until this day, June 3, 2005. (22 RT 3667-68.) The last time it was started was within the last two months. (22 RT 3668.) On cross-examination Detective Goldberg testified nothing covered or protected the Bronco at the impound facility. To bring it to the courthouse, the car was pulled on the tow truck. A hook on a pulley was placed under the car. (22 RT 3670-71.) Over the last two years the car was started twice. (22 RT 3673.)

The jury was escorted outside to hear the Bronco. (22 RT 3679-80.) Defense counsel said she had not expected the car to be still on top of the tow truck. It was positioned near buildings, four feet from the ground on the truck. That truck had a metal base. If the car were started in this position, the sound would reverberate, sounding louder. Also, the muffler was very visible. (22 RT 3680-82.) The trial court allowed the jury to view and listen to the car. (22 RT 3683-84.)

B. The Trial Court Erred In Allowing The Prosecution Have The Jurors View And Listen To Appellant's Bronco

An important element of a fair trial is that the jury consider only relevant and competent evidence bearing on a defendant's guilt or innocence. (*Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [88 S.Ct. 1620, 20 L.Ed.2d 476]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384.) Inclusion of relevant evidence is tantamount to a fair trial. Similarly,

exclusion of prejudicial evidence can safeguard the defendant's rights as much as that of the prosecution. (*People v. Delarco* (1983)142 Cal.App.3d 294, 305-06; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7.)

Except as provided by statute, all relevant evidence is admissible. (*People v. Crittenden* (1994) 9 Cal.4th 83, 132; Evid. Code, §§ 350, 351.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*People v. Garceau* (1993) 6 Cal.4th 140, 177, 93, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93; Evid. Code § 210.) Nonetheless, a trial court has the discretion under Evidence Code section 352 to exclude otherwise admissible evidence if the prejudicial effect of the evidence outweighs its probative value. (Evid. Code § 352; *People v. Rivera* (2011) 201 Cal.App.4th 353, 362-63.)

In exercising its discretion under Evidence Code section 352, a trial judge must carefully balance the probative value of the evidence with the danger of prejudice from its admission. "[D]iscretion should favor the defendant in cases of doubt because in comparing prejudicial impact with probative value the balance 'is particularly delicate and critical where what is at stake is a criminal defendant's liberty.'" (*People v. Delarco, supra,* 142 Cal.App.3d 294, 306, citing *People v. Lavergne* (1971) 4 Cal.3d 735, 744.)

Evidence of a demonstration is admissible when the party seeking to introduce the evidence shows it is relevant, its conditions and those existing at the time of the alleged occurrence are shown to be substantially similar, and the evidence will not confuse or mislead the jury but instead assist jurors in determining the facts. (*People v. Jones* (2011) 51 Cal.4th 346, 375; *People v. Boyd* (1990) 222 Cal.App.3d 541, 565 [party seeking to introduce evidence of experiment must show as foundational facts the

relevance, similar conditions, and that it would not mislead jury]; *People v. Rivera, supra,* 201 Cal.App.4th 353, 363; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1114 [probative value of evidence of crime reenactment depends on its similarity to the events and conditions that existed at time of crime].)

An appellate court reviews a trial court's ruling concerning the admissibility of evidence for an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) A reviewing court will find the trial court abused its discretion when, considering all the circumstances, there is a clear showing that court exceeded the bounds of reason. (*People v. Martinez* (1998) 62 Cal. App.4th 1454, 1459.)

In this case, the Bronco had been sitting outside, unprotected and exposed for two years. For the jury, the prosecutor had the Bronco put on a tow truck, near buildings and idling, conditions not remotely similar to those existing at the time witnesses allegedly saw it, i.e., traveling at 25-35 miles per hour. Given the dissimilarity in circumstances and condition of the car, the demonstration lacked relevance, was misleading and the trial court erred in allowing it, violating appellant's constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (*Bruton, supra,* 391 U.S. 123, 131, fn. 6; *McKinney v. Rees, supra,* 993 F.2d 1378, 1384; *People v. Delarco, supra,* 142 Cal.App.3d at pp. 305-06; *People v. Boyd* (1990) 222 Cal.App.3d 541, 565-66; *People v. Vaiza* (1966) 244 Cal.App.2d 121, 126-27; *Beck, supra,* 447 U.S. 625, 637-638; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

In *People v. Boyd, supra,* 222 Cal.App.3d 541, the defendants sought to introduce a film which purportedly reproduced lighting conditions at the crime scene. The purpose of the film was to demonstrate that a witness could not have seen events clearly enough to identify the perpetrators. (*Id.*

at p. 565.) The trial court viewed the film and decided the foundational requirements for its admission had not been met. The court explained that it thought the human eye could see more than the film showed, and that no witness testified that the film was an accurate representation of the lighting conditions on the night of the crime. The appellate court found no error in the trial court's ruling. (*Id.* at pp. 565-66.) According to the appellate court, LeRoy attempted to reproduce the lighting conditions as best he could; however, he conceded that the angle of the moon was not the same as on the night of the murder. Moreover, he did not position a truck with its headlights on at the scene or reproduce the reflection of light from the chrome grille of a parked car. LeRoy was also unsure whether the foliage on a tree at the site and the resulting pattern of shadows were the same in April when he made the film as they had been the previous September. Because the purpose of the film was to demonstrate to the jury the lighting conditions under which witnesses were able to view the events of the crime, these conditions assumed great significance. The trial court reasonably concluded that the lighting conditions portrayed on the film were not sufficiently similar to the lighting conditions on the night of the crime. (*Id.* at p. 566.)

In *People v. Vaiza, supra,* 244 Cal.App.2d 121, four pictures were admitted into evidence to show lighting conditions at the scene of the crime. The photographs were taken at approximately 7:30 p.m. many months after the event. The lighting conditions at the time of the crime were those existing at 2:00 a.m. (*Id.* at pp. 126-27.) According to the appellate court, the trial court abused its discretion in admitting the pictures. Since these were offered solely to show the lighting conditions at the time of the crime, it was incumbent on the prosecution to lay a proper

foundation by having the pictures taken at the same hour of the morning the incident happened. (*Id.* at p. 127.)

Similarly, here, the conditions of the demonstration were unlike those during the crimes. Jurors heard the Bronco not as the witnesses allegedly encountered it, traveling down a street in a neighborhood, but idling in a lot surrounded by buildings. For two years the Bronco had been parked outside and unprotected in a lot and its motor started only twice. The muffler was held in place by wire. (21 RT 3592-94; 22 RT 3673.) It was positioned four feet from the ground on a truck. That truck had a metal base which made the sound reverberate. (22 RT 3680-82.) Since the demonstration was offered solely to show the jury how the car sounded at the time of the crimes, i.e., to bolster the testimony of the prosecution's witnesses, it was incumbent on the prosecution to lay a proper foundation by presenting the Bronco in substantially similar conditions. (Compare *People v. Rivera, supra,* 201 Cal.App.4th at pp. 364-65 [demonstration presented under conditions not substantially similar to the crime did not help the jury's understanding of the case, thereby diminishing the minimal probative value].)

In short, the trial court erred in allowing the Bronco demonstration. The conditions were so dissimilar, eliminating any probative value, and it was misleading to the jury. The error implicated appellant's constitutional rights to due process, a fair trial, and to a fair and reliable guilt determination. (*Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [88 S.Ct. 1620, 20 L.Ed.2d 476]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384; *People v. Delarco* (1983) 142 Cal.App.3d 294, 305-06; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

C. The Error Was Prejudicial

Where federal constitutional rights are implicated, the standard for prejudice is that set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705], i.e., whether the error is harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at pp. 24-26 [87 S.Ct. 824, 17 L.Ed.2d 705].) As the trial court's error violated appellant's constitutional right to a fair trial, the *Chapman* standard for reversal should apply. Yet, even under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, whether there is a reasonable probability the defendant would have received a verdict more favorable absent the error (*id.* at p. 836), the judgment should be reversed.

The evidence buttressed the prosecution's case on the central issue in the case, whether appellant was a perpetrator. Despite evidence of all the other Broncos in the area registered as of April 7, 2004, model years 1985 through 1995 - over 2000 in East San Diego County and Poway - if jurors thought the Bronco was appellant's, they likely would conclude he was a perpetrator. (27 RT 4843-44, 4851-52.) Hearing the sound of the Bronco during the demonstration, made louder by the hole in the muffler, surrounding buildings, idling and placement on the truck, jurors were likely to have believed the testimony of the prosecution witnesses who claimed to have heard a loud car and inferred that the witnesses saw appellant's Bronco.

Making matters worse was the factor that the prosecution did not have an overwhelming case against appellant. Its case was built on the testimony of three teenage witnesses who were not believable. Peretti was not credible, being an accomplice and drug user, and giving inconsistent testimony.

Peretti's father also received the reward money for providing information about the case and she received immunity for testifying. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2559, 2646-50, 2653, 2706; 26 RT 4626-28, 4551-55; 27 RT 4668.) Peretti's father contacted Crime Stoppers and told Peretti to talk to the police, pressuring her to cooperate. (16 RT 2684, 2598.)

Handshoe also lacked credibility. He was a heavy drug user at the time of the shooting, admitted guilt in the case and tried to extract the best deal he could from the prosecution. (22 RT 3801-06, 3809, 3811-15.) Paulson lacked credibility as well. He admitted to having committed crimes and was a mentally unstable drug addict. (17 RT 2906-09.) Jurors were not convinced from the testimony of Peretti, Handshoe and Paulson. They asked for readbacks of their testimony. (7 CT 1464, 1466-67.) This factor by itself suggests the error was prejudicial. (*People v. Markus*, *supra,* 82 Cal.App.3d 477, 480.) Also, Investigator Roehmholdt showed Vangorkum a photo of a Bronco that was not appellant's Bronco. Vangorkum said that was the car he saw the day of the shooting. He said he would "place money on it." (24 RT 4313-14.)

So, given the nature of the evidence, buttressing the prosecution's case on the key issue of identity, and the lack of a strong prosecution case, the error was not harmless beyond a reasonable doubt. Also, it was not improbable that had the evidence been excluded, appellant would have obtained a more favorable outcome. (*People v. Alcala* (1984) 36 Cal.3d 604, 635-36.)

Even if there was an equal balance of reasonable probabilities, the judgment should still be reversed for such balance "necessarily means that. . . 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.*

Rowland (1968) 262 Cal.App.2d 790, 798, citation omitted.) Yet, should this Court find it impossible to accurately state the effect on the jurors of the trial court's error, reversal is still required. (*People v. Spearman* (1979) 25 Cal.3d 107, 119.)

Even if this Court finds no prejudice at the guilt phase of the trial, there still was prejudice at the penalty phase of the trial, a realistic possibility the jury would have rendered a different verdict absent the error. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) There, the jury was allowed to consider evidence presented at the guilt phase of the trial. (CALJIC No. 8.85; 8 CT 1642.) Evidence supporting the inference the Bronco witnesses heard was indeed appellant's Bronco, jurors would have been hard-pressed to believe appellant was not a perpetrator. Rejecting his defense and concluding he was not only a perpetrator but the one who shot Brucker, jurors likely thought he deserved the maximum penalty. The erroneous ruling violated appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

VIII. THE TRIAL COURT PREJUDICIALLY ERRED IN ALLOWING THE PROSECUTION TO IMPEACH JAMES STEVENS WITH HIS PRIOR FELONY CONVICTIONS, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

A. Procedural History

Defense counsel told the trial court that Stevens had impeachable felonies. However, some were questionable: his escape charge and robbery with a firearm. Counsel argued it was unnecessary to mention the firearm. Counsel also was unsure if the escape crime was one of moral turpitude. (27 RT 4709.) Counsel said Stevens had two unlawful driving or taking of vehicle without owner's consent offenses in 1986, and one in 1987, 1992, and 1993 (Vehicle Code section 10851). He also had a robbery conviction in 1996 (Penal Code section 211). Counsel argued it was unnecessary to go back to 1986, almost 20 years, that it was better to limit the offenses to those from 1993 forward. Counsel based his objections on Evidence Code section 352. (27 RT 4709, 4714.)

The trial court said the escape offense involved readiness to do evil and was impeachable if a felony. (27 RT 4714.) Also, the robbery was with a firearm use enhancement (Penal Code section 12022.5); this was permissible. (27 RT 4715.) The trial court said the crimes being old did not neutralize their probative value because it was an uninterrupted sequence of criminal activity. The prosecutor could ask about four or five of the priors. (27 RT 4715.)

Stevens' testified his criminal history included convictions for auto theft in 1986, 1987, 1992, and 1993, a conviction for escape from 1986, and a 1996 conviction for robbery with use of a firearm. (27 RT 4800-01.)

B. The Trial Court Erred In Allowing The Prosecution To Impeach Stevens With Evidence Of His Prior Felony Convictions Because The Prejudice From Its Admission Outweighed Any Impeachment Value

A witness may be impeached with a prior conviction of any felony evincing moral turpitude, defined as the "general readiness to do evil." (*People v. Castro* (1985) 38 Cal.3d 301, 313-316.) Yet, a trial court may still exclude evidence that attacks the credibility of a witness under Evidence Code section 352 if the prejudice to the defendant from the inquiry outweighs its probative value. (*People v. Castro, supra,* 38 Cal.3d 301, 312-13; *People v. Clark* (2011) 52 Cal.4th 856, 931.) Factors considered in an Evidence Code section 352 analysis include whether the conduct bears adversely on the person's honesty or integrity and the nearness or remoteness of the prior conduct. (*People v. Collins* (1986) 42 Cal.3d 378, 391 ["Properly understood, those factors [*People v. Beagle*] remain relevant to any application of section 352 even after the adoption of section 28(f)."]; *People v. Beagle* (1972) 6 Cal.3d 441, 453.) "When the witness is not the defendant, remoteness of the conviction is a prominent factor." (*Piscitelli v. Salesian Soc.* (2008) 166 Cal.App.4th 1, 12.)

The question of whether a trial court erred in allowing the impeachment of a witness with evidence of his or her prior felony conviction is reviewed for an abuse of discretion. (*People v. Clark, supra,* 52 Cal.4th 856, 932.) A reviewing court will find the trial court abused its discretion when, considering all the circumstances, there is a clear showing that court exceeded the bounds of reason. (*People v. Martinez* (1998) 62 Cal.App.4th 1454, 1459.)

Here, the offenses, some almost 20 years old and all but one over a decade old, were remote and should have been excluded based on the prejudice outweighing any probative value. Although there is no "consensus among courts as to how remote a conviction must be before it is too remote" (*People v. Burns* (1987) 189 Cal.App.3d 734, 738), the use of a 10 year period as a presumptive cut-off date for prior convictions is within a court's discretion. (*People v. Pitts* (1990) 223 Cal.App.3d 1547, 1554.)

As to the robbery offense, even though an offense of moral turpitude (*People v. Clark, supra,* 52 Cal.4th 856, 932) and Stevens was incarcerated until the year 2000 (27 RT 4748) (*People v. Turner* (1994) 8 Cal.4th 137, 200, abrogated on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536 ["We are hesitant to characterize defendant's diminished ability to commit crimes because of his imprisonment for all but several months from 1976 until the 1987 retrial as a 'legally blameless life.'"]), it still was of minimal value in assessing Stevens' credibility. Robbery has been held to be of lesser value in assessing a witness' credibility. (*People v. Fries* (1979) 24 Cal.3d 222, 229, superseded by statute on other grounds as stated in *People v. Castro* (1985) 38 Cal.3d 301[convictions for theft offenses, e.g., robbery and burglary, are somewhat less relevant on the issue of credibility than are crimes such as perjury and hence are entitled to less weight].)

Further, the priors were prejudicial and cumulative. They portrayed Stevens as a long-time criminal. The prosecution did not need all of them to inform jurors that Stevens had a criminal history. Although there is no limit on the number of prior convictions used to impeach a witness' credibility (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 927), the jury already had testimony disclosing Stevens had been in prison and this is where he met appellant. (27 RT 4747.) Jurors would not have thought that Stevens had no prior convictions. (*People v. Mendoza, supra,* 78 Cal.App.4th 918, 927

[impeachment with only one or two priors would have given defendant false aura of veracity as it would have suggested he led a legally blameless life].)

In short, under Evidence Code section 352, the trial court erred in admitting evidence of Stevens' priors to impeach him. They had minimal value in assessing his credibility and any such value was outweighed by the prejudice from their admission. The error violated appellant's constitutional right to a fair and reliable guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7, 15.)

C. The Error Was Prejudicial

Should this Court determine that the trial court erred in allowing the prosecution to impeach Stevens with his priors, it must reverse if it finds a reasonable probability appellant would have received a verdict more favorable absent the error. (*People v. Frank* (1985) 38 Cal.3d 711, 732; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Under this standard, this Court should reverse.

First, the evidence minimized appellant's defense. Stevens was an important witness for appellant's defense, testifying about appellant's whereabouts on April 14, appellant's demeanor that day, Stevens' use of the Bronco, and appellant's physical appearance. (E.g., 27 RT 4751-53, 4762-63, 4769, 4773.) Also, contrary to what Northcutt said, Stevens testified he was never in a room with appellant while coverage of Brucker's homicide was aired on the television and appellant purportedly told someone to "shut the fuck up." In mid-April, Stevens saw news coverage about the Brucker homicide. But, appellant was not with Stevens at the

time. (27 RT 4763; 24 RT 4169-70.) Hearing Stevens was convicted of all these crimes, jurors were unlikely to believe anything he had to say.

The probable bias against him had to have adversely affected the verdict as the prosecution's case was not strong, based as it was on the testimony of three teenage witnesses who had no credibility. Peretti was not believable, being an accomplice and drug user, and giving inconsistent testimony. She lied about Huhn's involvement, her father received the reward money of $10,000 for providing information on the case, and she received immunity for testifying. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2646-50, 2653, 2559, 2706; 26 RT 4626-28, 4551-55; 27 RT 4668.)

Handshoe also was not credible. He was a heavy drug user at the time of the shooting, admitted guilt in the case and tried to manage the best deal he could from the prosecution. (22 RT 3801-06, 3809, 3811-15.) Paulson lacked credibility too. He admitted to prior crimes and was a mentally unstable drug addict. (17 RT 2906-09.) The jury was not convinced after hearing testimony of Peretti, Handshoe and Paulson; jurors asked for readbacks of their testimony. (7 CT 1464, 1466-67.) This factor by itself suggests the error was prejudicial. (*People v. Markus, supra,* 82 Cal.App.3d 477, 480.)

Further, there were over 2000 Broncos in the area. DMV records from a search of all Broncos, model years 1985 through 1995, registered as of April 7, 2004 in east San Diego and Poway, showed 1501 Broncos in Alpine, El Cajon, Lakeside and Santee, and 559 in La Mesa, Lemon Grove and Poway. (27 RT 4843-44, 4851-52.) Vangorkum was shown a photo of a Bronco that was not appellant's Bronco. Vangorkum said that was the car he saw the day of the shooting. He said he would "place money on it." (24 RT 4313-14.)

Increasing the prejudice was the importance of credibility in the case; the prosecution and defense gave divergent views of the shooting. According to the prosecution, appellant shot Brucker during a robbery and burglary. (30 RT 5319.) According to the defense, appellant was not a perpetrator. The teenage witnesses were not truthful and there was no credible evidence implicating appellant in the crimes. (30 RT 5190-96, 5233-43.) Thus, the case outcome depended on who the jury believed. Evidence minimizing the credibility of appellant's witness diminished the believability of appellant's defense, making it more likely jurors would reject it.

So, given the nature of the evidence, diminishing the credibility of an important defense witness, the lack of a strong prosecution case against appellant, and the importance of credibility, the error was not harmless beyond a reasonable doubt. It also was not improbable that had the evidence been excluded, appellant would have obtained a more favorable outcome. (*People v. Alcala* (1984) 36 Cal.3d 604, 635-36.) Even if there was an equal balance of reasonable probabilities, the judgment should still be reversed. (*People v. Rowland, supra,* 262 Cal.App.2d 790, 798.) Yet, if it is impossible to accurately state the effect on the jurors of the error, reversal is still required. (*People v. Spearman, supra,* 25 Cal.3d 107, 119.)

Even if this Court finds no prejudice at the guilt phase of the trial, there still was prejudice at the penalty phase of the trial, i.e., a realistic possibility the jury would have rendered a different verdict absent the error. (*People v. Hamilton, supra,* 45 Cal.4th 863, 917; *People v. Brown, supra,* 46 Cal.3d 432, 448.) The jury was allowed to consider the evidence presented in the guilt phase of the trial in the penalty part of it. (CALJIC No. 8.85; 8 CT 1642.) Evidence minimizing the believability of appellant's witness, making appellant's defense less credible, gave the jury a reason to reject his defense and conclude the prosecution had proved its case. Believing

appellant was the most culpable defendant, jurors likely concluded he should be punished to the maximum extent allowed. The erroneous ruling violated appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

IX. THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING INVESTIGATOR BAKER'S TESTIMONY THAT TRAVIS NORTHCUTT SAID APPELLANT PREDICTED SOMETHING BIG WOULD HAPPEN INVOLVING A SAFE, VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND TO A FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

A. Procedural History

The prosecution asked its witness, Travis Northcutt, if appellant talked of committing a crime involving a safe. Northcutt answered he did not. (20 RT 3106.) The prosecution asked him if he remembered telling Investigator Baker that appellant told him that "you were coming along and that something big was going to happen, a big hit that involved a safe, and that he then asked if you wanted to be part of it." Northcutt said he did not recall. (20 RT 3506.) The prosecution asked if he remembered saying this to Investigator Baker. Northcutt said he did not. (20 RT 3506.) The prosecution asked: "So is it your testimony that you did not say it or that you don't recall?" Northcutt said: "I don't recall." (20 RT 3506.) The prosecution asked the same question again. Defense counsel objected and the trial court overruled the objection. Northcutt said: "No, I don't recall."

(20 RT 3510.) The prosecution then asked: "If Mr. Baker said that's what you said, would you agree that's what you said?" Northcutt said: "provided that I – that I don't recall, then I'm – yeah, I really can't answer that." (20 RT 3510.) The prosecution later asked: "This about – about Eric telling you that he was involved in something big and that it involved a safe and that – and asking you if you wanted to be involved with it?" (20 RT 3520-21.) Northcutt said that would have never happened. (20 RT 3521.) The prosecution asked Northcutt if he remembered Investigator Baker telling him when he came to his house that he thought Northcutt would be asked about that. Northcutt said: "Yes." (20 RT 3521.) The prosecution asked: "And do you remember, then specifically telling him that you weren't even sure if Eric actually told you this and that you may have just thought it up?" Northcutt said: "Yes. It never happened." (20 RT 3521.) The prosecution asked: "It never happened?" Northcutt responded: "No. It couldn't possibly, no, no." (20 RT 3521.)

Later in the trial, the prosecution asked Investigator Baker if during his interview with Northcutt, Northcutt said that appellant told him he was coming along. Defense counsel objected and contended the prosecution was leading the witness. (24 RT 4169.) The prosecution said this was impeachment. The trial court said Northcutt was asked this and a foundation for a prior inconsistent statement existed. (24 RT 4169.) The prosecution asked Investigator Baker if Northcutt told him that appellant told him he was coming along and that something big was going to happen, a big hit that involved a safe, and if Northcutt wanted to be part of it. Investigator Baker said he did say that. (24 RT 4169.)

B. Investigator Baker's Statement Was Inadmissible Hearsay Because Although Appellant's Alleged Statement Constituted An Admission, Northcutt's Statement Relating What Appellant Said Constituted Inadmissible Hearsay

"An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." (*Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [88 S.Ct. 1620, 20 L.Ed.2d 476]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384.)

A defendant's constitutional right to confront witnesses is violated by the admission of hearsay[7] evidence unless the prosecution can show the evidence bears adequate indicia of reliability. (*People v. Trimble* (1992) 5 Cal.App.4th 1225, 1233; *Idaho v. Wright* (1990) 497 U.S. 805, 815 [110 S.Ct. 3139, 111 L.Ed.2d 638].) When the proffered evidence qualifies under a firmly rooted hearsay exception, reliability can be inferred. Where it does not, the evidence must be excluded absent a showing of particularized guarantees of trustworthiness. (*People v. Trimble, supra,* 5 Cal.App.4th 1225, 1233.)[8]

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[7] Evidence Code section 1200 provides as follows: "(a)'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

(b) Except as provided by law, hearsay evidence is inadmissible.

(c) This section shall be known and may be cited as the hearsay rule."

[8] The Sixth Amendment's Confrontation Clause requires exclusion of testimonial statements of a witness unless the defendant had an opportunity to cross-examine and the witness is unavailable to testify. (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54 [124 S.Ct. 1354, 1369, 158 L.Ed.2d 177].) The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (*People v. Dement* (2011) 53 Cal.4th 1, 23; *Crawford, supra,* 541 U.S. at p. 60.)

Multiple hearsay is not excluded so long as each level of hearsay comes within an exception. (*Padilla v. Terhune* (9th Cir. 2002) 309 F.3d 614, 621; *People v. Zapien* (1993) 4 Cal. 4th 929, 951-52; Evid. Code, § 1201.)

The decision on the admissibility of the evidence is reviewed for an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

In this case, the trial court erred in admitting Investigator Baker's testimony relating appellant's statement to Northcutt. His testimony on this point constituted inadmissible multiple hearsay since each statement did not come within a hearsay exception. The trial court's error in admitting the evidence implicated appellant's constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (*Bruton, supra,* 391 U.S. 123, 131, fn.6 [88 S.Ct. 1620, 20 L.Ed.2d 476]; *McKinney, supra,* 993 F.2d 1378, 1384; *People v. Lew* (1968) 68 Cal.2d 774, 778-80; *People v. Schmaus* (2003)109 Cal.App.4th 846, 857-59; *Beck, supra*, 447 U.S. 625, 637-638; U.S. Const. Amend. V, XIV; Cal. Const. Art. I, § 7, 15.)

In *People v. Lew, supra,* 68 Cal.2d 774, the defendant argued the trial court erroneously allowed into evidence certain hearsay statements to show the state of mind of the victim, Karen, at the time of her death. According to the defendant, he retrieved the gun from another room while with Karen. While both sat in a chair the gun accidentally discharged, striking Karen in the left temple. The defendant became hysterical when he discovered Karen was not breathing. He sought help; but Karen died a short time later. (*Id.* at pp. 776-77.) The hearsay statements were four statements consisting of threats allegedly made by the defendant to Karen which she then related to friends, and three statements consisting of Karen's remarks to friends which showed her attitude towards the defendant. The testimony was introduced to show Karen's state of mind prior to her death. (*Id.* at p. 778.)

According to the Court, had any witness overheard the defendant threaten Karen, that witness could have properly testified to the content and manner of the threat. Such testimony would have been relevant to the defendant's intent and admissible under the admissions exception to the hearsay rule. Yet, not one prosecution witness actually heard the defendant threaten Karen. While threats made by the defendant are material, they must be testified to by the person who heard them, not by someone who was told by someone else they were made. As double hearsay, the alleged threats could not be admitted under the admissions exception. (*Id.* at pp. 778, 780.)

Similarly, here, the evidence should have been excluded. Investigator Baker did not hear appellant's statement. Northcutt related it to him and no hearsay exception applied for Northcutt's statement to Baker. Further, the statement was not trustworthy. No one else testified about this conversation. Also, Northcutt could not specify when he heard appellant say something big would happen involving a safe; he just offered a time frame between mid-December of 2002 and April of 2003. (24 RT 4183.) (Compare *People v. Schmaus, supra,* 109 Cal.App.4th 846, 857 [where statement of Arce relating Schmaus's statement may qualify within hearsay exception, Schmaus's statement would not; "at least one of the statements-the alleged Schmaus statement-is not admissible, and therefore the law allowing double hearsay is not applicable."]; contrast *People v. Lancaster* (2007) 41 Cal.4th 50, 82 [Court rejected defendant's argument that defendant's statement to Taylor as related by Marston not trustworthy when another witness would corroborate statement].)

1. Prior Inconsistent Statement

Under Evidence Code section 1235, a witness' statement is not made inadmissible by the hearsay rule if the statement is inconsistent with his or her testimony at the hearing, the witness was given an opportunity to explain or deny the testimony, and the witness has not been excused from further testimony. (Evid. Code, §§ 770, 1235[9]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1144.)

Here, Northcutt's statement was not a prior inconsistent statement. He said on two occasions when asked if appellant said something big was going to happen, a big hit that involved a safe, that he did not recall. (20 RT 3506, 3510.) A witness' statement he or she does not remember does not constitute an inconsistent statement. (Pen. Code, § 1235; *People v. Parks* (1971) 4 Cal.3d 955, 960; *People v. Sam* (1969) 71 Cal.2d 194, 209-10.)

In *People v. Parks, supra,* 4 Cal.3d 955, when asked at trial about the substance of her conversation with the defendant during their ride, Sharon could not recall what he said. The prosecution attempted to refresh Sharon's memory by reading from the police report. Sharon remembered some of the statements attributed to her; but she could not recall all of those that were read before the jury. According to the Court, a proper foundation for the

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[9] Evidence Code section 1235 provides as follows: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."

Evidence Code section 770 provides as follows: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:
(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or (b) The witness has not been excused from giving further testimony in the action."

introduction of the statements was not established because Sharon did not testify they were true. Claiming lapse of memory, she made no new statements at trial that were inconsistent with her original remarks. Also, nothing indicated she was deliberately evasive or that her asserted lapse of memory was untrue. (*People v. Parks, supra,* 4 Cal.3d at p. 960.)

In *People v. Sam*, *supra,* 71 Cal.2d 194, the Court found nothing inconsistent between the fact that the witness gave a statement to the officer over two years earlier or the substance of that statement, and his present claim of lack of recollection. According to the Court, a present failure of memory is logically consistent with prior knowledge especially when there has been a lapse of time. (*Id.* at pp. 209-10 and fn. 6.)

Similarly, here, Northcutt's response that he did not recall was not inconsistent with what was described by Investigator Baker in the interview. Also, there was nothing to indicate Northcutt's lapse of memory was untrue. Given the shooting of Brucker and his interview occurred some time before, it is understandable how he could have forgotten what he previously said. (*People v. Ledesma* (2006) 39 Cal.4th 641, 711 ["Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. . . when a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied."]; contrast *People v. Hovarter* (2008) 44 Cal. 4th 983, 1008-09, citation omitted [Court found evidence not inadmissible by hearsay rule; "In any event, Detective Pintane's testimony recounting A.L.'s prior statement was sufficiently inconsistent in effect to qualify as a prior inconsistent statement. . . Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement [citation], and the same principle governs the case of the forgetful witness."].)

As to Northcutt's later responses that "that would have never happened" and "it never happened" (20 RT 3521) when asked the same question, this still was not an inconsistent statement. The prosecution had asked the question multiple times and Northcutt had provided the same response, i.e., that he did not remember. His subsequent response, that it never happened, was in context not at odds with his prior responses.

Finally, the statement was not trustworthy. There was no corroboration and Northcutt was not credible. He appeared to have an adversarial relationship with appellant and was not cooperative in the investigation. According to Investigator Baker, Northcutt was angry at appellant for giving him bad tattoos. (24 RT 4182.) He did not get along well with appellant. (20 RT 3515.) Also, Northcutt was under the influence each time he spoke with Baker. (20 RT 3519.) When Baker contacted him in April of 2005, Northcutt did not want to talk to him. He went into the bathroom and closed the door. (20 RT 3519.) (Contrast *People v. Trimble, supra*, 5 Cal.App.4th 1225, 1236 [no error or confrontation clause violation in admitting hearsay given statements partially corroborated by other testimony].)

So, as each level of hearsay did not come within an applicable exception and the statements were not otherwise trustworthy, Investigator Baker's testimony relating what appellant told Northcutt, that something big was going to happen, a big hit that involved a safe, should have been excluded. The trial court's error violated appellant's constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. I, § 7, 15.)

C. The Error Was Prejudicial

Where federal constitutional rights are implicated, the standard for prejudice is that set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705], i.e., whether the error is harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at pp. 24-26 [87 S.Ct. 824, 17 L.Ed.2d 705].) As the trial court's error violated appellant's constitutional right to a fair trial, the *Chapman* standard for reversal should apply. Yet, even under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, whether there is a reasonable probability the defendant would have received a verdict more favorable absent the error (*id.* at p. 836), the judgment should be reversed.

To begin with, the evidence was not inconsequential. If believed, jurors may have concluded appellant played a key role in the crimes, that he was more than just a participant. Exacerbating the prejudice was the importance of credibility in the case since the prosecution and defense gave divergent views of the shooting. According to the prosecution, appellant shot Brucker during a robbery and burglary. (30 RT 5319.) According to the defense, appellant was not a perpetrator. The teenage witnesses did not testify truthfully and there was no credible independent evidence that implicated appellant in the crimes. (30 RT 5190-96, 5233-43.) Evidence buttressing the prosecution's version of events would have made it less likely jurors would have seriously considered appellant's defense. (*People v. Holt* (1984) 37 Cal.3d 436, 459 [error held prejudicial where "question of guilt depended to a large extent on the jury's determination of Holt's credibility vis-a-vis that of De George."].)

Also, it was not as if the prosecution had a strong case against appellant. It was built on the testimony of three untrustworthy teenage witnesses. Peretti was not credible, being an accomplice to the crime, drug user, and giving inconsistent testimony. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2559, 2646-50, 2653, 2706; 26 RT 4626-28, 4551-55; 27 RT 4668.) Handshoe also was not believable. He was a heavy drug user at the time of the shooting, admitted guilt in the case and obtained the best deal he could from the prosecution. (22 RT 3801-06, 3809, 3811-15.) Paulson lacked credibility as well. He had a prior criminal history and was a mentally unstable drug addict. (17 RT 2906-09.) Jurors were not initially convinced of their credibility, asking for readbacks of their testimony. (7 CT 1464, 1466-67.) This factor by itself suggests the error was prejudicial. (*People v. Markus, supra,* 82 Cal.App.3d 477, 480.)

Further, it was not undisputed that appellant's Bronco was the one involved in the crimes. There were many Broncos in the area. DMV records from a search of Broncos, model years 1985 through 1995, registered as of April 7, 2004 in east San Diego and Poway, showed 1501 Broncos in Alpine, El Cajon, Lakeside and Santee, and 559 in La Mesa, Lemon Grove and Poway. (27 RT 4843-44, 4851-52.) When Vangorkum was shown a photo of a Bronco that was not appellant's Bronco, he said that was the car he saw the day of the shooting and he would "place money on it." (24 RT 4313-14.)

In sum, the error was not harmless beyond a reasonable doubt. Further, it was not improbable absent the error appellant would have obtained a more favorable outcome. (*People v. Alcala* (1984) 36 Cal.3d 604, 635-36.) In any regard, even if there was an equal balance of reasonable probabilities, the judgment should still be reversed for such balance necessarily means that 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. Rowland* (1968) 262 Cal.App.2d 790, 798.)

This argument notwithstanding, however, should this Court find it impossible to accurately state the effect on the jurors of the error, reversal is still required. (*People v. Spearman* (1979) 25 Cal.3d 107, 119.)

In any respect, if this Court finds no prejudice at the guilt phase of the trial, there still was prejudice at the penalty phase of the trial, i.e., a realistic possibility the jury would have rendered a different verdict absent the error. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) In that part of the trial, the jury was allowed to consider evidence presented at the guilt phase of the trial. (CALJIC No. 8.85; 8 CT 1642.) Evidence showing appellant as a participant in the planning of the crimes may well have persuaded the jury that appellant was not only a perpetrator, but played the primary role in committing the crimes, thus deserving of the maximum penalty. The erroneous ruling violated appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

X. THE TRIAL COURT PREJUDICIALLY ERRED IN ALLOWING THE PROSECUTION TO ELICIT TESTIMONY DISCLOSING WHEN APPELLANT WAS IDENTIFIED AS A SUSPECT IN THE BRUCKER SHOOTING, VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, TO CONFRONT ADVERSE WITNESSES, AND TO A FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

A. Procedural History

The prosecution asked Detective Goldberg on cross-examination: "The first time that the person that you now know as Eric Anderson was identified to law enforcement came through the crime stopper tip, didn't it?" (26 RT 4594.) Defense counsel objected based on hearsay. The trial court asked if this was offered for the truth of the matter or to establish the progress of the investigation. The prosecution said it was offered to show the progress and timing of the investigation. The trial court decided to allow the response. (26 RT 4594.)

Detective Goldberg testified that they received information on appellant on the 17th of April via his nickname. (26 RT 4594.) The prosecution asked: "On April. So Mr. Brucker was shot on the 14th and it was three days later that – by his nickname Mr. Anderson was identified as a potential suspect?" Detective Goldberg answered: "That's correct." (26 RT 4594-95.)

B. The Trial Court Erred In Overruling Defense Counsel's Objection To Testimony Disclosing When Appellant Was Identified As A Potential Suspect

"An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." (*Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [88 S.Ct. 1620, 20 L.Ed.2d 476]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384.)

The hearsay rule bars the admission into evidence of a statement that was made by someone other than a witness while testifying at the hearing and offered to prove the truth of the matter stated. (Evid. Code § 1200.) The Sixth Amendment's Confrontation Clause requires exclusion of testimonial statements unless the defendant had an opportunity to cross-examine and the witness is unavailable. (*Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 1369, 158 L.Ed.2d 177].) Testimonial statements include those taken by police officers during interrogations, when there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. (*Davis v. Washington* (2006) 547 U.S. 813, 822 [126 S.Ct. 2266, 165 L.Ed.2d 224].)

An abuse of discretion standard of review applies to a trial court's ruling on the admissibility of evidence. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

Here, the evidence constituted inadmissible hearsay and a Confrontation Clause violation. Contrary to what the trial court decided, the detective's response was a statement offered for its truth since jurors would have to regard the April 17th date as true in order to ascertain the timing of the investigation. Further, the designation of appellant as a suspect did not come from Goldberg personally but from information received by him. (Compare *People v. Williams* (1996) 46 Cal.App.4th 1767, 1779 ["However, the conduct attributed to Tur was not based on the personal knowledge of Hogan, but instead reflected what he had been told by others. Accordingly, the contents of the letter were hearsay."]; contrast *People v. Alexander* (2010) 49 Cal.4th 846, 908 ["defendant's requests for information about Terry and for Watson to tell Terry to 'stay strong' were not offered for their truth, but rather for the fact that defendant made the

statements."].) Also, there was no ongoing emergency. The information was relevant for later use in a criminal prosecution. In allowing the detective's response into evidence, the trial court erred, violating appellant's constitutional rights to due process, a fair trial, and to confront adverse witnesses. The error also undermined appellant's constitutional right to a fair and reliable guilt determination. (*Crawford, supra,* 541 U.S. 36 [124 S.Ct. 1354, 1369, 158 L.Ed.2d 177]; *Bruton, supra,* 391 U.S. 123, 131, fn. 6 [88 S.Ct. 1620, 20 L.Ed.2d 476]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, VI, XIV; Cal. Const. Art. 1, §§ 7, 15.)

C. The Trial Court's Error Was Prejudicial

Because the trial court's error in admitting testimonial hearsay evidence is of federal constitutional dimension, implicating as it does a criminal defendant's fundamental rights, the reversible error test set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] applies. This test provides that the appellate court must reverse a conviction unless proven that the error is harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 23 [17 L.Ed.2d at p. 710].) Even under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, that a conviction may be reversed only if it appears reasonably probable the defendant would have obtained a more favorable outcome absent the error (*id.* at p. 836), the trial court's error requires reversal.

In this case, the evidence was damaging. Juror may well have used the testimony to assume appellant's flight from San Diego was not because of a parole violation but because of his status as a suspect, making this

assumption although no one testified of appellant indicating to anyone he knew the police had targeted him. This made him look like a criminal fleeing to avoid being caught for committing the crimes.

Making matters worse, the prosecution lacked a strong case against appellant. It was built on the testimony of three untrustworthy teenage witnesses. Peretti was an accomplice to the crime, drug user, and gave inconsistent testimony. Her father ended up with the reward money and she received immunity for testifying in this case. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2559, 2646-50, 2653, 2706; 26 RT 4626-28, 4551-55; 27 RT 4668.) Handshoe also was not believable. He was a heavy drug user at the time of the shooting, admitted guilt in the case and vied for the best deal he could from the prosecution. (22 RT 3801-06, 3809, 3811-15.) Paulson's appeal was no better. He admitted to prior crimes and was a mentally unstable drug addict. (17 RT 2906-09.) Jurors were not convinced of their credibility, asking for readbacks of their testimony. (7 CT 1464, 1466-67.) This factor by itself suggests the error was prejudicial. (*People v. Markus*, *supra,* 82 Cal.App.3d 477, 480.)

Further, appellant's Bronco was just one of many in the area. DMV records from a search of Broncos, model years 1985 through 1995, registered as of April 7, 2004 in east San Diego and Poway, showed approximately 2000 in East San Diego County and Poway. (27 RT 4843-44, 4851-52.) When Vangorkum was shown a photo of a Bronco that was not appellant's Bronco, he said that was the car he saw the day of the shooting and he would put money on it. (24 RT 4313-14.)

Increasing the prejudice was the importance of credibility in the case since the prosecution and defense gave divergent views of the shooting. According to the prosecution, appellant shot Brucker during a robbery and burglary. (30 RT 5319.) According to the defense, appellant was not a

perpetrator. The teenage witnesses did not testify truthfully and there was no credible independent evidence that implicated appellant in the crimes. (30 RT 5190-96, 5233-43.) So, the outcome of the case depended on who the jury believed. Evidence suggesting appellant fled the county to avoid arrest for the Brucker shooting diminished the credibility of the defense, making it more likely the jurors would reject it.

So, given the damaging nature of the evidence, the lack of an overwhelming prosecution case, and the importance of credibility in the case, the error was not harmless beyond a reasonable doubt. It also was not improbable that had the evidence been excluded, appellant would have obtained a more favorable outcome. (*People v. Alcala* (1984) 36 Cal.3d 604, 635-36.)

Even if there was an equal balance of reasonable probabilities, the judgment should still be reversed for such balance "necessarily means that. . . 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. Rowland* (1968) 262 Cal.App.2d 790, 798, citation omitted.) Yet, should this Court find it impossible to accurately state the effect on the jurors of the trial court's error, reversal is still required. (*People v. Spearman* (1979) 25 Cal.3d 107, 119.)

Even if this Court finds no prejudice at the guilt phase of the trial, there still was prejudice at the penalty phase of the trial, i.e., a realistic possibility the jury would have rendered a different verdict absent the error. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) There, the jury was allowed to consider evidence presented in the guilt phase. (CALJIC No. 8.85; 8 CT 1642.) Evidence linking appellant's flight to the instant crimes may well have persuaded jurors that appellant was a perpetrator and because trying to flee, probably was the

most culpable of the defendants; he should be punished to the maximum extent. The erroneous ruling violated appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

XI. THE CUMULATIVE EFFECT OF THE TRIAL COURT'S EVIDENTIARY ERRORS MANDATES THAT THE JUDGMENT BE REVERSED

Cumulative errors may infect a trial with such unfairness that the resulting conviction is a denial of due process. (*People v. Hill* (1998) 17 Cal.4th 800, 815; *People v. Hudson* (1981) 126 Cal.App.3d 733, 741 ["When all [errors] are combined, there is no doubt that appellant was deprived of his right to a fair trial guaranteed to him by the due process clauses of the United States and California Constitutions."]; U.S. Const., Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.) Thus, even if a trial court's errors individually are not prejudicial, the combined effect of such errors may rise to the level of harmful prejudice required to have a judgment be reversed. (*People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1347-48; *People* v. *Cardenas* (1982) 31 Cal.3d 897, 907.)

Where errors are of constitutional and non-constitutional magnitude, the appropriate standard for reversal is the harmless error test set forth in *Chapman v. California, supra*, 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*People* v. *Morris* (1991) 53 Cal.3d 152, 216, disapproved on other grounds by the court in *People v. Stansbury* (1995) 9 Cal.4th 824 [when errors of federal constitutional magnitude combine with nonconstitutional errors, all errors reviewed under a *Chapman* standard].)

Here, appellant contends that the multiple evidentiary errors, depicting him as a violent, experienced criminal who was likely to have committed the crimes, individually amounted to prejudicial error. Yet, even if this Court finds otherwise, that by themselves the errors are not prejudicial, cumulatively the errors are prejudicial, resulting in a trial so unfair as to violate his federal and state constitutional rights to due process, a fair trial, and to a fair and reliable guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

First, the errors combined severely compromised appellant's credibility and his defense. At minimum, the result was he was portrayed as an exceptionally violent person whose criminal history showed he was predisposed to having committed the current crimes. Additionally, the trial court's preclusion of important evidence to support appellant's defense and evidentiary rulings against him had the effect of improperly buttressing the prosecution's case and reducing the credibility of appellant's defense.

Exacerbating the prejudice was the factor that the prosecution's case stood on the testimony of three teenage witnesses who lacked credibility. Peretti was an accomplice to the crime, drug user, and gave inconsistent testimony. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2559, 2646-50, 2653, 2706; 26 RT 4626-28, 4551-55; 27 RT 4668.) Handshoe was a heavy drug user, admitted guilt in the case and was focused on obtaining the best deal possible from the prosecution. (22 RT 3801-06, 3809, 3811-15.) Paulson admitted to prior crimes, was mentally unstable and a drug addict. (17 RT 2906-09.) Jurors initially were not convinced by their testimony; they asked for readbacks of it during deliberations. (7 CT 1464, 1466-67.) This

factor by itself suggests prejudicial error. (*People v. Markus*, *supra,* 82 Cal.App.3d 477, 480.)

Further, appellant was not the only person driving a Bronco in the area. There were over 2000 similar Broncos in the area during the time of the crime. (27 RT 4843-44, 4851-52.) Vangorkum was shown a photo of a Bronco that was not appellant's Bronco and said that was the car he saw the day of the shooting, and that he would put money on it. (24 RT 4313-14.)

So, given the totality of the circumstances, revealing multiple errors that minimized appellant's credibility and the believability of the defense, and the jury's indecision, the combined effect of the errors should not be considered anything but prejudicial. The judgment should be reversed. (*People v. Ortiz* (1962) 200 Cal.App.2d 250, 259 [combined effect of errors required reversal].) As stated by the court in *People v. Williams* (1971) 22 Cal.App.3d 34:

> "This probable difficulty in decision is mentioned because there are errors and near improprieties in the case which taken together spell prejudice. Any one of the defects, as a sole irregularity in the face of a strong prosecution case, would probably not be considered prejudicial, but the totality of all the matters to be discussed, in combination, in light of the demonstrably close case herein, does reach, we feel, the level of harmful prejudice." (*Id.* at p. 40.)

Even if this Court finds no cumulative prejudice at the guilt stage of the trial, there was cumulative prejudice in the penalty stage, i.e., a realistic possibility the jury would have rendered a different verdict absent the error. (*People v. Hamilton*, *supra,* 45 Cal.4th 863, 917; *People v. Brown*, *supra,* 46 Cal.3d 432, 448.) The errors resulted in substantially minimizing appellant's credibility, portraying him as the mastermind of the crimes. Jurors were unlikely to have seriously considered his defense and likely

thought that appellant deserved to be punished with the most severe sentence. The errors undermined appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

XII. THE TRIAL COURT PREJUDICIALLY ERRED IN INSTRUCTING THE JURY WITH CALJIC NO. 3.19, THAT IT MUST DECIDE IF PROSECUTION WITNESSES PERETTI AND PAULSON WERE ACCOMPLICES, INSTEAD OF INSTRUCTING THAT THE WITNESSES WERE ACCOMPLICES AS A MATTER OF LAW, THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

A. Introduction

The defense sought to have the jury instructed that Peretti was an accomplice as a matter of law. According to counsel, her testimony showed she knew the crime was going to be committed. She also encouraged the commission of the crime by discussing the disposition of the proceeds. Afterwards, she provided false statements to the police. (28 RT 4998-5001.) The prosecution argued her conduct did not make her liable as an aider or abettor, or as an accessory. (28 RT 5002.) The trial court decided since a dispute existed as to whether Peretti was an aider and abettor, it was improper to give CALJIC No. 3.16. (28 RT 5002.) As to Paulson, defense counsel argued he was at more meetings regarding the plan than anyone else other than Handshoe who everyone agreed was an accomplice. (28 RT 5003.) The trial court decided it would not designate Paulson as an accomplice as a matter of law. (28 RT 5004.)

The jury was instructed with CALJIC No. 3.19, that it must decide if Peretti and Paulson were accomplices. (8 CT 1614-15.)[10]

The trial court erred since the evidence supported the finding that Paulson and Peretti were accomplices as a matter of law. Further, the error was prejudicial. On finding these witnesses were not accomplices, the jury did not have to comply with the rule requiring corroboration of accomplice testimony. Such corroboration was lacking from the evidence.

B. The Trial Court Erred In Denying The Defense's Request To Instruct The Jury That Peretti And Paulson Were Accomplices As A Matter Of Law

The trial court has a duty to ensure the jury is adequately instructed on the law governing all elements of the case submitted to it to the extent necessary for a proper determination in conformity with the applicable law. (*People v. Montoya (*1994) 7 Cal. 4th 1027, 1047.) To this end, when there is sufficient evidence a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices, including the need for corroboration. (Pen. Code, § 1111; *People v. Tobias* (2001) 25 Cal.4th 327, 331.)

An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given. (*People v. Whalen* (2013) 56 Cal. 4th

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[10] CALJIC No. 3.19 read as follows: "You must determine whether the witness Valerie Peretti or the witness Zachary Paulson are accomplices as I have defined that term.

A defendant has the burden of proving by a preponderance of the evidence that a witness was an accomplice in the crimes charged against the defendant. In determining whether a defendant has met this burden you may consider the evidence presented by the prosecution as well as evidence presented by the defense." (CALJIC No. 3.19; 8 CT 1614-15.)

1, 55, 58; Pen. Code, § 1111.) To be so chargeable, the witness must be a principal under Penal Code section 31. That section defines principals as all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission. (*People v. Whalen, supra,* 56 Cal.4th at pp. 58-59; *People v. Avila* (2006) 38 Cal. 4th 491, 564; Pen. Code, § 31.) An aider and abettor is one who acts with knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense. Like a conspirator, an aider and abettor is guilty not only of the offense he or she intended to encourage or facilitate, but also of any reasonably foreseeable offense committed by the perpetrator he or she aids and abets. (*People v. Whalen, supra,* 56 Cal.4th at p. 59; *People v. Avila* (2006) 38 Cal. 4th 491, 564.) The definition of accomplice encompasses all principals to the crime, including aiders and abettors and co-conspirators. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90.)

Accomplice testimony must be corroborated by such other evidence that tends to connect the defendant with the commission of the offense. Such evidence may not come from, or require aid from, the testimony of other accomplices or the accomplice personally. (*People v. Whalen, supra,* 56 Cal.4th at p. 58; *People v. Coffman* (2004) 34 Cal.4th 1, 103.)

Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn on the matter are undisputed. (*People v. Whalen, supra,* 56 Cal.4th at p. 59; *People v. Coffman, supra,* 34 Cal.4th 1, 103.)

In reviewing a claim of error in jury instructions, a court must consider the jury instructions as a whole. The jury instruction must be viewed in the context of the charges and the entire trial record. (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1330-31.)

Here, the logical inference from the evidence was that Peretti and Paulson were accomplices. Paulson was at the meetings prior to the shooting where details of the crime were discussed. In early 2003, Paulson, Lee, and Handshoe met in Lee's blue Cadillac. (17 RT 2865.) Lee said he knew the nephew of the owner of Cajon Speedway who had one million dollars in a safe. (17 RT 2866, 2868.) Lee suggested they steal it and commit a robbery; they could hold the older man hostage. (17 RT 2869-70.) Lee wanted 15 percent of the proceeds. (17 RT 2870-71.) About one month later, Paulson met again in Lee's car with Huhn, Handshoe and Lee. (17 RT 2871-72.) Lee again said he knew the nephew of the owner of Cajon Speedway who had a substantial amount of money in a safe. Lee said they should rob him and that he wanted 15 percent. (17 RT 2872-73.) Shortly before the shooting, Paulson, Handshoe, Huhn, appellant, Erik Swanson and Jake Lowe met at Handshoe's mobile home. (17 RT 2876-77.) Huhn said he could open the safe. Appellant said he could hold the guy hostage and pistol whip him if necessary. Handshoe said he could keep watch. (17 RT 2879.)

Peretti was also present during the meeting in the desert the summer of 2002. (16 RT 2523.) During the trip, details were discussed: Lee said there was a safe in El Cajon that contained two million dollars. (16 RT 2523-25.) Lee mentioned receiving 15 percent of the safe's money. (16 RT 2526-28.) Lee suggested Huhn take the money. (16 RT 2529-30.) Peretti also was present during discussions about what they would do with the proceeds at Handshoe's trailer and while everyone prepared for the crimes. She additionally gave misleading information to the police after the shooting. Although the latter evidence supports accessory, not principal, status (*People v. Fauber* (1992) 2 Cal.4th 792, 833-34), it shows conduct consistent with a pattern of support for Huhn and the defendants in

planning and committing the crimes. (16 RT 2500, 2516, 2646-47, 2583, 2586.) Further, Peretti was given immunity from the prosecution for testifying in appellant's case. (16 RT 2653.) This factor alone suggests accomplice status. (Compare *People v. Rios* (1985) 163 Cal.App.3d 852, 869 [where prosecution introduced evidence Ramos granted immunity on murder charge in exchange for his testimony and his statements were evidence of his involvement in planning burglary leading to the murder, court found record supported finding Ramos was an accomplice as a matter of law].) Although neither Peretti nor Paulson handled weapons or were present at the Brucker residence, this circumstance is not dispositive on the issue. An aider and abettor need not be present during the crimes if advising or encouraging their commission. (*People v. Horton* (1995) 11 Cal.4th 1068, 1114; *People v. Jehl* (1957) 150 Cal.App.2d 665, 668 ["I]f [they] knowingly aided or promoted the conspiracy, they are principals, and thus accomplices."].) Even if there was evidence inconsistent with their status as accomplices, this was not enough to make an instruction on accomplice as a matter of law inapplicable. (*People v. Medina* (1974) 41 Cal.App.3d 438, 443-44.)

In *People v. Medina, supra,* 41 Cal.App.3d 438, three witnesses testified against the defendant. None of them claimed to have seen and recalled all of the events. According to them, the defendants told one of them, Vaughn, they would have to kill the victims. Another witness, Gleitsman, saw one of the defendants stab a victim. Another witness, Walton, saw one of the defendants stab the other victim. Witness Vaughn was in shock from what he saw. (*Id.* at pp. 445-46.) According to the appellate court, inconsistencies existed between the three versions of the facts they did recall, and "in some respects it is almost certain that the whole truth was

not told by two of them." It found them to be accomplices. (*Id.* at pp. 443-44, 450.)

Similarly, here, given the different versions of events offered by the witnesses, it was certain someone was not testifying truthfully. Peretti provided inconsistent testimony on a variety of subjects, including appellant's appearance, the guns at the mobile home, and Huhn's involvement. Also, her father obtained the reward money and she received immunity for testifying, the latter also detracting from her credibility. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2646-50, 2653; 26 RT 4626-28, 4554-55; 27 RT 4668.) Paulson's testimony was suspect as well given he admitted to a criminal history and was a mentally unstable drug addict. (17 RT 2906-09.) Any falsities may well have been attempts to deflect blame, distancing themselves from the consequences of the crime. (*People v. Tobias* (2001) 25 Cal.4th 327, 331 ["an accomplice may try to shift blame to the defendant in an effort to minimize his or her own culpability."].) In essence, given Paulson and Peretti not only knew but associated with the defendants, there was no reasonable explanation for their presence with them during the planning stages unless part of and encouraging the group.

These points aside, a request for an instruction on accomplices that is favorable to the defense, accomplice as a matter of law, should not be refused simply because the prosecutor claims that the accomplice status is in dispute. If there is no dispute from the inferences drawn from the evidence, the court should instruct the jury that a witness is an accomplice as a matter of law. (*People v. Williams* (2008) 43 Cal. 4th 584, 636.) Here, given evidence presented by the prosecution not controverted by the defense supporting a finding Peretti and Paulson were accomplices, the prosecution claiming this status was in dispute did not make it so, especially since its case depended on their presence during the planning

stages and aftermath. The trial court should have instructed the jury they were accomplices as a matter of law. (*People v. Southwell* (1915) 28 Cal.App. 430, 433 ["It was not for the jury to decide whether each or any of the witnesses were accomplices, but under the testimony it was the duty of the court to give the requested instructions advising the jury that [the two witnesses] were both accomplices."].) The error undermined appellant's constitutional right to a fair and reliable guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7, 15.)

C. The Error Was Prejudicial

An error in a trial court's failure to properly instruct the jury on the law pertaining to accomplices is prejudicial if it is reasonably probable that a result more favorable to the appealing party would have been reached in absence of the error. (*People v. Jones* (1964) 228 Cal.App.2d 74, 96; *People v. Watson* (1956) 46 Cal.2d 818, 836.) "A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record." (*People v. Brown* (2003) 31 Cal.4th 518, 556.) The corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. The evidence is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth. (*Id.*)

Here, given the choice, jurors likely found Peretti and Paulson were not accomplices, thereby dispensing with the corroboration requirement. (See

CALJIC Nos. 3.11, 3.12.)[11] Unlike Handshoe, they were not charged as defendants. Also, it would have been easier for jurors to regard their testimony like any other witness's testimony and rely on it to find appellant guilty rather than to find them accomplices and make the extra effort to find corroborating evidence.

That the jury would have found appellant guilty if properly instructed with instructions directing it to find Peretti and Paulson accomplices as a matter of law was unlikely. Sufficient corroborating evidence was lacking. There were no testifying eyewitnesses to the shooting. Further, there were so many Broncos in the area, approximately 2000 in east San Diego County and Poway, that appellant possessing a Bronco did not indicate he was guilty. (27 RT 4843-44, 4851-52.) Although Handshoe testified appellant was at the trailer "jacking" up rounds from his gun prior to the crimes, walked up to Brucker's house while armed and said appellant confessed to things going wrong and shooting the guy, his credibility was minimal, if

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[11] CALJIC No. 3.11 read as follows: "You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense." (CALJIC No. 311; 8 CT 1613.)

CALJIC No. 3.12 read as follows: "To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the crime which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged.

However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged, or that it corroborate every fact to which the accomplice testifies.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime.

If there is no independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated." (CAJLIC No. 3.12; 8 CT 1613-14.)

any. (22 RT 3793, 3913, 3755-56, 3758-59, 3761-62.) He used drugs, admitted guilt in the case, and arranged for the best deal he could from the prosecution. (22 RT 3801-06, 3809, 3811-15.) In any event, he was an accomplice and his testimony could not suffice as corroborating evidence. (CALJIC 3.13; 8 CT 1614.) (Compare *People v. Martinez* (1982) 132 Cal.App.3d 119, 133 [court found insufficient corroborating evidence; no witness other than the accomplice identified Martinez as one of the robbers]; *People v. Dailey* (1960) 179 Cal.App.2d 482, 486 [court reversed, finding jury may have determined under the instructions given that Meyers was not an accomplice and decided guilt absent proper corroboration]; contrast *People v. Brown, supra,* 31 Cal.4th 518, 556 [Fields's statements were amply corroborated by testimony from other eyewitnesses to the crime as well as witnesses who testified to defendant's own statements that he "smoked that bitch" and took her truck].)

In short, the error was prejudicial. The judgment on Counts I and II should be reversed. Even if this Court finds no prejudice at the guilt phase of the trial, there still was prejudice at the penalty phase of the trial, a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error not occurred. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) Instructions that allowed the jury to bypass the corroboration requirement for accomplices allowed them to rely on testimony damaging to appellant's defense. Such testimony could have been what persuaded jurors to decide appellant was guilty. The erroneous ruling violated appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

XIII. IF THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT PERETTI AND PAULSON WERE ACCOMPLICES AS A MATTER OF LAW, THE EVIDENCE WAS INSUFFICIENT TO CORROBORATE THEIR TESTIMONY IMPLICATING APPELLANT IN THE MURDER AND CONSPIRACY

A. Introduction

The jury was instructed that accomplice testimony could be used to convict a defendant only if:

1. The accomplice's testimony was corroborated by other evidence tending to connect the defendant with commission of the crimes;
2. That supporting evidence was independent of the accomplice's testimony; and
3. The corroboration was not supplied by the testimony of another accomplice. (CALJIC Nos. 3.11, 3.12, 3.13; 8 CT 1613-14.)

As set forth in appellant's previous argument, the trial court should have instructed the jury that as a matter of law Peretti and Paulson were accomplices. If this Court agrees, then the evidence was insufficient to support the jury's verdicts because there was not substantial supporting evidence independent of the accomplice testimony that linked appellant to the murder and conspiracy.

B. The Evidence Was Insufficient To Corroborate The Testimony Of Paulson And Peretti Implicating Appellant In The Murder And Conspiracy

A conviction may not be based on the uncorroborated testimony of an accomplice. (Pen. Code, § 1111; *People v. Martinez, supra,* 132 Cal.App.3d 119, 132.) To corroborate the testimony of an accomplice, the

prosecution must produce independent evidence which, without aid from the testimony of the accomplice, tends to connect the defendant with the crime charged. The evidence need not corroborate the accomplice on every fact testified. The evidence is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense. If the sum total of all of the evidence (other than the accomplice's testimony) connects the defendant to the commission of the offense, the requirements of Penal Code section 1111 are satisfied. (*Id; People v. Fauber* (1992) 2 Cal.4th 792, 834.) The trier of fact's determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime. (*People v. McDermott* (2002) 28 Cal.4th 946, 985.)[12]

Here, the evidence was insufficient to support the jury's findings of guilt for murder and conspiracy because there was no evidence outside of accomplice testimony implicating appellant in the commission of the murder and conspiracy. (*People v. Martinez* (1982) 132 Cal.App.3d 119, 132-33.)

In *People v. Martinez, supra,* 132 Cal.App.3d 119, Heath was found to be an accomplice. The court found no evidence which, absent Heath's testimony, connected Martinez to the commission of the robberies of which he was convicted. Although certain testimony by both police officers

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[12] Generally, a "substantial evidence" test applies to determine if the prosecution has introduced sufficient evidence to meet its burden of proving every element of a crime beyond a reasonable doubt in a criminal case. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.) The corroboration requirement for accomplice testimony is an exception. (*Id.* at p. 261.)

corroborated Heath's testimony, it did nothing more than show the commission of the offense or its circumstances. (*Id.* at pp. 132-33.)

Similarly, here, evidence outside of accomplice testimony did no more than show the circumstances of the offenses. It did not show appellant was the shooter or that he engaged in a conspiracy. Although Investigator Baker testified that Northcutt told him he saw appellant wearing a goofy hairpiece and that he usually drove the Bronco and that appellant said a big hit involving a safe would happen, told Northcutt to keep his mouth shut and that he was the third person to know of appellant's involvement (24 RT 4169-70), this evidence was insufficient to constitute the required corroboration. Northcutt could not specify to Investigator Baker when he heard appellant say something big would happen involving a safe. (24 RT 4183.) Northcutt additionally said the hairpiece he saw appellant wear was brown; he did not mention a salt and pepper color. (24 RT 4184.) When Investigator Baker told Northcutt he might be asked in court what appellant said about gathering a group for something big involving a safe, Northcutt said that maybe he made that up, that appellant did not say this. (24 RT 4190.) Further, Northcutt did not get along with appellant and was under the influence each time he spoke with Investigator Baker. (20 RT 3515, 3519.) Also, evidence that appellant drove a Bronco did not prove he committed any crime. There were approximately 2000 Broncos, model years 1985 through 1995, registered as of April 7, 2004 in east San Diego County and Poway. (27 RT 4843-44, 4851-52.) When Vangorkum was shown a photo of a Bronco that was not appellant's Bronco, he said that was the car he saw the day of the shooting and he would put money on it. (24 RT 4313-14.) (Compare *People v. Belton* (1979) 23 Cal.3d 516, 527 [reversal for the failure to produce evidence that corroborated the accomplice testimony]; contrast *People v. Fauber* (1992) 2 Cal.4th 792,

834-35 [Court found testimony corroborated by other witness testimony that defendant gave him victim's credit card number and investigator's testimony that a search of camper used by defendant yielded book of maps stamped with name and address of victim's employer].)

In sum, as insufficient evidence corroborated the accomplice testimony implicating appellant as the perpetrator, the judgment on Counts I and II should be reversed and appellant cannot be retried. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *Burks v. U.S.* (1978) 437 U.S. 1, 18 [98 S.Ct. 2141, 57 L.Ed.2d 1] [Court held "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, ..."]; *DuBois v. Lockhart* (8th Cir. 1988) 859 F.2d 1314, 1318 ["state court reversed a conviction because the prosecution failed to corroborate accomplice testimony as required by state statute. Such a reversal has been characterized by the Arkansas Supreme Court as one based on evidentiary insufficiency, and, therefore, a second prosecution is barred."].)

XIV. THE TRIAL COURT PREJUDICIALLY ERRED IN INSTRUCTING THE JURY ON ACCESSORIES, VIOLATING APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

A. Procedural History

The prosecution asked the trial court to give an instruction on accessory after the fact for Peretti. The prosecution said Peretti was given immunity based on the theory that after the crime she did not reveal Huhn's involvement. The jury should know there is liability for this and it was not

accomplice liability but liability for being an accessory after the fact. (30 RT 5263-64.) Defense counsel said Peretti knew about the plan to commit the crime before it happened. She encouraged it. This conduct did not make her an accessory after the fact. (30 RT 5264-65.) Further, a jury can consider what one does after the crime in deciding if the person is an aider and abettor. Also, nothing in the record explained the immunity grant. It would be inappropriate for the prosecutor to argue why he granted immunity. (30 RT 5265.) The trial court said it was inclined to read the jury a definition of accessory. Counsel for Lee also objected based on the lack of evidence to support the instruction. (30 RT 5268.) Counsel for appellant joined. (30 RT 5268-69.) The trial court instructed the jury with CALJIC 6.40, accessory to a felony.[13]

B. The Trial Court Erred In Instructing On Accessories Because The Evidence Was Insufficient To Support The Instruction

The crime of accessory consists of the following elements: (1) a principal must have committed a specific, completed felony; (2) the accused must have harbored, concealed, or aided the principal; (3) with knowledge that the principal committed the felony or has been charged or convicted of the felony; and (4) with the intent that the principal avoid or escape from arrest, trial, conviction, or punishment. (*People v.*

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[13] CALJIC No. 6.40 read as follows:
"Every person who, after a felony has been committed, harbors, conceals, or aids a principal in that felony with the specific intent that the principal may avoid or escape from arrest, trial, conviction, or punishment, having knowledge that the principal has committed that felony or has been charged with that felony, or convicted thereof, is guilty of the crime of accessory to a felony, in violation of Penal Code section 32.

An accessory to a felony is not, by that fact alone, a principal in that felony." (30 RT 5273; 8 CT 1607; CALJIC No. 6.40.)

Plengsangtip (2007) 148 Cal.App.4th 825, 836; Pen. Code, § 32.) Certain lies to authorities when made with the requisite knowledge and intent will constitute the aid or concealment contemplated by Penal Code section 32. Passive failure to reveal a crime, refusal to give information, or the denial of knowledge motivated by self-interest does not constitute the crime of accessory. (*People v. Plengsangtip, supra,* 148 Cal.App.4th 825, 836.) An accessory is not an accomplice. (*People v. Horton* (1995) 11 Cal.4th 1068, 1114; *People v. Nguyen* (1993) 21 Cal.App.4th 518, 537.)

Absent a request, a trial court must instruct on general principles of law that are closely and openly connected to the facts and are necessary for the jury's understanding of the case. (*People v. Jennings* (2010) 50 Cal.4th 616, 667.) In reviewing a claim of error in jury instructions, a court must first consider the jury instructions as a whole to determine whether error has been committed. (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1330.) The jury instruction must be viewed not in artificial isolation but in the context of the charges and the entire trial record. (*Id.,* at pp. 1330-31.)

In this case, the evidence was insufficient to support instructions on accessories as to Peretti. The evidence showed she was an accomplice, not an accessory. She was present during the meeting in the desert in the summer of 2002. (16 RT 2523.) Details were discussed; Lee said there was a safe in El Cajon that contained two million dollars, mentioned receiving 15 percent of the safe's money and suggested that Huhn take the money. (16 RT 2523-30.) Peretti also was present during discussions about what they would do with the proceeds. She also was with the others at Handshoe's trailer while everyone prepared for the crimes. (16 RT 2500, 2516, 2646-47.) Although she initially did not tell the police of the Brucker shooting or Huhn's involvement (16 RT 2583, 2586, 2646), it was for her own self-interest. She was Huhn's girlfriend and pregnant with his child;

she did not want to have him arrested. (16 RT 2647.) (*People v. Plengsangtip, supra*, 148 Cal.App.4th 825, 836 [failure to reveal crime, refusal to give information, or denial of knowledge motivated by self-interest does not demonstrate accessory status]; compare *People v. Nguyen* (1993) 21 Cal.App.4th 518, 537-39 [no accessory status where two defendants refused to talk to police about the crimes, and third defendant merely admitted he was present at the scene of the robbery and downplayed his role].)

In short, as the evidence was insufficient to support an instruction on accessories, the trial court erred in giving this instruction to the jury. The error undermined appellant's constitutional right to a fair and reliable guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

C. The Error Was Prejudicial

An error in a trial court's failure to properly instruct the jury is prejudicial if it is reasonably probable that a result more favorable to the appealing party would have been reached in absence of the error. (*People v. Jones* (1964) 228 Cal.App.2d 74, 96; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Here, given the lack of instructions directing the jury to find Peretti an accomplice as a matter of law, jurors may well have found Peretti an accessory. Jurors could have thought that since she knew what Huhn did and did not disclose his involvement in the crimes to the police, she was an accessory. (16 RT 2645, 2647.) In so finding, jurors could have then treated

her testimony like any other witness' testimony, not needing to find corroborating evidence before relying on it to find appellant guilty.

That this would have made a difference in the outcome was not improbable. Had jurors found Peretti was an accomplice, the lack of corroborating evidence would have resulted in jurors not relying on her testimony in deciding the case. (See CALJIC 3.11; 8 CT 1613.) In this respect, Handshoe was an accomplice himself and Paulson was not a credible witness. Jurors did not initially accept their testimony; they asked for readbacks of it during deliberations. (7 CT 1464, 1466-67.)

Evidence appellant drove a Bronco did not implicate him in the crimes. There also were approximately 2000 Broncos, model years 1985 through 1995, registered in east San Diego County and Poway in April of 2004. (27 RT 4843-44, 4851-52.) When Vangorkum was shown photo of a Bronco that was not appellant's Bronco, he said that was the car he saw the day of the shooting and he would "place money on it." (24 RT 4313-14.)

So, given the likelihood jurors found Peretti was an accessory, thereby dispensing with the corroborating evidence requirement, the error was prejudicial. The judgment on Counts I and II should be reversed.

This argument aside, if this Court finds no prejudice in the guilt phase of the trial, there still was prejudice in the penalty phase of the trial, a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error not occurred. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) There, the jury was allowed to consider evidence presented at the guilt phase of the

trial. (CALJIC No. 8.85; 8 CT 1642.) Instructions that made it more likely the jury would decide Peretti was not an accomplice likely resulted in the jury using her testimony to find appellant guilty, not having any corroboration requirement. Thus, embracing evidence showing appellant as the major participant in the crimes, jurors would have been inclined to seek a penalty of death to reflect his increased culpability. The erroneous ruling violated appellant's constitutional right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

XV. THE TRIAL COURT PREJUDICIALLY ERRED IN ITS RESPONSE TO THE JURY'S QUESTION AS TO WHETHER JURORS COULD CONSIDER A WITNESS'S DEMEANOR IN THE COURTHOUSE IN DETERMINING THE CREDIBILITY OF THAT WITNESS AND DENYING THE DEFENSE'S REQUEST TO INSTRUCT THE JURY ON THE SUBJECT THEREBY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

A. Procedural History

During Peretti's testimony, Juror No. 12 sent a note to the judge which read: "Can I figure a person's attitude and demeanor outside of the court room, i.e., specific witness actions in courts main area outside of main entrance." (7 CT 1434.) The trial judge called the juror in the courtroom with the attorneys and responded: "The short answer is no. The instructions that I gave in terms of demeanor means demeanor while testifying." (16 RT

2719.) The trial court then asked the juror if the juror saw something that was affecting his or her ability to be impartial. The juror said:

> "I saw a witness that at least – we were down in the common area, and you see everybody. And a witness was, what I would say, in a much more joyous and, you know, very high levity than what I would expect of somebody who is in this kind of magnitude of a case. And it just didn't really appeal that, you know, can I weigh that the same way, where they're really happy here but yet they're completely opposite? And that's where I just wasn't sure, if you could, you know, take that kind of opinion or not. I wanted to get a resolution. Okay, I can't take it, then not a problem. It won't affect me. I just wanted to know what the right answer was. (16 RT 2719.)

Counsel for Lee asked how many jurors were present when this was observed. The juror responded two others from the same jury panel. They noticed this behavior and discussed whether they could consider this demeanor. (16 RT 2720-21.) In response to defense counsel's question as to which witness, the juror confirmed the witness was Peretti. (16 RT 2721.) After the juror exited the courtroom, counsel for Lee said that the jury should be allowed to consider this in evaluating the credibility of witness testimony. (16 RT 2722.) The trial court suggested counsel draft a special instruction. Defense counsel added that he saw when the jury was leaving that afternoon that:

> "Peretti was seated in the end chair of the back row to the court's right. And it seemed to me, pretty obvious, that she was attempting – consciously attempting to make eye contact with each juror that walked past her. Not only make eye contact, but then smile to each juror as they passed." (16 RT 2722.)

Co-counsel for appellant said she saw this too, and that it appeared a "very concerted effort on her part." (16 RT 2722-23.)

The trial court suggested telling the jury that it would order witnesses not to communicate with jurors directly or indirectly. (16 RT 2723.)

The next day the trial court informed the jury:

> "It is important to recognize that a witness is allowed to communicate with a trial juror only through the question and answer procedure. The taking of testimony in the courtroom. If, at any time, you feel that a witness is attempting to communicate outside this approved procedure, you must tell me. Simply write a note and hand it to the bailiff. Further, if you see a witness at a location other than a witness stand and the witness is engaged in conduct that may influence you in your role as a trial juror, you must tell me, again, a simple note. . . ..
>
> And a reminder, and this is a reminder because I've already given you these legal instructions when I offered some preliminary legal instructions at the time of opening statements. You must determine the facts in this case from the evidence received in this trial and not from any other source. Evidence means testimony, writings, material objects, or anything presented to the senses that are offered to prove the existence or nonexistence of a fact. In determining the credibility of a witness, you may consider the demeanor of the witness while testifying and the manner in which the witness testifies." (17 RT 2736-37.)

Later in the trial when parties discussed the jury instructions, the trial court addressed the defense's proposed instruction. (25 RT 4445-46.) The defense wanted the jury told that jurors could consider the demeanor of the witness present in the courthouse for the purpose of testifying. Defense

counsel said the rule was that the jury could consider anything having a tendency to impact credibility, and a witness such as Peretti who acted as demonstratively as she did in front of the jury outside the courtroom should have her credibility evaluated by jurors who saw that. The trial court said only one saw the behavior; others may not have. Also, parties agreed that the trial court should read CALJIC 1.00[14] on the subject. The trial court decided not to give the proposed instruction. (25 RT 4446-47.)

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[14] CALJIC No. 1.00 read as follows: "You have heard all the evidence, and now it is my duty to instruct you on the law that applies to this case. The law requires that I read the instructions to you. You will have these instructions in written form in the jury room to refer to during your deliberations.

You must base your decision on the facts and the law.

You have two duties to perform. First, you must determine what facts have been proved from the evidence received in the trial and not from any other source. A 'fact' is something proved by the evidence or by stipulation. A stipulation is an agreement between attorneys regarding the facts. Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict and any finding you are instructed to include in your verdict.

You must accept and follow the law as I state it to you, regardless of whether you agree with it. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.

You must not be influenced by pity for or prejudice against a defendant. You must not be biased against a defendant because he has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that a defendant is more likely to be guilty than not guilty. You must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and a defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences." (CALJIC No. 1.00; 8 CT 1589-90.)

B. The Trial Court Erred In Its Response To The Jury's Question On Whether Jurors Could Consider A Witness's Demeanor In The Courthouse In Determining The Witness's Credibility Because The Response Directed That Jurors Could Consider Only A Witness's Demeanor While The Witness Testified

A trial court has a duty to help the jury understand the legal principles it is asked to apply. (*People v. Beardslee* (1991) 53 Cal.3d 68, 97; Pen. Code § 1138.) A violation of this duty implicates a defendant's right to a fair trial conducted substantially in accordance with law. (*People v. Frye* (1998) 18 Cal.4th 894, 1007; U.S. Const. Amend. V, XIV; Cal. Const. Art. I §§ 7, 15.) In assisting the jury in understanding the legal principles, the trial court "must attempt to clear up any instructional confusion expressed by the jury." (*People v. Giardino* (2000) 82 Cal.App.4th 454, 465, citation omitted.) When the court's original instructions are full and complete, the court has the discretion under Penal Code section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) The trial court must at least consider how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable or whether it should reiterate the instructions already given. (*Id.*) A court's response will not suffice if it fails to consider what was motivating the jury's question or if the response is inadequate to answer the question on a matter not fairly resolved by the court's instructions. (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 251; *U.S. v. Southwell* (9th Cir. 2005) 432 F.3d 1050, 1052-53.)

In this case, the jury asked whether jurors could use a witness's demeanor in the courthouse in assessing the witness' credibility. Instead of directly answering the jury, the trial court solicited a special instruction on the point and then refused to give it. The trial court then decided to

reread existing instructions, ultimately giving the jury no guidance on the matter. Jurors were left with the impression that they could not consider the demeanor of Peretti or any other witness in the courthouse or courtroom when the witness was not testifying. Yet, nothing precluded the jury from paying attention in the courtroom or discussing during deliberations a juror's observations in the courtroom. It would have been no different than a juror expressing to other jurors that a witness looked like he or she was lying. Moreover, jurors' observations in open court were subject to contradiction or qualification by the other jurors. Having been instructed that they could consider a variety of factors in determining the witness's credibility, including the witness's demeanor while testifying (CALJIC 2.20; 8 CT 1594-95), the trial court at minimum should have informed the jury it could consider a witness's conduct in the courtroom. The trial court's failure to respond appropriately to the jury question implicated appellant's constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (Compare *People v. Heishman* (1988) 45 Cal.3d 147, 196-97 [where defendant claimed error in prosecutor's argument calling attention to the expressions on defendant's face while he was in the courtroom, Court found no error; prosecutor's references to defendant's facial demeanor were made at trial where he placed own character at issue and therefore it was proper for jurors to draw inferences from their observations]; *People v. Jackson* (1989) 49 Cal.3d 1170, 1206 [same]; *People v. Frye* (1998) 18 Cal.4th 894, 1007; *Beardslee v. Woodford* (9th Cir. 2004) 358 F.3d 560, 575; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7, 15.)

C. The Trial Court's Error Was Prejudicial

Because the trial court's error in this instance violated appellant's federal due process right, the reversible error test set forth in *Chapman v. California, supra*, 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] applies. (E.g., *People v. Giardino, supra,* 82 Cal.App.4th at pp. 470-71.) Under this standard, or even the one set forth in *People v. Watson, supra*, 46 Cal.2d 818, i.e., whether it is reasonably probable that a result more favorable to the defendant would have been reached in absence of the error (*id* at p. 836), the judgment should be reversed. One court has held, at least for questions during deliberations, that there is no category of instructional error more prejudicial than when the trial judge errs in responding to the jury's inquiry. (*People v Thompkins* (1987) 195 Cal.App.3d 244, 252-53.)

A key consideration in determining whether the trial court's error was prejudicial is whether jurors were misled. Although the question of whether jurors were misled most often arises when a trial court has misread an instruction as opposed to inappropriately responding to a jury question, there is no reason why such inquiry should not be done here. The practical effect of the errors is the same. In both situations the jury is allowed to make findings on deficient jury instructions, a circumstance weighing in favor of a finding of prejudice. (*People v. Heishman* (1988) 45 Cal.3d 147, 164.)

Here, it was likely the jury was misdirected since the trial court's response with nothing more indicated jurors could not consider demeanor except while the witness was actually testifying. As CALJIC No. 1.00 instructed jurors to follow the law as the trial court stated it to them, it was not improbable the jury followed the trial court's lead instead of broadly interpreting the instruction that the jury could consider a variety of nonexclusive factors in assessing a witness' credibility.

This point aside, it was likely that if the trial court had properly instructed jurors on the point, they would have disregarded Peretti's testimony, finding it not credible. After all, based on the juror's disclosure, Peretti's demeanor suggested a lack of credibility in anything she said. This was important since the prosecution's case depended in large part on Peretti's testimony. She was the only witness who testified of appellant's involvement prior to the group departing for Brucker's residence. She testified that appellant and Handshoe talked about "how they were going to go do this," appellant mapped out the surrounding cars and the doorway and said a red car or truck and a white car or truck would be there. (16 RT 2510, 2512-14.) He also assigned duties for Handshoe and Huhn and pulled out a semi-automatic gun, cocked it back and said: "let's do this fast." (16 RT 2515, 2533-34.) Peretti also testified of the group leaving in appellant's Bronco with appellant driving. (16 RT 2520-22.) The jury rejecting her testimony would have made the prosecution's task in proving appellant guilty an uphill climb.

Making it more likely the jury would have rejected Peretti's testimony if properly instructed was the factor that she was not a believable witness. She was an accomplice and gave inconsistent testimony about, among other things, appellant's disguise, Ritterbush, and the guns at the mobile home. She also lied about Huhn's involvement, her father ended up with the reward money, and she received immunity for testifying. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2646-50, 2653; 26 RT 4626-28, 4554-55; 27 RT 4668.) Understandably, jurors did not initially believe her, asking for a readback of her testimony. (7 CT 1464, 1467.) This factor by itself suggests the error was prejudicial. (*People v. Markus*, *supra,* 82 Cal.App.3d 477, 480.)

So, had the trial court appropriately responded to the jury's question, jurors likely would have concluded Peretti was not a credible witness and rejected her testimony. The error was not harmless beyond a reasonable doubt. It also was not improbable that absent the error, appellant would have obtained a more favorable outcome. Yet, as it is unknown the effect on the jury from the trial court's error in failing to properly address the jury's question, it cannot be said the error was not prejudicial. (*People v. Litteral* (1978) 79 Cal.App.3d 790, 797; *People v. Henderson* (1935) 4 Cal.2d 188, 194.) The judgment should be reversed.

This argument aside, if this Court finds no prejudice at the guilt phase of the trial, there still was prejudice at the penalty phase of the trial, a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error not occurred. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 448.) In the penalty part of the trial, the jury was allowed to consider evidence presented in the guilt phase. (CALJIC No. 8.85; 8 CT 1642.) Not properly responding to the jury's question on whether jurors could rely on Peretti's demeanor in the courthouse in assessing her credibility, jurors were more apt to use her testimony to find appellant guilty and decide he should be punished to the maximum extent to reflect his greater role in the crime. The erroneous ruling violated appellant's constitutional right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

XVI. APPELLANT'S CONVICTION SHOULD BE REVERSED BASED ON PROSECUTORIAL MISCONDUCT; THE MISCONDUCT IMPLICATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND FAIR AND RELIABLE GUILT AND PENALTY DETERMINATION

A. Procedural History

1. Vouching

The prosecutor argued to the jury as follows:

"I told you when I started this argument that the two defendants – but for the two defendants in this room, Steven Brucker would be alive today. I believe with all my heart that I've provided you with the evidence to prove that that is true." (30 RT 5330.) Defense counsel objected to this statement, arguing that it sounded like vouching. (30 RT 4333.) The trial court disagreed, finding no misconduct. (30 RT 5334.)

2. Misstating The Evidence And Stating Facts Not In Evidence

On the subject of Handshoe's testimony and plea agreement, the prosecutor argued to the jury:

> "Is it a lesser sentence? You bet it is. You bet it is. Is it still a significant sentence? You bet it is. But, you know, the thing about Brandon Handshoe's 'deal' with the People is that it was done when it was done, and it was done before he testified on the stand. And he could have blamed this crime on Martians, and it wouldn't have changed his 17-year sentence." (30 RT 5296.)

Defense counsel objected, asserting the prosecutor was misstating the evidence. The trial court reminded the jury this was argument. The prosecutor continued:

> "This would not have changed his sentence, if he came in and said Martians…
>
> The point is: The deal was struck, and no matter what he said, he was getting 17 years. If he came in and said it was Martians that did it, the deal that he was going to testify and get 17 years was a done deal. It can't go up, it can't go down; that's the way it is.
>
> So you have to ask yourself: if that's true – and it is – then why would he lie? Why would he lie?" (30 RT 5296-97.)

Defense counsel objected again, asserting the prosecutor committed misconduct. The prosecutor was not fairly commenting on the evidence or interpreting the facts. He was a party to the agreement and knew the agreement was revocable if Handshoe deviated from the truth. The prosecutor was misleading the jury. (30 RT 5332.)

The trial court said it appeared that the agreement's language did not support the prosecutor's characterization. Yet, it would be difficult to discern what exactly was truthful. So, it would be difficult to revoke the agreement. The jury could decide if the prosecutor mischaracterized the agreement. (30 RT 5333-34.)

3. Argumentative Questioning

The prosecutor asked the following questions of defense witness Stevens:

> "Q. Mr. Stevens, is it fair to say that you'll do whatever it takes to help Mr. Anderson avoid responsibility for his actions in this case?

A. No. It's – I – I took an oath here and I'm planning on telling the truth.

Q. Now, you took an oath so that you wouldn't perjure yourself?

A. That's correct.

Ms. Vandenbosch: Objection, argumentative, your honor.

The Court: This is – do it in terms of those foundational questions. The question and answer stands as to the oath. No more oath questions.

Mr. McAllister: Okay.

Q. Well, what you're telling us here is that you, who has been convicted of these felony offenses that you've told us about, just won't perjure yourself.

Ms. Vandenbosch: Your honor, argumentative."

After Stevens said he was telling the truth, the Court stated: "he's telling – he indicates that he's telling the truth" and directed the prosecutor to continue with his questions. (27 RT 4806-07.)

B. The Prosecutor Committed Misconduct

A prosecutor's intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 180-81 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *People v. Hill* (1998) 17 Cal.4th 800, 819; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, § 7.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law if it involves the use of deceptive methods to attempt to persuade the court or jury. (*People v. Hill, supra,* 17 Cal.4th 800, 845; *People v. Earp* (1999) 20 Cal.4th 826, 858.) It is as much a prosecutor's

duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. (*Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed. 1314]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 691.)

In deciding a claim of prosecutorial misconduct, the reviewing court must determine at the threshold how the remarks would or could have been understood by a reasonable juror. (*People v. Benson* (1990) 52 Cal.3d 754, 793.) Misconduct need not be intentional in order to constitute reversible error. Emphasis is on whether the defendant received a fair trial. (*People v. Clair* (1992) 2 Cal.4th 629, 661; *People v. Bolton* (1979) 23 Cal.3d 208, 214.)

1. Vouching

No matter if indirect or direct:

> "[a] prosecutor has no business telling the jury his individual impressions of the evidence. Because he is the sovereign's representative, the jury may be misled into thinking his conclusions have been validated by the government's investigatory apparatus." (*U.S. v. Kerr* (9th Cir. 1992) 981 F.2d 1050, 1053.)

Here, by telling the jurors that he believed with all his heart that the evidence proved the defendants were guilty, the prosecutor told the jury his opinion of the evidence. This was misconduct, implicating appellant's constitutional rights to due process, a fair trial and fair and reliable guilt determination. (*People v. Perez* (1962) 58 Cal.2d 229, 246, abrogated on other grounds in *People v. Green* (1980) 27 Cal.3d 1; *People v. Hill, supra,* 17 Cal.4th at p. 845; *People v. Cotton* (1959) 169 Cal.App.2d 1, 2-3; *People v. Adams* (1960) 182 Cal.App.2d 27, 34-35; *Beck, supra,* 447 U.S.

625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

In *People v. Cotton* (1959) 169 Cal.App.2d 1, the prosecutor said in closing argument:

> "when Mr. Keeys is used by the State Bureau of Narcotics and he is produced here as a witness and knowing that he is going to give testimony that is not corroborated in the fashion that we have talked about, I ask you to draw the very clear inference that that man is a man who is worthy of belief. At least some of us believe he is worthy of belief or we wouldn't use him in this work and wouldn't put him on the witness stand." (*Id.*, at pp. 2- 3.)

Without discussion, the court held the prosecutor committed misconduct and the only question was whether it was prejudicial. (*Id.* at p. 3.)

In *People v. Adams* (1960) 182 Cal.App.2d 27 the court similarly found the prosecutor committed misconduct by attesting to the credibility of one of the prosecution's witnesses. In that case, the prosecutor argued as follows:

> "Mrs. McKenna testified to one other factor, that I feel is important. It was brought out . . . not only as to her testimony, but it was brought out concerning Mr. Miller, and that is that each of these individuals was subjected to a polygraphic examination. . . . There is no legitimate investigator in Los Angeles who would not suspect these persons of participating in the offense. But these persons were then subjected to a polygraphic examination and thereafter, they are called in here as witnesses . . . You just have to have some faith in the police officers who represent you, and also in your District Attorney's office. You must have some faith in their interpretation. . . Don't you think Mr. Tidyman who testified from the stand is an experienced police officer?

Don't you think that everything Mr. Haley said also came to the attention of this officer and to other officers, and don't you think that these officers interrogated these witnesses and then put them through the ropes, so to speak, in determining whether these persons were principals in this case?" (*Id.* at pp. 31-32.)

According to the appellate court, the prosecutor committed misconduct by informing the jury the witnesses had been investigated and interrogated by the police officers and commenting that the faith and integrity of the district attorney's office and police department were pledged in support of the veracity of the witnesses' testimony. That court found these contentions clearly related to facts not in evidence and to the prosecutor's personal views. (*Id.* at pp. 34-35.) The court pointed out the prosecutor's comments were intended to and gave credence to the testimony of Mr. Miller and Mrs. McKenna on the theory that after having given them the lie detector test, the district attorney concluded they were trustworthy and entitled to the jury's confidence. (*Id.* at p. 35.)

In this case as well the prosecutor committed misconduct. Like the prosecutors in *People v. Cotton, supra,* 169 Cal.App.2d 1 and *People v. Adams, supra,* 182 Cal.App.2d 27 who pledged their support as prosecutors behind their witnesses, the prosecutor in this case did the same. He conveyed to the jury what he personally thought about the evidence, thereby putting his government office behind his opinion. The prosecutor's expression of personal opinion also "tended to improperly imply to the jury that the deputy district attorney possessed information as to [their] character and credibility in addition to the evidence adduced during the trial bearing upon [their] reliability as a witness." (*People v. Perez, supra,* 58 Cal.2d at p. 246 ["the prosecutor's remarks concerning Hayward's credibility

represent another improper attempt to use argument to the jury as a means of supplying additional testimony in support of the People's case."].)

2. Misstating The Evidence And Stating Facts Not In Evidence

While counsel has latitude at argument to "urge whatever conclusions counsel believes can properly be drawn from the evidence, counsel may not assume or state facts not in evidence or mischaracterize the evidence." (*People v. Harrison* (2005) 35 Cal.4th 208, 249, citations omitted.)

Here, by telling the jurors that Handshoe would have received the benefit of the deal regardless of his testimony, the prosecutor misrepresented the evidence on a crucial issue, violating appellant's constitutional rights to a fair trial, and fair and reliable guilt determination. (*People v. Bell* (1989) 49 Cal.3d 502, 539; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

The plea deal was continent on Handshoe telling the truth. There was nothing to suggest he could lie and still reap the agreement's benefits. (22 RT 3803-09.) Thus, the prosecutor's argument was not a fair interpretation of the facts, being contrary to what the agreement set forth. Further, the inaccuracy could not have been unintentional as the prosecutor was involved in arranging for the agreement. He could not have been unaware of its terms. (22 RT 3803-06, 3809.) (Compare *People v. Bell, supra,* 49 Cal.3d at p. 539 [Court found prosecutor's comment about drug improper; the comment was neither based on the evidence nor related to a matter of common knowledge]; *People v. Hill, supra,* 37 Cal.4th 800, 824-27 [Court found several instances of misconduct where prosecutor misstated evidence, gaining unfair advantage, and misstatements were not

unintentional]; contrast *People v. Harrison, supra,* 35 Cal.4th 208, 249 [Court found prosecutor did not fabricate evidence but just suggested inference; after making argument in question, prosecutor immediately referred to defendant's intention].)

3. Argumentative Questioning

When a prosecutor's questions are designed not to elicit information but to provoke argument, the questions are argumentative and improper. (*People v. Johnson* (2003) 109 Cal.App.4th 1230, 1236.) Here, the prosecutor's questions to Stevens on the oath were designed to provoke argument. They were improper and constituted misconduct, violating appellant's constitutional rights to a fair trial, and fair and reliable guilt determination. (*People v. Ellis* (1966) 65 Cal.2d 529, 539-40; *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1235-36; *People v. Carrera* (1989) 49 Cal.3d 291, 318-19; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

In *People v. Ellis*, *supra,* 65 Cal.2d 529, the California Supreme Court condemned the prosecutor's repeated references to the defendant and his alibi witness as perjurers, finding the references constituted misconduct. According to the Court, the term perjurer implied a willful falsehood. Perjury was a felony and the connotation conveyed was apt to be far more derogatory than that conveyed by the term liar. As applied to the defendant, it would affect the ability of the jury to dispassionately weigh the credibility of the accused and the issue of guilt or innocence. The Court further found that unless the prosecutor was careful to predicate his conclusion that perjury was committed solely on the evidence before the jury, the specter of

jury reliance on prosecutorial access to information outside the record was raised. (*Id.* at pp. 539-41.)

In *People v. Johnson, supra,* 109 Cal.App.4th 1230, after the defendant refused to disclose certain information, the prosecutor asked: "Sir, are you going to pick and choose what you feel like telling us today and what you don't [feel] like telling us? Is that what you're saying?" Also, when the prosecutor elicited testimony from the defendant that he had not expected the drug dealer to call the police, the prosecutor stated: "Have to be crazy to do that, wouldn't he?" The trial court found the questions inappropriate. Another time, the prosecutor asked the defendant to "tell us why." The defendant replied: "I'm sorry. Why? Why what?" The prosecutor responded: "This guy was there to pick up his child. Why did you have to kill him?" The court sustained the defense's objection that the question was argumentative. The prosecutor continued: "Why was he killed that day?" Defense counsel made the same objection. The prosecutor persisted: "Tell us it was something more than just this gang thing, you thought this guy was from some gang." Defense counsel again objected and the court sustained the objection. (*Id.,* at pp. 1234-35.) According to the appellate court, the questions were argumentative and improper. They went beyond an attempt to elicit facts within the defendant's knowledge and were instead intended to engage him in an argument. (*Id.* at p. 1236.)

In *People v. Carrera, supra,* 49 Cal.3d 291, defense counsel objected to the prosecutor's questions to the defendant, contending they were argumentative. Some questions were as follows: "Q. So how many people did you discuss the case with before deciding on what to testify to? ... Q. So you were not being truthful when you talked to certain individuals in the jail on tape, but all of a sudden now you are being truthful, is that correct?" (*Id.,* at pp. 318-19, fn. 20.) With limited discussion, the Court stated: "We

do not condone the prosecutor's manner of cross-examining defendant in this case." (*Id.,* at p. 319; compare *People v. Teixeira* (1955) 136 Cal.App.2d 136, 146-47 [where prosecutor asked same question multiple times despite trial court sustaining objections, appellate court found questions improper].)

In this case as well, the above-referenced questions by the prosecutor were argumentative because they went beyond an attempt to elicit facts within Stevens' knowledge. They reflected an attempt to portray Stevens as a liar, incapable of telling the truth, and engage him in argument even after the trial court told the prosecutor not to ask any more oath questions. (27 RT 4806.) In so doing, the prosecutor committed misconduct.

In sum, the prosecutor committed misconduct by providing jurors with his personal opinion of the strength of the evidence, misstating the evidence and argumentative questioning. The misconduct violated appellant's constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. 1, §§ 7, 15.)

C. The Error Was Prejudicial

In determining whether a prosecutor's misconduct was prejudicial, this Court has held the relevant inquiry is "had the prosecutor refrained from the misconduct, is it reasonably probable that a result more favorable to the defendant would have occurred." (*People v. Strickland* (1974) 11 Cal.3d 946, 955.) Yet, the United States Supreme Court has held where federal constitutional rights are implicated, the standard for prejudice is that set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17

L.Ed.2d 705], i.e., whether the error is harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at pp. 24-26 [87 S.Ct. 824, 17 L.Ed.2d 705].) Since the prosecutor's misconduct implicated appellant's constitutional right to a fair trial, the appropriate prejudice standard is the one set forth in *Chapman, supra,* 386 U.S. 18. This assertion notwithstanding, under either standard the misconduct was prejudicial.

The prosecutor's remarks relating his personal belief about the evidence and Handshoe's agreement were not harmless. After hearing them, jurors were likely to have believed the evidence must be enough to prove appellant was guilty and that Handshoe was telling the truth. (*People v. Bolton* (1979) 23 Cal.3d 208, 213, citations omitted ["such testimony, although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence."].) Also, Handshoe's testimony and his plea agreement were crucial for the prosecution's case. His testimony provided the prosecutor with evidence implicating appellant as the key player in the crimes. If Handshoe was to reap its benefit regardless of his testimony, there was no motive for him to lie. (Contrast *People v. Frandsen* (2011) 196 Cal.App.4th 266, 277 [evidence prosecutor misrepresented was not relevant to charges against defendant].)

As to the prosecutor's questioning of Stevens, Stevens was an important witness for appellant. He supported the defense that appellant was not a perpetrator and was elsewhere during the crimes. By the prosecutor using the word perjure, the connotation conveyed was derogatory, implying Stevens willfully lied under oath, committing a felony. (*People v. Ellis* (1966) 65 Cal.2d 529, 539-40.) Hearing the prosecutor's questions, jurors were likely to have dismissed Stevens' testimony as untruthful.

Further, notwithstanding the state of the evidence, it was not improbable jurors followed the prosecutor's lead in all instances, i.e., believed that Handshoe was being truthful in his testimony, the evidence supported a finding of guilt and Stevens was unworthy of belief. "[J]uries very properly regard the prosecuting attorney as unprejudiced, impartial and nonpartisan, and statements made by him are apt to have great influence." (*People v. Perez* (1962) 58 Cal.2d 229, 247, abrogated on other grounds in *People v. Green* (1980) 27 Cal.3d 1; *People v. Duvernay* (1941) 43 Cal.App.2d 823, 828.) Further, any admonition by the trial court would not have helped. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 811 [appellate court decided admonitions could not negate effect of remarks indicating that the prosecutor and his witnesses are more trustworthy than defendants].)

The misconduct may well have tipped the balance against appellant given the prosecution's evidence. The case against appellant was built on the testimony of teenage witnesses, Peretti, Handshoe and Paulson, who were either drug addicts, accomplices, or mentally unstable, and gave inconsistent testimony.[15] (16 RT 2509-10, 2519, 2533-34, 2537-38, 2646-50, 2653; 26 RT 4626-28, 4554-55; 27 RT 4668; 22 RT 3801-06, 3809, 3811-15; 17 RT 2906-09.) (*People v. Pitts* (1990) 223 Cal.App.3d 606, 816 ["Nor is it an answer to say, . . . this case was sufficiently strong as to render any misconduct harmless. Assuming the evidence was sufficient to convict, it did not point unerringly to guilt. Under such circumstances, the type of misconduct involved here could reasonably have tipped the scales."].) Jurors had doubts about them; they asked for readbacks of their testimony. (7 CT 1464, 1466-67.) This factor by itself suggests the error was prejudicial. (*People v. Markus*, *supra,* 82 Cal.App.3d 477, 480.)

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[15] Peretti gave inconsistent testimony on a variety of subjects.

"It is true the jury had an opportunity to observe the demeanor and character of the witnesses and may have had reason to return the verdict herein irrespective of the errors committed during the trial. As to this, of course, we can say nothing. But from the mere record, as we read it however, the errors may have turned the scale in favor of the prosecution. When a defendant is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law." (*People v. Santa Maria* (1962) 207 Cal.App.2d 306, 317.)

In short, given the nature of the prosecutor's misconduct, it was reasonably probable the balance was tilted in favor of the prosecution. Such misconduct was prejudicial by any standard and the judgment should be reversed.

Even if this Court finds no prejudice at the guilt phase of the trial, there still was prejudice at the penalty phase of the trial, a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error not occurred. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 447-48.) There, the jury could consider evidence presented at the guilt phase of the trial. (CALJIC No. 8.85; 8 CT 1642.) The prosecutorial misconduct likely strongly influenced the jurors' interpretation of the evidence and resulted in the jury not only finding appellant guilty but also deciding he should have the maximum penalty. The misconduct violated appellant's constitutional right to a fair and reliable penalty determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

XVII. THE TRIAL COURT ERRED IN FAILING TO SEAL THE VERDICT IN HUHN'S CASE OR ISSUING A GAG ORDER, AND THEREAFTER NOT CONDUCTING AN INQUIRY INTO WHETHER THE IMPARTIALITY OF ANY OF APPELLANT'S JURORS WAS COMPROMISED BY THE PUBLICITY OF HUHN'S VERDICT; REVERSAL IS REQUIRED

A. Procedural History

On Friday, June 23, 2005, the trial court discussed with the prosecution and counsel for Huhn, Ms. Rosenfeld, about sealing the jury verdict for Huhn. It was notified the Huhn jury reached a verdict. Although counsel for appellant and Lee were not present, the trial court stated their position, which was that the timing of the verdict was important and that if one jury made its decision earlier than the other, the trial court should ensure the other jury's deliberations were not influenced by a public verdict. (40 Supp. RT 5808.) The prosecution said there was no need to deviate from the regular procedure for taking a jury verdict since the normal admonitions to the jury were sufficient. Huhn's trial counsel did not want to seal the verdict. (40 Supp. RT 5809-10.) The trial court said a real possibility existed of the other jury being influenced given almost identical issues were being deliberated. The court should do something to make sure that does not occur. The prosecution suggested a gag order. (40 Supp. RT 5811.) The trial court said this was a reasonable option. It did not want to jeopardize Huhn's rights or those of the prosecution. (40 Supp. RT 5812.) The trial court suggested inquiring to see if jurors would be available on the following Wednesday. If so, the verdict would be sealed until then with a verbal order admonishing not to discuss the case. The prosecution said this would be a mistake. But, the trial court had the prosecution's agreement to do whatever would be appropriate. (40 Supp. RT 5815-16.) The

prosecution added that the jury had reached a verdict and counsel was entitled to have it taken in a public forum and announced openly; if counsel was unwilling to waive, there were problems. (40 Supp. RT 5817-18.) Huhn's counsel said the defendant was not willing to provide a waiver. (40 Supp. RT 5818.) The trial court said it would take the verdict at that time. It was required to do so without a waiver from Huhn of his right under Penal Code section 1147. (40 Supp. RT 5818-19.)

Later that day, defense counsel told the trial court he was surprised at the course of action chosen since the understanding was that the verdict would not be made public as long as appellant's jury was still deliberating. (32 RT 5384.) The trial court suggested giving the jury the regular admonishments. (32 RT 5386.) The trial court told the jury they would be off for several days and to not discuss the case with anyone. The trial court told the jury not to read, view or listen to any account or discussion of the case reported in the news media, or scan headlines. (32 RT 5388.)

After proceedings resumed, defense counsel sought to file with the court news articles on the Huhn verdict that came out in the online and print version of the city's major newspaper on June 23 and 24, 2005. (33 RT 5418; Pros. Ex. Nos. 52, 53.) Defense counsel said he objected to what happened; counsel had not been notified about the verdict being rendered, was not in a position to state objections to having the verdict published, and no precautions were taken to isolate appellant's deliberating jury. (33 RT 5419.) Counsel said he thought an agreement was reached that something would be done to prevent the second jury panel from being tainted. Counsel said the articles in the paper referred to appellant in demeaning terms and referenced Huhn's defense which was that he was scared to death of appellant; appellant was a "maniac with a gun." (33 RT 5422.) Counsel said the prosecution's burden was lessened and appellant's presumption of

innocence was diminished. The next proceeding was the reading of the verdict from appellant's jury. (33 RT 5423-24.)

B. The Trial Court Erred In Not Taking Precautions To Ensure The Impartiality Of Appellant's Jury Following The Verdict In Huhn's Case And Thereafter Failing To Inquire Whether The Impartiality Of Any Of Appellant's Jurors Was Compromised

An accused has a constitutional right to a trial by an impartial jury. (U.S. Const., Amend. VI, XIV; Cal. Const., art. I, § 16; *In re Hamilton* (1999) 20 Cal.4th 273, 293-94.) An impartial jury is one in which no member has been improperly influenced. (*In re Hamilton, supra*, 20 Cal.4th 273, 204.) Whether a juror consciously receives outside information or is involuntarily exposed to events outside the trial evidence, the inquiry is the same. Both require examination for probable prejudice. (*Id.* at pp. 294-95.) A trial court has a duty to inquire into allegations of misconduct during jury deliberations and conduct whatever inquiry is reasonably necessary. (*People v. Martinez* (2010) 47 Cal.4th 911, 941-42; Pen. Code, §1089.)

In the case of media exposure on the case, the trial court must decide at the threshold whether the media accounts of the case are actually prejudicial, whether the jurors were probably exposed to the publicity, and whether they would be sufficiently influenced by bench instructions alone to disregard the publicity. (*U.S. v. Aragon* (5th Cir. 1992) 962 F.2d 439, 443.) As to the likelihood that the prejudicial accounts reached the jury, "[t]he most important factors, in our view, are the prominence of the media coverage itself and the measures taken by the district court to minimize the probability of jury exposure." (*U.S. v. Bermea* (5th Cir. 1994) 30 F.3d 1539, 1558.)

A trial court's decision is reviewed for an abuse of discretion. (*People v. Martinez, supra,* 47 Cal.4th at p. 942; *U.S. v. Bermea, supra*, 30 F.3d 1539, 1556.)

In this case, the trial court not only erred in failing to ensure appellant's jury would not be exposed to the verdict on Huhn's case but also erred in failing to inquire whether any of the jurors had heard of the verdict and if so, whether they could remain impartial. The error implicated appellant's constitutional rights to due process, a fair trial, to be tried by an impartial jury, and a fair and reliable guilt determination. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1331-32; *U.S. v. Aragon, supra,* 962 F.2d 439, 445-46; *Beck v. Alabama, supra,* 447 U.S. 625, 637-638; U.S. Const., Amend. V, VI, XIV; Cal. Const., Art. I, §§ 7, 15, 16.)

In *People v. Cummings, supra,* 4 Cal.4th1233, co-defendant Gay's jury returned a verdict of death prior to the commencement of the penalty trial for defendant Cummings. Although the parties stipulated that the verdict would remain sealed, after a conference with Gay's attorney alone, the court unsealed the verdict of death which was reported in the press. Cummings moved to impanel a new jury in part because two of the Cummings jurors had learned that a verdict was reached. The court questioned those jurors, one of whom had immediately closed the newspaper and did not know what the verdict was. The other juror had seen a newspaper headline, knew what the verdict was, but had not read the article. She assured the court she could be impartial in reaching a penalty verdict in Cummings' case. The motion to impanel a new jury and motions to excuse those two jurors were denied. (*Id.* at p. 1331.)

Cummings argued that the danger of a jury obtaining knowledge of such facts is great when dual juries are used, that there was no justification for unsealing the verdict, and unsealing should be forbidden. He also

contended that in these circumstances, prejudice should be presumed and that the prosecution should bear the burden of overcoming the presumption. (*Id.*)

According to the Court, the record did not reveal the reasons for the decision to unseal the Gay verdict. But there were suggestions that the trial court believed it would be necessary to discharge the jurors and that they, counsel, or Gay himself might discuss the verdict publicly if it remained sealed. In any event, the procedure followed by the court was proper. Even if inadvertent, it is misconduct for a sitting juror to read a newspaper article relating to the trial. The Court decided if that occurred, the trial court should conduct a hearing into whether and to what extent the jury may have been affected and whether there was good cause to discharge any juror. The trial court did so here and it found that only two jurors knew of the news reports and both could be impartial. The inquiry was sufficient to rebut any presumption of prejudice that might arise from the jurors' inadvertent exposure to the news reports of the Gay verdict. (*Id.* at pp. 1331-32.)

In *U.S. v. Aragon, supra,* 962 F.2d 439, the appellate court found the trial court abused its discretion in failing to act decisively to ascertain the impact of the news article on the jury. The trial court made no inquiry. The article was not published in an obscure manner. According to the appellate court, at minimum, when the trial court was apprised of the existence of the potentially prejudicial article, it should have made the proper inquires to the jury. Also, the instructions the trial court did provide to the jury on publicity were insufficient. The jury was just told to avoid reading about or listening to media reports about the case itself. According to the appellate court, such a selective prohibition did not obviate the trial court's need for inquiry. It was impossible to determine if jurors were actually exposed to

the article. Thus, it would have to speculate to decide that no juror saw or heard the account, and that undue prejudice did not result. (*Id.* at pp. 441, 445–46.)

Similarly, here, although defense counsel thought an agreement was reached on the subject and the prosecution even suggested a gag order, the trial court, after discussing the matter with Huhn's attorney and the prosecutor alone, ended up allowing the Huhn verdict to be taken in open court which was reported in the press. (32 RT 5384; 33 RT 5418, 5422; 40 Supp. RT 5808-19.) When the jury reconvened several days later, the trial court conducted no inquiry to see if any of the jurors heard of the Huhn verdict despite the very real possibility jurors did. (Contrast *U.S. v. Bermea, supra,* 30 F.3d 1539, 1560 [where appellate court found low chance jurors exposed to the publicity, a factor supporting district court's decision that individual voir dire was unnecessary, district court had conducted collective voir dire after both instances of innately prejudicial publicity].) In this respect, the newspaper was not an obscure paper; it was San Diego's primary newspaper. Further, the article did not record just procedural details. One article characterized appellant as a maniac with a gun who coerced Huhn to commit the crime. (33 RT 5422.) Making matters worse, the trial court's instructions did not suffice. They informed jurors to disregard news media reports about the case and ignore the headlines. Yet, even if jurors tried to follow these instructions, if they were to notice the headlines, they would probably have unintentionally read them before realizing they must not go further, thereby discovering Huhn was found guilty. (32 RT 5388.) In any case, it is impossible to know if jurors were actually exposed to news of the Huhn verdict. To conclude they were not and that appellant was not prejudiced would be to speculate.

"Reviewing courts have stressed the need for trial courts to do more than merely instruct the jury to 'disregard' or 'pay no attention to' media accounts of the case,. . . The court in *Bermea* also stressed the need for frequent formal admonitions and instructions (*Bermea, supra,* 30 F.3d at p. 1559) and, . . . suggested that trial judges regularly should poll the sitting jury to inquire whether any member has been exposed to media coverage concerning the case." (*NBC Subsidiary* (KNBC-TV), *Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1225, fn. 50.)

The trial court's decision following Huhn's verdict to forego precautions to preserve the impartiality of appellant's jury and failing to conduct an inquiry to see if jurors were exposed to the verdict constituted error, implicating appellant's constitutional rights to due process, a fair trial, a trial by impartial jury, and to a fair and reliable guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, VI, XIV; Cal. Const. Art. I, §§ 7, 15, 16.)

C. Reversal Is Required As The Presumption Of Prejudice Cannot Be Rebutted

When the jury has been exposed to improper outside influences, the test for prejudice is not the strength of the prosecution's case, but whether the impartiality of the jury has been compromised. (*People v. Vigil* (2011) 191 Cal.App.4th 1474, 1488, fn. 5.) As a general rule, jury misconduct raises a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted. (*In re Hitchings* (1993) 6 Cal.4th 97, 118.) Reversal is required if there is a substantial likelihood one or more jurors were improperly influenced by the misconduct. (*People v. Holloway* (2004) 33 Cal.4th 96, 125.)

Here, no evidence was presented to rebut the presumption that misconduct occurred affecting the verdict. This point aside, there was a substantial likelihood the verdict was reached by a jury with one or more of its members knowing of the Huhn verdict. As a conviction cannot stand if even a single juror has been improperly affected by the misconduct, appellant is entitled to a new trial. (Compare *People v. Vigil* (2011) 191 Cal.App.4th 1474, 1487-88 [court decided presumption of prejudice not rebutted; jurors were undecided and misconduct pertained to issue in the case].)

The error was prejudicial also at the penalty phase of the trial, jurors using the same evidence and considerations from the guilt phase. (CALJIC No. 8.85; 8 CT 1642.) (*People v. Brown* (1988) 46 Cal.3d 432, 447-48 [reversal if a reasonable possibility jury would have rendered a different verdict absent the error].) Jurors knowing appellant was referred to as a maniac with a gun and that Huhn feared him may well have convinced them appellant was the most culpable and deserved the death penalty. The error violated appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck, supra,* 447 U.S. 625, 637-638; U.S. Const. Amend. V, VIII, XIV; Cal. Const. Art. I, §§ 7, 15, 17.)

XIII. THE JUDGMENT SHOULD BE REVERSED BASED ON JURY MISCONDUCT

A. Procedural History

Appellant moved for a new trial on several grounds, one of which was the jury receiving a prosecution exhibit that had not been admitted into evidence, Prosecution Exhibit No. 79. (8 CT 1667-71, 1683.) Defense counsel claimed it contained a statement by the prosecutor alleging appellant was not only guilty of the charged offense but presented a danger

to the public. Defense counsel asserted that such inflammatory language was obviously prejudicial to appellant and likely to have resulted in juror bias against him. (8 CT 1671-72.)

Prior to addressing appellant's motion for new trial, the trial court stated the motion had a typographical error; Exhibit No.19 should be referenced as Exhibit No. 79. (38 RT 5732.) The trial court acknowledged this exhibit had not been admitted into evidence; but, it was placed in the jury room. The exhibit was a letter from the district attorney offering his opinion that appellant was a dangerous man. The letter was in response to Pasquale's letter to the district attorney on his potential testimony in appellant's trial. (38 RT 5733.) The district attorney wrote: "As you pointed out, the greater good here is to see that Anderson is not in a position to harm others." (38 RT 5733.) The trial court said it did not appear the letter was an effort by the prosecution to blast appellant as a dangerous man. It was just an effort to have Pasquale testify. (38 RT 5733-34.) The trial court did not find this would create inherent bias towards appellant since the opinion about appellant was already in evidence through Defense Q. There was not a substantial likelihood appellant suffered actual prejudice due to jurors' inadvertent receipt of the letters. (38 RT 5734-35.)

Prosecution Exhibit Number 79, a letter written to Pasquale on June 15, 2004 from the prosecutor in appellant's case read:

> "Mr. Pasquale:
>
> I received your letter postmarked June 1, 2004 just yesterday. I appreciate your situation but I am afraid there is nothing I can do for you regarding any cases you may have pending.
>
> I also appreciate how difficult it is to find yourself in the position of being compelled to testify in such a serious case while incarcerated as an inmate. But, as you pointed out, the greater good

here is to see that Anderson is not in a position to harm others in the future.

I can tell you that we will make every effort to have you here for testimony and then returned as quickly as possible to minimize any inconvenience to you." (Pros. Ex. No. 79; see 8 CT 1683.)

B. The Jury Engaged In Misconduct When Jurors Were Given An Exhibit Not Admitted Into Evidence During Deliberations

One accused of a crime has a constitutional right to a trial by jury. (U.S. Const., Amend. VI; Cal. Const., art. I, § 16;[16] *People v. Collins* (1976) 17 Cal.3d 687, 692.) "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (*In re Hitchings* (1993) 6 Cal. 4th 97, 110.)

Even if unintentional, a jury's receipt of information on its case that was not part of the evidence received at trial is misconduct. (*People v. Nesler* (1997) 16 Cal.4th 561, 579.) Such misconduct leads to a presumption that the defendant was prejudiced because of it. (*Id.* at p. 578.) This presumption of prejudice may be rebutted only by proof that no prejudice actually resulted. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 399.)

The requirement that a jury's verdict must be based on the evidence developed at trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the evidence developed

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[16] Although section 16 of article I does not explicitly guarantee trial by an impartial jury as does the Sixth Amendment, "that right is implicitly guaranteed by our charter, as the courts have long recognized." (*People v. Wheeler* (1978) 22 Cal.3d 258, 265.)

against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-473 [85 S.Ct. 546, 13 L.Ed.2d 424].)

"Due process means a jury capable and willing to decide the case solely on the evidence before it." (*Smith v. Phillips* (1982) 455 U.S. 209, 217 [102 S.Ct. 940, 71 L.Ed.2d 78].)

Here, the jury was given an exhibit, Prosecution Exhibit No. 79, that was not admitted into evidence. The exhibit was a letter from the prosecutor in appellant's case informing the witness that the "greater good" was to see appellant not be in a position to harm others in the future. (See 8 CT 1683.) Although the jury was not responsible for the error in allowing the exhibit to be viewed during deliberations, it was still misconduct for the jury to be exposed to it since it had not been admitted as evidence at trial. (Compare *People v. Andrews* (1983) 149 Cal.App.3d 358, 363 [when during jury deliberations court discovered that exhibits not introduced into evidence were sent mistakenly to jury room, court found this constituted jury misconduct although not intentional].) The misconduct implicated appellant's constitutional rights to due process, a fair trial, trial by impartial jury and to a fair and reliable guilt determination. (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-473 [85 S.Ct. 546, 549, 13 L.Ed.2d 424]; *Smith v. Phillips* (1982) 455 U.S. 209, 217 [102 S.Ct. 940, 71 L.Ed.2d 78]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. V, VI, XIV; Cal. Const., Art. I, §§ 7, 15, 16.)

C. Reversal Is Required As The Presumption Of Prejudice Cannot Be Rebutted

As a general rule, jury misconduct raises a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted. (*In re Hitchings* (1993) 6 Cal.4th 97, 118.) Reversal is required if there is a substantial likelihood one or more jurors were improperly influenced by the misconduct. (*People v. Holloway* (2004) 33 Cal.4th 96, 125; *People v. Nesler* (1997) 16 Cal.4th 561, 578.)

> "Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not inherently prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was actually biased against the defendant. If we find a substantial likelihood that a juror was actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard." (*People v. Nesler, supra,* 16 Cal.4th 561, 578-79, citations omitted.)

The reviewing court independently determines whether there is a substantial likelihood of bias, looking to the entire record to resolve this issue. (*Id.* at pp. 582-83.)

Here, no evidence was presented to rebut the presumption that misconduct occurred, affecting the verdict. This point aside, the letter was inherently prejudicial, substantially likely to have to have influenced one or more jurors. In the letter, the prosecutor stated his personal opinion that

appellant would harm others if not locked up. Not only communicating appellant was a criminal, the prosecutor communicated the impression that appellant was guilty of the charges. As "juries very properly regard the prosecuting attorney as unprejudiced, impartial and nonpartisan, ... statements made by him are apt to have great influence." (*People v. Perez, supra,* 58 Cal.2d 229, 247; *People v. Bolton* (1979) 23 Cal.3d 208, 213, citations omitted ["such testimony, although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence."].)

Alternatively, there was more than a substantial likelihood the jurors were influenced by the letter. The prosecution's evidence against appellant was not strong. It relied on the testimony of teenage witnesses, all having credibility issues (e.g., 16 RT 2509-10, 2519, 2533-34, 2537-38, 2646-50, 2653; 26 RT 4626-28, 4554-55; 27 RT 4668; 17 RT 2906-09; 22 RT 3801-06, 3809, 3811-15). The prosecution also presented evidence portraying appellant as criminally disposed to have committed the crimes; his uncharged bad acts and prior burglaries showed him as an experienced criminal. The letter buttressed the prosecution's case substantially as it showed the personal opinion of appellant's criminal propensity and guilt from someone the jurors were likely to find most credible – the government's representative. Additionally, contrary to the trial court's finding that the opinion was already before the jury in Defense Exhibit Q (38 RT 5734-35), it was not. Defense Exhibit Q was Pasquale's letter to the prosecutor offering his own opinion of appellant's guilt, not the prosecutor's opinion. (43 CT 8948.)

As a conviction cannot stand if even a single juror has been improperly affected by the misconduct, reversal is required. (*People v. Pierce* (1979) 24 Cal.3d 199, 208; compare *People v. Vigil* (2011) 191 Cal.App.4th 1474,

1487-88 [court decided presumption of prejudice not rebutted; jurors were undecided and misconduct pertained to issue in the case].)

The error was prejudicial also at the penalty phase of the trial. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Brown* (1988) 46 Cal.3d 432, 447-48 [reversal if a reasonable or realistic possibility the jury would have rendered a different verdict absent the error].) There, the jurors were free to use evidence from the guilt phase in making their decision. (CALJIC No. 8.85; 8 CT 1642.) Thus, given the inflammatory nature of the exhibit, the prosecutor warning that appellant may harm others, jurors may well have been persuaded that appellant deserved the maximum penalty. The error violated appellant's right to a fair and reliable penalty determination. The judgment should be reversed. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, VIII, XIV; Cal. Const. Art. I, §§ 7, 15, 17.)

XIX. THIS COURT SHOULD REVIEW THE TRIAL COURT'S IN-CAMERA PROCEEDING ON APPELLANT'S *PITCHESS* MOTION

Counsel for Huhn filed a *Pitchess*[17] motion, requesting discovery of past complaints on Investigator Baker that related to any prior incident of dishonesty and other misconduct. Appellant's trial counsel joined into the motion. The trial court granted it and an in-camera hearing was held. The trial court decided there was no discoverable information to turn over. (5 CT 1073-74; 5 RT 788-89, 791-96.)

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[17] *Pitchess v. Superior Court of Los Angeles County* (1974) 11 Cal.3d 531

In *People v. Mooc* (2001) 26 Cal.4th 1216, this Court detailed the process following a *Pitchess* motion. When a trial court concludes good cause exists for discovery of relevant evidence contained in a law enforcement officer's personnel files, the trial court will look at the documents and decide their relevancy. The trial court should make a record of what documents it examined before ruling on the motion. (*Id.* at pp. 1228-29.) This Court further referred to the right of a defendant to obtain appellate review of a trial court's disclosure decision following an in-camera hearing on the defendant's *Pitchess* motion. (*Id.*, at pp. 1228-30.)

Following *People v. Mooc, supra,* 26 Cal.4th 1216, appellant requests this Court to follow the procedures outlined above to review the records to decide if the trial court's determination constituted error.

XX. THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT PREJUDICIALLY ERRED IN ALLOWING APPELLANT TO PRESENT AN IRRELEVANT AND INFLAMMATORY STATEMENT TO THE JURY DEMANDING THE DEATH PENALTY, NOT STRIKING THE TESTIMONY SUA SPONTE, AND FAILING TO ADEQUATELY INSTRUCT THE JURY GIVEN APPELLANT'S STATEMENT, THEREBY VIOLATING STATE LAW AND THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION

A. Introduction

Appellant testified at the penalty phase trial that he wanted the jury to give him the death penalty. He testified that he was innocent and the jury's verdict was wrong. (35 RT 5623.) He further stated:

> "I don't give a shit. Give me the death penalty. If you believe I'm guilty, kill me. . . I really despise all of you and your decision. I don't think you were reasonable or fair. Thanks for nothing." (35 RT 5623.)[18]

The trial court violated state law and the Fifth, Eighth and Fourteenth Amendments to the Federal Constitution by allowing appellant to present irrelevant, inadmissible and extremely damaging testimony that he should be sentenced to death. This resulted in a charade of a penalty trial and an unreliable penalty verdict. The trial court should have stricken the testimony sua sponte, and the jury told to disregard it. Further, even if this

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[18] During the penalty trial, the defense called Mason who testified Huhn told him he shot Brucker. (35 RT 5614-16.) Mason also testified at the preliminary hearing that Huhn admitted doing the shooting. (35 RT 5618-19.) No other mitigating evidence was presented. Appellant had confirmed to the trial court that he instructed his attorney not to present mitigation evidence. (35 RT 5507.)

Court were to reaffirm its position that a defendant has the right to ask the jury to choose the death penalty, in this case, error still occurred because the jury was not adequately instructed how to properly consider that testimony.

B. The Trial Court Erred In Permitting Appellant To Present Irrelevant And Inflammatory Testimony To The Jury That Death Was The Appropriate Penalty In This Case Because It Was Irrelevant And Inadmissible Under State Law And The Fifth, Eighth And Fourteenth Amendments To The Federal Constitution, Undermining Appellant's Rights To Due Process And A Fair And Reliable Penalty Determination

> "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S. Ct. 2978, 49 L. Ed. 2d 944] [plurality opinion].)

California has recognized limited circumstances where as a matter of fundamental public policy, rights and decisions that are normally personal to a criminal defendant may be limited or overruled to obtain death penalty reliability. For example, a capital defendant is not permitted to waive his or her automatic appeal of a death judgment. (Cal. Const., art. VI, § 11, subd. (a); Pen. Code, § 1239, subd. (b); *People v. Mai* (2013) 57 Cal. 4th 986, 1055.) Because death is different, the United States Supreme Court has stressed that capital sentencing must be controlled by clear and objective standards to produce nondiscriminatory application. (*California* v. *Brown*

(1987) 479 U.S. 538, 544 [107 S. Ct. 837, 93 L. Ed. 2d 934] [conc. opn., O'Connor, J.].) This Court has emphasized that the decision to impose death must be undertaken in compliance with the statutory guidelines. (*People v. Brown* (1985) 40 Cal. 3d 512, 538-40.) A defendant has a substantial and legitimate expectation that he or she will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion. (*Hicks v. Okla.* (1980) 447 U.S. 343, 346 [100 S. Ct. 2227, 65 L. Ed. 2d 175].)

Consideration of any relevant mitigating evidence on the defendant's character or background and circumstances of the particular offense ensures the reliability in the determination that death is the appropriate punishment in a specific case. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 327-328 [109 S. Ct. 2934,106 L. Ed. 2d 256], affirmed and reversed in part in *Penry v. Johnson* (2001) 532 U.S. 782 [121 S. Ct. 1910, 150 L. Ed. 2d 9].) The jury must make moral assessments of facts as they relate to whether death is appropriate for the individual defendant. That jury must be free to reject death on the basis of any constitutionally relevant evidence. The jury must weigh the aggravating and mitigating factors, assigning whatever moral or sympathetic value each juror deems appropriate to each, and upon completion of the weighing process must decide if death is the appropriate penalty. (*People* v. *Clark* (1990) 50 Cal. 3d 583, 631.)

1. Because The Right to Testify Is Not Absolute and Extends Only to Relevant and Admissible Material, Appellant's Opinion That Death Was The Appropriate Punishment Was Inadmissible At The Penalty Phase And Violated State Law And The Fifth, Eighth And Fourteenth Amendments

A criminal defendant generally enjoys the right to take the stand and testify in his or her own defense. (*Rock v. Arkansas* (1987) 483 U.S. 44, 51-

53 [107 S. Ct. 2704, 97 L. Ed. 2d 37] [recognizing right under due process and compulsory process guarantees to present evidence in one's defense under the Fifth, Sixth, and Fourteenth Amendments]; *People v. Robles* (1970) 2 Cal.3d 205, 215 [recognizing right under California law].) However, this right is not absolute. It encompasses the right to present relevant testimony, e.g., relevant to the jury's decision-making function. (*Rock v. Arkansas* (1987) 483 U.S. 44, 51-53, 55 [107 S. Ct. 2704, 97 L. Ed. 2d 37]; *Franklin v. Lynaugh* (1988) 487 U.S. 164, 172-175 [108 S.Ct. 2320, 101 L. Ed. 2d 155]; *People v. Alcala* (1992) 4 Cal. 4th 742, 806-07 ["The jury's focus at that proceeding must be directed to the defendant's character and prior record, and the circumstances of the charged offense."].) The defendant must comply with rules of procedure and evidence designed to assure fairness and reliability. (See, e.g., *United States v. Gallagher* (9th Cir. 1996) 99 F.3d 329, 332, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [93 S.Ct. 1038, 35 L.Ed.2d 297].) The state may restrict the defendant's right to testify as long as the restrictions are not arbitrary or disproportionate to the purposes they are designed to serve. (*Rock v. Arkansas*, *supra*, 483 U.S. 44, 55; *United States v. Gallagher*, *supra*, 99 F.3d 329, 332 [it is neither arbitrary nor disproportionate to refuse to allow a defendant to give narrative testimony].)

Appellant acknowledges that this Court has held a defendant may testify in favor of the death penalty (*People v. Mai*, *supra*, 57 Cal.4th at p. 1056; *People v. Webb* (1993) 6 Cal.4th 494, 534) and that a defendant's absolute right to testify cannot be foreclosed or censored based on content (*People v. Webb*, *supra*, 6 Cal.4th at p. 535). However, appellant respectfully requests that these decisions be reconsidered based on having been incorrectly decided as set forth in the argument below.

In *Booth v. Maryland* (1987) 482 U.S. 496 [107 S. Ct. 2529, 96 L. Ed. 2d 440], the United States Supreme Court held that the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence as it is irrelevant to the jury's sentencing decision and risks arbitrary and capricious imposition of the death penalty. (*Id.* at pp. 502-03.) This decision was partially overruled in *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720]. However, left intact was part of the *Booth* holding that the Eighth Amendment prohibits admission of penalty phase testimony regarding the propriety of or desire of one penalty over another. (*Id.* at p. 830, fn. 2; *People v. Smith* (2003) 30 Cal. 4th 581, 622.) This prohibition applies equally to testimony offered by the prosecution and by the defense. An exception is testimony that the defendant deserves to live from one with whom the defendant had a significant relationship; this is proper mitigating evidence as indirect evidence of the defendant's character. (*Id.*, at pp. 622-623; *People v. Ervin* (2000) 22 Cal.4th 48, 102.)

Due process also prohibits death penalty decisions based on aggravation that is "totally irrelevant to the sentencing process." (*Zant v. Stephens* (1983) 462 U.S. 862, 885 [103 S. Ct. 2733, 77 L. Ed. 2d 235]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 585-586 [108 S. Ct. 1981, 100 L. Ed. 2d 575].) Testimony by a defendant expressing to the jury his or her preference for the death penalty is irrelevant and renders the verdict unreliable, unfair and a violation of due process.

This Court has held that "[a] defendant's opinion regarding the appropriate penalty the jury should impose usually would be irrelevant to the jury's penalty decision." (*People v. Danielson* (1992) 3 Cal. 4th 691, 715, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal. 4th 1046.) It has no bearing on the defendant's character or record, or

circumstances of the offense. (Compare *People v. Smith* (2003) 30 Cal.4th 581, 622 [the United States Supreme Court "has never suggested that the defendant must be permitted to do what the prosecution may not do. The views of a crime victim, especially, as here, of the victim of one of the noncapital crimes, regarding the proper punishment has no bearing on the defendant's character or record or any circumstance of the offense."].) Indeed, this Court in *People v. Webb* (1993) 6 Cal. 4th 494 recognized this. Although finding a defendant's absolute right to testify cannot be foreclosed or censored, this Court found any improper effect from such testimony is to be alleviated by an appropriate instruction when suitable. (*Id.*, at p. 535.) This remedy appears to convey the acknowledgment that testimony requesting a penalty of death is not probative of any aggravating or mitigating factor, having no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to the penalty determination. (See *People v Boyd* (1985) 38 Cal. 3d 762, 774.) Without proper precautions by way of instructions, this type of testimony injects an irrelevant factor into the weighing process and encourages a jury to decide the penalty arbitrarily, e.g., based on a defendant's stated preference for death. (See *People v. Ramos* (1984) 37 Cal 3d 136, 155-156.)[19]

Here, appellant had the right to testify in his defense at the penalty phase of his trial. However, he did not have the right to offer irrelevant and inadmissible testimony, i.e., demanding the jury to sentence him to death. None of his testimony had any bearing on his character or any circumstance of the offense. It was not a mitigating or aggravating factor that jurors were instructed to consider in weighing the aggravating and mitigating

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[19] Appellant discusses in the third section of this argument the inadequacy of the trial court's instructions to the jury on the subject.

circumstances and choosing the penalty. (Pen. Code, § 190.3.) "It is beyond cavil that evidence presented in mitigation must be relevant to the defendant's character and prior record, or the circumstances of the charged offense." (*People v. Lancaster* (2007) 41 Cal. 4th 50, 102; *People v. Alcala* (1992) 4 Cal.4th 742, 807 ["a capital defendant has no right to demand jury consideration of such evidence at the penalty phase. The jury's focus at that proceeding must be directed to the defendant's character and prior record, and the circumstances of the charged offense."].) This Court has previously concluded a defendant's testimony was irrelevant to the defendant's character, record and circumstances of his offense, and properly excluded. In *People v. Lancaster, supra,* 41 Cal. 4th 50, this Court concluded the defendant's testimony about other cases was not relevant to his character, record or circumstances of the crime. (*Id.* at pp. 101-02.) For the same reason, appellant's testimony was not relevant and should have been stricken.

Although this Court in *People v. Mai, supra,* 57 Cal. 4th 986 and *People v. Webb, supra,* 6 Cal.4th 494, found no error in the defendant testifying to the jury of his preference for the death penalty, in so holding, this Court did not state that the testimony was relevant as an aggravating or mitigating factor. Instead, this Court focused on whether the jury's function in deciding the appropriate penalty based on aggravating and mitigating factors was compromised. In *People v. Mai, supra,* this Court concluded the jury had instructions that indicated the list of factors in mitigation and aggravation was exclusive. (*People v. Mai, supra,* 57 Cal.4th 986, 1056.) Thus, there was no risk of the jury using a defendant's preference for death as a factor to weigh in deciding the appropriate penalty. In *People v. Webb, supra,* 6 Cal.4th 494, the defendant's testimony revealed factors that were relevant to the circumstances of the crime and his character, thus fitting

within the factors listed in Penal Code section 190.3. His testimony was not entirely irrelevant. This Court also pointed out that an "extensive case in mitigation" was presented. It was unlikely the jury's sentencing responsibility was diminished due to the defendant's stated death preference. (*Id.* at pp. 513, 535; compare *People v. Guzman* (1988) 45 Cal.3d 915, 929-33, 961-63 [no error in allowing defendant to testify of his preference to death to jury; defendant also testified in great detail on mitigating factors relevant to his character, relevant for the jury's consideration in deciding the appropriate penalty].)

The Fifth, Eighth and Fourteenth Amendments as well as the due process provisions of the Federal Constitution prohibit the use of irrelevant testimony in the sentencing process. Because appellant's testimony was not relevant to the sentencing determination, the trial court erred in allowing the jury to consider it in reaching a penalty decision. (*Booth, supra,* 482 U.S. at pp. 509; *Payne v. Tennessee, supra,* 501 U.S. 808, 830, n.2; *Zant v. Stephens, supra,* 462 U.S. 862, 885; *Johnson v. Mississippi* (1988) 486 U.S. 578, 585-86 [108 S. Ct. 1981, 100 L. Ed. 2d 575].)

2. The Trial Court Had an Independent Obligation To Strike Appellant's Testimony that Death Was the Appropriate Penalty

The United States Supreme Court long ago recognized that "[i]t is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process." (*Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co* (1919) 249 U.S. 134, 145-146 [39 S. Ct. 237, 63 L. Ed. 517]; *United States v. Young* (1985) 470 U.S. 1, 10 [105 S.

Ct. 1038, 84 L. Ed. 2d 1] [duty of trial court to keep trial within proper bounds].)

California judges are held to the same standard.

> "[A] judge is not a mere umpire presiding over a contest of wits between professional opponents, but a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts between the parties who have sought the protection of our courts. Within reasonable limits, it is not only the right but the duty of a trial judge to clearly bring out the facts so that the important functions of his office may be fairly and justly performed." (*Estate of Dupont* (1943) 60 Cal.App.2d 276, 290; *People v. Carlussi* (1979) 23 Cal.3d 249, 256; accord *People v. Sturm* (2006) 37 Cal.4th 1218, 1237 ["the court has a duty to see that justice is done"]; Pen. Code, section 1044 ["it is the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."].)

Here, presented with a defendant bent on obtaining the worst possible option for himself, it became incumbent upon the trial court to take control of the proceedings, limit the introduction of evidence to relevant and material matters, and ensure that the penalty phase trial was fair, appeared fair, and produced a just and reliable verdict. (Pen. Code, § 1044; *Indiana v. Edwards* (2008) 554 U.S. 164, 177 [128 S. Ct. 2379, 171 L. Ed. 2d 345], citation omitted ["proceedings must not only be fair, they must appear fair to all who observe them"]; see also *People v. McKenzie* (1983) 34 Cal.3d 616, 626-627 [by permitting proceeding to go forward when defense counsel declined to participate in trial, the trial court violated its

independent duty to protect the rights of the accused, its duty to ensure a fair determination of the issues on the merits and its obligation to promote the orderly administration of justice]; *Clisby v. Jones* (11th Cir. 1992) 960 F.2d 925, 934 & fn. 12 [suggesting that trial courts have independent duty to intervene when trial proceedings are so fundamentally unfair as to threaten to render the trial a mockery of justice]; *United States v. ex rel. Darcy v. Handy* (3rd Cir. 1953) 203 F.2d 407, 427 [there are circumstances under which counsel's representation is "so lacking in competency or good faith that it would become the duty of the trial judge or the prosecutor, as officers of the state, to observe and correct it" so as to avoid a trial that amounts to a "farce and a mockery of justice" in violation of due process].) The trial court should have not allowed appellant's testimony asking for a punishment of death; it should have instructed the jury to disregard it.

In short, in a death penalty case, this Court expects the trial court and the attorneys to proceed with the utmost care and diligence and with scrupulous regard for fair and correct procedure. The proceedings here fell well short of this goal. (*People v. Hernandez* (2003) 30 Cal.4th 835, 878, disapproved on other grounds in *People v. Riccardi* (2012) 54 Cal. 4th 758.)

3. Even If Appellant's Testimony Demanding The Death Penalty Were Admissible, The Trial Court Erred In Failing To Instruct The Jury Sua Sponte Not To Consider It In Choosing The Appropriate Penalty

Although this Court has held a defendant's right to testify cannot be precluded or sanitized based on the substance of that testimony, this Court has also held the remedy for a potentially improper effect is a limiting instruction. (*People v. Webb*, *supra*, 6 Cal. 4th 494, 535.) This instruction would ensure jurors will not improperly weigh aggravating and mitigating

circumstances, giving improper weight to the defendant's testimony requesting the death penalty. Appellant's request for the death penalty was the type of irrelevant, improper material that should have led the trial court to ensure the jury did not factor it in the weighing process. By not so instructing the jury, the trial court permitted appellant to turn the penalty trial into a charade, the jury's selection of the death penalty a foregone conclusion. At minimum, the trial court should have instructed the jury that appellant's testimony was not an aggravating factor and therefore could not be used in the weighing process. What resulted was a trial with a dearth of mitigating evidence, a powerful statement by appellant asking for the death penalty but with no precautions taken that the jury would not rely on that testimony in making its determination. Appellant's testimony that he did not care, to give him the death penalty (35 RT 5623), surely encouraged the jury to short circuit the process and decide on a penalty of death. The lack of proper instruction to guide the jury in light of this testimony violated the Eighth Amendment standards of reliability that require a jury's discretion be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U.S 153, 189 [96 S.Ct. 2909, 49L.Ed.2d 859].) Any witness' testimony about the appropriateness of a punishment by itself creates a constitutionally unacceptable risk the jury may impose the death penalty in an arbitrary and capricious manner. (*Booth v. Maryland* (1987) 482 U.S. 496, 503 [107 S. Ct. 2529, 96 L. Ed. 2d 440], overruled on other grounds in *Payne v. Tenn.* (1991) 501 U.S. 808 [111 S. Ct. 2597, 115 L. Ed. 2d 720].)

On this issue, appellant's case may be distinguished from *People v. Webb, supra,* 6 Cal.4th 494 and *People v. Mai, supra,* 57 Cal.4th 986. In *People v. Webb, supra,* 6 Cal.4th 494, the defendant argued the trial court prejudicially undermined the reliability of the penalty verdict by allowing

him to testify in favor of a death sentence. The defendant had testified to the jury about his background, admitted to the capital crimes and explained he wanted the death penalty. (*Id.* at pp. 513, 534.) This Court rejected the argument, finding that any potentially improper effect is to be alleviated with a limiting instruction where appropriate. The instruction given in *People v. Webb, supra,* read: "You are instructed that despite the defendant's testimony, you remain obligated to decide for yourself, based upon the factors in aggravation and mitigation, whether death is the appropriate penalty." In finding this instruction sufficient, this Court pointed to the "extensive case in mitigation presented by witnesses other than defendant" and assumed the jury followed the instruction and fully considered the penalty evidence. (*Id.* at p. 535.)

In *People v. Mai, supra,* 57 Cal.4th 986, this Court decided the constitutional reliability of a death judgment was not undermined when a defendant testified in favor of the death penalty. According to this Court, although the jury did not have specific instruction that despite the defendant's testimony it must decide the appropriate penalty based upon the factors in aggravation and mitigation, the jury was instructed it must weigh the aggravating and mitigating evidence to determine the appropriate penalty, and should return a death verdict only if persuaded the aggravating circumstances were so substantial in comparison to mitigation that death was warranted. The jury was told the listed aggravating factors were exclusive, that the only Penal Code section 190.3 factors the jury could consider in aggravation were factors (a) (circumstances of the capital crime), (b) (other violent criminal conduct), and (c) (prior felony convictions). Jurors were also told not to be swayed by bias against the defendant. (*Id.* at pp. 1056-57.)

Here, however, these instructions were not all given. Although instructed not to be influenced by bias or prejudice against the defendant (CALJIC No. 8.84.1; 8 CT 1641) and that the jury must weigh the factors in aggravation and mitigation despite testimony offered by appellant (CALJIC No. 8.88; 8 CT 1657), unlike the jurors in *People v. Mai, supra,* jurors here were not told the list of aggravating factors was exclusive, an instruction that lessened the possibility the jurors in *People v. Mai, supra,* would have improperly used the defendant's request for the death penalty in the weighing process. Jurors here were instructed that they shall consider all the evidence received during any part of the trial, and consider and be guided by the following listed factors if applicable (pertaining to the offense and whether the defendant was an accomplice or under extreme duress or impaired during the crime, prior felony conviction, presence or absence of criminal activity, the defendant's age, and any other circumstance pertaining to the gravity of the crime or other aspect of the defendant's character or record the defendant offers as a basis for a sentence less than death). (CALJIC No. 8.85; 8 CT 1642-43.)

Also, compared to *People v. Webb, supra,* 6 Cal.4th 494, there was a greater need here for a proper limiting instruction since appellant did not offer any testimony relevant to mitigating factors and the defense did not present extensive mitigating evidence. The jury here should have been clearly told that it should not consider appellant's desires in the weighing process. The language in the existing instructions, that the jury should decide the proper penalty "despite testimony offered by the defendant suggesting preference for a particular penalty" (CALJIC No. 8.88; 8 CT 1657) was inadequate to convey to the jury that this testimony was not a factor to consider.

Further, since little mitigating evidence was presented, the jury would have been hard-pressed to find a balance of factors to weigh and not feel justified in acquiescing to appellant's demand. The trial court had the power to ensure the reliability of the penalty determination by at minimum giving the proper instructions; but, it failed to take steps to do so.

The trial court's error also diminished the jury's sense of personal responsibility for the death verdict. (*Romano v Oklahoma* (1994) 512 U.S. 1, 15 [14 S. Ct. 2004, 129 L. Ed. 2d 1](conc. opn., J. O'Connor.) A juror could vote for death far easier knowing that the ultimate decision was one that appellant wanted and there were no instructions directing jurors not to rely on his testimony.

In short, the trial court erred in allowing appellant to demand to the jury to give him the death penalty, not striking the testimony sua sponte. Even if admissible testimony, the trial court erred in not properly instructing the jury that appellant's testimony could not be considered as an aggravating factor and included in the weighing of aggravating and mitigating circumstances. The penalty trial ended up being a charade of a death determination, constitutionally unfair and unreliable. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, VIII, XIV; Cal. Const. Art. I, §§ 7, 15, 17.)

C. The Error Was Prejudicial

The trial court's error violated appellant's federal constitutional rights. Also, the state law standard for penalty phase error is the same as the harmless beyond a reasonable doubt standard of *Chapman v. California*,

supra, 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. Thus, that standard applies. (*Id.* at p. 24; *People v. Brown* (1988) 46 Cal.3d 432, 447-48.)

Here, the sentence cannot be considered reliable when the record reflects that appellant was allowed to order the jury to choose a penalty of death and clear instructions were not given for the jury to properly decide the penalty without considering that testimony. Appellant's statement was perhaps the most dramatic event at the trial, given he also conveyed his disdain for the jury (35 RT 5623), introducing arbitrary considerations in the penalty process. Absent the error, the prosecution would have faced an uphill battle to have the jury vote in favor of death penalty. There was no premeditated plan to kill Brucker. Appellant's prior burglaries were not violent crimes.

In any case, when the jury in a capital case is deprived of substantial evidence in mitigation, has the defendant asking for a penalty of death, and lacks proper instructions directing jurors how to properly weigh the aggravating and mitigating factors in light of the defendant's testimony requesting the death penalty, the potential for prejudice is obvious. What occurred here was a constitutionally unfair and unreliable penalty trial. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, VIII, XIV; Cal. Const. Art. I, §§ 7, 15, 17.) The judgment should be reversed and the case remanded for a new penalty trial.

XXI. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING THE DEFENSE'S REQUEST TO INSTRUCT THE JURY WITH A REVISED VERSION OF CALJIC NO. 8.85, DIRECTING THAT THE LIST OF AGGRAVATING AND MITIGATING FACTORS WAS AN EXCLUSIVE LIST

A. Introduction

Defense counsel asked the trial court to instruct the jury with a revised version of CALJIC No. 8.85, identifying aggravating and mitigating circumstances. The trial court rejected the request, finding that aggravating and mitigating factors need not be identified. The court stated that under *People v. Turner* (2004) 34 Cal. 4th 406 and *People v. Brown* (2004) 33 Cal.4th 382, there is no requirement that the aggravating and mitigating factors be identified. (35 RT 5495-96, 5627-28.)

The version of CALJIC No. 8.85 given to the jury provided in relevant part as follows:

> "In determining which penalty is to be imposed, you shall consider all the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable. . .." (CALJIC No. 8.85; 8 CT 1642.)

B. The Trial Court Erred In Failing To Instruct The Jury That The List Of Aggravating And Mitigating Factors Was The Entire List Of Factors As Set Forth In CALCRIM 763

The jury should be instructed on request that the list of aggravating and mitigating factors is the entire list of factors. (*People v. Souza* (2012) 54 Cal.4th 90, 140; *People v. Hillhouse* (2002) 27 Cal.4th 469, 508-09; *People*

v. Gordon (1990) 50 Cal.3d 1223, 1275, fn. 14, overruled on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787.) In *People v. Hillhouse, supra,* 27 Cal.4th 469, this Court stated: "we suggest that, on request, the court merely tell the jury it may not consider in aggravation anything other than the aggravating statutory factors." (*Id.* at p. 509, fn. 6.) The Commentary to CALCRIM 763, the CALCRIM equivalent to CALJIC No. 8.85, states: "The committee has rephrased this for clarity and included in the text of this instruction, 'You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case.'" (CALCRIM 763, Commentary.) CALCRIM 763 in relevant part provides that:

> "Under the law, you must consider, weigh, and be guided by specific factors, where applicable, some of which may be aggravating and some of which may be mitigating. I will read you the entire list of factors. Some of them may not apply to this case." (CALCRIM 763.)

Without this language, it is not clear to jurors whether additional circumstances might be considered as aggravating factors, the risk being the jury may rely on a circumstance that is not included on the statutory list of factors. (*People v. Williams* (1988) 45 Cal.3d 1268, 1325, abrogated on other grounds in *People v. Guiuan* (1988) 18 Cal.4th 558; *People v. Boyd* (1985) 38 Cal.3d 762, 778, fn. 10 [Court held trial court erred in allowing the jury to consider evidence of defendant's community reputation; defense counsel had asked court to instruct that jury could not consider any facts or circumstances as aggravating factors other than those listed in the statute and trial court had rejected that instruction].)

In short, the trial court erred. Jurors should have been instructed that the entire list of aggravating and mitigating factors was as identified in the instructions. The error violated appellant's constitutional right to a fair and

reliable penalty determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

C. The Error Was Prejudicial

The state law standard for penalty phase error is essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California, supra,* 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. The error is reversible if there is a realistic possibility the jury would have rendered a different verdict absent the error. (*People v. Howard* (2010) 51 Cal.4th 15, 38; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

Here, the jury had no limit on factors it could consider as aggravating. The prosecutor reinforced this in his argument by arguing to the jury that it could consider "all the things that you heard in the guilt phase. Everything." (36 RT 5692.) Hearing this, jurors may well have believed any factor was applicable as set forth in CALJIC No. 8.85. (CALJIC 8.85; 8 CT 1642.) Jurors also likely thought the prosecutor's reference to appellant's demeanor and characterization of him as a dangerous person, posing a danger to prison employees, indicated these were aggravating factors although they were not; they had nothing to do with the current crime and were not in response to any plea by appellant for pity and sympathy. (36 RT 5698.) (*People v. Fierro* (1991) 1 Cal.4th 173, 244, disapproved on other grounds in *People v. Letner* (2010) 50 Cal.4th 99; *People v. Navarette* (2003) 30 Cal.4th 458, 519; contrast *People v. Lang* (1989) 49 Cal.3d 991, 1040-41 [prosecutor's remark to jury when explaining Penal Code section 190.3 factor (a) [circumstances of crime] that it could consider defendant's demeanor while on stand only proper if no more than suggesting

inapplicability of mitigating factor; here, remark never amplified or explained and its meaning was unclear].)

In short, given the likelihood jurors believed there was no limit on what they could consider as aggravating factors, especially combined with appellant's testimony and the dearth of mitigating evidence, the error was not harmless. The penalty judgment should be reversed.

XXII. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING THE DEFENSE'S REQUEST TO INSTRUCT THE JURY THAT THERE NEED NOT BE ANY MITIGATING CIRCUMSTANCES TO JUSTIFY A DECISION THAT THE PENALTY BE LIFE WITHOUT PAROLE

A. Procedural History

Defense counsel asked the trial court to instruct the jury that there need not be any mitigating circumstances for the jury to choose a penalty of life without parole. (35 RT 5628.) Defense counsel thought this was an essential instruction since appellant sought to limit the defense's presentation of mitigating evidence. The existing instructions were not clear on this point. (35 RT 5629.) The trial court rejected the proposed instruction, finding that CALJIC No. 8.88 covered the subject. (35 RT 5630.)

B. The Trial Court Erred In Denying The Defense's Request To Instruct The Jury That It Could Decide On A Penalty Of Life Without Parole Even Without Mitigating Circumstances

The jury must be instructed on the weighing process for aggravating and mitigating circumstances in deciding the appropriate punishment. (Pen. Code, § 190.3; *People v. Murtishaw* (2011) 51 Cal.4th 574, 588-89; *People v. Brown* (1985) 40 Cal.3d 512, 544.)

> "[O]ur statute and instruction give the jury broad discretion to decide the appropriate penalty by weighing all the relevant evidence. The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (*People v. Duncan* (1991) 53 Cal.3d 955, 979.)

Although CALJIC No. 8.88 instructs the jury on the weighing process for aggravating and mitigating circumstances, it lacks language that specifically directs the jury that it may find a penalty of life without parole even absent mitigating circumstances. This is a necessary provision, especially in appellant's case where limited mitigating evidence was presented. Not surprisingly, CALCRIM 766 has included this language in its instruction. That instruction in relevant part provides as follows:

> "Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances. Even without mitigating circumstances, you may decide that the aggravating circumstances are not substantial enough to warrant death. To return a judgment of death, each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified." (CALCRIM 766.)

Appellant's case may be distinguished from cases where this Court has rejected a similar instruction requested by the defense. In *People v. Anderson* (2001) 25 Cal.4th 543, the defendant asked that jurors be instructed that they need not find any mitigating circumstances to decide on a penalty of life imprisonment. The jury was instructed, among other things, it could consider as reasons for not imposing the death penalty any

circumstances relating to the case or the defendant, that it specifically could consider as a mitigating circumstance any lingering doubt about the defendant's guilt or the truth of any special circumstance, and that any one such factor may be sufficient standing alone to support a decision that death is not the appropriate punishment. Jurors were also instructed they were free to assign whatever moral or sympathetic value they deemed appropriate to each factor and to return a judgment of death, each juror must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. (*Id.* at pp. 598-99.)

The Court found the instruction was properly rejected and redundant. According to the Court, no reasonable juror, having heard the standard instructions given in this case, would assume a penalty of death was required despite insubstantial aggravating circumstances merely because no mitigating circumstances were found. (*Id.* at p. 600, fn.20.)

In *People v. Lenart* (2004) 32 Cal.4th 1107, the defense proposed a special instruction that provided: "You need not find any mitigating circumstances in order to return a sentence of life imprisonment without possibility of parole. A life sentence may be returned regardless of the evidence." (*Id.* at p. 1136.) According to the Court, although the trial court refused to give the instruction, it did instruct the jury that "[t]he defendant has no burden to introduce any factors in mitigation and the absence of factors in mitigation does not require a verdict of death." The first sentence of the defendant's requested instruction would have duplicated the instruction given. (*Id.*)

By contrast, here, the jury was not instructed on lingering doubt or that even one factor alone was sufficient to base a decision. Also, the defense presented minimal mitigating evidence. So, the question for jurors was whether they could decide on a life without parole penalty despite not

finding any mitigating factors from the evidence presented. Further, the jury was not instructed as in *People v. Lenart, supra,* 32 Cal.4th 1107 that the defendant has no burden to introduce factors in mitigation and the absence of these factors does not require a verdict of death. Also, given the theme of the penalty phase instructions was the required weighing process, the obvious inference would be absent mitigating circumstances that the aggravating circumstance would be "substantial in comparison." (CALJIC No. 8.88; 36 RT 5719.) The drafters of CALCRIM 766 appeared to agree on this point and believed the jury should be so instructed, that it could choose life without parole instead of death absent mitigating factors. The specific language the defense requested is contained in that instruction. (CALCRIM 766 ["Even without mitigating circumstances, you may decide that the aggravating circumstances are not substantial enough to warrant death"].)

In short, the trial court erred in denying the defense's request to instruct the jury that there need not be any mitigating circumstances to justify a decision that the penalty be life without parole. The error violated appellant's constitutional right to a fair and reliable penalty determination. (*Beck, supra,* 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

C. The Error Was Prejudicial

The state law standard for penalty phase error is essentially the harmless beyond a reasonable doubt standard of *Chapman v. California, supra,* 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*People v. Howard* (2010) 51 Cal.4th 15, 38; *People v. Brown* (1988) 46 Cal.3d 432, 447-48.) The error is reversible if there is a realistic possibility the jury would have rendered a

different verdict absent the error. (*People v. Brown, supra,* 46 Cal.3d 432, 448.)

Here, the error was prejudicial. There was limited mitigating evidence presented. So, the jury likely thought the only issue it had to decide was whether there were aggravating factors; if so, the penalty must be death since those aggravating factors had to be "so substantial" in comparison. (CALJIC No. 8.88; 36 RT 5718-20; 8 CT 1657.) Given these circumstances, the penalty judgment must be reversed.

XXIII. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING THE DEFENSE'S REQUEST TO INSTRUCT ON LINGERING DOUBT

A. Procedural History

During discussions on instructions, the trial court said as to a lingering doubt instruction, it felt taken advantage of in terms of how the evidence turned out. According to the trial court, the testimony was aimed at establishing reasonable doubt. Had the trial court known the essence of Mason's testimony, it would have precluded it. (35 RT 5630-31.) The trial court said the intent was not to allow the defense to put on evidence on reasonable doubt but to focus on Factor J, that appellant was involved in a less central role than the guilt phase evidence established. The trial court said it was inclined not to give the lingering doubt instruction. (35 RT 5631.)

Defense counsel said without the jury being instructed on this point, it would be difficult for the jurors to believe they could apply such a standard, that they could require proof greater than that which is required for guilt in

order to vote for death as the penalty. The lingering doubt argument had no force without the jury knowing this. (35 RT 5631-32.) The trial court decided it would not give a lingering doubt instruction. (35 RT 5632-33.)

B. The Trial Court Erred

In resolving the issue of penalty, a capital jury may consider residual doubts about a defendant's guilt. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1272.) "Factors (a) and (k) of section 190.3 allow a capital defendant to argue innocence to the jury as a factor in mitigation." (*Id.*) Lingering or residual doubt is defined as that state of mind "between beyond a reasonable doubt and beyond all possible doubt." (*People v. Arias* (1996) 13 Cal.4th 92, 182-83.)The United States Supreme Court has held that there is no federal constitutional right to a "residual doubt" instruction at the sentencing phase of a capital case. (*Franklin v. Lynaugh* (1988) 487 U.S. 164, 172–174 [108 S.Ct. 2320, 101 L.Ed.2d 155].) This Court has held such instruction is not required. (*People v. Jones* (2012) 54 Cal.4th 1, 84.) Yet, this instruction may be necessary when supported by the evidence. (See *People v. Thompson* (1988) 45 Cal.3d 86, 135.)

Here, there was evidence supporting a lingering doubt instruction. Mason testified he was in local custody in 2003 and for a time was Huhn's cellmate. Huhn told him Handshoe went with Huhn to the door. Huhn also said he shot Brucker five or six times. (35 RT 5614-16.) Mason also testified at the preliminary hearing that Huhn admitted doing the shooting. (35 RT 5618-19.) This evidence would have allowed the jury to find that lingering doubt did exist, sufficient to support the jury deciding against death penalty. Without the jury being so instructed, it is doubtful jurors

would have known it could apply a greater degree of certainty of guilt for imposition of the death penalty, and that this standard could not be met given evidence of appellant's innocence. The trial court's failure to so instruct the jury violated appellant's constitutional rights to due process and to a fair and reliable penalty determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const., Amend. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

C. The Error Was Prejudicial

The standard for reversal is the same as the harmless beyond a reasonable doubt standard set forth in *Chapman v. California, supra,* 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*People v. Howard* (2010) 51 Cal.4th 15, 38; *People v. Brown* (1988) 46 Cal.3d 432, 447-48.) The error is reversible if there is a realistic possibility the jury would have rendered a different verdict absent the error. (*People v. Brown, supra,* 46 Cal.3d 432, 448.)

Here, the error was prejudicial. Defense counsel argued lingering doubt to the jury, asking jurors to consider that more certainty was needed for the penalty decision than for the guilt phase. (36 RT 5708-09, 5712-13.) Had jurors been instructed on this point and thus known they could apply a higher standard in deciding the appropriate penalty, it was not improbable they would have decided against the death penalty. (Contrast *People v. Fauber* (1992) 2 Cal.4th 792, 864 [Court found the refusal of lingering doubt instruction not prejudicial since counsel did not argue jury should base its decision on any residual doubt as to defendant's guilt; in fact counsel said that the issue had already been decided].) Jurors may have concluded Mason's testimony caused residual doubt on whether appellant

was the one who shot Brucker, enough doubt to decide against the death penalty.

In short, the error was not harmless. The penalty judgment should be reversed.

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

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date, this Court has considered the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. The constitutionality of a State's death penalty system turns on review of that system in context. (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6 [126 S.Ct. 2516, 165 L.Ed.2d 429]; see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [104 S.Ct. 871, 79 L.Ed.2d 29] [a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].) When viewed as a whole, California's sentencing

scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence may render California's scheme unconstitutional.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first-degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute; but that section is broad enough to encompass almost every murder.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on a burden of proof and who may not agree with each other. Paradoxically, the fact that death is different has meant that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is an unreliable system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. Appellant's Death Penalty Sentence Is Invalid Because Penal Code Section 190.2 Is Impermissibly Broad

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. In so doing,

the statute is in violation of the Eighth and Fourteenth Amendments to the United States Constitution. To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 248 [92 S.Ct. 2726, 33 L.Ed.2d 346] [conc. opn. of Douglas, J, citations omitted.]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the special circumstances set out in Penal Code section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 457, 468.) Yet the enumerated special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder. In California, almost all felony-murders are now special circumstance cases and felony-murder cases include accidental and unforeseeable deaths as well as acts committed in a panic, under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441, 477; *People v. Hillhouse* (2002) 27 Cal.4th 469, 512 [conc. opn. Kennard, J. ["[there is] little distinction between 'lying in wait' as a form of first degree murder and the lying-in-wait special circumstance, which subjects a defendant to the death penalty."].) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death. This Court should review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution and prevailing international law.

B. Appellant's Death Penalty Sentence Is Invalid Because Penal Code Section 190.3 Subdivision (a) As Applied Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments

Penal Code section 190.3, subdivision (a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such an unpredictable manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as aggravating within the statute's meaning.

Factor (a), listed in Penal Code section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. (*People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88, par. 3.)

The Court has allowed extraordinary expansions of Factor (a), approving reliance on it to support aggravating factors based upon the defendant having sought to conceal evidence several weeks after the crime (*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10), having had a "hatred of religion"(*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582), threatening witnesses after his arrest (*People v. Hardy* (1992) 2 Cal.4th 86, 204) or disposing the victim's body in a manner that precluded its recovery (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35.) It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than

an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657, conc. opn. Moreno, J.)

The purpose of Penal Code section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although Factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750]), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors in California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra*, 512 U.S. at pp. 986-90, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Id.* at p. 988.) As a consequence, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, Penal Code section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [108 S.Ct. 1853, 100 L.Ed.2d 372].) Viewing Penal Code section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an aggravating circumstance, thus emptying that

term of any meaning and allowing arbitrary and capricious death sentences in violation of the federal constitution.

C. California's Death Penalty Statute Lacks Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To A Jury Determination Of Each Factual Prerequisite To A Sentence Of Death, Thereby Violating The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution

California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (Pen. Code, § 190.2) or in its sentencing guidelines (Pen. Code, § 190.3). Penal Code section 190.3, subdivision (a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Also, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. Also, except as to the existence of other criminal activity and prior convictions, juries are not instructed on a burden of proof. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is moral and normative, the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most

consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. Appellant's Death Verdict Was Not Premised On Findings Beyond A Reasonable Doubt By A Unanimous Jury That One Or More Aggravating Factors Existed And That These Factors Outweighed Mitigating Factors; His Constitutional Right To Jury Determination Beyond A Reasonable Doubt Of All Facts Essential To The Imposition Of A Death Penalty Was Thereby Violated

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

These omissions are consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors, or that death is the appropriate sentence." (*Id.* at p. 1255.) But this finding has been rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].

In *Apprendi*, 530 U.S. 466, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict

of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 490.)

In *Ring, supra,* 536 U.S. 584, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The Court acknowledged that in a prior case reviewing Arizona's capital sentencing law, *Walton v. Arizona* (1990) 497 U.S. 639, it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.*, at 598.) The Court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding that increases the possible penalty is the functional equivalent of an element of the offense; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt. (*Ring, supra,* 536 U.S. at p. 609.)

In *Blakely, supra,* 542 U.S. 296, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an exceptional sentence outside the normal range upon the finding of substantial and compelling reasons. (*Id.*, at pp. 299, 302-03.) In that case, the petitioner was sentenced to more than three years above the 53–month statutory maximum of the standard range because he had acted with deliberate cruelty. The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State argued there was no *Apprendi* violation because the relevant statutory maximum is not 53 months, but the 10-year maximum for class B felonies. The Court disagreed, concluding the State's sentencing procedure did not comply with the Sixth Amendment. The statutory maximum for *Apprendi* purposes is the maximum sentence a

judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. (*Id.* at pp. 303-04.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621], the Court found that the Sixth Amendment was violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines that was based on the sentencing judge's determination of a fact not found by the jury or admitted by the defendant. (*Id.* at p. 245.) The Court in *Booker* reaffirmed its holding in *Apprendi* that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*Id.* at p. 244; compare *Cunningham, supra,* 549 U.S. 270, 288-89 [Court decided California's Determinate Sentencing Law, which authorized judge, not jury, to find facts exposing defendant to elevated upper term sentence violated defendant's right to trial by jury].)

i. In The Wake Of *Apprendi*, *Ring*, *Blakely*, And *Cunningham*, Any Jury Finding Necessary To The Imposition Of Death Must Be Found True Beyond A Reasonable Doubt

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial except as to proof of prior criminality relied upon as an aggravating circumstance. Even in that context, the required finding need not be unanimous. (E.g. *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255.)

Yet, California statutory law and jury instructions require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, Penal Code section

190.3 requires the trier of fact to find the aggravating factors substantially outweigh any and all mitigating factors. (Pen. Code, § 190.3) As read to appellant's jury, an aggravating factor is: "any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; 8 CT 1656.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the jury must find one or more aggravating factors. Before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility. But, they do not mean that death is the inevitable verdict as the jury can still reject death as the appropriate punishment notwithstanding these factual findings. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277.)

This Court has rejected the applicability of *Apprendi* and *Ring*. According to its previous decisions, *Apprendi* and *Ring* are inapposite because under the California death penalty scheme, once a defendant is convicted of first-degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense. Also, under California's scheme, each juror must believe the circumstances in aggravation substantially outweigh those in mitigation; but the jury as a whole need not find any one aggravating factor to exist. The final step is a free weighing of all factors by the jury. (E.g., *People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 263; *People v. Anderson* (2001) 25 Cal.4th 543, 589.) Also, in *People v. Black* (2005) 35 Cal.4th 1238, this Court held that

California's determinate sentence law just authorizes a sentencing court to engage in the type of fact finding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range. Therefore, the upper term is the statutory maximum and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi, supra,* 530 U.S. 466, *Blakely, supra,* 542 U.S. 296, and *Booker, supra,* 543 U.S. 220. (*Id.* at p.1254.)

Yet, the United States Supreme Court in *Cunningham, supra,* 549 U.S. 270 explicitly rejected this reasoning. In *Cunningham* the Court stated:

> "Contrary to the *Black* court's holding, our decisions from *Apprendi* to *Booke*r point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Id.* at p. 293.)

Similarly, under Penal Code section 190.2, subdivision (a), the maximum penalty for any first-degree murder conviction is death. Neither life without possibility of parole nor death can be imposed unless the jury finds a special circumstance. (Pen. Code, § 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Pen. Code, § 190.3; CALJIC No. 8.88.) So, if a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt. (*Ring, supra,* 536 U.S. at p. 602.) California's failure to require the

requisite fact finding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

ii. Whether Aggravating Factors Outweigh Mitigating Factors Is A Factual Question That Must Be Resolved Beyond A Reasonable Doubt

A California jury must first decide whether any aggravating circumstances, as defined by Penal Code section 190.3 and the standard penalty phase instructions, exist in the case. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment.

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death. (*Ring, supra*, 536 U.S. at pp. 589, 609.)

This Court's refusal to accept the applicability of *Ring, supra,* 536 U.S. 584 to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

D. The Due Process And The Cruel And Unusual Punishment Clauses Of The State And Federal Constitutions Require That The Jury In A Capital Case Be Instructed That Jurors May Impose A Sentence of Death Only If They Are Persuaded Beyond A Reasonable Doubt That The Aggravating Factors Exist And Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521 [78 S.Ct. 1332, 2 L.Ed.2d 1460].)

The primary procedural safeguard in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendments. (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].) In capital cases the sentencing process must satisfy the requirements of the Due Process Clause. (*Gardner v. Florida* (1977) 430 U.S. 349, 358 [97 S.Ct. 1197, 51 L.Ed.2d 393].)

2. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend on the significance of what is at stake and the goal of

reducing the likelihood of erroneous results. (*In re Winship, supra*, 397 U.S. 358, 363-64; see also *Addington v. Texas* (1979) 441 U.S. 418, 423 [99 S.Ct. 1804, 60 L.Ed.2d 323].) It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *In re Winship, supra,* 397 U.S. 358 (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

> "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. The stringency of the beyond a reasonable doubt standard bespeaks the weight and gravity of the private interest, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that society impose almost the entire risk of error upon itself." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755 [102 S.Ct. 1388, 71 L.Ed.2d 599], citations omitted.)

The penalty proceedings involve imprecise substantive standards that leave determinations unusually open to the subjective values of the jury.

Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error since that standard has long proven its worth as a prime instrument for reducing the risk of convictions resting on factual error. (*Winship*, *supra*, 397 U.S. at p. 363; *Monge v. California* (1998) 524 U.S. 721, 732 [118 S.Ct. 2246, 141 L.Ed.2d 615] ["[I]n a capital sentencing proceeding, as in a criminal trial, the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."].) Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize reliability in the determination that death is the appropriate punishment in a specific case. The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

E. California Law Violates The Sixth, Eighth And Fourteenth Amendments To The Federal Constitution By Failing To Require That The Jury Base Any Death Sentence On Written Findings Regarding Aggravating Factors

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California*

v. Brown (1987) 479 U.S. 538, 543 [107 S.Ct. 837, 93 L.Ed.2d 934]; *Gregg v. Georgia* (1976) 428 U.S. 153, 195 [96 S.Ct. 2909, 49 L.Ed.2d 859].) Meaningful appellate review is not possible given that California juries have discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances. Without written findings, reconstructing the findings of fact cannot be done. (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316 [83 S.Ct. 745, 9 L.Ed.2d 770], overruled on other grounds in *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1 [112 S.Ct. 1715, 118 L.Ed.2d 318].)

This Court has held that the absence of written findings by the sentencer does not render the death penalty scheme unconstitutional. (*People v. Cruz* (2008) 44 Cal.4th 636, 681.) Yet, this Court has considered a written statement of reasons to be an element of due process so fundamental that it is even required at parole suitability hearings. (*In re Sturm* (1974) 11 Cal.3d 258, 269, 272.) The same analysis should apply to the far graver decision to put someone to death.

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Pen. Code, § 1170, subd. (c).) Capital defendants should have at least the same protections as those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [111 S.Ct. 2680, 115 L.Ed.2d 836].) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), the sentencer in a capital case should be constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

There are no other procedural protections in California's death penalty system that could compensate for the unreliability inevitably produced by

the failure to require an articulation of the reasons for imposing death. The failure to require written findings thus violates not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

F. California's Death Penalty Statute As Interpreted By The California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, Or Disproportionate Impositions Of The Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review. In *Pulley v. Harris* (1984) 465 U.S. 37 [104 S.Ct. 871, 79 L.Ed.2d 29], the high court, while not holding that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, suggested "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) For California's death penalty sentencing scheme, viewing its lack of requirement for comparative proportionality review as a whole, the absence of such review renders that scheme unconstitutional. Although this court has held otherwise (e.g., *People v. Cruz* (2008) 44 Cal.4th 636, 681; *People v. Sapp* (2003) 31

Cal.4th 240, 317) these decisions should be re-examined in light of Eighth Amendment considerations.

G. The Prosecution May Not Rely On Unadjudicated Criminal Activity In The Penalty Phase; Further, Even If It Were Constitutionally Permissible For The Prosecution To Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve As A Factor In Aggravation Unless Found To Be True Beyond A Reasonable Doubt By A Unanimous Jury

This Court has held that the jury may consider unadjudicated offenses under Penal Code section 190.3, factor (b) as aggravating factors without violating the defendant's rights to trial, confrontation, an impartial and unanimous jury, due process, or a reliable penalty determination. (*People v. Cruz* (2008) 44 Cal.4th 636, 681.) Yet, under *Ring, supra,* 536 U.S. 584 and *Apprendi, supra,* 530 U.S. 466, any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85 [108 S.Ct. 1981, 100 L.Ed.2d 575].) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant, e.g., shooting at an occupied motor vehicle and battery with infliction of serious bodily injury, and jurors were instructed on these acts to consider as aggravating circumstances. (CALJIC No. 8.87; 8 CT 1644.) Under the Due Process Clause of the Fourteenth Amendment and jury trial guarantee of the Sixth Amendment, the findings required for a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. (E.g., *Ring, supra,* 536 U.S. 584, 606, 609.) Thus, even if it were constitutionally permissible to rely on alleged unadjudicated criminal activity as a factor in

aggravation, such acts would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for unanimity on this point. Such instruction is not generally provided for under California's sentencing scheme.

H. The Failure To Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators Precluded A Fair, Reliable, And Evenhanded Administration Of The Capital Sanction

As a matter of state law, each of the factors (d), (e), (f), (g), (h), and (j), were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184.) The jury, however, was left free to conclude that not finding a mitigating circumstance from those factors could establish an aggravating circumstance. Jurors were thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Zant v. Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235].)

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death. (*People v. Kraft* (2000) 23 Cal.4th 978, 1078-1079; *People v. Arias* (1996) 13 Cal.4th 92, 188; *People v. Morrison* (2004) 34 Cal.4th 698, 730.) Yet, these decision should be re-examined. In *People v. Morrison* (2004) 34 Cal.4th 698, the trial judge mistakenly believed that Penal Code section 190.3, factors (e) and (j) constituted aggravating instead of mitigating factors. This Court recognized that the trial court so erred, but found the error to be harmless. (*Id.*, at pp. 727-29.) Given a judge could be misled by the language at issue, jurors likely would as well. Other trial judges and prosecutors have been misled in the same way. (See e.g.,

People v. Carpenter (1997) 15 Cal.4th 312, 423-424, superseded by statute as stated in *People v. Friend* (2009) 47 Cal.4th 1.)

The possibility that appellant's jury aggravated his sentence on the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except on the basis of statutory aggravating factors. (See *People v. Boyd* (1985) 38 Cal.3d 765, 772-75.) Appellant's federal due process rights were was violated as well. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175]; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 ["However, the failure of a state to abide by its own statutory commands [for sentencing] may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state"]; U.S. Const. Amend. V, VIII, XIV; Cal. Const. Art. 1, §§ 7, 15, 17.)

It is not improbable that appellant's jury aggravated his sentence based on non-existent factors and did so believing that the State, as represented by the trial court, had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law but also the Eighth Amendment for it made it likely that the jury treated appellant as more deserving of the death penalty than he might otherwise be. (*Stringer v. Black* (1992) 503 U.S. 222, 235 [112 S.Ct. 1130, 117 L.Ed.2d 367].)

The interpretation of how to discern aggravating and mitigating factors is not uniform. From case to case, even with no differences in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances due to differing constructions of the CALJIC or CALCRIM pattern instructions given. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [102 S.Ct. 869, 71 L.Ed.2d 1].) Whether a

capital sentence is to be imposed cannot be permitted to vary from case to case according to juries' different understandings of which factors on a statutory list the law permits them to weigh in favor of the death penalty.

XXV. CALIFORNIA'S SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS

As noted in the preceding arguments, the United States Supreme Court has directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California* (1998) 524 U.S. 721, 731-732 [118 S. Ct. 2246, 141 L. Ed. 2d 615].) Despite this directive, California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra,* 17 Cal.3d at 243; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541 [62 S.Ct. 1110, 86 L.Ed. 1655].) Equal protection guarantees must apply with greater force, the scrutiny of the challenged

classification be more strict, and any purported justification by the State of the different treatment be even more compelling when the interest at stake is not simply liberty, but life itself. The State cannot meet this burden for its death penalty scheme.

In *People v. Prieto, supra,* 30 Cal.4th 226 as in *People v. Snow* (2003) 30 Cal.4th 43, this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (*People v. Prieto, supra,* 30 Cal.4th at p. 275; *People v. Snow, supra,* 30 Cal.4th at p. 126, fn. 32.) Whatever the relevance of the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case must be found true unanimously and beyond a reasonable doubt. (See, e.g., Penal Code §§ 1158, 1158a.) When a California judge considers which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.420 provides that the reasons for selecting one of three authorized prison terms under Penal Code section 1170, subdivision (b) must be stated orally on the record.

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true or what aggravating circumstances apply. Also, no reasons for a death sentence need be provided. These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws. (*Bush v. Gore* (2000) 531 U.S. 98, 104-05 [121 S.Ct. 525, 148 L.Ed.2d 388].)

Although the decision in *Ring, supra,* 536 U.S. 584 hinged on the Court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections. (*Ring, supra*, 536 U.S. at p. 609.) To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the federal constitution. (See, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra,* 536 U.S. at p. 609; U.S. Const. Amend. V, VIII, XIV.)

XXVI. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The United States is one of a small number of nations that regularly uses the death penalty as a form of punishment. (Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to exceptional crimes such as treason is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [108 S.Ct. 2687, 101 L.Ed.2d 702] [plur. opn. of Stevens, J.].) Indeed, nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006).)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its

beginning on the customs and practices of other parts of the world for its understanding of the system. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law." (*Miller v. United States* (1870) 78 U.S. 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.].)

Due process and the Eighth Amendments are not static concepts. In determining that the Eighth Amendment now bans the execution of mentally retarded persons, the United States Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21 [122 S.Ct. 2242, 153 L.Ed.2d 335], citing the Brief for The European Union as Amicus Curiae in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Even if capital punishment is not contrary to international norms of human decency, its use as regular punishment for a substantial number of crimes is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 316.) Further, given the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country to the extent that international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227 [16 S.Ct. 139]; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly justify a comparison with actual practices in other cases include the imposition of the death penalty for

felony-murders or other non-intentional killings, and single-victim homicides. (See Article VI, Section 2 of the International Covenant on Civil and Political Rights [limits death penalty to only the most serious crimes].) Categories of criminals that require such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399, 406 [106 S.Ct. 2595, 91 L.Ed.2d 335]; *Atkins v. Virginia, supra*, 536 U.S. at p. 321.)

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

XXVII. THE TRIAL COURT ERRED IN IMPOSING SENTENCE FOR THE SERIOUS FELONY PRIOR AND PRISON PRIOR BASED ON THE SAME PRIOR CONVICTION

The complaint alleged appellant suffered three prior convictions that qualified as strikes (Pen. Code, §§ 1170.12, subd. (a)-(d); 667, subd. (b)-(i)), two of which constituted serious felonies (Pen. Code, §667, subd. (a)(1)), and served a prior prison term (Pen. Code, § 667.5, subd. (a)). The convictions for the alleged prison priors were the same ones for the serious felony priors. (1 CT 35-36, 113-114.) Appellant was sentenced to terms for the prison prior and the serious felony priors. (38 RT 5754-58.)[20]

A trial court may not impose both an enhancement pursuant to Penal Code section 667, subdivision (a)(1) for a prior serious felony conviction and an enhancement under Penal Code section 667.5, subdivision (b) for a

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[20] Because the trial court imposed an unauthorized sentence, this Court may review the trial court's sentencing error in the absence of an objection in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

prior prison term resulting from that same conviction. As that is what happened in appellant's case, the one year term must be stricken. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150, 1153.)

XXVIII. THE CUMULATIVE EFFECT OF THE GUILT PHASE AND PENALTY PHASE ERRORS REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS AND THE DEATH PENALTY JUDGMENT

1. Guilt Phase

Appellant's convictions should be reversed due to the cumulative prejudice caused by numerous errors, separately identified in Arguments I through XVIII, inclusive, which operated together, and in any combination, to deny appellant his constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, VI, XIV; Cal. Const. Art. 1, §§ 7, 15.)

"The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." (*Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-303 [93 S.Ct. 1038, 35 L.Ed.2d 297]; see *Montana v. Egelhoff* (1996) 518 U.S. 37, 53 [116 S.Ct. 2013, 135 L.Ed.2d 361] [the Court in *Chambers* held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn.15 [98 S. Ct. 1930, 56 L. Ed. 2d 468] ["[T]he cumulative effect of the potentially damaging circumstances of this case violated the due

process guarantee of fundamental fairness ...."].) "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People* v. *Hill* (1998) 17 Cal.4th 800, 844.)

Thus, even in a case with strong government evidence, reversal is appropriate when "the sheer number of ... legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone." (*Id.* at p. 845; *United States* v. *Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476.)

In a close case which turns on the credibility of witnesses, as in this case, anything which tends to discredit the defense witnesses or bolster the story told by the prosecution witness requires close scrutiny when determining the prejudicial nature of the error. (*People* v. *Briggs* (1962) 58 Cal.2d 385, 404; see also *United States* v. *Simtob* (9th Cir. 1990) 901 F.2d 799, 806 [improper vouching for a key witness' credibility by the prosecutor in a close case not cured by court's instruction]; *People* v. *Taylor* (1986) 180 Cal.App.3d 622, 626 [error requires reversal in close case where credibility was the key issue].) In a close case any error of a substantial nature may require a reversal. Any doubt as to its prejudicial character should be resolved in favor of the defendant. (*People v. Zemavasky* (1942) 20 Cal. 2d 56, 62; *People* v. *Wagner* (1975) 13 Cal.3d 612, 621.)

When a trial court commits evidentiary error, the error is not necessarily rendered harmless by the fact there was other, cumulative evidence properly admitted. (*Parle* v. *Runnels, supra,* 505 F.3d at p. 928; *Krulewitch v. United States* (1949) 336 U.S. 440, 444-45 [69 S.Ct. 716, 93 L.Ed. 790] [in a close case, erroneously admitted evidence - even if cumulative of other evidence - can tip the scales against defendant]; *Hawkins* v. *United States* (1954) 358 U.S. 74, 80 [79 S. Ct. 136, 3 L. Ed. 2d 125] [concluding

that erroneously admitted evidence, though in part cumulative, may have tipped the scales against petitioner on the close and vital issue of his state of mind].)

Here, there were serious errors that cumulatively violated appellant's due process rights under *Chambers* v. *Mississippi, supra,* 410 U.S. 284. The jury was allowed to hear improperly admitted testimony against appellant that portrayed him as an experienced criminal, dangerous to society and criminally disposed to having committed the current crimes. The jury also heard the prosecutor, the government's representative, vouching for its case, misrepresenting the evidence and stating facts not in evidence. Also, erroneously admitted evidence implicated appellant as a perpetrator and mastermind of the crimes, he was precluded from presenting important evidence to support his defense, and the jury was improperly instructed on important points of the law. These errors individually and cumulatively buttressed the prosecution's case and reduced the credibility of appellant's defense, making it more likely the jury would reject his defense.

Making matters worse was the lack of a strong case against appellant; the prosecution case rested on the testimony of three untrustworthy teenage witnesses who even the jury did not appear to believe initially. (16 RT 2509-10, 2519, 2533-34, 2537-38, 2559, 2646-50, 2653, 2706; 26 RT 4626-28, 4551-55; 27 RT 4668; 22 RT 3801-06, 3809, 3811-15; 17 RT 2906-09; 7 CT 1464, 1466-67.) What ensued was a trial built on a foundation of prejudicial, inadmissible evidence, an unfair advantage to the prosecution and improper instructions.

In view of the substantial record of the cumulative errors described above, the prosecution cannot prove beyond a reasonable doubt that there is no "reasonable possibility that [the combination and cumulative impact of the guilt phase errors in this case] might have contributed to [appellant's]

conviction." (*Chapman v. California, supra,* 386 U.S. at p. 24.) Appellant's convictions must be reversed.

2. Penalty Phase

The death judgment must be evaluated in light of the cumulative effect of the multiple errors occurring at both the guilt and penalty phases of his trial. (*Taylor* v. *Kentucky* (1978) 436 U.S. 478, 487, fn. 15 [98 S. Ct. 1930, 56 L. Ed. 2d 468]; *People* v. *Hill, supra,* 17 Cal.4th 800, 844-845; *People v. Hayes* (1990) 52 Cal.3d 577, 644; *Phillips* v. *Woodford* (9th Cir. 2001) 267 F.3d 966, 985.) This Court has recognized that evidence that may not have otherwise affected the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137.)

Here, there is a substantial record of serious errors that individually and cumulatively, or in any combination, violated appellant's due process rights under *Chambers v. Mississippi, supra,* 410 U.S. 284 and require reversal of the death judgment. The numerous and substantial errors identified above in the guilt phase of the trial, as set forth in Arguments I through XVIII, inclusive, including the cumulative effect of the errors in the guilt phase of trial, which arguments are incorporated herein by reference, deprived appellant of a fair and reliable penalty determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; *Woodson* v. *North Carolina, supra,* 428 U.S. at p. 304; *Zant* v. *Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235]; U.S. Const. Amend. V, VI, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17.)

Even if this Court were to hold that not one of the errors was prejudicial by itself, the cumulative effect of these errors sufficiently undermined confidence in the integrity of the penalty proceedings. The constitutional

violations, violations of appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights, compounded one another, and created a pervasive pattern of unfairness resulting in a penalty trial that was fundamentally flawed and a death sentence that was unreliable.

In sum, it simply cannot be said that the combined effect of these errors had no effect on at least one of the jurors. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [105 S.Ct. 2633, 86 L.Ed.2d 231].) Appellant's death sentence must be reversed.

CONCLUSION

For the foregoing reasons, appellant Eric Anderson respectfully requests reversal of his convictions and the judgment of death.

DATED: _____, 2013

Respectfully Submitted,

_____

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Certification Regarding Word Count

The word count in appellant's opening brief is 69,258 words according to my Microsoft Word program. (Cal. Rules of Court, Rule 8.630.)

I declare under penalty of perjury that this statement is true.
Executed on _____, at San Diego, California,

Signature: _____, Name:

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DECLARATION OF PROOF OF SERVICE

I, Joanna McKim, declare that:

I am a member of the State Bar of California and attorney of record in this proceeding. I am over the age of 18 years, not a party to this action, and my place of employment is in San Diego, California. My business address is P.O. Box 19493, San Diego, California,

On _____ 2013 I served the document described as:
Appellant's Opening Brief, S138474/SCE230405

on the interested party/parties in this action as set forth below:

_x__ (By Mail) I caused such copies of the document to be sealed in an envelope and deposited such envelope in the United States mail in San Diego, California. The envelope was mailed with postage thereon fully prepaid addressed to:

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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 on _____, 2013 in San Diego, California.

_____
Joanna McKim