IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	No. S026408
vs.	Alameda County Superior Court
FRANK LYNCH,	No. H-10662
Defendant and Appellant.	

Appeal From the Judgment of the
Superior Court of the State of California
for the County of Alameda

The Honorable Philip V. Sarkisian, Judge Presiding

APPELLANT'S OPENING BRIEF

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	)	**Alameda County**
FRANKLIN LYNCH,	)	**Superior Court**
	)	**No. H-10662**
Defendant and Appellant,	)	
	)	

STATEMENT OF APPEALABILITY

This is an automatic appeal pursuant to Penal Code section 1239,[1] subdivision (b), from a conviction and judgment of death entered against appellant Franklin Lynch (hereinafter appellant), in the Alameda County Superior Court on April 28, 1992. (CT 3448, 3510-3515.)[2] The appeal is taken from a judgment that finally disposes of all issues between the parties.

STATEMENT OF THE CASE

The case originated on August 19, 1987, when a six-count felony complaint was filed in the Alameda County Municipal Court for the San

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[1]All further code section references are to the Penal Code, sometimes referenced by the prefix PC, unless otherwise noted.

[2]Hereinafter, all references to the Clerk's Transcript will be designated by "CT" followed by the appropriate page number. The Reporter's Transcript will be designated by "RT."

Leandro-Hayward Judicial District, in Case No. 221679. (CT 1-3.)[3]

A preliminary hearing in the Superior Court of Alameda County began on December 29, 1987, and continued through August 26, 1988, before Judge Peggy Hora. Appellant was held to answer and Information No. H-10662 was filed on August 30, 1988. (CT 2943-2958.) Appellant was charged with five counts of burglary, five counts of robbery, three counts of murder, and two counts of attempted murder. Specifically, the Information alleged the following crimes:

With respect to victims Bessie Herrick and Ruth Durham, appellant was charged with residential burglary (PC 459), residential robbery (PC 211) and attempted murder (PC 187). Each count charged infliction of great bodily injury (PC 1203.075 and 12202.7) and injury upon a person over the age of sixty years. (PC 1203.09(a)). (Counts 1-6; CT 2943-2948.)

With respect to victims Anna Constantin, Pearl Larson and Adeline Figuerido, appellant was charged with residential burglary, residential

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[3]The complaint, alleging burglary and three attempted murders, was amended on September 30, 1987, following Mrs. Constantin's death. (CT 6-8). A second amended complaint, filed November 24, added another murder count and another attempted murder count. (CT 9-13.) A third amended complaint, filed after the preliminary hearing was underway and without leave of court on January 7, 1988, alleged three new counts, two new special circumstances and one new prior. (CT 14-20.) That filing was the subject of appellant's petition for a writ of mandate before the First Appellate District, which was denied on February 22, 1988. (CT 21.)

robbery and murder. Each count also alleged great bodily injury and injury upon a person over the age of sixty years. In addition, seven special circumstances were alleged: three burglary specials, three robbery specials and one multiple murder special circumstance. Two prior felony convictions were also alleged. (Counts 7-15; CT 2948-2958.)

On June 10, 1991, appellant filed a *Marsden*[4] motion to replace his trial attorneys, Michael Ciraolo and Michael Berger. (Sealed CT 11876-11881.) That motion was denied on August 1, 1991. (Sealed RT 8/1/91:30.) On September 27, 1991, appellant filed a motion to represent himself under *Faretta v. California* (1975) 422 U.S. 806. (CT 3037.) The *Faretta* motion was denied by Judge DeLucchi on October 7, 1991. (Sealed RT 10/7/91:5-18.)

On October 23, 1991, Judge DeLucchi recused himself (CT 3074) and vacated his previous orders denying the *Marsden* and *Faretta* motions. (RT 10/23/91:86.) The case was assigned to Judge Sarkisian (CT 3075.1) who also denied revisited *Marsden* and *Faretta* motions. (RT 3.) Pretrial motions, including a failed motion for a change of venue, were heard between October 31, 1991, and December 3, 1991. (CT 3092-3165.)

Jury selection began December 4, 1991. (RT 114.) On February 18,

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[4]*People v. Marsden* (1970) 2 Cal.3d 118.

1992, a jury and five alternates were sworn and the prosecution began its guilt phase case-in-chief. (RT 2630, 2640.) Following the close of the prosecution's case on March 3, 1992 (RT 3901), the defense moved for a judgment of acquittal pursuant to Penal Code section 1118.1 with respect to counts 4, 5, and 6, the Durham counts; that motion was denied. (RT 3915.)

The defense began on March 5, 1992, and rested the following day. (RT 3934-4089.) On March 10, 1992, both sides gave closing arguments and following the denial of the defendant's motion for a mistrial (RT 4218), the jury began the guilt phase deliberations. (RT 4258.) On March 17, 1992, the jury returned its verdicts acquitting appellant of two counts of attempted murder and one count of residential robbery, but finding him guilty of five counts of burglary, four counts of robbery, and three counts of murder. It also found the seven special circumstance allegations to be true.[5]

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[5]Specifically, the jury found as follows: Count 1: guilty of burglary of Bessie Herrick (CT 3341); Count 2: guilty of robbery of Bessie Herrick (CT 3342); Count 3: not guilty of attempted murder of Bessie Herrick (CT 3343); Count 4: guilty of burglary of Ruth Durham (CT 3344); Count 5: guilty of robbery of Ruth Durham (CT 3345); Count 6: not guilty of attempted murder of Ruth Durham (CT 3346); Count 7: guilty of burglary of Anna Constantin (CT 3347); Count 8: guilty of robbery of Anna Constantin (CT 3348); Count 9: guilty of murder of Anna Constantin (CT 3349); Count 10: guilty of burglary of Pearl Larson (CT 3350); Count 11: not guilty of residential robbery of Pearl Larson (CT 3351); Count 12: guilty of murder of Pearl Larson (CT 3352); Count 13: guilty of burglary of Adeline Figuerido (CT 3353); Count 14: guilty of robbery of Adeline Figuerido (CT 3354); Count 15: guilty of murder of Adeline Figuerido (CT

(RT 4278-4287; CT 3341-3362.)

The prosecution's penalty phase evidence was presented on March 26-27, 1992. (RT 4294-4547.) The defense presented evidence in mitigation on March 31, 1992. (RT 4549-4594.) Final arguments in the penalty phase were presented by both sides on April 1, 1992 (RT 4612-4673) and jury deliberations began that afternoon. (RT 4698.) The next afternoon, the jury returned its verdict sentencing appellant to death. (CT 3447; RT 4701.) On April 28, 1992, the trial court denied the motion for modification of the death verdict under Penal Code section 190.4 (RT 4713), and imposed the sentence of death.[6] (RT 4729.) Appellant filed a notice of appeal and this appeal followed.

3355). All seven special circumstances, three burglary, three robbery and one multiple murder special, were found to be true. (CT 3356-3362).

[6]On the non-capital counts, the court imposed : Count 1: midterm of 4 years for burglary and 3 years for the infliction of great bodily injury, totaling 7 years; Count 2: midterm of 4 years for robbery and 3 years for the infliction of great bodily injury, totaling 7 years; Count 4: midterm of 4 years for burglary and 3 for the infliction of great bodily injury, totaling 7 years; Count 5: midterm of 4 years for robbery and 3 for the infliction of great bodily injury, totaling of 7 years; Count 7: midterm of 4 years for burglary; Count 8: midterm of 4 years for robbery; Count 10: midterm of 4 years for burglary; Count 13: midterm of 4 years for burglary and 3 for the infliction of great bodily injury, totaling 7 years; Count 14: midterm of 4 years for robbery. The sentence as to the great bodily injury clauses on counts 1, 2, 4 and 5 and as to counts 7, 8, 10, 13 and 14, were stayed, to become permanent on completed of the unstayed portion of the sentence. It found that the two prior convictions and the "aged victim" clauses on counts 1, 2, 4, and 5 did not enhance the sentences. (CT 3449; 3519.)

STATEMENT OF FACTS

I. The Guilt Phase

A. Introduction

Appellant was tried for three murders[7] and two attempted murders[8] which took place in various Bay Area locations in the summer of 1987. In each case appellant was also charged with burglary and robbery. Except that these crimes all involved elderly women, the five cases had little in common. Of the three murder cases, the causes of death varied, from strangulation to blunt trauma injuries. In one case it appeared the perpetrator intended to kill the victim;[9] in at least two others there was no evidence of an intent to kill. In fact appellant was acquitted of both attempted murder charges.

In some of the cases, the homes were completely ransacked; in other cases, there was no evidence of ransacking or even that anything had been taken. Appellant was acquitted of the robbery in the latter case. [10] One case

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[7]Appellant was charged with and convicted of the murders of Anna Constantin, Adeline Figuerido and Pearl Larson.

[8]Appellant was charged with, but acquitted of, the attempted murders of Ruth Durham and Bessie Herrick.

[9] Several times during the attack, the perpetrator threatened to kill Mrs. Constantin.

[10]Appellant was acquitted of robbery of Mrs. Larson.

had sexual overtones,[11] not present in the other cases.

The method of entry in each case varied as well. In two cases, a torn back screen door indicated forced entry, but in the other cases there was no sign of forced entry. In one case, the victim told the police that the attacker knocked at the front door before entering the house. In none of the cases was there any physical evidence that appellant had ever been inside the homes.

There is a strong likelihood that if these cases had been prosecuted as separate crimes, as they should have been, appellant would have been acquitted in all of them. However, because they were tried together, the jury undoubtedly looked at the evidence in combination. This "spillover effect" transformed five extremely weak cases into one significantly more compelling case. By joining the cases for trial and treating them as serial burglaries by one perpetrator, the cumulative evidence had a snow-ball effect. Under these circumstances, appellant had virtually no chance of being fairly tried, solely on the basis of the evidence in each case.

Ultimately, appellant was convicted because of two factors: (1) cross-racial identifications from people who believed they saw appellant in

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[11]Mrs. Larson was found lying on her bed with her dress pulled up above her waist and wearing no underwear.

their neighborhood; and (2) appellant's sale of an antique gold bracelet associated with the Constantin burglary. It is highly unlikely that appellant's possession of this gold bracelet in the Constantin case would have been sufficient evidence to convict him, even of *that* burglary, robbery and murder. But it is even less likely that the bracelet evidence could have established appellant's guilt for the other four burglaries as well.

However, after August 18, 1989, when Mrs. Constantin's gold bracelet was identified as having been sold by appellant, the police essentially treated all of the cases as solved crimes. A press conference was held on August 19, and by that evening, appellant's photograph was on the television news. Thereafter, appellant's name and likeness were notorious in the Bay Area and witnesses who were initially uncertain about whether they had seen appellant eventually became positive in identifying him.

By the time of the November 4, 1987, physical lineup, several witnesses admitted that they attended the lineup prepared to see and identify Franklin Lynch, having followed the news of his arrest in Los Angeles. However, even at that, the witnesses were only able to say that they believed they had seen appellant in or near the neighborhoods where the burglaries took place. Of those, only some were able to actually place appellant in the area on the *day* of the burglary. Others could only say they

had seen him several days before or after the crime took place.

In all of the cases, the witnesses testified that it was "unusual" to see a black person walking in their neighborhood. Nevertheless, there was evidence that other black men had also been observed in those neighborhoods around the time of the burglaries. However, appellant was not permitted to present all of the witnesses who might have testified about the presence of those other individuals. By the time the case went to trial, numerous witnesses identified appellant in court as the man whom they had seen in their respective neighborhoods. However, the majority of these witnesses had been far less certain, or had even failed to make an identification, at the time the crimes took place.

Finally, if the jury had any doubts about the identity of the perpetrator, the prosecutor resolved those doubts when he commented to the jury in his closing argument, "Isn't it strange that after Mr. Lynch fled our county there has been no other cases. . . ." (RT 4200.) Although there was no evidence to support the prosecutor's statement, and although the defense objected and called for a mistrial, the trial court allowed the remark to stand, and refused to admonish the jury to ignore the improper remark. The guilty verdict was, by then, inevitable.

The jury's return of a death sentence was almost as predictable,

given the number of cases which were joined and the way in which the jury was selected. Four women from the jury venire (three of whom were minority women) were challenged by the prosecutor for cause and removed by the trial court, even though they all stated their general support for the death penalty and their willingness to judge this case strictly on the basis of the evidence and the court's instructions. In addition, after the jury was sworn and while the trial was already underway, the prosecutor challenged juror Ronald Anderson and asked that he be dismissed from the jury. Anderson happened to be African-American, like appellant. Though juror Anderson repeatedly assured the court that he would give both sides a fair trial, the trial court replaced Mr. Anderson with an alternate.

The facts of the five cases will be briefly summarized below. More detailed facts are contained in the body of appellant's brief at the beginning of each argument. Because the sequence of events is so critical in this case, the facts will, for the most part, be presented as they took place chronologically rather than in the order presented by the prosecution. To the extent witnesses were able to make identifications at or near the time of the crimes, those facts will be included in the descriptions of the crimes. Identifications which were made later, will be presented as they occurred, in sections D and E, *infra*.

B. The Five Crimes

1. Pearl Larson

Pearl Larson, age 76, lived with her teenage grandson on Wake Avenue in San Leandro. On the evening of June 24, 1987, close to midnight, she was found dead in her home. (RT 3232, 3240-3241.) She was last seen alive about 12 hours earlier, by her gardener, Jolevia Jones. Mr. Jones spoke with Mrs. Larson in front of her home at about 11:45 a.m., that day.

Mrs. Larson was found lying face up on her bed. Her arms were up across her face and her hands were bound together with a nylon. A piece of clothing had been tied around her face. (RT 3275.) Her house dress was pulled up above her waist and she was wearing no underwear. The forensic pathologist determined that Mrs. Larson had been strangled to death.[12] (RT 3292.) There was no evidence that she had been beaten to death.[13] There was no evidence that anything in her house was missing, or even out of

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[12]Dr. Herrmann testified that her injuries were "highly indicative of some degree of asphyxia due to compression of the neck, strangulation. . . ." (RT 3281.) In his opinion, it was more likely that the injury to her neck was caused by squeezing of the neck, than by a direct blow. (RT 3292.)

[13]Although Mrs. Larson had some small abrasions on the bridge of her nose and her lip, they were superficial and the doctor believed they may have been caused by the garment around her face. (RT 4275.) She had bruising around her left eye, caused by blunt trauma, but it was doubtful that the trauma would have even rendered her unconscious. (RT. 3292.)

place. (RT 3130-3133, 3137.) She was wearing jewelry -- a ring and a necklace.[14] (RT 3277, 3292.) There were no signs of forced entry. Mrs. Larson's friend testified that she tried to reach Mrs. Larson by telephone shortly after noon that day, but got no answer. (RT 3236.) From the evidence, it is apparent that Mrs. Larson was strangled sometime between 11:45 a.m., when she spoke to the gardener, and around 11:00 p.m., that night, when the police arrived. However, the pathologist could not give a likely time of death. (RT 3278.)

On the day of the murder, Mrs. Larson's regular gardener, Mr. Jones, had been working at the Larson home with his occasional helper, David Wesley. Both gardeners are black. (RT 3190-3193.) When they arrived at the Larson home, they spoke briefly to Mrs. Larson, and then Mr. Jones left for another job, leaving David Wesley to work alone in Mrs. Larson's side yard. About 40 minutes later Mr. Jones returned and the two men left shortly thereafter. (RT 3147-3149.) Mr. Jones testified that David Wesley was a thin, light complected black man, about 5'8" tall, with a mustache.[15] He had problems with his equilibrium and walked with a

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[14]There were abrasions around her ring finger which the pathologist testified could be suggestive of someone trying to remove the ring. (RT 3277.)

[15]Mr. Wesley testified that in June of 1987, he was 5'10" tall and 175-180 pounds. He wore a mustache that came down below the corners of

staggering gait, somewhat like a drunk person. (RT 3168-3170.)

Across the street from the Larson home lived Jacqueline Brown. At about 11:20 a.m. that day she looked out her window and saw a black man in Mrs. Larson's side yard. He walked along the side of the house, went over to some bushes and appeared to be urinating. (RT 3179-3180.) He walked to the front of the house, and then walked down the street, until Mrs. Brown lost sight of him. (RT 3182.) Then, at about noon, she saw the man again, when he jumped over Mrs. Larson's bushes and momentarily lost his balance. He kept going, running down Wake Avenue. (RT 3184-3185.)

The next morning after the murder, Sgt. Fischer came to Mrs. Brown's house and told her that Mrs. Larson was dead. (RT 3200.) Mrs. Brown described the man she saw as a black man, with a medium build, about 5'8" tall, 145-155 pounds, 28 to 32 years old, with black frame sun glasses. She said that he had something wrong with the way he walked, as though he had a bad back. (RT 3201-3202.) Initially, she strongly believed that the man she saw was the gardener's helper. In his report, Sgt. Little wrote that the walk of the man Mrs. Brown saw jumping over the Larson

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his mouth, and may have also worn a beard. He always wore a hat, but not sunglasses. (RT 3331-3334.) He denied having anything to do with the Larson crimes. (RT 3326.)

fence was "definitely the same as the gardener's helper." (RT 3320.)

Two days later, Officer Kirby Wong showed Mrs. Brown a group of photos, Exhibit 48 A-F. (RT 3191, 3260-3262.) She picked out two, one of David Wesley, because she had "seen him around," and one of Allan Jerome Austin, whom she believed was the man she saw running from Mrs. Larson's yard. (RT 3192-3193, 3262-3263.) A week later, Mrs. Brown went with another officer down the street to see the man who was doing gardening work. She confirmed that he was not the man she had seen. (RT 3194.) The other man, Allan Jerome Austin was never charged in this case (RT 3213), nor was he included in the physical lineup that took place in November. (RT 3319.)

2. Adeline Figuerido

On July 28, 1987, about a month after Mrs. Larson had been found strangled to death, 89 year old Adeline Figuerido was found dead in her home on 143rd Avenue in San Leandro. She was last seen alive around 10:30 that morning by her daughters, Marie and Olivia, who lived with her. Before they left the house that day, the daughters locked all of the doors. They returned between 11:30 a.m. and noon and found their mother lying in the dining room, covered with a bedspread, her hands bound behind her back with a cut electrical cord, and her head wrapped with a piece of

yellow fabric. (RT 3368, 3382-3383.)

The house had been completely ransacked. (RT 3369-3370.) Mattresses in all three bedrooms had been lifted and moved, and the drawers in most of the rooms had been pulled out and emptied. (RT 3386-3392.) Although some property had apparently been taken, the type and amount was not firmly established.[16]

Pathologist Sharon Van Meter testified that Mrs. Figuerido had multiple blunt trauma injuries to her face and neck, including a fracture to the right side of the face, a fracture of the right jaw, extensive fracturing of the zygoma, the cheek bone just below the right eye, and bruising and abrasions in the area of her eyes, mouth and lips. (RT 3343-3345, 3348.) Dr. Van Meter testified it would take considerable force to break the bones in the zygomatic arch area, as it is a medium thickness bone. (RT 3349.) A dark blue purple band of contusion, or bruising, about five inches wide, was found on the victim's neck, from the right side, around the front, and to the

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[16]Olivia Figuerido testified that $200 cash, which had been hidden under the sofa in the living was never recovered. (RT 3379.) She also said that several expensive items of jewelry were missing. (RT 3380-3381.) However, Sgt. Kitchen, the principal investigating officer, testified that Olivia Figuerido subsequently informed the police that the $200 cash and the jewelry, which had originally been reported as stolen, had actually been found in the house. (RT 3472-3473.) Another officer testified that Olivia had called him to say that *some of the cash* had been found, but money hidden in another piece of furniture was still missing. (RT 3783-3784.)

left side, below the ear.[17] (RT 3344.) Most of the injury was to the right side of her face, although there was also fracturing of the upper mandible on the left side. (RT 3348.)

The doctor found the injuries to her face and neck to be consistent with having been struck with a fist ten or twelve times. (RT 3347, 3349.) In Dr. Van Meter's opinion, death was caused by blunt trauma to the head and neck with external hemorrhage and aspiration of blood. (RT 3355.)

Investigators removed six usable prints from inside the Figuerido home. Four were eliminated and the other two were never identified. (RT 3395-3396.) Three or four dirt footprints were also preserved, but were not compared with any shoes known to belong to appellant. (RT 3401.) A single dark hair was collected from the stove top, which appeared to have been moved during a struggle, but it was never analyzed. (RT 3402.) There was no physical evidence connecting appellant to the crime scene. (RT 3404, 3796.)

Later that day, Jan Morris, who was working at a business across the street from the Figuerido home, was interviewed by Officer Barrajas at her home. She told him about a man she had seen in the neighborhood that morning. (RT 3586.) At about 11:30 a.m., she looked out the window and

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[17]The band of contusion could have been caused by something having been wrapped around the neck and compressed. (RT 3353.)

saw a medium complected black man, with medium short dark hair and a medium build, standing on the driveway behind the picket fence of the house across the street. (RT 3582-3583.) She could not see if he had facial hair. He was in his early twenties. (RT 3597-3598.) At that time, appellant was age 32. (RT 3310.) The man walked down the driveway toward the front of the house, stopped and looked in both directions, turned around and walked quickly toward the back of the house. (RT 3583-3584.) She observed him for a total of about 20 seconds at most. (RT 3594, 3604.)

Soon after that Mrs. Morris saw Mrs. Figuerido's daughters arrive back home, and also saw the police arrive after that. (RT 3584-3585.) She testified that it was very unusual to see a black person in that neighborhood. (RT 3610.)[18]

3. Anna Constantin

On August 13, 1987, Anna Constantin, a 73 year old Russian woman who lived with her daughter Vickie, was attacked in her home on Blossom Way in San Leandro, sometime between 3:30 and 4:30 in the afternoon. (RT 3538, 3542.) Vickie found her mother lying on the floor propped up against the back door, at about 5:45 p.m., after returning home from work.

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[18]Another witness, Irma Casteel, later surfaced and was shown a photo lineup that included appellant's photo. However, the record indicates that Mrs. Casteel's first contact with the police was on August 19, 1987. (RT 3804-3805.) Her testimony is discussed in sections C and D, *infra*.

Anna Constantin was swollen and appeared to have been badly beaten. (RT 3485.) Anna Constantin asked her daughter to call 9-1-1 and she did. (RT 3537.) Either at home or after they were at the hospital, Mrs. Constantin told her daughter what had happened. The conversation was in Russian, and Vickie translated what her mother said.

After feeding her dogs around 3:30 p.m., Mrs. Constantin went outside to water her yard, but then heard her dogs barking ferociously by the kitchen door. When she went inside to investigate, she was hit from behind. She was pushed to her knees and beaten on her back. Her attacker stepped on her face and neck and beat her more. (RT 3539, 3542.) She kept trying to get up, and he continued to beat her with his fists and some object, and she kept asking why. (RT 3540.) Eventually she was quiet and the man got up and walked to the other side of the room and she could hear him moving things around. (RT 3541.) He came back and put a blanket over her, tied her hands and continued to beat her. She thought she had been hit with an iron. (RT 3541.)

Although she did not see her attacker, she believed by his voice and his accent that he was black. He said to her several times, "Fuck you, bitch, I'll kill you." (3540.) Because he spoke quickly and because she was not fluent in English, Mrs. Constantin did not understand anything else that he

said.

Dr. Chuc Van Dang treated Mrs. Constantin at the hospital shortly after 6:00 p.m. (RT 3666.) She had an open, two inch wound on the back of her head that went down to the skull. (RT 3669.) She had fractures of a right rib and the left cheek bone, and multiple bruises on the shoulders and body, all caused by blunt trauma. (RT 3670-3671.) Her next most serious injury was the rib fracture and injury to her lung cavity. (RT 3675.)

When Vickie returned home she saw that some rooms were messy and things were out of place. (RT 3544.) Several items were missing, including a gold bracelet from Russia that had a tiny envelope charm with "1902" on it, a gold chain with an ivory elephant figurine, a gold chain with a pearl and diamond chip, and about a hundred dollars in cash. (RT 3544-3546, 3554-3555.) The back screen door had been cut. (RT 3824-3825.)

Although Mrs. Constantin initially survived her injuries, and was transferred to a rehabilitation facility where she was recovering slowly, she died on September 26, 1987, from blood clots. Dr. Van Meter explained that clots (or thrombi) are a recognized side effect of being bedridden or hospitalized. In the doctor's opinion, the thrombi caused her death and they were the result of the treatment and complications of the injuries she sustained. (RT 3747-3748.)

4. Ruth Durham

On August 15, 1987, 88 year old Ruth Durham was attacked in her home on Alden Road in Hayward. Mrs. Durham had been visiting next door at her daughter and son-in-law's house, and returned home at around 4:30 p.m. (CT 350, 360.)[19] She returned through the back of the house, and came through a screen door. She came inside and sat down in her living room chair. (CT 351.)

She pulled her knee braces down to her ankles and the next thing she knew, somebody hit her (CT 352), first on one side of her face and then on the other, and not from behind. (CT 361.) Her next memory was being in the hospital. (CT 353, 369.) Mrs. Durham never identified appellant, even as he was seated in the courtroom at the trial. (CT 353.)

Her son-in-law, Merline Burkenbine, testified that Mrs. Durham had a daily routine of visiting her daughter in the afternoon. She visited on August 15, and she left their house at about 3:30 p.m. A little after 5:30 p.m., Steve Berger, Mr. Burkenbine's neighbor, told him there was something wrong at Mrs. Durham's. (RT 2772, 2785.) They both went to

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[19]Ruth Durham was 93 years old at the time of the trial in 1992. (CT 350.) Because of her infirmity, a videotape of her testimony at the preliminary hearing was played for the jury. (People's Exhibit 23, RT 2723.) Her testimony will therefore be designated by references to the Clerk's Transcript.

her house and found her sitting on the porch step leaning against a post. She had blood on her and appeared to have been beaten in the face. (RT 2773-2774, 2786.)

Mr. Burkenbine called 9-1-1. (RT 2774.) Mr. Burkenbine noticed that the front door of the Durham house was open. (RT 2775.) This was unusual, as there were four locks installed on that door and Mrs. Durham rarely used the front door. (RT 2775-2776.) It was her custom when visiting, to exit her house through the back, leaving the door open and the screen door unlocked. (RT 2784-2785.) A hook-and-eye latch was on the inside of the screen. (RT 2784.) After the incident, Mr. Burkenbine discovered a two-inch slit in the back screen door, near the hook-and-eye latch, that had not been there two days earlier. (RT 2788-2789.)

Sheriff's Deputy Dennis Lynch testified that on August 15, 1987, he responded to a call at the Durham house. (RT 2710-2712.) He was the first officer to arrive on the scene, where he encountered an elderly woman sitting on the front porch of her house bleeding from her face and head. (RT 2712-2713.) Deputy Lynch ordered an ambulance which arrived in 7 to 10 minutes. (RT 2714.) The front door of the house was open when Deputy Lynch arrived. (RT 2717.) The inside of the house appeared to have been ransacked, there were blood stains, and the screen of the back

door was ripped. (RT 2715.)

Dr. Kenneth Miller was the emergency room physician who attended Mrs. Durham on August 15, 1987. (RT 2859.) He testified that she had multiple injuries to her face, including massive swelling deformities with a laceration on the right side, bruising around the right eye, and a hemorrhage around the iris of the right eye. (RT 2859-2860.) She also had fractures on both sides of her jaw, a fracture of the right upper jaw going up around the right eye, and probably a concussion causing amnesia for recent events. (RT 2860, 2867.) She received sutures for two lacerations, near her right eye and the side of her mouth, and surgery for the fractures. (RT 2861, 2866.) Dr. Miller gave the opinion that Mrs. Durham's injuries were the result of blunt trauma which could have been caused by a clenched fist. (RT 2863.) He thought that Mrs. Durham sustained a minimum of two blows. (RT 2864.) In terms of property loss, three new women's sweaters in boxes, a hearing aid, and $6.00 in cash were missing. (CT 365.) At the time of the attack, Mrs. Durham was wearing a watch and a ring, neither of which were taken. (CT 362, 373.)

5. Bessie Herrick

Bessie Herrick was deceased at the time of the trial, so a videotape of her testimony from the preliminary hearing was played for the jury (RT

2927-2928; People's Exh. 35.)

On August 17, 1987, Frank and Bessie Herrick lived on Royal Avenue in unincorporated Hayward. (CT 790-792, 834-835.) Mrs. Herrick was 74 years old at the time. (CT 791.) That day, between about 3:45 and 4:15 in the afternoon, Mrs. Herrick was inside the house and her husband was in their backyard watering the lawn. (RT 2977-2982.) Exactly what took place after that, however, is not clear.

Mrs. Herrick apparently stepped outside to ask her husband to come inside soon. (CT 837.) When she came back in the house, she sat down in her chair in the living room. (CT 841.) The next moment she was hit and knocked unconscious. She testified that she did not regain consciousness until after she was in the hospital. (CT 800.) Nevertheless, she also testified that right after being hit, her husband "immediately called 9-1-1. . . ." (CT 793-796, 798-799.)

The first police officer to arrive on the scene was Allan Lerche of the Alameda County Sheriff's Department. He testified that he arrived at about 4:30 p.m., and Mrs. Herrick told him that she had been hit from behind by a black male. (RT 3985.) He did not ascertain how she was able to determine the race of her attacker. (RT 3985.)

Dr. Edwin Whitman treated Mrs. Herrick for her injuries at Eden

Hospital that afternoon. She was moderately alert at the time. Her face was swollen, and she had puncture wounds around her left eye, and fractures of the nose, the inferior rim of the left eye orbit and the maxilla. Dr. Whitman believed she had sustained blunt trauma around her head and neck, and the fractures could have been caused by one hard blow. Dr. Whitman testified that his notes made at the time indicated that Mrs. Herrick was alert and aware. (RT 2961-2963, 2967.) Mrs. Herrick told him that she had been struck in her home and that she could not recognize the person who had hit her. (RT 2970.)

Sheriff's Detective Sergeant Joseph Brown testified that he interviewed Mrs. Herrick later that night, while she was undergoing treatment at the hospital. (RT 4009, 4014.) Mrs. Herrick told him that a black man entered her home through the front door, that she thought he was let into her home by her husband, and that she was sitting in a chair when she was struck. (RT 4010.) She asked the Sergeant Brown if her husband had let the man in, and he said no. (RT 4017.)

Sergeant Brown also testified that, in a second interview conducted later that evening by himself and Sergeant Little, Mrs. Herrick described the man as taller than her husband, and slender, with a bushy mustache. She said that *she* answered her front door, and the person that she later

identified as appellant opened the door and punched her in the face with a closed fist. The next thing she knew her husband was standing over her. (RT 3104.)[20] Still, Mrs. Herrick continued to tell the police that she *did not see* who hit her. (RT 4011.) When the police asked Mrs. Herrick for a description, she said "words to the effect that: 'My husband saw him. He would know.'" (RT 4012.) When asked if she could recognize the man again, she told Sgt. Brown, "I think *we* could." (RT 4016, emphasis added.)

Sergeant Little testified that, although he knew that Mrs. Herrick had previously said she did not see who hit her, he showed her a photo lineup in the hospital and she identified appellant's photo. (RT 4019.) Mr. Herrick was standing nearby when she looked at the photos. (RT 4025.) When Mrs. Herrick was asked on cross-examination *how* she was able to identify appellant, she simply said, "Because he's the one that struck me." (CT 808.)

Her husband, Frank Herrick, testified that at about 4:00 p.m., on August 17, 1987, he was watering his garden and his wife was in the house. (RT 2977-2978.) He saw a black man jogging south on his street, Royal Avenue. (RT 2979-2981, 2983.) The jogger was wearing gray sweat pants,

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[20]Mrs. Herrick gave the same information to TV station KGO, Channel 7, when she was interviewed after the incident. (Defendant's Exhibit C.)

and a striped shirt. (RT 2992.) Mr. Herrick testified that at the closest point the jogger was about 25 feet away, and he saw the front side and right side of his face. (RT 2998.)

After about five minutes Mr. Herrick finished watering and walked toward the back patio of his house. (RT 2982.) Through a window he saw appellant[21] inside hitting his wife on her face and upper chest, using a right upper cut type punch. (RT 2984-2985.) He testified that he saw appellant hit his wife not more than twice. (RT 2985.)

Mr. Herrick quickly went into the house, entering through the back door from the garage and going through the kitchen. (RT 2985.) When he got inside his wife lay on the floor by the fireplace, with blood around her, and no one else was there. (RT 2986.) She said that someone had pushed her. (RT 2995.) Mr. Herrick called 9-1-1. (RT 2986.)

Mrs. Herrick testified that $25 to $75 in cash was taken from her wallet (CT 798, 846), and an emerald ring which she kept in a dish close to

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[21]At trial, Mr. Herrick testified that it was *appellant* whom he saw jogging past the house (RT 2983), and *appellant* whom he identified inside of his house, hitting his wife. (RT 2984-2985.) However, none of the law enforcement witnesses testified that either Mr. or Mrs. Herrick gave any kind of positive identification of the man inside of the house *at the time the police arrived at the scene.* Police reports in the appellate record indicate only that Mr. Herrick saw someone inside his home wearing "something grey." At that time Mr. Herrick did not have any more information and did not say that he saw anyone *hitting* his wife. (CT 69.)

the chair where she had been sitting, was discovered to be missing after her attack. (CT 798-799; 837-838.)

Another witness interviewed by the police on the day of Mrs. Herrick's attack was John Wulf. He testified that at about 4:30 p.m., on August 17, he was driving in his car on Bartlett Avenue and approaching the intersection with Royal Road (RT 2931), where the Herricks lived. (RT 2976.) Mr. Wulf had to slow down, because a man jogging down the sidewalk ran out in the street, about 50 feet in front of his car. The man was running at an angle, from the south side to the north side of the street. (RT 2932-2934.) Mr. Wulf said that he got a good 15 to 20 second look at the man. He was a black man, about 5'8 to 5'10" tall. (RT 2935.) The man was not running at full speed, but simply jogging at a regular pace. (RT 2936.)

Mr. Wulf testified that the jogger was wearing *light, dress type trousers, and a light colored, dress shirt with a white collar*, similar to the one worn by defense counsel. He thought it was unusual for a man to be jogging in dress type clothing. (RT 2943.) The man was not carrying any clothing or packages. Mr. Wulf emphasized that he was "clear" that the man was wearing a dress shirt. (RT 2944-2945.) Mr. Wulf observed the man, "full face" for about 5 seconds. (RT 2946.) The man had facial hair

that he described as a Fu Manchu mustache. (RT 2947.)

The next day, August 18, Detective Joseph Brown showed Mr. Wulf a 6-photo lineup that included appellant's picture. (People's Exh. 24; RT 4013.)[22] Mr. Wulf made no identification from the photos. (RT 4012, 2949.)

A third witness who saw someone in the Herrick's neighborhood on August 17, was Eric Hoak. Mr. Hoak was driving to work a few minutes before 3:00 p.m. At that time he lived about eight houses from the Herrick's on Royal Avenue. (RT 2882-2883.) As his car passed the Herrick's house, Mr. Hoak saw a black man, about 6 feet tall, *wearing blue jeans and a dark blue sleeveless, slipover sweatshirt* (RT 2888), standing on the Herrick's front porch. (RT 2876.) The man attracted his attention, since no black people lived in that neighborhood. (RT 2876.) Mr. Hoak then drove on to work.

Later that same afternoon, someone from the Neighborhood Watch program contacted Mr. Hoak and asked if he had seen anything unusual that day. Mr. Hoak he told the neighbor about the black man on the Herrick's porch, and described him as he did in his testimony. (RT 2877.) The following day, August 18, Sgt. Little showed Mr. Hoak People's Exhibit 24,

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[22]Appellant's photo was in the fifth position in this photo lineup, as People's Exhibit 24-E, of the series 24-A through 24-F. (People's Exh. 24.)

a series of six photographs. Of the six photos, Mr. Hoak described four of the men as having goatees. He identified them as numbers 2, 4 and 5. The fourth one had a "partial" goatee. (RT 2892.) Mr. Hoak selected appellant's photo, the fifth one, Exhibit 24-E. (RT 2879.)

C. Descriptions and Publicity Surrounding the Crimes Prior to August 18, 1987

San Leandro Police Detective Robert Dekas testified that appellant's date of birth is July 21, 1955 (RT 3310), making appellant thirty-two years old in the summer of 1987, when the crimes took place. In 1986, appellant was 5'10" tall and 200 pounds. (RT 3312.) Beginning with the Larson murder on June 24, 1987,[23] information about the crimes and a possible suspect began to accumulate. (RT 4003.) Sergeant Joseph Kitchen, lead investigator with the San Leandro Police Department (RT 4002), testified that between June 24 and August 19, 1987, when a second news conference was held, there had been considerable publicity regarding assaults on elderly women in the San Leandro-Hayward area. (RT 3897.)

The sole identifying witness[24] in the Larson case, Jacqueline Brown,

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[23]Although RT 4003 indicates the date of *July 24* in reference to the Larson murder, it is apparent that the attorney misspoke, since the crime occurred on June 24, 1987.

[24]Mrs. Brown's identifications were not consistent. She initially only knew that she saw a black man in Mrs. Larson's yard on the day Mrs. Larson was murdered. At first she believed the man to be one of Mrs.

was first questioned by the police the day after the murder, on June 25. She described the man she saw as black, medium build, 145 to 155 pounds, about 5'8" tall, with sunglasses, and 28 to 32 years old. There was something wrong with his walk, as if he had a bad back. (RT 3200-3202.) Two days later, when she was shown a photo lineup, Mrs. Brown picked two other individuals, David Wesley and Allan Austin. (RT 3192-3193; RT 3262-3263.)

From July on, a general description of a suspect was disseminated: a black male, 20 to 30 years of age, sometimes described as having facial hair, and sometimes without facial hair. (RT 3898-3899.) Following the Figuerido murder on July 28, 1987, further information was gathered. That same day, Thomas Ivory saw a thin black male, about 27 to 30 years of age and between 5'10" and 5'11" tall, walking in the area of 143rd Avenue, Mrs. Figuerido's street. (RT 3990-3991.) Also that day, July 28, Jan Morris described a man she saw as a medium complected black male in his *early twenties*, 21 to 23 years old. (RT 3597, emphasis added.)

On July 29, 1987, the police held a press conference to provide the media with further information. (RT 4003.) That same day, at least one Bay Area newspaper printed a story about the Figuerido murder, which

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Larson's gardeners, but later changed her mind.

included a composite drawing.[25]

Around this same time[26] Mrs. Irma Casteel, who lived on 144th Street, one street away from where Mrs. Figuerido lived, saw something in the morning paper about the murder, that included a composite drawing of a suspect. Based only upon this composite, she remarked to her husband that she had seen the same man walking on their street the day before. However, she did not notify the police. (RT 3803-3804.) She did mention it to a neighbor and sometime later the police brought her some photos to review. At trial she testified that the man she saw was about 29 years old, but when she spoke to the police she may have told them the man appeared to be 20 to 25. (RT 3817.) She said the man had *no facial hair, no mustache, no beard*, no glasses or sunglasses, and no hat. (RT 3818.) She observed him walk down the sidewalk of her street, walk to the dead-end, and then come back down towards her. She lost sight of him after that.

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[25]One witness, Mrs. Irma Casteel, testified that the paper carried a "photograph" of appellant. (RT 3803.) However, there was no evidence that any photograph of appellant had been publicized until a few weeks later, and Mrs. Casteel testified that she did not differentiate between a photograph and a composite picture. (RT 3814.)

[26]Mrs. Casteel testified that she saw a man on 144th Avenue on July 27, 1987, and the next day saw a picture that looked liked the man in the paper. (RT 3803.) That would have made it July 28, which was the date of Mrs. Figuerido's murder. It is more likely that Mrs. Casteel saw the newspaper article on July 29, 1987, the day after the murder.

(RT 3800, 3802.)

About two weeks later, on August 12, 1987, Mrs. Lavinia Harvey, who lived with her husband on Medford Avenue on the outskirts of Hayward (RT 3048), saw someone on her property. At around 3:00 p.m., she saw someone standing in her driveway, on the side of her house, near the bottom of her window. She could see only the top of someone's head and at first believed it was a boy. (RT 3053.) Mrs. Harvey picked up an iron rod (People's Exh. 40) and stepped outside to investigate. She discovered a tall, black man about 10 feet away. (RT 3049, 3051, 3053.) The man said he was looking for "a black kid," and asked for permission to look in her side yard. She agreed, but continued to watch him until he had left her property and was out of view. (RT 3056-3057.)

That same day, August 12, the police talked to Mrs. Harvey about the incident. She told them what happened but was not asked to review photographs until several weeks later, on September 1, 1987. (RT 3060.)

Between August 14th and August 18th, the *Daily Review* newspaper printed several articles which contained descriptions of a suspect, as follows: (1) August 14: black male in his twenties, medium build, 5'11" tall and 175 lbs.;

(2) August 17: two differing descriptions, in different cases:

(a) a dark complected man, 5'11" tall, about 170 lbs., with short natural haircut and a medium build; and (b) 5'8" tall, 145-155 lbs., wearing glasses.

(3) August 18, 1987: dark complected black man, late twenties or early thirties, 5'10" tall, 180 lbs., with cropped natural hairstyle and "Fu-Manchu" mustache. (RT 3999.)

D. The Recovery of Mrs. Constantin's Gold Bracelet and Its Connection to Appellant

On August 14, 1987, the day after Anna Constantin had been beaten and robbed, Sgt. Kitchen informed Oakland Police Officer Lloyd Ross that a piece of identifiable jewelry had been taken in a robbery. He described a heavy gold chain link bracelet with a small envelope charm attached, with the numbers "1902" engraved on it. (RT 3629-3630.)

Three days later, on August 17, 1987, Officer Ross reviewed "buy slips" from S & D Coin Shop in Oakland, and discovered a slip which indicated that appellant had sold a ten carat link bracelet on August 13, 1987, at 5:02 p.m. (RT 3631; People's Exh. 75.) Officer Ross went to the coin shop to put a hold on the bracelet, and saw that the small envelope charm was not attached. (RT 3635.) The buy slip contained a fingerprint, as is required by law when persons sell items to pawnbrokers. (RT 3636.)

On August 18, criminalist John Shull determined that the thumbprint left on the back side of the pawn slip was that of appellant Franklin Lynch.

(RT 3830.) Vickie Constantin identified the bracelet as being the one taken from her mother's house. (RT 3645.) After that appellant's photo was obtained and the photo lineup was assembled. (RT 3899-3900.)

E. Identifications Made on and After August 18, 1987; the Physical Lineup on November 4, 1987; the In-Court Identifications Made During the Trial

The first photo lineup in this case (Exh. 48A-F) was the one shown to Jacqueline Brown in June, in connection with the Larson murder. It did not contain appellant's photo, and Mrs. Brown chose two other individuals from that display. (RT 3192.) However, once appellant had been connected to the Constantin bracelet, the police began contacting numerous witnesses with whom they had previously been in contact -- not just in the Constantin case but in all five cases. (RT 2914.) Several new photographic lineups, all of which included appellant's photo, were then prepared and shown to a series of witnesses between August 18 and August 20.[27]

1. The Second Round of Photo Lineup Identifications

On August 18, Sgt. Little visited Patricia and Joseph Armstrong (RT 2904), and Barbara Sullivan and her daughter Stacie Reznes, all of whom had earlier reported seeing a black man in the Durham neighborhood on the

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[27]Exhibit 24A-F, was the photo lineup used primarily by Sgt. Little (RT 2914.) Officer Dekas used Exhibit 50A-F (RT 3195) and Lt. Nelson used Exhibit 41A-F, which was shown to only one witness, Lavinia Harvey, on September 1, 1987.

day of that crime.[28] (RT 2912.) Of those four witnesses, only Patricia Armstrong identified appellant from the photo lineup, People's Exhibit 24.[29] (RT 2914.)

Also on August 18, Sgt. Little showed the same photo lineup to Eric Hoak. Mr. Hoak identified appellant's photo. (RT 2879, 2906.) That same day Detective Brown showed the photo lineup to John Wulf, but Wulf did not recognize anyone in the photos at that time.[30] (RT 2940, 4012.)

On the afternoon of August 19, 1987, there was a joint press conference involving San Leandro Police Department and Alameda County

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[28] Mrs. Sullivan testified that on August 15, at about 4:30 p.m., she and her daughter were in a car, in the area of Meekland and Alden, near the Durham home. (RT 3972.) Mrs. Sullivan saw a black man on Alden, walking around the corner. She told Sgt. Brown that he was 19 years old, 5'9" tall and weighed 200 pounds. He was wearing a red flannel shirt, and walked with a gait. (RT 3974-3975.) Neither Mrs. Sullivan nor her daughter identified appellant from the photo lineup. (RT 2913.)

[29] At trial Mrs. Armstrong testified that on August 15, 1987, the day of Mrs. Durham's attack, at around 4:30 p.m., she was a passenger in a car her husband was driving eastbound on Alden Road toward their home. (RT 2792-2793.) As they turned left into Boston Road, she saw a black man walking east on the sidewalk on Alden. (RT 2794-2795; 2805.) He was about 10 feet away. (RT 2796.) She and the man looked at each other for about 3 to 5 to seconds of eye contact. (RT 2805.) She said it was unusual to see a black person walking in the neighborhood. (RT 2806.) The man was not running or jogging, just walking. (RT 2807.) Mrs. Armstrong did not say anything about the man at the time she saw him. (RT 2806.)

[30] At the November 4, physical lineup, however, Mr. Wulf identified appellant. (RT 2942.)

Sheriff's Department. The television media were present and that night the 6:00 p.m. news broadcast appellant's picture to the public in the Bay Area. The next morning, August 20th, the newspapers printed appellant's photo. (RT 3894-3895.)

On August 19, 1987, Officer Robert Dekas showed Jacqueline Brown a six-photo lineup (People's Exh. 50A-F), which included appellant in the fifth position. Mrs. Brown, who said she had seen a black man on Mrs. Larson's property, chose number 3, Darnell Bowling, and number 5, appellant. (RT 3308.) She said that the person she saw wore sunglasses and looked like numbers 3 and 5. (RT 3310.) Darnell Bowling did not participate in the physical lineup on November 4. (RT 3318.)

That same day, Officer Dekas showed Jan Morris and Thomas Ivory a photo lineup (People's Exh. 50 A-F), in connection with the Figuerido murder. (RT 3426, 4006-4007.) Appellant's photo was number 5. (RT 3427.) Both Morris and Ivory had previously said they had seen a black man in Mrs. Figuerido's neighborhood on the day of her murder. However, neither witness identified appellant's photo from the lineup. Mrs. Morris wrote on the form, "I do not think it is any of them."[31] (RT 3426.) Mr.

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[31]Nevertheless, Mrs. Morris testified at trial and identified appellant in court. She claimed that she had originally lied when she was shown the photos because she was afraid to get involved. She was persuaded to come forward later on. (RT 3595.)

Ivory wrote on the card, "I don't think I know any of them." (RT 4007, 3993.)

Also on August 19, a detective from the San Leandro Police Department brought photos for Mrs. Irma Casteel to review. She was shown Exhibit 50 A-F, which included appellant's photo. Mrs. Casteel wrote on the back of the exhibit, "I won't say for sure but number five looks more closely onto it." Five months later, she was shown Exhibit 60, which was a photograph taken of the physical lineup held November 4. In that lineup, appellant was number 4. Mrs. Casteel put question marks on numbers 3 and 4, because she thought they looked alike. (RT 3806-3807.)

On August 20, Adele Manos saw appellant's photograph in the newspaper and contacted the police. The police came to her home and showed her a photo lineup (Exh. 50A-F) and she identified appellant's photo as the man she believed she had seen on August 13. (RT 3503-3504.)

At trial, Mrs. Manos testified that on August 13, at around 3:15 or 3:20 p.m., about a block past the intersection of Bancroft and Blossom in San Leandro, she saw a black man coming out of the hedges. (RT 3497-3498.) She testified that the man attracted her attention because he looked like he was crouched down, as if he was hiding behind the bushes, and then stood up and looked around and walked down the path. (RT 3512-3513.)

However, she acknowledged that at the preliminary hearing she had testified that when she first saw the man, he was not ducked down hiding behind hedges, but was walking from the building toward the sidewalk, like anybody else would walk, with his body partially blocked by hedges, and that possibly her attention was drawn to him because he was black. (RT 3517-3518.)

Ms. Manos testified that she was startled at first, slowed down, and looked at the man, making eye contact as she drove past him. (RT 3498.) She was driving toward San Jose, and the man was walking in the opposite direction, toward Blossom. (RT 3499-3500.) The man was wearing a long sleeved blue shirt and tan pants. (RT 3500.) His left hand seemed to swing freely and his right hand was held in a more stiff position. (RT 3500.) She observed him for a total of 10 to 15 seconds. (RT 3501.)

Ms. Manos testified that the day after she saw the man, she read in the *Daily Review* about the assault on Anna Constantin on August 13, 1987, and a day or two later she saw a composite drawing in the newspaper. (RT 3502, 3520.) When she saw the photo on August 20, she called the police.

On August 20, Mackie Williams was arrested by the Oakland and San Leandro Police Departments for a parole violation. He was questioned about jewelry that he was wearing, including two gold chains (Exhs. 66A

and 66B), identified as having been stolen in the Constantin robbery. (RT 3754.)[32] Mackie Williams never participated in any lineups. (See fn. 33.)

About two weeks after the August 19 press conference and after appellant's picture had been well-publicized on television and in the newspaper, Lt. Nelson met with Lavinia Harvey to show her a six-photo display. (Exhibit 41 A-F; RT 3060.) Mrs. Harvey believed that number 5 (appellant's photo) looked familiar because of his eyes. She wrote on the back of the photo "I think this could be him, the eyes are his." (RT 3063.) Lt. Nelson then went to his vehicle and brought back a single photo of appellant to show to Mrs. Harvey. When she saw this second photo of appellant, she said, "That's him." (RT 3064.)

Beginning on August 18, 1987, appellant's photograph and/or likeness was printed in the *Daily Review* newspaper on numerous occasions, including seven times before the November 4, 1987, physical lineup, and an additional fourteen times after that in 1988. (RT 3999-4000.) By the time of the physical lineup, appellant's name and photograph had been well publicized in the print and television media. (RT 3894-3895, 3999-4000.)

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[32] Mackie Williams told Sgt. Kitchen that the chains were given to him about a week earlier by appellant. (RT 3756.) By this time, however, appellant's photo had already been publicized in connection with the various burglaries.

2. The Physical Lineup on November 4, 1987

The physical lineup was held at the Oakland Police Administration Building on November 4, 1987. (CT 502, 509.) Six individuals were asked to stand in the lineup, but none of those participants, with the exception of appellant, had been previously included in the photographic lineups, which all of the lineup witnesses had previously reviewed.[33]

Because appellant's appointed public defender was not present, appellant participated in the lineup under protest. (CT 556, 575.) Appellant was placed in the fourth position in the lineup, figure number 4. (RT 2693.) The witnesses were given cards with six figures, and were asked to place an "x" on a figure if they made an identification. (RT 2695.)

Thomas Ivory and Barbara Sullivan, consistent with their review of the photographs, did not choose appellant from the lineup. (RT 3993-3994,

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[33]The Alameda County Sheriff's Department prepared Exhibit 24A-F, the photo display used by Sergeant Little right after the press conference. (RT 2914.) He confirmed that he did not attempt to have those individuals from the photo display also included as subjects in the physical lineup. That lineup was conducted by the Oakland Police Department and he did not give the Oakland Police any information about who had been in the photo display. (RT 2914.) Those who were included in the other photo display, Exhibit 50A-F, are listed at RT 3307. Comparing that list to those who participated in the physical lineup (RT 2695), reveals that only appellant was in both. Although the record does not indicate the names of those who were shown in the third photo display, Exhibit 41A-F, that display was shown only to Mrs. Harvey (RT 3061), and was shown on September 1, 1987, after appellant's name and picture had been widely publicized.

3976-3977.) But Patricia Armstrong (RT 2909), Eric Hoak (RT 2902) and Adele Manos (RT 3506) did.

Both John Wulf and Joseph Armstrong had not identified appellant's photo when they had been shown the six photographs in August, but both chose appellant at the November physical lineup. (RT 2827, 2940.) Although Mr. Armstrong denied seeing appellant's photograph between August and November, his wife, Patricia Armstrong, estimated that she had seen appellant in the media about three times between the first photo lineup and the physical lineup on November 4. (RT 2816.)

Lavinia Harvey, who had been shown the photos well after the press conference, on September 1, had tentatively identified appellant from the six-photo lineup, but then positively identified him when the officer showed her the single photo of appellant, which included his name on the picture. (RT 3093.) Mrs. Harvey testified that after appellant was arrested in Los Angeles, she saw his picture in the newspaper more than once. (RT 3076.) When she attended the lineup she expected to see appellant because she knew he had been arrested. She was hoping he would be in the lineup and when she saw him, she identified him. (RT 3079-3080.)

Frank Herrick also testified that he went to the lineup expecting to see Franklin Lynch because he had read about his arrest in the newspapers.

(RT 3010.) Frank and Bessie Herrick both chose appellant from the November 4th physical lineup. (CT 805-808, RT 2989-2990.)

When Jacqueline Brown was shown the second photo lineup in August, she chose two photos, one of Darnell Bowling and one of appellant. That evening she saw appellant's picture on the television and heard his name for the first time. Between then and the November lineup, Mrs. Brown saw appellant's image two or three more times on television. (RT 3218.) She identified him at the physical lineup on November 4. (RT 3196-3197.)

Irma Casteel did not attend the physical lineup, but several months later was shown a videotape of it. (RT 3444.) After viewing the video she put question marks on Figures 3 and 4, saying those two looked the most like the person she saw walking on her street. She remembered that Figure 4 was the person she had previously picked out of the photo lineup that was shown to her by Sgt. Borden. (RT 3450.)

3. Courtroom Identifications Made At Trial

At trial, all of these prosecution's witnesses (both of the Armstrongs, Mr. Hoak, Mr. Wulf, Mrs. Brown, Mrs. Manos, Mrs. Casteel, Mrs. Harvey, the Herricks, and Mrs. Morris) identified appellant as he was seated in the

courtroom.[34] All of them had previously seen his picture in a photo lineup; all but one had also seen appellant at the physical lineup.

F. The Testimony of Dr. Elizabeth Loftus

Elizabeth Loftus was qualified and testified as an expert in eyewitness identification. (RT 4036.) She testified that there are three psychological stages involved in making an identification of something one has seen. The first stage is "acquisition," when a person sees an event and information is laid down in the memory system. The second stage is "retention," when the event is over and time passes. And the third stage is "retrieval," when the person tries to recall, or retrieve information from memory. (RT 4036-4037.)

The longer the retention stage, the more memory fades and the more it is susceptible to post-event information such as discussion with others, television or newspaper reports, and the content of suggestive or leading questions. If a person is shown photographs of a suspect between the time they first see an individual and a time when they are asked about the

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[34]Bessie Herrick had died by the time of the trial, but identified appellant at the preliminary hearing. (CT 793-794.) The others who made in-court identifications were Patricia Armstrong (RT 2802), Joseph Armstrong (RT 2828), Frank Herrick (RT 2983), Eric Hoak (RT 2881-2882), John Wulf (RT 2936), Lavinia Harvey (RT 3054), Jacqueline Brown (RT 3196-3197), Adele Manos (RT 3502), and Irma Casteel (RT 3808.)

individual, the photographs can act like post-event information and influence the witness's report. The witness will retrieve information both from the initial observation and also from the observation of the photographs. (RT 4041, 4042.)

Race is also a significant factor because people make more mistakes if they try to identify a stranger of a race different from their own, and this holds true even for people who are relatively free of racial prejudice. (RT 4043-4044, 4054-4055.) Research has also shown that there is little correlation between a witness's confidence and his or her accuracy. (RT 4045.)

In a law enforcement context, if a person has seen photos or composites of a suspect before being shown a photo display, the identification could be affected in several ways. (RT 4046.) First, this could make the person look familiar, and that familiarity can mistakenly be related back to the event itself rather than the post-event source. (RT 4046.)

Also, if a witness is given positive feedback or reinforcement for having chosen a particular photograph, it is more likely the witness will make that same selection again later. (RT 4047.) For example, letting him see that others have put their initials on the back of a photograph, or telling the witness that someone else has made the same identification, could be

such reinforcement. (RT 4047.)

A common problem arises when a witness sees an event, is shown a photograph of an individual, and two or three months later attends a lineup with that same individual in it. (RT 4048.) If there are several people in the lineup, but only one of the subjects was part of an earlier photo display, this is called a photo-biased identification. (RT 4048.) Research has shown that seeing the photos increases the likelihood of a false identification at the lineup. (RT 4048.)

A leading study demonstrated that the chance of a false identification in a lineup when the individual had not been seen before was about 8%, but if the person's photo had been seen although the person was not seen at the time of the original event, the error rate went up to 20%. (RT 4049.) When a witness is shown an initial photo spread, then sees a photo of an individual two or three times on television or in a newspaper, and then attends a physical lineup, there is significant potential for contaminating the retrieval, making that one individual more and more familiar, and dramatically increasing the likelihood that the person would be selected even if he had not been seen at the original event. (RT 4049.)

The photo-biased identification problem occurs even in lineups that are not otherwise particularly suggestive. (RT 4076.) If a witness is correct

in selecting a certain photo out of a photo lineup and subsequently sees photos of the person in the newspaper, that would merely be reinforcement of a correct selection. (RT 4077.) The witness may not have actually seen the person previously, but seeing photos has made the person seem familiar, leading to a mistaken identification. (RT 4077.)

The chance of an erroneous identification at a lineup is also increased if the witness believes that a suspect has been caught and will be in the lineup, because it exerts pressure on the witness to make a selection. (RT 4050.)

Research is inconclusive on which feature is the most important feature in making an accurate identification. (RT 4053.) Although something about the eyes is often one of the first things people mention, there is no evidence that selecting a suspect because of his eyes relates to accuracy. (RT 4053.)

In Dr. Loftus's opinion, when a witness has seen a photo lineup and a physical lineup and then makes an identification in court, they may state that the in-court identification is based on memory of an initial event and not on photographs, but they are unaware of the power of post-event information and are not able to separate out the sources of their memories. (RT 4056.)

II. The Penalty Phase

A. The Prosecution's Aggravating Evidence

The prosecution presented four separate incidents in aggravation.

1. Robbery of Rose Nimitz

The first involved the 1982 robbery of Rose Nimitz, an elderly Palo Alto woman, who had her ring stolen from her while she was in her home. Appellant was chased down by the police and arrested. Appellant was found with a glove and the victim's diamond ring at the time of his arrest. (RT 4306-4310.) He was convicted of robbery in Santa Clara County. The defense stipulated to the fact of his conviction. (RT 4381.)

2. Rose Garden University Incident

The second incident took place in 1983, in the Rose Garden University area of San Jose. (RT 4324.) Appellant was involved in a scuffle with Officer Michael Rabourn of the San Jose Police Department. Rabourn testified that there had he had been a rash of residential burglaries and so he was patrolling in an unmarked car. On January 4, 1983, he saw someone walking in the shadows across some front yards. (RT 4325.) The subject was a stocky black male wearing heavy clothes. (RT 4326.) Rabourn asked the man for identification but the man started backing away. (RT 4327.) Rabourn grabbed his arm and the man struck him on the cheek,

knocking Rabourn off balance; then he ran. (RT 4329.) Rabourn chased him and after he found him crouched down in a back yard, Rabourn tried to get a restraint hold on him. A fight ensued, with both men swinging. (RT 4330.) Eventually the officer hand-cuffed and arrested him. (RT 4331.) Officer Rabourn identified appellant in court. (RT 4328.) Appellant was not charged with any of the burglaries in the area. (RT 4334.)

3. North County Jail Incident

The third incident presented by the prosecution involved a scuffle at the North County Jail in Oakland on June 26, 1988. (RT 4336.) Appellant was visiting his wife and daughter in a visiting booth at the jail. When it was time to end the visit, Deputy Stephen Ciabotti attempted to handcuff appellant, but appellant resisted, because he did not want to be handcuffed in front of his family. (RT 4342.) A struggle ensued and Chiabotti's partner, Deputy Walters, also got involved, wrestling appellant to the ground. The three men struggled, with appellant swinging his fists and kicking. (RT 4344-4345.) Appellant was eventually handcuffed and returned to the housing unit. Chiabotti received medical attention for swelling and bruising to his upper right cheek, under his eye, and his hand. (RT 4349.)

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4. Murder of Agnes George in Richmond

The fourth incident involved the murder of 79 year old Agnes George in Richmond, California. (RT 4468.) Mrs. George lived in a house on the middle of the block with neighbors on both sides of her. (RT 4418.) She was last seen alive on October 14, 1987, at about 2:00 p.m. by her neighbor Darlene Fleming. (RT 4471.) Mrs. Fleming discovered Mrs. George's body around noon the next day, after noticing that Mrs. George had not yet opened her curtains. (RT 4479.) Mrs. George's house had been completely ransacked; her hands and legs were tied with a rope and cord, and the right side of her head was injured and bloody. (RT 4405-4406.)

A pathologist determined that she had suffered multiple injuries over her entire body, including injuries associated with the ligature bindings on her ankles and wrists. She had multiple head, neck, and facial injuries, including abrasions, bruising, lacerations, and hemorrhaging under the skin. Areas around her eyes and ears were swollen. (RT 4386.) She had bruising on her back, shoulders, legs and arms and hemorrhaging of the lower abdomen and hemorrhage of the brain. (RT 4387-8.) Both sides of the upper and lower jaw bone were fractured, as were the sinus bones. (RT 4394-4395.) Mrs. George's death was caused by traumatic head and neck injuries, possibly from being beaten with a hammer or by a closed fist or a

foot. (RT 4389.) The time of death was not determined. (RT 4395, 4399.)

Mrs. George kept a cash box in her bedroom, that contained between $200 and $500. (RT 4440.) The box had been emptied. In addition two heavy coats, some sweaters and jackets were missing. (RT 4441, 4443.)

Two witnesses, Mrs. Fleming and Mrs. Lopez, testified that they had seen a black man in the neighborhood. Mrs. Fleming saw the man at about 10:00 a.m. on October 15, 1987, near Mrs. George's house. (RT 4474.) He was talking to two white people who were in a car in the middle of the street. Then the man walked down the street and disappeared from sight. (RT 4476.) That afternoon, Mrs. Fleming viewed a series of photos. (Exh. 127.) She thought the man she had seen was number four, except that the person she saw had no mustache. (RT 4487.)

Mrs. Lopez testified that on October 7, 1987, eight days before Mrs. George's murder, she saw a black man, about 30 years old, walking by outside in the street. She found it unusual because there were rarely people walking around outside. (RT 4428.) She told a Richmond police officer about the man that day. (RT 4427.) On October 19, 1987, an officer returned with photos (Exh. 127), and she recognized the man she saw outside. She picked number four, which was appellant. She identified appellant in the courtroom. (RT 4430.)

Shoe prints found at the scene did not match the shoes appellant was wearing when he was arrested. (RT 4543.) There was no physical evidence connecting appellant to the crime. (RT 4545.)

B. Defense Evidence in Mitigation

1. Agnes George Murder

Richmond Police Officer Douglas Hembree testified that there were numerous reports throughout the City of Richmond, on October 16, 1987, that people had seen appellant in the area. (RT 4564.) The prosecution stipulated that as of March 31, 1992, the Contra Costa District Attorney had not charged appellant with the Agnes George homicide, and that there is no statute of limitation on homicide. (RT 4594.)

2. Appellant's Background

Billy Rachel, a nurse's assistant, testified that she had known appellant for about 15 or 16 years. (RT 4566.) When her husband passed away in March of 1977, she was having money problems. One day appellant was at her house and gave her $100 with a kiss, saying the money was for her and she did not have to pay him back. (RT 4568.) Mrs. Rachel testified that she believed he had been to Reno and had won it. (RT 4570.) The last time she had seen him was sometime in April, 1987, the day before police officers came to her house. As she got out of her car appellant asked

to borrow $10 and when she told him she only had $40 and had just spent it, he offered to help her take in the groceries. (RT 4570.)

Irish Shepherd testified that appellant was a member of a gospel singing group led by her husband in the 1970s. Appellant was in the group for over two years, and they used to sing at different churches, sometimes high schools, and once at a detention center. The group made a record on which appellant sang a solo. (RT 4573- 4574.) Appellant attended rehearsals and performances faithfully, and the group required its members to adhere to certain tenets of the Bible. (RT 4574.) The members were also not supposed to participate in certain parties or get drunk. (RT 4579-4580.) Mrs. Shepherd testified that appellant left the group in late 1976 and that she did not know why. (RT 4581.)

Joe Ann Lynch, appellant's mother, testified that she and her husband, appellant's father, had been together 39 years and had three children. Appellant was the middle child. (RT 4582-4583.) She was in court to ask the jurors to spare her son's life and that she prayed to God for his life. (RT 4583.) She loved her son and all her children very much and would do anything to help them. (RT 4583.)

Raymond Lynch, Sr., appellant's father, testified that he was a retired supervisor at a machine shop in Oakland, and that the family had

moved to Fresno in April, 1987. (RT 4585.) Appellant had lived at home through high school. (RT 4585.) Mr. Lynch cared for all his children, had a steady job, and was generally able to take care of the family's needs. (RT 4586.) Appellant had moved out at age 17, had gotten married, and had made Mr. Lynch a grandfather six times. (RT 4586.) He also had other grandchildren. (RT 4586.)

Appellant and all the children were raised to obey the law and be religious. (RT 4587.) The family was Baptist and appellant attended church regularly, practically every Sunday, like the whole family. (RT 4587.)

Mr. Lynch had visited appellant in jail, once or twice a month, and talked with him quite often on the telephone. (RT 4586.) He was in court as appellant's father, asking the jury to spare his life. (RT 4586.)

Appellant's brother, Raymond Lynch, Jr., age 38, testified that their father never beat or abused them. (RT 4589, 4590.) Raymond testified that he was a minister and a program analyst with the Internal Revenue Service and had been employed by the federal government for 15 years. (RT 4589-4590.) He had previously had a substance abuse problem but overcame it through the Jehovah's Witness religion and wanting a different lifestyle. (RT 4590.)

He had visited and written to appellant since his incarceration on the charges in the case at bar, and had spoken with him on the telephone, counseling him about the benefits he had received from religion. (RT 4591.) Raymond had last visited appellant about six months previously. (RT 4592.)

* * * * *

I.

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S TIMELY REQUEST TO REPRESENT HIMSELF PURSUANT TO *FARETTA v. CALIFORNIA.* THE DENIAL WAS REVERSIBLE ERROR.

A. Factual Background

Jury selection in appellant's case began on December 4, 1991. Nearly six months before that, on June 10, 1991, before any trial date had been set, appellant filed a *Marsden*[35] motion to replace his attorneys, Michael Ciraolo and Michael Berger. (Sealed CT 11876-11881.) Due to scheduling conflicts of the attorneys and the trial court's busy calendar,[36] the motion could not be heard for two months. On August 1, 1991, Judge Goodman denied appellant's *Marsden* motion. (Sealed RT 8/1/91:30.)

A month later, on September 4, 1991, on the advice of his counsel, (Sealed RT 10/7/91:15), appellant withdrew his speedy trial waiver. (CT 3033.)[37] On September 27, appellant filed a written "Motion to Act as

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[35] *People v. Marsden, supra,* 2 Cal.3d 118.

[36] See sealed RT 6/12/91:7-8 and RT 7/26/91:1-2.

[37] Appellant told the trial judge, "[T]ruthfully, actually, the time waiver wasn't my idea. It was my attorney's idea because of some strategic move or whatever." In fact, the record appears to support appellant's claim. At the June 10, 1991, hearing, in appellant's absence, the trial court said to the attorneys, "I don't want to give you a trial date because if we pull a time waiver we have got some problems. (RT 6/10/91:2.) The court's remarks may have prompted trial counsel to do just that, i.e., encourage Mr. Lynch

Counsel in Pro Per (Faretta Motion)," under *Faretta v. California* (1975) 422 U.S. 806, with a supporting declaration and points and authorities. (CT 3037.) In addition to seeking pro per status, appellant's motion sought "15 hours telephone time, . . . 20 hours use of the typewriter" per week and any other "pro per privileges" to which he was entitled, to "facilitate his defense." (CT 3042.) *Appellant made no written or oral request for any additional time to prepare for trial.*[38] Although there still was no trial date set when the *Faretta* motion was heard on October 7, 1991, Judge DeLucchi denied the motion, on the grounds that it was untimely:

> [Mr. Lynch] has been represented by Mr. Ciraolo for over four years. . . .
>
> [B]ecause of the advanced age of the victims . . . and because of the delay in the proceedings *which might arise* in the event I granted Mr. Lynch his pro per status, the Court's going to rule that this motion is not timely made.
>
> We're on the eve of trial. The trial is to begin within two

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to *pull his time waiver*. Nevertheless, the withdrawal of the time waiver on September 4, required that a trial date be set no later than November 1, 1991. (RT 9/11/91: 3.)

[38]The trial judge tried to convince appellant he *would* need more time, but the record demonstrates that appellant was not eager for a continuance or in any way seeking to delay the trial. (RT 10/7/91:9-12.) Ultimately, his position was that he would first review the trial materials and then decide whether he needed any additional time. (*Id.* at p. 12.)

> weeks.[39] There was a time waiver. The Court's made space and time available for the trial of this case. Both sides are prepared to proceed.

(Sealed RT 10/7/91:25, emphasis added.)

The following week, on October 16, 1991, appellant filed a second *Faretta* motion (CT 3054) and a second *Marsden* motion (CT 3060), along with a peremptory challenge of Judge DeLucchi, under Code of Civil Procedure section 170.6. (CT 3053.) All three motions were heard and denied the next day. (Sealed RT 10/17/91:72; RT 10/17/91:42-43.)[40]

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[39]The judge's statement that the trial was to begin in "two weeks" was inaccurate. In fact, there was *no trial date* set at that time, and it was only *anticipated* that hearings on the numerous *pretrial motions* would begin two weeks later on October 21. (See RT 10/7/91:26.) The trial was *supposed* to have begun by November 1, but that was still *three weeks*, not two weeks, away, and appellant's motion had been filed more than a month prior to that earliest anticipated trial date.

[40]Regarding the *Faretta* motion, Judge DeLucchi stated, "I think it's a dilatory motion. It doesn't have any merit at all except just to postpone the proceedings, an attempt to postpone the proceedings further." (RT 10/17/91:43.) The judge stated that pretrial motions were supposed to begin the following week, on October 21, however, a trial date still had not been set. Appellant argued the timeliness of his motion: "We haven't even started pretrial motions. We haven't started selecting a jury. We haven't set a trial date." (Sealed RT 10/17/91:71.) Appellant also correctly pointed out that any delay had been caused not by himself, but by his counsel: "I haven't been in charge of this case for the last four years. It's not my fault they're just now arriving or coming at a trial date. . . . [Trial counsel's] been busy with other cases, with other clients. The D.A. has been tied up. So, it's not my fault." (*Id.* at pp. 70-71.) Appellant was correct about the reason for the delay. (See sealed RT 8/1/91:13, where Mr. Ciraolo states that he had been carrying three capital cases, and was involved in a 16-month capital trial until the spring of 1991.)

A week later, on October 23, 1991, Judge DeLucchi reversed himself with respect to the section 170.6 peremptory challenge, and recused himself. (RT 10/23/91:85.) He then vacated his orders with respect to the *Marsden* and *Faretta* motions and told appellant he could renew both motions when a new judge was assigned. (*Id.* at p. 86.) The case was then continued until October 28, 1991, at which time appellant agreed to a limited time waiver, which permitted the pretrial motions to begin on November 18, 1991. (RT 10/28/91:1.) The case was then assigned to Judge Sarkisian.

On October 31, Judge Sarkisian ruled upon the *Faretta* and *Marsden* motions on the basis of the record that had been made before Judge DeLucchi. (RT 3.) At that time, a trial date still had not been set, no pretrial motions had been heard, and appellant still was not requesting any additional time to prepare for trial. Nevertheless, both motions were denied. With respect to the *Faretta* motion, Judge Sarkisian stated:

> [I]t's my independent conclusion from a review of the record, that this request is untimely. Among the factors that I have considered in assessing the defendant's request are his prior proclivity to attempt to substitute counsel,[41] the stage of the proceedings, and in particular the disruption and the delay that might reasonably be expect to follow the granting of his

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[41]Appellant had filed just two *Marsden* motions in the four years that his case had been pending - - one in June of 1991, and the second one at the same time as the *Faretta* motion in September, 1991.

> motion. This record indicates that many of the witnesses in this case are elderly. I will note that Mr. Lynch has been represented by present counsel for a number of years.

(RT 8-9.) Pretrial motions, which included a change of venue motion and a motion to sever, were then heard over the next several weeks.[42] Jury selection began December 4, 1991 (CT 3166); on February 18, 1992, the jury was impaneled and sworn, and the prosecutor's case-in-chief began. (CT 3225-3226; RT 2640.)

B. Argument

In *Faretta v. California* (1975) 422 U.S. 806, the United States Supreme Court held that the Sixth Amendment to the United States Constitution affords a criminal defendant the right to refuse the assistance of counsel and to represent him or herself. In *Faretta*, the defendant had asked to represent himself "weeks" before trial.[43] Although the record established that he had knowingly and intelligently waived his right to counsel, the trial court denied his request. (*Id.* at p. 835.)

The Supreme Court held that under the circumstances, the trial court

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[42]Hearings on the motions were held on November 12, 14, 19, 20 and 26 and December 3, 1991. (CT 3092, 3109, 3118, 3136, 3164 and 3165.)

[43]The Supreme Court decision does not state how long before trial Mr. Faretta had made his request, but the decision refers to weeks rather than months. (See *Faretta, supra*, 422 U.S. at p. 807 ["well before the date of trial"] and at p. 808 [several weeks thereafter, but still prior to trial"].)

had violated Faretta's constitutional right to conduct his own defense when it forced him to accept the appointment of a public defender against his will. (*Id.* at p. 836.) The Court observed that "[t]he defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." (*Id.* at p. 834.) Under *Faretta* this Court now holds that a trial court must grant a defendant's request for self representation if (1) the defendant is mentally competent and makes his request knowingly and intelligently after being apprised of the dangers of self-representation; (2) the request is made unequivocally and (3) the request has been timely made. (*People v. Welch* (1999) 20 Cal.4th 701, 729.) In *Faretta*, since the motion had been made *before trial,* the timing of the motion had not been in issue.

However, two years after *Faretta* was decided, this Court was asked to consider whether a *Faretta* motion made mid-trial, just before the last day of testimony, had to be honored as a matter of Sixth Amendment law. (*People v. Windham* (1977) 19 Cal.3d 121.) Looking to the experience of other jurisdictions for guidance, the *Windham* Court decided that *Faretta* motions made *after the trial had started* could be left to the sound discretion of the trial judge. Recognizing the potential problems associated

with disrupting "proceedings already in progress," this Court found "the requirement of a *pretrial motion* . . . [to be] a workable and appropriate predicate to the exercise of the *Faretta* right." (*Id.* at p. 127, emphasis added.) Thus, *Windham* held that "in order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial." (*Id.* at p. 128.)

The *Windham* court explained that the "reasonable time" requirement "must not be used as a means of limiting a defendant's Constitutional right of self-representation." (*Id.* at p. 128, fn. 5.) Rather, the requirement was intended only to prevent a defendant from misusing the *Faretta* motion as a "means to *unjustifiably delay a scheduled trial* or to obstruct the orderly administration of justice." (*Id.*, emphasis added.)

Although this Court has never set a bright-line test for timeliness, as the federal courts have done,[44] appellant's motion was timely applying even

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[44]In the Ninth Circuit, a *Faretta* motion made prior to jury impanelment is per se timely "unless it is shown to be a tactic to secure delay." (*Avila v. Roe* (9th Cir. 2002) 298 F.3d 750, 752; *Fritz v. Spalding* (9th Cir. 1982) 682 F.2d 782, 784.) Under Ninth Circuit law, appellant's motion was timely as a matter of law. Other circuits similarly recognize that a defendant's ability to assert the right of self-representation is unqualified when the request is made before trial. (See *United States v. Beers* (10th Cir.1999) 189 F.3d 1297, 1303 [if unequivocally demanded before trial, the right is unqualified]; *United States v. Walker* (2d Cir. 1998) 142 F.3d 103, 108 [if defendant asks to proceed pro se before the trial

the most conservative standards and should have been granted as a matter of law. As discussed further below, the trial court misunderstood its role, and mistakenly believed that it *had discretion* to deny appellant's motion. However, since appellant's motion was timely the trial court had no such discretion. Moreover, as there was absolutely no evidence that appellant's purpose was to delay the trial, his motion should have been granted as a matter of federal constitutional law. The trial court's error was reversible per se (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn.8 [*Faretta* violation is not subject to harmless error analysis]), and appellant is entitled to a new trial.

1. Appellant's *Faretta* Request Was Unequivocal and Made Knowingly and Intelligently.

While *Faretta* motions may be denied if the defendant equivocates about his desire to represent himself or if there is evidence that his waiver of the right to counsel was not made knowingly and intelligently (*People v. Welch, supra*, 20 Cal.4th at p. 729), such issues did not arise in appellant's case. His typewritten motion clearly and unequivocally requested pro per

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commences, right is absolute and request must be granted]; *United States v. Noah* (1st Cir.1997) 130 F.3d 490, 497 [defendant's right is absolute if invoked clearly and distinctly prior to the beginning of his trial; right is qualified once trial is under way]; *United States v. Webster* (8th Cir.1996) 84 F.3d 1056, 1063, fn. 3 [right is unqualified only if demanded before trial].)

status and cited appropriate law. (CT 3037-3042.) At the hearing, appellant demonstrated his familiarity with relevant law, and even posed novel but appropriate objections to the qualifications questionnaire which the judge had asked him to complete. (Sealed RT 10/7/91:16.)[45] The evidence thus fully supports a finding that appellant knowingly and intelligently waived his right to counsel. He was competent to do so, and made an unequivocal written request. Indeed, the trial court's only stated reason for denying appellant's motion was because the court found that it had been filed "on the eve of trial" and was therefore not timely. However, that finding was unquestionably erroneous.

2. Appellant's Request Was Timely Under Both the Federal and the State Standards for Timeliness.

Applying the Ninth Circuit rule, that a timely *Faretta* motion must be raised prior to the impanelment of the jury (see fn.44, *supra*), appellant's motion was well within the federal time requirement. Even under the less

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[45] Judge DeLucchi acknowledged that appellant had made a good point in objecting to the questionnaire: "You might be right. . . . you don't think it's anybody's business to inquire as to your past education or legal expertise; right?" Appellant responded, quite appropriately, "To a certain degree, yes, to make sure that I'm competent, you know, and able to understand and conduct myself, you know." (Sealed RT 10/7/91:17.) In fact, this Court has acknowledged that the trial court may not deny a *Faretta* motion on the grounds that the defendant does not have legal expertise or sufficient education. (See *People v. Welch, supra*, 20 Cal.4th at pp. 732-734, citing *Faretta v. California, supra*, 422 U.S. at pp. 835-836.)

clear-cut time guidelines employed by this Court, that the motion be brought within a *reasonable time* prior to the commencement of trial, appellant's motion was certainly timely filed.

In deciding what is a "reasonable time" before trial, two dates must necessarily be known: (1) the date on which the *Faretta* motion is first made and (2) the date on which the trial is scheduled to begin. In appellant's case the first operative date was September 27, 1991, the date on which appellant *filed* the motion, even though it was *heard* and later denied in October. (See, e.g., *People v. Scott* (2001) 91 Cal.App.4th 1197, 1205, which, in citing *People v. Ruiz* (1983) 142 Cal.App.3d 780, 784, notes that the motion in that case was made *six days before trial* even though it was heard and denied three days before trial. See also, *People v. Welch, supra,* 20 Cal.4th at pp. 729-730, where 3 ½ months before trial was calculated from the date the motion was made rather than the date on which it was argued or decided and *People v. Clark* (1992) 3 Cal.4th 41, 93, 99 [time is figured from the date defendant asked to represent himself, on August 13, not the date the motion was heard on August 20].)

The second operative date, the date on which the trial is scheduled to begin, frequently changes as the case proceeds. However, in reviewing the trial court's decision as to whether a *Faretta* motion was filed reasonably in

advance of trial, this Court considers only the circumstances that existed *at the time the trial court made its ruling*, not the situation that may have ultimately developed *after* the trial court ruled. (*People v. Marshall* (1997) 15 Cal.4th 1, 24; *People v. Moore* (1988) 47 Cal.3d 63, 80.) However, even using this conservative approach, which gives the benefit of the doubt to the trial court, appellant's motion was filed five to eight weeks before trial and was timely as a matter of law.

When appellant's September 27th *Faretta* motion was first heard on October 7, Judge DeLucchi understood that a number of significant pretrial motions still had to be argued before the trial could begin.[46] However, those motions were expected to be heard *after* October 21; and November 1 was the date being used as the target date for beginning the trial, though no date certain had been set.[47] Thus, using only the information that was before the trial court at the time of the hearing, the *Faretta* motion was filed

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[46]As of October 7, 1991, the following motions had been filed by the parties and had yet to be heard: Defendant's motion to suppress line-up identification, defendant's motion to sever counts, defendant's motion for change of venue, and motion for conditional examination of a witness. The prosecutor filed two additional motions on November 20, 1991. (RT 98.)

[47]Judge DeLucchi said, "September the 4th, time was withdrawn, which requires this Court to bring this case to trial no later than - - according to the date I have here is November 1st, 1991. . . [T]he Court is prepared to begin the pretrial motions in this case on October the 21st. Today is October the 7th ." (RT 10/7/91:19-20.)

approximately five weeks before the earliest *likely* trial date. Without question, it was filed "within a reasonable time prior to the commencement of trial." (*People v. Windham, supra*, 19 Cal.3d at p. 128.)

Moreover, if the timeliness issue is viewed from the perspective of Judge Sarkisian, which it should be since he was the judge who ultimately ruled on the *Faretta* motion after Judge DeLucchi vacated his own order, the time span is even longer than five weeks. As of October 31, when Judge Sarkisian ruled, appellant had already agreed to a limited time waiver until November 18. Consequently, from Judge Sarkisian's perspective, appellant's *Faretta* motion had been filed nearly *eight weeks* (52 days) before the earliest likely trial date of November 18. Regardless of which time frame is used - - five weeks or eight weeks - - a review of California cases that have ruled on the timeliness issue since the *Windham* case, reveals that appellant's motion was filed well within the range that is considered timely.

In *People v. Clark, supra,* 3 Cal.4th at p. 99, this Court explained that it had never established "a hard and fast rule that any motion made before trial – no matter how soon before – was timely." However, certain ranges have been established. For example, *Faretta* motions filed *after* jury selection has begun are clearly not timely. (See, e.g., *People v. Jenkins*

(2000) 22 Cal.4th 900, 961; *People v. Barnett* (1998) 17 Cal.4th 1044, 1087; *People v. Mayfield* (1997) 14 Cal.4th 668, 809-810; *People v. Cummings* (1993) 4 Cal.4th 1233, 1320.) Similarly, some courts have held that *Faretta* motions made four days (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1204), five days (*People v. Hill* (1983) 148 Cal.App.3d 744, 757) and even six days (*People v. Ruiz* (1983) 142 Cal.App.3d 780, 791) before the trial was scheduled to begin were too close to the trial date and therefore within the trial court's discretion to deny.

However, this Court has never questioned the timeliness of *Faretta* motions filed three months (*People v. Welch* (1999) 20 Cal.4th 701, 729) or four months (*People v. Dent* (2003) 30 Cal.4th 213) before trial, and in *Clark, supra,* this Court assumed the timeliness of a motion that had been made "over a month before trial was scheduled to begin." (*People v. Clark, supra,* 3 Cal.4th at p. 99, citing *People v. Wilks* (1978) 21 Cal.3d 460.) In fact, this Court has never found a motion filed *two* months before trial, as in appellant's case, to be untimely. Indeed, while timeliness was not an issue in the *Faretta* decision itself, in that case the motion had only been filed "weeks before trial." Appellant, having filed his motion *nearly eight weeks prior* to the earliest possible trial date, was clearly within the time frame suggested by the Supreme Court in *Faretta v. California.* The trial court,

therefore, had no discretion to deny the motion. Its reliance upon reasons such as appellant's "proclivity" to try to substitute counsel (he had filed two *Marsden* motions in four years) and the delay that "might" be expected to follow if the motion were granted, was therefore misplaced. In denying the motion, the trial court committed reversible error per se.

3. The Trial Court Has No Discretion to Deny a Timely *Faretta* Motion, Unless It Is Shown to Be a Delay Tactic.

It is settled law that

> under the *Faretta* test, if a request for self-representation is unequivocally asserted within a reasonable time before the commencement of a trial, and if the assertion is voluntarily made with an appreciation of the risks involved, *the trial court has no discretion to deny* it. (*Faretta, supra*, 422 U.S. at pp. 835-836; *People v. Windham* (1977) 19 Cal.3d 121, 128, 137 Cal.Rptr. 8, 560 P.2d 1187.)

(*People v. Williams* (2003) 110 CalApp.4th 1577, 1585, emphasis added; *People v. Joseph* (1983) 34 Cal.3d 936, 943.) Although denial of an otherwise timely *Faretta* motion will be upheld when the record demonstrates that it was filed "to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice" (*People v. Windham, supra,* 19 Cal.3d at p. 129, fn. 5; *Fritz v. Spalding* (9th Cir. 1982) 682 F.2d 782, 784), there is absolutely no evidence of any such dilatory purpose in the instant case. Since the record clearly demonstrates that the motion was

filed well before trial and that it was filed for the appropriate reasons, the trial court was simply without discretion to deny it. Nevertheless, both times that appellant presented his motion, the trial court assumed that it *did have the discretion* to deny the motion, and hence cited reasons that, under the circumstances, were simply irrelevant. A review of the record reveals absolutely nothing to suggest that appellant's motion was filed as a delaying tactic.

Judge DeLucchi, the first judge to consider appellant's motion, questioned appellant extensively about his reasons for wanting to represent himself. (See Sealed RT 10/7/91:7-12.) Since appellant's "life [was]on the line," appellant stated that he wanted to "have the say-so," and guide the case in the direction that he felt it should be going. (*Id.* at p. 8.)

After a thorough examination, Judge DeLucchi concluded that the motion had not been timely made, but *he did not make a finding* that appellant had filed the motion to delay or disrupt the trial.[48] Indeed, the record demonstrates quite clearly that appellant did not ask for a continuance and, even after Judge DeLucchi repeatedly suggested to appellant that he would need additional time to prepare, appellant conveyed,

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[48]The judge's ruling focused only on the four years that trial counsel had represented appellant, the advanced ages of many of the witnesses, the fact that "both sides" were prepared to proceed, and the "possible" delay that might arise if the motion were granted. (Sealed RT 10/7/91:25.)

at most, only a passing interest in a continuance.[49]

Appellant expressed some confusion as to why everyone was suddenly rushing to take the case to trial, just at the moment he had decided to go pro per. (Sealed RT 10/7/91:14.) When the judge explained that the rush had been precipitated by appellant's withdrawal of his time waiver, appellant indicated he would be willing to reinstate the waiver. He told the judge that the withdrawal had not been his idea, but rather his attorney's, and that by requesting self-representation he was "somewhat in a sense requesting to vacate that time waiver." (*Ibid.*)

Thus, appellant made it clear to the trial court that while he wished to go to trial soon and had not previously considered a continuance, he was *willing*, if the court thought it appropriate, to withdraw his speedy trial demand and consider a short continuance to prepare. Nothing about appellant's responses to the court showed any desire to disrupt or delay the proceedings. Rather, the record demonstrates that he was flexible and respectful in his approach and willing to fully cooperate in whatever fashion

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[49] In any event, appellant would have been within his rights had he asked for a continuance since his motion was timely filed. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1039; *People v. Clark, supra*, 3 Cal.4th at p. 110 ["a necessary continuance must be granted if a motion for self-representation is granted."].) Of course, if the motion is made midtrial, the court has the discretion to deny the motion on the grounds that a continuance would be required. (*Clark, supra,* 3 Cal.4th at p. 110.)

the court felt appropriate. He simply wanted to represent himself.

The prosecutor argued that appellant's motion was an "11th hour request," and urged the court to "deny him the fruits of his dilatory tactic." The prosecutor had "assured [the victims] that [the delay caused by the motion] *was not done by [trial counsel] Mr. Ciraolo.*" (RT 10/7/91:23.) But that simply was not true. In fact, it had been trial counsel's busy capital trial schedule that had caused several years' delay through the spring of 1991. (See fn. 40, *supra.*)

Nevertheless, once appellant sought pro per status the prosecutor overlooked Mr. Ciraolo's scheduling problems, and instead accused appellant himself of "dilatory tactics." This unfair characterization was not lost on appellant:

> [T]he blame was shifted to me as far as trying to delay this trial. I haven't been in charge of this case for the last four years. . . . [The prosecutor] stated that he was sure it wasn't Mr. Ciraolo's dilatory tactics, that he's trying to imply [sic] to delay the trial - -

(Sealed RT 10/17/91:69.)

Appellant's point was a good one. Bringing the case swiftly to trial out of concern for the elderly witnesses was not raised as a serious issue until appellant sought pro per status. Moreover, it was not a substantial issue in any event since all of the witnesses were videotaped at the

preliminary hearing, and in fact the testimony of two of the victim-witnesses was ultimately presented at the trial by way of their videotaped preliminary hearing testimony. (RT 2730, 2929.) Still, the trial court was more than willing to adopt the prosecution's position that appellant's motion was a delay tactic, and that under *People v. Frierson* (1991) 53 Cal.3d 730, the motion had not been timely made:

> All this is doing is you're trying to do - - in my opinion is just to postpone this some more, and it's not timely made. There is law on it. I cited the case, *People versus Frierson*. There's law on it. I didn't make this up out of whole cloth.

(Sealed RT 10/17/91:70.) However, the *Frierson* case, cited by the prosecutor and relied upon by the judge, was inapposite. In *Frierson*, the *Faretta* motion was made *the day before the scheduled trial* and the defendant sought a 60-day continuance. Because the motion was untimely, the judge had the discretion to deny the motion, and cited many of the factors relied upon by Judge DeLucchi in this case.

Although the judge believed that allowing appellant to represent himself would delay the trial, the judge neither found, nor had any basis to find, that appellant *sought pro per status for that purpose*. It was clear from the colloquy with Judge DeLucchi, that appellant had no such intention. (See Sealed RT 10/7/91:7-12.)

Several weeks later, after Judge DeLucchi vacated his order and

Judge Sarkisian ruled on the motion, he relied solely on Judge DeLucchi's record. Although Judge Sarkisian found the request to be untimely, and that delay "might reasonably be expected to follow the granting of his motion," he could offer no support for that conclusion. The record is simply devoid of any evidence that appellant sought to represent himself for an improper purpose. Moreover, a finding that the *effect* of the motion *might* be to delay the proceedings is not the same as a finding of a *purpose* to delay, and is not a cognizable reason for denying an otherwise timely *Faretta* motion. (*Fritz v. Spalding, supra*, 682 F.2d at p. 784.)

The record reflects that appellant did not expect, or ask for, a continuance to prepare for trial; his only concerns were that he be allowed "pro per privileges" such as phone and typewriter time in his jail cell each week. Quite the opposite of exhibiting a "purpose to delay," appellant candidly admitted that he had not even *considered* whether he would need additional time to prepare. (Sealed RT 10/7/91:9.) It was only after considerable prodding by the trial judge, after the court suggested that appellant *would need some time* to hire a private investigator, that appellant showed any interest in requesting additional time. "Actually, I hadn't considered any time as far as what - - how long it would take for me to go over, you know, some of the, you know, evidence and, you know." (*Ibid.*)

The trial court went out of its way to try to persuade appellant that *he would need more time to prepare for trial if he were going to represent himself.* The court's leading questions to appellant and his counsel appeared to be designed to bolster the court's ruling that the motion had to be denied because appellant would indeed need additional time. While the trial court's view was not unreasonable - - having time to prepare would help *anyone* going to trial, attorney or not - - the court's conversation with appellant does not establish that appellant had filed the motion for that purpose.

Appellant did his best to show the court that he was not responsible for the long delay in bringing the case to trial, and that his request to represent himself was raised in a timely manner, especially under the circumstances. Appellant told the court:

> [My attorney's] been busy with other cases, with other clients. The D.A. has been tied up. So, it's not my fault. It's just now that I've recently seen that what I have been seeing to make me want to exercise my Sixth Amendment rights . . . to represent myself. . . . And it wasn't untimely. We haven't even started pretrial motions. We haven't started selecting the jury. We haven't set a trial date.

(Sealed RT 10/17/91:71.)

The trial court assured appellant he need not worry about an incorrect ruling:

> If it wasn't untimely and I made a mistake and you get convicted, we'll start all over again. Right? Every ruling I'm making, everything I say is on that record. If you go down the tubes, everything I've done is subject to review and scrutiny. You know that. This case will be reviewed with a fine toothed comb *if anything happens serious to you. So don't worry.*

(*Id.* at pp. 70-71, emphasis added.)

Something "serious" has certainly happened to appellant. It is now time for this Court to correct the error made by the trial court.

In summary, the record supports the following:

(1) Due to trial counsel's busy capital case schedule, serious work on appellant's case did not begin until the spring of 1991 (Sealed RT 8/1/91:13 [Mr. Ciraolo had been carrying three capital cases, including a 16-month capital trial until the spring of 1991]);

(2) At that time appellant began to see that little work on his case had been done and believed his attorneys were not adequately representing him. He promptly filed a *Marsden* motion (June), followed by a *Faretta* motion (September). No trial date was set, and November 1 was only considered a "likely" trial date. Since the motion was filed well in advance of trial, appellant's *Faretta* motion should have been granted as a matter of law; because it was not, appellant's convictions and death sentence must be reversed and appellant must be given a new trial.

II.

THE TRIAL COURT'S IMPROPER REMOVAL OF FOUR QUALIFIED JURORS REQUIRES REVERSAL OF THE DEATH PENALTY.

A. Introduction and Factual Background

Jury selection in this case began on December 4, 1991. (RT 114; CT 3166.) Among the potential jurors were four women[50] who all expressed their support for the death penalty, some quite strongly, when the circumstances warranted it. None of the women said they would always vote automatically for either life or death. Their answers during voir dire revealed that while they believed in the death penalty, they would only impose it in this case if they felt very certain that the evidence clearly called for it. They expressed no unwillingness to follow the court's instructions or their oath as jurors.

However, after the prosecutor improperly pressured three of the women (McBeth, Collazo and Kanegawa) with misleading information about what their obligations would be if they imposed the death penalty, the three women were finally pushed to agree that they would have difficulty carrying out these supposed duties. Using graphic and emotionally charged

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[50]Three of the four were minorities, as they identified themselves in their questionnaires. (Collaza, Mexican-American [CT 6313]; Kanagawa, Japanese [CT 8288]; and Paxton, African American [CT 8954].)

statements about having to "personally" send appellant "to die. . . in the gas chamber," (RT 959), the prosecutor predicted that these women would "get cold feet," or "weak knees" after paying "lip service" to the death penalty. In the end, all three women succumbed to the prosecutor's badgering, eventually questioning their ability to do what the *prosecutor claimed* would be their duty: to announce to a "packed courtroom" that they were sending appellant to die in the gas chamber. (RT 623.) The trial court allowed the improper questioning to proceed and then, based upon the jurors' apparent equivocation, sustained the prosecutor's challenges for cause.

In the case of the fourth juror, Ms. Paxton, she believed in the death penalty and was willing to impose it, but expressed doubt that the crimes in this case would warrant death. For that reason alone, she was excused.

In each instance the trial court concluded that the juror's views would "prevent or substantially impair the performance of her duty as a juror in accordance with the court's instructions and her oath." (RT 632, 959, 1686, 1849.) As discussed below, the record does not in any way support the trial court's conclusion. Reversal of the death penalty is therefore required.

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1. The Voir Dire of Kathleen McBeth: Difficulty Facing "A Packed Courtroom" To Say Mr. Lynch Should Die In The Gas Chamber

The jury questionnaire in this case had just one question regarding capital punishment: "What are your feelings about the death penalty?" Ms. McBeth responded: "If the crime was of the nature to warrant the death penalty I believe it should be done." (CT 4355.)

During voir dire, Ms. McBeth stated that she believed in the death penalty but was not certain she could be the person who decides who "gets it or not." She was not sure she "could really do it." (RT 614.) The court then explained that the process was a "very subjective" one and that she would be free to assign whatever weight she thought was appropriate to the aggravating and mitigating factors. When asked whether she believed the crimes in the present case "were serious enough where the death penalty is a possible punishment," Ms. McBeth said she was unsure how to answer the question. (RT 616.) The court then explained that it only wanted to know whether both punishments would be options or possibilities:

> If you can just say right now, "Judge, I know right now there is no way I am ever going to walk into this courtroom and say that I vote for the death penalty, and it just doesn't matter what happens in this trial," then we need to know that.

(RT 616.) Ms. McBeth answered: "No, I couldn't just decide one way or the other right on the spot." (RT 616.) Although Ms. McBeth confirmed

that she would have to wait and had not made up her mind, the court seemed not to understand her response and continued the same line of questioning. The judge asked her to assume that she had weighed all of the factors and had decided that death was the appropriate punishment. He then asked if she could come back to the courtroom and say that death was her decision. She answered, "I think so." (RT 617.) She appropriately explained that she would need to be absolutely certain:

> There would have to be absolutely [sic] elimination of everything to the point that that is the only thing left to do. . . . Like any other thoughts, thinking there is a chance that he should have life rather than death. I would have to just clear it out in my mind completely.

(RT 617.) The judge then followed up with his last question, "Do you think that you honestly believe that you would be open to the possibility of either of those punishments, depending on the evidence." Ms. McBeth said, "Yes, I think so." (RT 618.)

The prosecutor then began his questioning by asking if the crimes alleged in this case, three murders and two attempted murders, were of the type to which the death penalty should apply. She answered, "It's hard to say at this time." (RT 618.) However, she agreed that the death penalty was the right punishment for certain crimes. (RT 619.)

When asked if she were the type of person who only believed the

death penalty was appropriate for people who had put a bomb on a flight and killed hundreds of people, she replied, "It's hard for me," explaining that she had never been required to give the subject much thought before then. The judge then intervened, explaining that no one was asking her how she would vote in this particular case, but only if she would never vote for one punishment or the other, under any circumstances. (RT 619-620.)

The prosecutor then gave an emotion-charged and inaccurate description of what would happen if all twelve jurors voted for death:

> You are going to have to come down and announce in open court, *in front of Mr. Lynch*, in front of his defense attorneys, Judge Sarkisian, in front of me and *maybe a packed courtroom*, that you, *Kathleen McBeth*, are voting to impose the death penalty, knowing that that is going to be the first step which leads to *his execution by lethal gas, strapped in a chair in the gas chamber* in San Quentin sometime in the future, do you understand that?

(RT 623, emphasis added.) Although Ms. McBeth said yes, the prosecutor did not drop the subject but continued this improper effort to wear her down: "Your vote for death, you are one-twelfth of the thing *that's going to put him in that gas chamber*, you realize that?" Again, she said yes. But still he pressed on: "Can you be part and parcel of a panel of people *which sends somebody to their death*? (RT 624, emphasis added.) She answered:

> I honestly cannot give a direct answer to that because I don't know how I could live with myself. Can I actually be part of a group that would say this man has to die? . . . *I don't know.*

> Like I say, *it's circumstances I have never been in* or really given that much thought to.

(RT 624, emphasis added.) However, Ms. McBeth again confirmed that death was appropriate as a penalty in certain cases, and expressed legitimate concerns about whether she would feel compelled to impose it in this particular case, since it was a situation she had never before considered. Rather than simply accept these appropriate responses, the prosecutor continued to pressure Ms. McBeth, telling her she would not be "true to yourself" if she "got cold feet" and decided she ultimately could not impose the death penalty. (RT 624.) After lecturing her more, Ms. McBeth responded with a question of her own: [L]ike you say, I don't know, so I guess the answer would have to be no, wouldn't it?" (RT 625.) Although Ms. McBeth had *never said* that she was unable to do it, only that *she didn't know*, the prosecutor thanked her for her "honest answer," admitting she could not impose death. (RT 625.)

Upon questioning by the defense Ms. McBeth stated that she had voted for the death penalty when it was on the ballot. (RT 626.) She had given it some thought and felt it was appropriate in some cases. Her only problem was being "the final person to say, okay, do it." (RT 626.) Nevertheless, when asked if she could *never* be a juror who would vote for death, she said, "Under no circumstances? No, there would be - - of course,

there are circumstances." (RT 627.) She confirmed three times that there were circumstances where she could sit on a jury and vote for death, depending on the seriousness of the crime and the facts of the case. She promised to keep an open mind and hear all of the facts before she decided. (RT 627.) She promised to give both sides a fair trial on the issue of penalty, to reserve judgment and keep an open mind until the end of the penalty trial and then decide the appropriate penalty. (RT 628.)

The trial judge then made a series of statements to her. He stated that he felt her answers to the prosecutor were very different than her answers to the defense. He told her that he believed she supported the death penalty, felt it was warranted in certain cases, but that she could not "face Mr. Lynch and announce that that is your vote, knowing that that is going to cause him to be put to death in the gas chamber, is that correct, am I correct?" To the judge's leading question Ms. McBeth simply said yes, and the prosecutor challenged her for cause. (RT 629-630.)

The defense objected, arguing that taking all of her answers together revealed that she was thoughtful, that she would give the issue of penalty serious consideration and that with some admitted difficulty she could impose the death penalty. (RT 631-632.) Nevertheless, the court granted the prosecution's challenge for cause on the grounds that Ms. McBeth had

given arguably inconsistent or equivocal answers and that her views would substantially impair the performance of her duties as a juror. (RT 632.)

2. The Voir Dire of Olympia Collazo: Could Not Tell Defendant She Was Sending Him "To Die in the Gas Chamber"

Ms. Collaza stated on her jury questionnaire, "I feel that the death penalty should be imposed on certain individuals but not all. Also I'm not against or in favor of it." (CT 6330.) During voir dire, she said that she never feels that she would *always* vote for death but "sometimes" feels that she could *never* vote for death. (RT 954.) But when asked to clarify that statement, she explained that not everyone who kills should get the death penalty, but also, not everyone who kills should get life in prison. (RT 954.) She was then asked if the crimes in this case were serious enough "where the death penalty is a possibility." Before she could respond, however, the court gave examples of other types of murder cases - - someone who put a bomb on a plane and killed 300 people, or someone who raped and murdered a small child. Ms. Collazo's answer was simply, "I would say probably life in prison." (RT 956.) Although it was not entirely clear what question Ms. Collazo was actually responding to, the prosecutor immediately challenged her for cause and the defense asked to question her.

Ms. Collazo said she would "probably" vote against the death penalty if it were on the ballot. However, she was unwilling to say that she would never vote for death in a death penalty case, no matter what the circumstances. (RT 956.) When asked if she could vote for death in this case, she said twice that it was a "possibility" and ultimately said, "probably so." (RT 957.) When the prosecution questioned her, she agreed that the crimes in this case were "really terrible," (RT 958) but stated she had *no preference for either punishment.* When asked if she thought she "could ever personally vote to send somebody to die in the gas chamber," she said, "I don't think so." (RT 959.) The prosecutor then told Ms. Collazo:

> Because if you . . . think that the death penalty is appropriate, you are going to come down here in open court and you are going to have to say I, Olympia Collazo are [sic] voting to send that man at the end of the table to die in prison, in the gas chamber, could you do that?

(*Ibid.*) To that question she responded, "I don't believe so." (*Ibid.*) With that, the prosecution's challenge for cause was granted, on the same grounds: that her views would prevent or substantially impair the performance of her duties as a juror. (RT 959-960.)

3. The Voir Dire of Linda Kanegawa: She Didn't "Think" She Could Announce Her Verdict For Death.

On her questionnaire Ms. Kanegawa said, "I do believe in the death

penalty if warranted." (CT 8305.) When questioned by the court she continuously affirmed her understanding of the process as described. (RT 1674-1676.) When asked if she felt the crimes were so terrible that she would invariably vote for death, she expressed discomfort with having to make either decision and said, "I couldn't say that right now. . . . I'd rather not say at this point." (RT 1676.) She did believe that the crimes were serious enough that the death penalty could possibly apply but that she would not automatically vote for death. (RT 1677.) She agreed to follow the court's instructions and was open to voting for either penalty, depending on the evidence. (RT 1678.)

On voir dire by the prosecutor, she explained that if the crime were bad enough she did believe that some people *should get the death penalty.* She confirmed that in an election, she would vote for capital punishment. (RT 1680.) She explained that she supported the death penalty because for some crimes, people "should get what they deserve." She also thought that life in prison might in some ways be "more cruel, sometimes. I would say just put them to death now." (RT 1681.) On a scale of one to ten, with ten being someone who believes that death is the only appropriate punishment for murder, she said that she considered herself "a six." (RT 1682.)

Ms. Kanegawa admitted being "uncomfortable" with making a

"decision for somebody else," but denied that her discomfort would interfere with her following the court's instructions. (RT 1682.) Although that is precisely the type of juror that *should be on a capital jury*, the prosecutor apparently found her lack of bloodthirstiness unacceptable and began his same improper pressure tactics. He asked Ms. Kanegawa if she understood what the "ramifications" would be if she voted for the death penalty. She said, "No. I don't understand." (RT 1683.)

> Q. Well, if you vote for the death penalty, you and 11 others, you are going to be one-twelfth, you, yourself, are one-twelfth of a panel of people which are recommending that *Mr. Lynch be put to death in the gas chamber, you realize that*?
> A: Yes.
> Q: And if you vote for death, it's going to happen sometime in the future.
> A. Yes.
> Q. Can you do it, if you think it's justified and called for?
> A. Yes.

(RT 1683.) Despite these assurances, the court allowed the prosecutor to continue badgering this juror. His apparent purpose was to pressure her into admitting that she could not or would not perform the same duties she had just agreed to carry out. The juror was left with the impression that she had given the "wrong" answer:

> The reason I ask that question, you are the third panel we've had on this particular case. We've been at this since probably late November, and we've talked to a couple of hundred other people already, and had, in another case with the same judge, the same defense attorney and same prosecutor, talked to over

a thousand people on another capital case, and quite a few of them said, *I will vote for the death penalty; just like you have.* I believe in it if called for, for certain types of horrible crimes; just like you have. And, you know, they wave the flag and they say, you know, crime is rampant and this is a perfectly permissible punishment for the crimes of first-degree murder with special circumstances.

Yet, when they have to put into action things that they really believe in, *they get cold feet, you know, weak knees, and weak in the stomach,* and they say, well, I believe in it. And they will pay lip service to that. But they will say, time out, Mr. D.A., you know, you've proven the case. I think they deserve the death penalty. *I personally, can't do it.* Let somebody else do the dirty work. I just can't do it.

They are paying lip service and *not being totally faithful to the oath they took or true and faithful to the court and all the attorneys.* Do you understand that?

A. Mm-hmm.

Q. Do you have any feelings as to that?

A. Yeah. That why I say I'm not comfortable in making the decision. I believe that, but like I said, I'm not comfortable in making the decision.

(RT 1685, emphasis added.) When the court finally asked her if she would be able to come down and announce her decision, if in fact it were for death, she said, "It's hard to say, to tell you the truth." The court asked again if she was "not sure" or didn't think that she could announce her verdict and she said, "No, I don't." (RT 1686.) With that final response, the court granted the prosecution's challenge for cause. (RT 1686.)

4. The Voir Dire of Ruther Paxton: Did Not Feel Strongly *This* Crime Warranted Death.

When Ruther Paxton, an African American woman, was asked how she felt about the death penalty, she simply answered, "Fine." (CT 8971.) On voir dire she stated that she would not automatically vote for death. (RT 1845.) When asked if the crimes were serious enough to possibly warrant the death penalty, she indicated that it was a possibility if the factors had been sufficiently proven in the penalty phase.[51] (RT 1846.)

The court then went into a very lengthy discussion of the different crimes for which the death penalty might be appropriate and concluded by asking if she would be open to either punishment, "depending upon all of the evidence that you hear?" (RT 1846.) Ms. Paxton asked, "whether I would vote for death or - - ?" Since it seemed that Ms. Paxton believed that the judge was asking her how she would vote in this case, the judge tried to clarify his question. He said he just wanted to know if she would be open to either possibility. Again, Ms. Paxton replied that she did not know, because it would depend upon the circumstances and the evidence. (RT 1847.) When asked if she could vote for death, she said, "I guess so." (RT

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[51]Her actual words were, "Well, if the second trial['s] evidence, you know, warrants it or I think maybe it proves up to a certain point, yes, that – that could be possible." (RT 1846.)

1847.)

The court then asked her if there was anything else she would like to tell the court about her views on the death penalty. She answered:

> Well, it [would] just have to be so horrible, you know, beyond wildest imagination, before I could just say somebody got to die.

(RT 1848.) The judge then reminded her that she had already heard the general description of what had happened in this case. He asked her if she believed that those crimes were serious enough to warrant the death penalty. She responded, "No, not really." (RT 1848.) Without any further questioning by anyone, the prosecutor's challenge for cause was sustained, for the same reason as previously given, that her views on capital punishment would substantially impair the performance of her duties. (RT 1848-1849.)

B. Under The *Adams-Witt* Standard The State Failed To Meet Its Burden of Demonstrating These Jurors Would Not Follow The Court's Instructions Or Their Oath.

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, the Supreme Court held that prospective jurors in a capital case may not be excused for cause on the basis of moral or ethical opposition to the death penalty. A capital defendant's Sixth and Fourteenth Amendment right to an impartial jury prohibits the exclusion of prospective jurors "simply because they voiced

general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Id.* at p. 522.) Instead, the state could properly excuse only those jurors "who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." (*Witherspoon v. Illinois, supra*, 391 U.S. at pp. 522-523, fn. 21, emphasis omitted.)

Later, in *Adams v. Texas* (1980) 448 U.S. 38, the Supreme Court clarified that *Witherspoon*, rather than being a *ground for challenging* a prospective juror, was actually just a *limitation* on the power of the state to exclude a juror for cause:

> [I]f prospective jurors are barred from jury service because of their views about capital punishment on *"any broader basis" than inability to follow the law or abide by their oaths, the death sentence cannot be carried out.*

(*Adams v. Texas, supra*, 448 U.S. at p. 48, emphasis added.) Thus, under *Adams,* a juror's views about the death penalty can *only* be the basis of a challenge for cause if those views would "prevent or substantially impair" the juror's ability to carry out those duties required *by the court's instructions and the juror's oath.* (*Adams v. Texas, supra*, 448 U.S. at p. 45;

People v. Stewart (2004) 33 Cal.4th 425, 440-441.) Moreover, as the Supreme Court later made plain in specifically re-affirming *Adams*, if the state seeks to exclude a juror under the *Adams* standard, it is the state's burden to prove the juror meets the criteria for dismissal. (*Wainwright v. Witt* (1985) 469 U.S. 412, 423; *People v. Stewart*, *supra*, 33 Cal.4th at p. 445.)

In the present case, none of the four women who were removed gave any indication that they were *unable to carry out those duties required by the court's instructions and their oath as jurors*. Under California law, there is never a situation where a juror *must* impose the death penalty, it is only an option which *may* be exercised when the juror determines that the aggravating circumstances substantially outweigh mitigating circumstances. (CALJIC No. 8.88.) Moreover, each juror is free to assign whatever weight he or she deems appropriate to the various factors being considered. (*Ibid.*) While none of these jurors were willing to commit ahead of time to imposing a death sentence in this particular case, they all continuously maintained that they agreed with having a death penalty *and* would be willing to impose it *if they concluded that the circumstances warranted it.* None of the women were *eager* to be put in that position, but all were willing to follow the law as it was explained to them. That is precisely what

is required of a juror in a capital case.

> As this Court observed in the *Stewart* case, even people who
>
> firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

(*People v. Stewart, supra*, 33 Cal.4th at p. 446, quoting, *Lockhart v. McCree* (1986) 476 U.S. 162, 176.) In appellant's case, none of the women were *philosophically opposed* to the death penalty, or even against applying it under the right circumstances. Whatever difficulties they might have had in reaching a death verdict, those were not sufficient grounds for disqualifying them unless the prosecutor could meet his burden of proving that the jurors were not "willing to temporarily set aside their own beliefs in deference to the rule of law." (*Ibid.*)

Nor was it established that any of these prospective jurors were subject to removal for an unwillingness to follow their oath. California Code of Civil Procedure section 232, subdivision (b), sets out the oath which each seated juror is asked to affirm:

> Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court?

Each juror must acknowledge their agreement by saying, "I do." (Code of

Civ.Pro., § 232, subd.(b).) This oath confirms that the juror will try the case to the best of his/her ability and decide the verdict only according to the evidence and the instructions. Although the trial court never asked this precise question of them, when the women were given the opportunity, they clearly expressed a strong desire to *not prejudge the evidence, to wait until they had heard all of the evidence to make a decision, to be fair to both sides, and to reach a penalty decision, including the possibility of death, based only upon the facts they would hear.* (McBeth: RT 616, 618-619, 627-628; Collazo: RT 956-958; Kanagawa: RT 1676-1678, 1683.) That is precisely what their oath and the court's instructions required of them. Again, none of the four women who were removed for cause gave any indication that they would not make a decision based on anything other than the evidence and the instructions.

In *Adams v. Texas, supra*, the Court concluded that the essence of the juror's oath, to fairly decide the facts and follow the court's instructions, *is all that may be required of a juror.* In the Court's words, the state may only insist "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (448 U.S. at p. 48.) Thus, a prospective juror can be discharged for cause only where the record demonstrates that her views prevent her from being able to follow the law

as set forth by the court, and as required by the oath. (448 U.S. at p. 48.)

Three of the four jurors certainly expressed reservations about having to impose the death penalty, but such feelings are appropriate in a case where a fellow citizen's life hangs in the balance.

> But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever *is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths*, regardless of their feelings about the death penalty.

(Adams v. Texas, supra, 448 U.S. at p. 49, emphasis added.) The Supreme Court in *Adams* emphasized that the State may not constitutionally exclude jurors "whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected." (*Id.* at p. 50.)

Prospective jurors McBeth, Collazo and Kanegawa all seemed to have qualms about actually imposing a death verdict. But those feelings were only expressed in terms of having to appear before a "packed courtroom" and announce that they, "personally," were agreeing to send Mr. Lynch, "the man at the end of the table," to be "strapped in a chair in the gas chamber" to die by "lethal gas." (RT 623, 959.) Reluctance to "announce" one's verdict in the manner described by the prosecutor, does not establish a *disqualification* under the *Witt* standard. This Court

recognized this important difference in the *Stewart* case, where "the question as phrased in the juror questionnaire did not directly address the pertinent constitutional issue." (*People v. Stewart, supra*, 33 Cal.4th at p. 447.) In reversing the trial court's disqualification of five jurors, this Court recognized that the trial court had confused reluctance to impose death, or opposition to the death penalty, with inability to follow the law:

> [T]he trial court erroneously equated (i) the *nondisqualifying concept* of a very difficult decision by a juror to impose a death sentence, with (ii) the *disqualifying concept* of substantial impairment of a juror's performance of his or her legal duty, and failed to recognize that question No. 35(1)(c), standing alone, did not elicit sufficient information from which the court properly could determine whether a particular prospective juror suffered from a disqualifying bias under *Witt, supra*, 469 U.S. 412, 424, 105 S.Ct. 844.

(*Stewart, supra*, 33 Cal.4th at p. 447.)

In appellant's case, the prosecutor misled the jurors about what they were required to do if they imposed death, and then convinced the trial court that the prospective juror's views made them constitutionally ineligible to sit on a capital jury. The trial court confused the *nondisqualifying concept* of reluctance to announce the verdict with the *disqualifying concept* of unwillingness to follow the court's instructions and the juror's oath..

Moreover, the prosecutor's tactics were highly misleading and

should not have been permitted by the trial court for two reasons. First of all, neither the court's instructions nor the juror's oath require a juror to make any statement at all, following a death verdict. With respect to formalizing a verdict for death, the instructions in this case required that the jurors select a foreperson, that all twelve jurors agree as to penalty, and that "any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom." (CT 3446.)

Although Penal Code section 1149 describes the procedure for taking the verdict, that procedure merely requires a group affirmation of the verdict.[52] Penal Code section 1163[53] allows for individual polling of jurors, but polling is not required by the instructions or the oath and is required only if a party so requests. In the event the jury *is polled*, the individual juror must simply say, "yes," when asked if the verdict as read is his or hers.

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[52]Penal Code section 1149 provides: "When the jury appear they must be asked by the Court, or Clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same."

[53]Penal Code section 1163 provides: "When a verdict is rendered, and before it is recorded, *the jury may be polled*, at the request of either party, in which case they must be severally asked whether it is their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation." (Emphasis added.)

That is precisely the procedure that was used in appellant's case. (RT 4701-4703.) Had the prosecutor accurately represented to these women that they *might be required* to affirm that the verdict, as read, was theirs, by simply answering, "yes," their responses very likely would have been different. But, in any event, the duty to affirm their verdict if polled, is a completely separate question from whether they would follow the court's instructions and decide the case fairly according to the facts – duties they repeatedly indicated they were willing to perform. As *Adams* and *Stewart* make it abundantly clear, such jurors cannot properly be excused for cause.

The second problem with what the prosecutor told these women, is the manner in which he approached them. He purposely used graphic images, and inflammatory language to cause them to recoil and shrink from the task at hand. His strategy was just one step short of telling the jurors that the defendant's family would be crying in the courtroom, pleading for his life, while the juror would be "throwing the switch." Painting gruesome pictures for the jury about what a death sentence "really means," is something capital defense attorneys are prevented from doing, on the theory that doing so injects irrelevant factors into the equation. (See, e.g., *People v. Whitt* (1990) 51 Cal.3d 620, 644 [evidence of how the death penalty is carried out does not aid the jury in deciding the crucial issue of whether the

death penalty is appropriate].)

Prosecutors, whose job it is to try the case before jurors who are committed to being fair and following the law, should be held to the same standard. If the defense may not evoke sympathy from a jury by describing the execution process, the prosecution should not be able to use similar strategies in an effort to drive all but the most "cold-hearted" or "bloodthirsty" jurors from the jury pool.

In this case, the prosecutor led the women to believe they would have to look the defendant in the eye, face his family, his lawyers, his friends, and in front of a crowded courtroom, stand up and essentially announce, "I, [Kathleen McBeth], am sending you, Franklin Lynch, to San Quentin's gas chamber, to be strapped to a chair, and to die from lethal gas." That was clearly an exaggeration, meant to cause the women to recoil at the thought of imposing the death penalty. The fact that the prosecutor appeared to succeed in his strategy, does not mean that the women were actually unqualified to serve. The record shows that the state failed to meets its burden in challenging them for cause. The trial court erred in sustaining the challenges, and their removal violated appellant's constitutional right to a fair and impartial jury.

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C. Under The *Adams/Witt* Standard Jurors May Not Be Removed Simply Because They Equivocate About Their Ability To Impose Death Or, As In This Case, To Announce Their Verdict.

As discussed previously, if the state seeks to exclude a juror under the *Adams* standard, it is the state's burden to prove the juror meets the criteria for dismissal. (*Wainwright v. Witt* (1985) 469 U.S. 412, 423; *People v. Stewart, supra,* 33 Cal.4th at p. 445.) This Court has repeatedly held that it is the *Adams/Witt* standard which reviewing courts should apply in evaluating a trial court's decision to discharge jurors because of their views on the death penalty. (*See, e.g., People v. Stewart, supra,* 33 Cal.4th at pp. 440-441; *People v. Holt* (1997) 15 Cal.4th 619, 650; *People v. Avena* (1996) 13 Cal.4th 394, 412.)

In applying the *Witt* standard, however, and with all due respect, this Court has taken a wrong turn. In a series of cases, this Court has held that where the record shows a prospective juror equivocates about his or her ability to vote for death, (1) a trial court may decide to discharge the juror and (2) that decision is binding on the reviewing court. (*See, e.g., People v. Mincey* (1992) 2 Cal.4th 408, 456; *People v. Breaux* (1991) 1 Cal.4th 281, 309-310; *People v. Frierson* (1991) 53 Cal.3d 730, 742; *People v. Cox* (1991) 53 Cal.3d 618, 646.) Ultimately, these cases all rely for this proposition on *People v. Ghent* (1987) 43 Cal.3d 739 at 768. In turn, *Ghent*

relied on *People v. Fields* (1984) 35 Cal.3d 329, 355-356, for this proposition, which itself relied on this Court's 1970 decision in *People v. Floyd* (1970) 1 Cal.3d 694.

What this history shows is that the current rule which this Court is applying -- holding that a trial court may rely on a prospective juror's equivocal responses to discharge that juror in a capital case -- is based on a 1970 precedent which pre-dates the *Adams* case by nearly a decade. In fact, an analysis of the actual voir dire in *Adams*, as well as in cases the Supreme Court has decided since *Adams*, shows that the United States Supreme Court embraces precisely the opposite rule.

In this regard, in addition to modifying the *Witherspoon* standard, *Adams* went on to apply the modified standard in the case before it to several prospective jurors. Ultimately, *Adams* held that a number of these jurors had been improperly excused for cause in that case, precisely because the state had not carried its burden of proving that the jurors' views "would prevent or substantially impair the performance of [their] duties as . . . juror[s] in accordance with [their] instructions and [their] oath." (*Adams v. Texas, supra*, 448 U.S. at p. 45.) Reviewing the voir dire of several of these jurors shows that this Court's rule deferring to a trial court's treatment of jurors who give equivocal responses is fundamentally contrary to *Adams*.

In fact, the voir dire in *Adams* involved several jurors who were equivocal about whether their penalty phase deliberations would be affected by the fact that death was an option. For example, prospective juror Francis Mahon was unable to state that her feelings about the death penalty would not impact her deliberations. Instead, she admitted that these feelings "could affect me and I really cannot say no, it will not affect me, I'm sorry. I cannot, no." (*Adams v. Texas*, No. 79-5175, Brief for Petitioner, Appendix ("Adams App.") at pp. 3, 8.)[54] Prospective juror Nelda Coyle expressed the same concern. She too equivocated when asked if her feelings about imposing the death penalty would affect her deliberations. (Adams App. at pp. 23-24.) She too admitted she was unable to say her deliberations "would not be influenced by the punishment . . . ." (Adams App. at p. 24.)

Similarly, prospective juror Mrs. Lloyd White believed her aversion to imposing death would "probably" affect her deliberations. (Adams App. at pp. 27, 28.) She "didn't think" she could vote for death. (Adams App. at pp. 27-28.) Prospective juror George Ferguson admitted that opposition to capital punishment "might" impact his deliberations, while prospective juror Forrest Jenson admitted that his views on the death penalty would

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[54] The Appendix to Brief of Petitioner in *Adams* is a transcript of the voir dire examination of prospective jurors.

"probably" affect his deliberations. (Adams App. at pp. 12, 17.)

In connection with each of these five jurors expressing equivocal comments, the trial court resolved the ambiguity in the state's favor, discharging them all for cause. Significantly, the Supreme Court did *not* defer to any of these five conclusions; instead, the Court ruled that the record contained insufficient evidence to justify striking any of these jurors for cause. (*Adams, supra,* 448 U.S. at pp. 49-50.) Although all five jurors had given equivocal responses, which the state trial judge had resolved in favor of discharging the jurors, the Supreme Court reversed, holding that jurors could *not* be discharged "because they were unable positively to state whether or not their deliberations would in any way be affected." (448 U.S. at pp. 49, 50.) In other words, when a juror gives conflicting or equivocal responses -- as did jurors Mahon, Coyle, White, Ferguson and Jenson in *Adams* -- the trial court is not free to simply assume the worst and discharge the jurors for cause. The reason is simple; when a prospective juror gives equivocal responses, the state has not carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror . . . ." (*Adams v. Texas, supra*, 448 U.S. at p. 45.)

Seven years after *Adams* the Supreme Court addressed this same issue, again holding unconstitutional a trial court's exclusion of a juror who

equivocated about her ability to serve on a capital jury. (See *Gray v. Mississippi* (1987) 481 U.S. 648.) During voir dire, prospective juror H.C. Bounds was questioned. According to the state supreme court, the voir dire was "lengthy and confusing" and resulted in responses from Ms. Bounds which were "equivocal." (*Gray v. State* (Miss. 1985) 472 So.2d 409, 422.)

When asked if she had any "conscientious scruples" against the death penalty, Ms. Bounds replied "I don't know." (*Gray v. Mississippi*, No. 85-5454, Joint Appendix at 16.) When asked if she would automatically vote against imposition of death, she first explained she would "try to listen to the case" and then responded that "I don't think I would." (*Id.* at pp. 17, 18.) When pressed by the trial court to commit to a position, she agreed that she did not have scruples against the death penalty where it was "authorized by law." (*Id.* at p. 18.) But when directly asked by the prosecutor whether she could vote for death, she said "I don't think I could." (*Id.* at p. 19.)

The prosecutor moved to strike Ms. Bounds for cause. The trial court noted that "I don't know whether she could or couldn't [vote for death]. She told me she could, a while ago." (*Id.* at p. 20.) Seeking to resolve this, the court asked Ms. Bounds whether she could vote for the death penalty and she responded "I think I could." (*Id.* at p. 22.) When the

prosecutor again challenged Ms. Bounds, the trial court found that "she can't make up her mind." (*Id.* at p. 26.) The trial court then resolved the ambiguity by discharging Ms. Bounds for cause.

Before the United States Supreme Court, the state "devoted a significant portion of its brief to an argument based on the deference this Court owes to findings of fact made by a trial court." (*Gray v. Mississippi, supra*, 481 U.S. at p. 661, fn.10.) In fact, the state made the very argument this Court has repeatedly embraced, arguing that a conclusion Ms. Bounds was improperly excused for cause "refuse[s] to pay the deference due the trial court's finding that juror Bounds was not qualified to sit as a juror." (*Gray v. Mississippi*, No. 85-5454, Respondent's Brief at pp. 15-16.) Noting that the trial court found Ms. Bounds to have given equivocal responses, and that "the trial judge was left with the definite impression that juror Bounds would be unable to faithfully and impartially apply the law," the state urged the Supreme Court to give the trial judge's conclusion "the deference that it was due . . . ." (*Id.* at pp. 22, 23.) In his reply, petitioner conceded that Ms. Bounds had "equivocated" in her responses, but argued that under this circumstance "the prosecutor, the party that requested Mrs. Bounds's excusal, had not carried its burden." (*Gray v. Mississippi*, No. 85-5454, Petitioner's Reply Brief at p. 22.)

Of course, the state's position in *Gray* represents the precise view this Court adopted in 1970. (*People v. Floyd, supra*, 1 Cal.3d at p. 724.) As noted above, it is a view this Court has continued to follow since *Floyd*. (*People v. Mincey, supra*, 2 Cal.4th at p. 456; *People v. Breaux, supra*, 1 Cal.4th at pp. 309-310; *People v. Frierson, supra*, 53 Cal.3d at p. 742; *People v. Cox, supra*, 53 Cal.3d at p. 646; *People v. Ghent, supra*, 43 Cal.3d at p. 768; *People v. Fields, supra*, 35 Cal.3d at pp. 355-356.)

Significantly however, it is the same position the Supreme Court rejected, not only in *Adams*, but in *Gray* as well. Both *Adams* and *Gray* rejected the state's arguments that (1) the trial court was free to discharge equivocal jurors for cause and (2) a reviewing court was required to pay deference to such a discharge. In fact, not only did the Supreme Court refuse to afford *any* deference to the trial court's finding in *Gray*, but it concluded that the discharge of juror Bounds violated the Constitution. (*Gray v. Mississippi, supra*, 481 U.S. at p. 661, fn. 10.) As the Court held, "the trial court was not authorized . . . to exclude venire member Bounds for cause." (*Ibid.*)

The treatment of equivocal jurors in both *Adams* and *Gray* was compelled by developments in the High Court's capital case/Eighth Amendment jurisprudence. In the years between the Court's landmark

decision in *Furman v. Georgia* (1972) 408 U.S. 238, and its later decisions in *Adams* and *Gray*, the Court repeatedly recognized that death was a unique punishment, qualitatively different from all others. (See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153, 181-188; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) Relying on this fundamental premise, the Court held there was a corresponding need for procedures in death penalty cases which increase the reliability of both the guilt and penalty phase processes. (See, e.g., *Beck v. Alabama, supra*, 447 U.S. 625; *Gardner v. Florida, supra*, 430 U.S. at p. 357.)

As the Court later recognized, the rule set forth in *Adams* "dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to . . . great[] concern over the possible effects of an 'imbalanced' jury." (*Lockhart v. McCree, supra,* 476 U.S. at p. 182.) The rule in *Adams* -- designed to minimize the risk of an "imbalanced jury" -- was appropriate precisely because of "the discretionary nature of the [sentencing] jury's task [in a capital case]." (*Id.* at p. 183.) In fact, the Court specifically noted that the *Adams* rule would not apply "outside the special context of capital sentencing." (*Ibid.*)

In other words, however the standard of proof is properly applied in non-capital cases (where the jury is simply making a binary determination of fact), the standard applied in capital cases is different. In the "special context of capital sentencing" -- where the jury is making a largely discretionary decision as to whether a defendant should live or die -- there is a greater concern over the impact of an "imbalanced jury" on the reliability of the judgment, as well as with ensuring that the state not seat juries predisposed to a death verdict. Accordingly, in both *Adams* and *Gray*, the Supreme Court made clear that when a prospective capital-case juror gives equivocal responses, the state has not carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror." (*Adams v. Texas, supra*, 448 U.S. at p. 45.)[55]

In light of the actual voir dire in both *Gray* and *Adams*, this Court must reconsider the 1970 precedent which forms the basis for the rule currently applied in all California capital cases. The current California rule -- which permits the state to satisfy its burden of proof by eliciting

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[55] In fact, in *Gray v. Mississippi, supra*, petitioner specifically relied on the "special context" of capital sentencing -- and the largely discretionary role of jurors deciding if a defendant should live or die -- in urging the Court to find improper the trial court's discharge of an equivocal juror in that case. (*Gray v. Mississippi*, No. 85-5454, Petitioner's Reply Brief at p. 22.)

equivocal answers from prospective jurors -- cannot be squared with the rule applied in either *Adams* or *Gray*, or the Eighth Amendment developments on which they were based.

The difference between the two rules is important in this case. As has already been discussed, McBeth, Collazo and Kanegawa each gave answers which demonstrated that they were qualified to serve. It was only upon improper questioning that they eventually *appeared to equivocate* on whether they could vote for death. However, the record shows that they only equivocated about whether they could *announce* their verdict in the exaggerated manner misdescribed by the prosecutor.

Their equivocal answers, however, did not show them to be constitutionally disqualified to serve. Instead, the record demonstrates that they were precisely the type of juror who *should sit on a capital case.* Each woman said that death was appropriate in certain cases, but was unwilling to make a snap decision on whether death would be the appropriate penalty in *this case.* Neither the court's instructions nor the juror's oath require anything more. While each had reservations about actually having to send someone to their death, such feelings have been recognized by the Supreme Court as "inherent in the jury system," (*Adams v. Texas, supra,* 448 U.S. at p. 50), and not grounds for a challenge for cause.

In the case of Ms. Paxton, she did not say she would *automatically* vote for life without parole irrespective of the evidence, nor did she say she would *never vote for death* in this type of case. She simply stated that she did "not really" think the crimes in this case were ones that she would find appropriate for imposing the death penalty. That response was clearly not enough to disqualify her. She simply was answering the question being posed, based upon the little information that she had been given at that point. The problem was not in her answer but in the question. When she was asked the *proper question*, whether she would be open to either possible penalty, she replied that it would depend upon the circumstances and the evidence. (RT 1847.) It was apparent from her answers that she did not want to commit herself to voting for death before hearing the evidence, and that she was not convinced, at that early juncture, that the crimes in this case warranted death. Not only was her belief *insufficient for disqualifying her*, but as with the other three women, Ms. Paxton's attitude was exactly the type that should be desired on a capital jury: an unwillingness to prejudge the evidence and a belief that death, though appropriate in some cases, should be reserved for only the most "horrible" (RT 1848) of crimes. The trial court's removal of Ms. Paxton for cause was not supported by the record.

Four qualified jurors were removed by the trial court without sufficient cause, and contrary to the *Adams/Witt* standard. As noted above, the erroneous granting of even a single challenge for cause requires reversal. (*Gray v. Mississippi, supra*, 481 U.S. at p. 660.) Appellant's death sentence must be reversed.

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III.

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SEVER COUNTS, DEPRIVING APPELLANT OF HIS RIGHT TO A FAIR TRIAL AND RESULTING IN CAPITAL CONVICTIONS BASED UPON WHOLLY INSUFFICIENT EVIDENCE.

A. Introduction

The charges in this case were based upon five separate incidents, beginning with the murder of Pearl Larson on June 25, 1987 and ending with the robbery and assault of Bessie Herrick on August 17, 1987. There was no physical evidence that appellant had had contact with any of the victims or that he had ever even been inside of their homes. The only evidence which arguably connected appellant to *one* of the victims, was the evidence that he had possessed property stolen from Mrs. Constantin, shortly after it had been taken from her house. Because of this physical evidence linking appellant to Mrs. Constantin's property, if not the actual burglary of her home, the Constantin case was the strongest case against appellant.

Nevertheless, the evidence connecting appellant to each of these five incidents was so weak, that had the five cases been tried separately, appellant likely would have been acquitted in each of them. However, by trying the five incidents together, the jury necessarily followed the

prosecutor's urgings and considered all of the evidence in combination. This "spillover" effect unquestionably led to appellant's conviction and death sentence. As will be discussed herein, despite the dearth of evidence against appellant, his conviction and death sentence was virtually assured, once the severance motion was denied.

The prosecutor surely recognized the relative weaknesses of each of these five cases, and consequently, rather than presenting the evidence chronologically, presented the cases in the order of their relative evidentiary strength. His case opened with the very weak Durham and Herrick cases (August 15 and August 17, 1987), jumped back to the Larson case from June, 1987, then ahead to the Figuerido case from July, 1987, and ended with the Constantin case, which took place several days before the Durham and Herrick cases, on August 13, 1987. With respect to all of the incidents, the only significant issue in dispute at trial was the identity of the attacker. A review of the evidence reveals that had the prosecution been required to try these cases separately there simply would not have been sufficient evidence to establish beyond a reasonable doubt that appellant *had even been in the neighborhood* where each victim lived, let alone that he had robbed, attacked or murdered the victims. Given the outcome of this case it is apparent that the jury *did* allow the evidence in one count to spill over

into its consideration of the others. The extreme prejudicial effect of joining all five incidents is indisputable.

B. Procedural Background - The Motion To Sever Counts and The Motion For Acquittal

Appellant's motion to sever counts was filed on November 12, 1991. (CT 3099.) The defense argued that the five cases should be severed because the "facts of each case, taken individually, do not support convictions" (CT 3104), and that unless the counts were tried separately the jury would certainly aggregate all of the evidence and view it cumulatively, rather than separately, leading to convictions that would not otherwise be supportable, given the obvious lack of evidence in each individual case. Citing *Duncan v. Louisiana* (1968) 391 U.S. 145, appellant argued that his right to a fair trial under the Due Process Clause would be compromised if the charges pending against him were not severed. (CT 3104.)

The prosecution opposed the severance motion (CT 3106), arguing that appellant had failed to show how he would be prejudiced from the joinder. Citing *People v. Sully* (1991) 53 Cal.3d 1195, 1222, the prosecutor noted that a ruling on a motion to sever required weighing the probative value of any cross-admissible evidence against the prejudicial effect of evidence that the jury would not otherwise hear. The prosecutor argued that when the evidence in each case is cross-admissible, any inference of

prejudice from joinder is ordinarily dispelled.

Significantly, however, the prosecutor did not establish that the evidence was, in fact, cross-admissible. Instead, the prosecutor simply argued that "the murder cases all involve the death penalty; all are bizarre and potentially inflammatory, and none is weak in evidentiary support when compared with the others." (CT 3108.) There was absolutely no showing, nor even the assertion made, that the evidence was cross-admissible.

Nor did the trial court, in ruling on the motion, adequately address the issue of cross-admissibility. Instead, it simply made a passing comment about the offenses having some "common characteristics," and that they were all "inflammatory." Saving judicial resources was the trial court's primary focus in denying appellant's motion to sever:

> This is a capital case, and we have charges that involve brutal attacks on five elderly women inside their homes. The attacks, alleged attacks, were made during daytime hours over a relatively limited period of time. The offenses appear to share common characteristics, which *arguably are suggestive* of a single, common perpetrator. The charges are all potentially inflammatory in the court's view.
>
> As far as the relative evidentiary strength or weakness of the various charges or counts, other than the potential for prejudice which is always present when there are multiple incidents involving similar charges, that is, the possibility that a single jury will aggregate all of the evidence, suffice it to say that on the record presented, the defendant has not met his burden.

> *There are significant benefits in judicial economy to be gained by maintaining joinder of these charges. Jury selection alone would, in all likelihood, take additional weeks, even months, if separate trials are ordered on the capital charges.* This court is aware that joinder for judicial economy is not permitted if it would deny the defendant a fair trial. However, on the record before me on this motion, it's my conclusion that there has not been an adequate showing of potential prejudice.

(RT 37-38, emphasis added.)

The motion to sever was denied and all five cases proceeded to trial together. At the close of the prosecution's case, the defense moved for acquittal pursuant to Penal Code section 1118.1,[56] with respect to the Durham case, counts 4, 5 and 6 (RT 3906-3907), citing the lack of evidence to support a conviction. The prosecution agreed that "if you just take the Durham incident standing by itself, I would be in agreement with counsel" that the evidence was insufficient. However, he argued there was "a common scheme plan of modus operandi, which this court should take cognizance of." (RT 3907.) After hearing arguments regarding the

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[56]Penal Code section 1118.1 provides: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right."

similarities and dissimilarities of the five cases, the trial court found sufficient evidence to support counts 4, 5, and 6 and denied the motion for acquittal on the Durham counts. (See Argument X, *infra* at p. 268.)

The jury found appellant to be the perpetrator, and returned convictions in all five cases. In the Durham and Herrick cases, the jury found appellant guilty of burglary and robbery. (CT 3365-3366, 3368-3369.)[57] In the Larson[58], Figuerido and Constantin cases, appellant was convicted of first degree murder with special circumstances. (CT 3371-3374, 3376-3385.) As discussed below, the trial court erred in refusing to sever the counts, but even if it did not err, the joinder was prejudicial to appellant and deprived him of his right to a fair trial. His convictions and death sentence must be reversed.

C. Appellant Was Deprived of His Right to a Fair Trial By the Trial Court's Refusal to Order a Severance of Counts.

Penal Code section 954 permits the consolidation for trial of two or more different offenses of the same class of crimes, but "in the interest of

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[57] The jury apparently was not convinced that there was sufficient evidence to support the attempted murder charges in the Durham and Herrick cases and so found appellant not guilty in counts 3 and 6. (CT 3367, 3370.)

[58] In the Larson case there was no evidence that anything had been stolen during the burglary, consequently the jury acquitted appellant on the robbery charge. (CT 3375.)

justice and for good cause shown," the court may order the offenses to be "tried separately or divided into two or more groups and each of said groups tried separately." (Pen. Code § 954.) In this case, the offenses encompassed in the Durham, Herrick, Larson, Figuerido and Constantin crimes were of the same class, and accordingly joinder was *permissible* under the statute. *(People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

However, even when joinder is statutorily permissible under section 954, if the defendant can make a clear showing of prejudice, severance may still be required. (*People v. Jenkins* (2000) 22 Cal.4th 900, 947; People v. *Bradford, supra*, 15 Cal.4th at p. 1315; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 447.) As explained in *United States v. Berkeley* (D.C. Cir. 1978) 591 F.2d 919, cert. denied, 440 U.S. 966 (1979):

> The fear is that when two or more crimes are tried together and the evidence in one is greater than that of the other, the jury may infer that because the defendant appears to have committed at least one of the crimes, he has a propensity to commit crime or at least crimes of the nature charged. The jury may treat this assumed criminal disposition of the defendant as evidence that he committed the other crime(s) with which he is charged.

The unfairness is most acute when, as in the present case, the crimes are of the same type, for then it is almost impossible for the jury to avoid "the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again." (*United States v.*

Bagley (9th Cir. 1985) 772 F.2d 482, 488, cert denied, 475 U.S. 1023 (1986).)

Moreover, when "evidence on any of the joined counts was weak . . . it is more likely that joinder *will* affect the verdict." (*People v. Smallwood* (1986) 42 Cal.3d 415, 429.) This is because of "the likelihood that a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the charged offenses might permit the knowledge of the defendant's other criminal activity to tip the balance and convict him." (*People v. Bean* (1988) 46 Cal.3d 919, 936.)

In ruling on appellant's motion to sever the counts, it is critical that the trial court carefully consider the relative evidentiary strength of each of the cases, and whether the spillover effect of the joinder is likely to affect the outcome of the case. Thus, the question before the trial court in this case "was whether joinder would tend to produce a conviction when one *might not be obtainable on the evidence at separate trials*." (*People v. Valdez* (2004) 32 Cal.4th 73, 120, quoting *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244, and *Williams v. Superior Court, supra,* 36 Cal.3d at p. 454, emphasis added.)

If the statutory requirements for joinder are met, the defendant bears the burden of showing substantial danger of undue prejudice to obtain

reversal of an order denying severance. (*People v. Bean, supra,* 46 Cal.3d at pp. 938-939.) Certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever. Denial of severance may be an abuse of discretion where:

> (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) *a "weak" case has been joined* with a "strong" case, *or with another "weak" case,* so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case." (*People v. Bradford, supra*, 15 Cal.4th at p. 1315.)

(*People v. Catlin* (2001) 26 Cal.4th 81, 110, emphasis added.)

The propriety of a ruling on a motion to sever counts is judged by the information available to the trial judge at the time the motion was heard. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1285.) However, even if it is found that the trial court did not abuse its discretion in denying severance, reversal is required when it is shown that the "joinder substantially prejudiced defendant and denied him a fair trial." (See, e.g., *People v. Grant* (2003) 113 Cal.App.4th 579, 583; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083; *People v. Johnson* (1988) 47 Cal.3d 576, 590.) As this Court stated in *Williams, supra*, "[T]he joinder laws should never be used to deny a criminal defendant's fundamental right to due process and a

fair trial." (36 Cal.3d at p. 448.)

A review of the relevant facts of each of the five cases reveals that they were all relatively "weak" cases standing alone, with the Constantin case being the "strongest" because of appellant's connection to the gold bracelet which had been stolen in that burglary. Had the prosecution been forced to try the cases separately, Evidence Code section 1101, subdivision (b),[59] would have prohibited the evidence in the other cases from being admitted and it is likely that the lack of evidence would have resulted in acquittals. The trial court failed to properly assess the prejudice to appellant in denying the motion to sever, and in so doing deprived appellant of his right to a fair trial.

1. The Cases Against Appellant Were Weak; There Was Insufficient Evidence To Support The Individual Convictions Had They Been Tried Separately.

a. Ruth Durham - Hayward, August 15, 1987

Had the Ruth Durham case been tried on its own, there is little doubt that appellant would have been acquitted of the charges. Mrs. Durham

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[59]Evidence Code section 1101, subdivision (b), provides in relevant part: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

lived alone in her Hayward home. She testified that on the day of her attack she had been visiting her daughter's house, next door. She returned home at about 4:30 p.m. (CT 350)[60] and sat down in her chair in the living room. (CT 352.) The next thing she remembered was being struck on one side of her face and then the other. She remembers nothing after that until she was in the hospital. (CT 353.) She was not able to identify appellant, seated in the courtroom on the day of the preliminary hearing, as her assailant. (CT 353.)

The only other witnesses who could provide any clues as to the identity of the attacker, were two neighbors, Patricia and Joseph Armstrong. They testified to having seen a black man walking east on the sidewalk on Alden Road, the street on which Mrs. Durham lived, at around 4:30 p.m. on the day of the attack. (RT 2792-2795.) The man was not running, out of breath or perspiring heavily. His clothes did not appear disheveled (RT 2807, 2830) and he was not carrying anything. (RT 2830.) He was simply walking on the sidewalk with his coat thrown over his shoulder. (RT 2807.)

Three days later, on August 18, Sergeant Little from the Alameda

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[60]Citations are to the Clerk's Transcript, rather than the Reporter's Transcript because Ruth Durham's trial testimony was offered by way of her videotaped preliminary hearing testimony. The videotape was admitted into evidence at appellant's trial as Exhibit 23 (RT 2729) and played for the jury. (RT 2730.) Thus, citations to her trial testimony will be referenced to the Clerk's Transcript from the preliminary hearing.

County Sheriff's Department came to Mrs. Armstrong's home with a group of six photographs. She identified appellant's photo as the man she saw in the neighborhood. Her husband was unable to identify anyone from the photographs, but he testified that the man he saw was stocky, about 5'10" and 175 pounds.[61] (RT 2825, 2844, 2906.) He was also certain that the man he saw had *no beard, mustache, or facial hair* of any kind. (RT 2830.)[62]

Two other neighbors, Barbara Sullivan and her daughter, Stacie Reznes, also told the police that they saw a suspicious individual in the neighborhood about the same time as the incident occurred. Mrs. Sullivan testified that the person she saw was a black man, about 5'9" tall, 200

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[61] Initially, Mr. Armstrong told the police that the man he saw was 150 pounds, and had a "slim build" (CT 29), though this discrepancy was never raised in cross-examination. Police records favored the heavier description which Mr. Armstrong later adopted when he testified at the trial. For example, a police department photo of appellant from 1986, the year before the crimes, indicated that appellant was 5'10" tall and 200 pounds. (RT 3312.) The arrest warrant (CT 5) and police reports (CT 88) indicate that appellant was 180 pounds and 170 pounds, respectively. The sole witness in the Larson case (June 24, 1987) said the man she saw was 5'8" tall and 145-155 pounds. (RT 3201.)

[62]While Mr. Armstrong was *certain* that the man he saw *on August 15* had no facial hair whatsoever, other witnesses who claimed to have seen the same man on August 17, were just as certain that he had a "big mustache." (RT 3099.) Other witnesses said he had a beard [on August 12, 1987] (RT 3073); no mustache or beard [on July 27] (RT 3818); no mustache or beard [on July 28, 1987] (RT 3818, 3820).

pounds and about 19 years old. (RT 3974.) On August 18, Mrs. Sullivan and her daughter were shown the same photo lineup that was shown to the Armstrongs, but neither of the women identified appellant as the individual they observed walking in their neighborhood three days earlier. (RT 2912-2913.) Thus, of the four people who claimed to have seen a suspicious man around the time Mrs. Durham was attacked only one person, Mrs. Armstrong, chose appellant from the photo lineup. Nevertheless, by the time of the live line-up that was held several months later on November 4, 1987, both of the Armstrongs identified appellant as the man they saw walking in their neighborhood.

Reviewing all of the evidence relevant to the identity of the perpetrator of the Durham burglary, the only evidence that connected appellant was the testimony of the Armstrongs that someone who *looked like appellant* was present in the neighborhood around the time of the crime; and only Mrs. Armstrong chose appellant from the photo line-up right after the attack. Appellant's photograph was in the news many times between August and November, when the physical lineup took place (see, e.g., RT 3999-4000, 3524, 2899, 2950), which would account for Mr. Armstrong's identification of appellant months later, even though he had been unable to do so before. But even assuming the reliability of these

questionable identifications, this evidence merely placed appellant in the neighborhood. Taken together, the evidence was simply insufficient for a jury to have found, beyond a reasonable doubt, that appellant was responsible for the burglary, robbery and beating of Ruth Durham. Such scanty evidence likely would not have supported probable cause for an arrest, let alone a conviction. Appellant's conviction for the crimes associated with this incident can only be explained by the fact that they were joined with the other offenses.

b. Bessie Herrick - Hayward, August 17, 1987

The evidence in the Herrick case was nearly as weak. The attack on Mrs. Herrick took place while her husband was watering the backyard lawn of their Hayward home, between approximately 3:45 and 4:15 in the afternoon. (RT 2977-2982.) Mrs. Herrick recalled little more about the attack than that she was hit. It was apparent from her testimony that much, if not all, of what she claimed to have recalled about the incident was simply the recounting of information she had received afterwards from her husband.[63]

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[63]For example, Mrs. Herrick testified "he hit me, knocked me down, my glasses flew," (CT 796) and that she remembered nothing after that until she was in the hospital. (CT 799.) Nevertheless, she went right on to testify that her husband "immediately called 911. . ." (CT 799), something she only would have known because she had been told, since, when asked whether she regained consciousness while she was still in her home, she

Based upon what Mrs. Herrick told the first three police officers who talked to her, it must be assumed that *she did not see* her attacker. Mrs. Durham told Detective Sergeant Allan Lerche, the first officer at the scene to question her, that she had been "hit from behind." (RT 3984.) Nevertheless, she went on to say that her attacker was a black male. Later that day at the hospital, she told Sergeants Little and Brown that *she did not see who hit her.* (RT 3099.)

However, by the next day she had a detailed description of the man she claimed not to have seen. She told the same officers that a black man, taller and thinner than her husband and with a *big mustache*, had entered her home.[64] (RT 3099.) She said that she answered her front door, and the person whom she identified as appellant opened the door and punched her in the face with a closed fist. The next thing she knew her husband was standing over her. (RT 3104.)[65]

Eight months later, at the preliminary hearing, Mrs. Herrick testified that she could not recall where appellant was when she first saw him. (CT

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said, "Definitely not." (CT 800.)

[64] The police never inquired as to how she arrived at that description if she had not, in fact, seen the man. (RT 3099.)

[65]Mrs. Herrick gave the same information to TV station KGO, Channel 7, when she was interviewed after the incident. (Defendant's Exhibit C.)

794.) She also testified that she was standing close to her chair when she was first struck (CT 797) and that her attacker had a *beard.* (CT 830.) On cross-examination Mrs. Herrick testified that after leaving her husband in the backyard she came into her house and sat down in her favorite chair. (CT 841.) The next thing she recalled was standing up next to her chair and being "knocked down and out." (CT 842.) When asked if she had ever given the police a description of her assailant, she responded, "Not that I recall" (CT 823), and testified that she had not given the police any description of her assailant *before* the police showed her photographs. (CT 825.) She did, however, confirm that *her husband had told her what happened to her* (CT 823), and that before her own attack she had frequently read newspaper articles about other attacks which contained photographs of the suspect. (CT 828.)

When Mrs. Herrick was asked whether she had, at any time, opened her front door, she said she had not. (CT 839.) That testimony directly contradicted the testimony of Sergeant Little who said that Mrs. Herrick had told him she was punched after *opening her front door.* (RT 3104.)

Mrs. Herrick's testimony was clearly unreliable for purposes of identifying her assailant or describing the circumstances of the attack. Her story changed each time she was questioned; but if her original statement to

Sergeant Little is credited, Mrs. Herrick *did not even see her attacker*, rendering her later-claimed identification of appellant without foundation. The more likely explanation for her seeming ability to identify her assailant *even though she had not seen him* was that Mrs. Herrick had simply adopted her husband's theory as to how the attack occurred as well as his physical description of the attacker. However, Mr. Herrick's description was based upon *his later-formed belief* that the man he had seen jogging near his house moments before the attack, was in fact the same person whom he had seen, through his back yard windows, standing inside his home.

Mr. Herrick testified that while he was in his back yard watering he saw a black man, *wearing gray sweat pants and a striped shirt*, jogging on Royal Avenue, the Herrick's street. (RT 2979-2983.) At the closest point, the jogger was about 25 feet away from Mr. Herrick (RT 2998); he observed the jogger for 5-10 seconds (RT 3007) and then returned to his watering. (RT 2992.) Five minutes later Mr. Herrick walked toward the back patio of his house and through a window he saw someone hitting his wife, once or twice, while she lay on the floor by the fireplace. (RT 2982-2985.)[66] Mr. Herrick went quickly into the house, entering through the back

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[66]Initially, Mr. Herrick did not say that he saw the person inside the house strike his wife. The police report of Officer R. Griffin says that as Mr. Herrick "walked past the patio glass window he looked through the window and saw a person standing in his living room [by the front door].

door, but by the time he got to his wife, no one else was there. Mr. Herrick testified that the person he saw jogging was the same person who was hitting his wife and he identified appellant as that man. (RT 2995, 2983.)

Considering that Mr. Herrick claimed to have observed the attacker for more than 5 seconds, inside and outside of the house, one would have expected the police to ask Mr. Herrick to identify the assailant from the photographic lineup that was presented to everyone else on August 18. However, there was no evidence that Mr. Herrick was ever asked to review the photos. If he did, that evidence was never presented.

At some point, Mr. Herrick must have concluded that the jogger and the attacker were the same person, and his description of the jogger was

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He said all he was able to make out of the subject was of something gray in color and he was not able to get a better look or give a better description of the subject." After he went into the house, Mr. Herrick saw his wife lying in front of the fireplace on the floor. This report was not put into evidence nor was Officer Griffin called as a witness. (CT 69.) Nevertheless, at the preliminary hearing Mr. Herrick testified that he was able to see appellant, Franklin Lynch, hitting his wife as she was laying on the floor. He thought he saw him strike her twice. (CT 870.) Mr. Herrick testified that he first found out that the person he picked from the November 4 lineup was named Franklin Lynch when his wife was in the hospital and she picked his photo from the photo lineup. (CT 877.) When asked at the preliminary hearing about his statement to the police that he only could see gray sweat pants, he denied it, and claimed that he had told the police that he saw appellant hitting his wife. (CT 882.) Trial counsel failed to adequately highlight this glaring discrepancy between Mr. Herrick's testimony and his initial statement to the police, but the potential for impeachment is in the appellate record.

then adopted by his wife. Even though Mrs. Herrick initially claimed not to have seen the attacker, when the police showed her the photos, with her husband at her side, Mrs. Herrick chose appellant's photo. (RT 3103-3104.) Mr. Herrick's identification was also suspect. (See fn. 66, *supra*.)

Predictably, by the time of the physical lineup on November 4, 1987, both of the Herricks were quite able to identify appellant, even though at the time of the attack, both claimed not to have seen the attacker. (See fn. 66, *supra*.) As Mr. Herrick testified, when he went to the lineup he was expecting to see Mr. Lynch, and knew that the person he was supposed to be looking at was Franklin Lynch. (RT 3007.)

Mr. Herrick's belief that appellant was the person he saw jogging and also the person who attacked his wife, was further called into question by two other prosecution witnesses, Eric Hoak and John Wulf. Both testified to having seen a black man in the Herrick's neighborhood around the time of the attack, but their descriptions were markedly different from each other, and from Mr. Herrick's description.

Eric Hoak testified that around 3:00 p.m., on the afternoon of Mrs. Herrick's attack, he observed a tall black man, *wearing blue jeans and a dark blue sleeveless sweatshirt*, standing on the front porch of the Herrick home. (RT 2875-2876, 2888.) The clothing descriptions testified to by

Mr. Hoak and Mr. Herrick [grey sweatpants and a striped shirt] are so different that it is reasonable to conclude that the two witnesses observed different men. There were either two different men in the neighborhood, or one of the witnesses simply did not accurately remember what he observed.

A third witness, John Wulf, testified that around 4:30 p.m. that day, he observed a man running at an angle from the south side to the north side of the street, near the Herrick's home on Royal Avenue, wearing *light colored dress type trousers and a light colored dress shirt with a white collar.* Mr. Wulf thought it was unusual for someone jogging to be wearing dress type clothing. (RT 2943.) Mr. Wulf saw a full view of the man's face for about 5 seconds and about 15-20 seconds in total. (RT 2946.) The next day, when presented with a photographic lineup that included a picture of appellant, Mr. Wulf *did not identify appellant.* However, after seeing pictures and composites of appellant in the newspaper about "a half dozen times," between August and November, Mr. Wulf changed his mind. By the time of the November 4, 1987, physical lineup, Mr. Wulf had concluded that the man he saw jogging that day in August was in fact appellant. (RT 2950-2951.)

Taking the testimony of Mr. Herrick, Mr. Hoak and Mr. Wulf together, there is certainly considerable doubt about the identity of the

various joggers, as well as the identity of the perpetrator. All three witnesses eventually claimed to have seen appellant in the neighborhood on the afternoon of the attack. Yet the clothing descriptions are so different (grey sweatpants and a vertical striped shirt; blue jeans and a dark sweatshirt; and a light-colored dress outfit) that it immediately raises doubt as to whether they actually saw the same person or not. The contradictions in their descriptions suggest that there was more than one black man on or near the Herrick's property around the time of the attack, and raises considerable doubt as to the identity of the attacker and the reliability of the identification of appellant.

Another witness, Lavinia Harvey, testified that she saw appellant on her property five days earlier, on the afternoon of August 12, 1987. However, Mrs. Harvey's testimony only indicates that appellant was in the general vicinity of the Herrick and Durham homes, during the week preceding the break-ins. Moreover, Mrs. Harvey, like many of the other witnesses, was not initially sure of her identification of appellant from the photo lineup. She testified that she did not "pick any photos out" from the series of six that she was shown (RT 3062), though she thought that one "could be him" because of the eyes. It was only after the investigating officer went to his patrol car and returned with a single photo of appellant,

that Mrs. Harvey declared appellant to be the man who had visited her yard, looking for a child. (RT 3063-3064, 3054.)

Summarizing the evidence in the Herrick case, the only person who claimed to be able to identify the person who attacked Mrs. Herrick *immediately following the attack* was Mrs. Herrick herself, even though she also told police that she was "hit from behind," and did not see who hit her.

As with the Durham case, the evidence in the Herrick case was inconclusive at best, and certainly insufficient to support a conviction of guilt beyond a reasonable doubt. Appellant's conviction in this case can only be explained by the prejudicial effect of the five cases being joined together in one trial.

c. Pearl Larson - San Leandro, June 24, 1987

Two months before Mrs. Durham and Mrs. Herrick were attacked, Pearl Larson had been found dead in her San Leandro home, very late in the evening on June 24, 1987. Unlike any of the other cases, there were distinct sexual overtones associated with Mrs. Larson's murder. She was found lying on her bed with no underwear and her house dress pulled up above her waist. (RT 3248.) Her hands were bound with a nylon stocking. (RT 3274.) Unlike the other cases, Mrs. Larson had been strangled to death. (RT 3292.) Her house was not ransacked; there was no evidence of forced

entry, or that anything had been taken. (RT 3130-3133, 3137.) The pathologist was not able to give a time of death. (RT 3278.) Although the trial court had assumed that these were all "daytime" crimes when it denied the severance motion (RT 37), there was no evidence that Mrs. Larson had been murdered in the daytime. She was last seen alive at about 11:45 a.m., and friend had tried to reach her by phone in the afternoon (RT 3236), but there was no other evidence as to when the murder might have taken place.

The only evidence linking appellant to this crime was, once again, the testimony of a single neighbor, Jacqueline Brown, who, by the time of the trial, was certain that she saw appellant on the victim's property on the day of the murder. But, as was true with the other two attacks, this neighbor did not become certain about the identification until several months after she made the observation. Three days after the murder, on June 27, Mrs. Brown actually picked two other individuals from a photo lineup. She said one of them, Allan Austin, *was the man she saw jumping over Mrs. Larson's bushes,* the day of the murder. (RT 3193, 3213.)

At the time of the incident, Mrs. Brown described the man she saw as 5'8" tall and 145-155 pounds. (RT 3201.) She was also quite certain that the man she saw had something "wrong with his walk like he had a bad back." (RT 3202.) That description could have described one of Mrs.

Larson's gardeners, David Wesley, also a black man, who walked "just like a drunk man," after being hit by a car and having his equilibrium impaired. (RT 3150-3151.) However, Mrs. Brown later eliminated Mr. Wesley as a possible suspect. (RT 3193-3194, 3298-3300.)

Two months later, on August 19, when Mrs. Brown was shown another photo lineup, she picked two more photos as possible suspects. (RT 3196.) Photo #3 was that of Darnell Bowling (RT 3307) and photo # 5 was that of appellant. That evening, appellant's photo was shown on television on the 6:00 p.m. news. (RT 3217.) If Mrs. Brown had had any doubt as to whether the person she observed was photo #3 or photo #5, her doubts were likely resolved after she watched the news that night. By the time of the November 4, 1987, physical lineup, Mrs. Brown also had become certain that appellant was the man she saw in Pearl Larson's yard. By then, Mrs. Brown had seen appellant's photo on a number of occasions, including several times in the media. (RT 3218.) The other two men she had earlier identified in the photo lineups, Allan Austin and Darnell Bowling, were not asked to be part of the November 4 physical lineup. (RT 3318-3319.)

Summarizing the evidence related to the identity of the perpetrator in the Larson murder, it is reasonable to assume that he was a black male, since a black male was seen in Mrs. Larson's yard shortly before the time of

her death, and also seen jumping over her backyard fence, within minutes of her likely time of death. However, the only witness to the trespass was Mrs. Brown, who originally believed that one of the gardeners was the person she saw, and then identified two other individuals from the photo lineups. She only became certain that appellant was the culprit after she had seen his picture on the evening news.

d. Adeline Figuerido - San Leandro, July 28, 1987

Adeline Figuerido was murdered in her home at 833 143rd Avenue in San Leandro, between 10:30 and 11:45 a.m. on July 24, 1987. The only evidence connecting appellant to this murder was the testimony of two women from the neighborhood. One thought that she had seen appellant the day before the murder; the other, the day of the murder.

Jan Morris worked on 143rd Avenue, across the street from the Figuerido home. She told the police that she saw a black man walking down Mrs. Figuerido's driveway on the morning of the murder, and described him as a man in his early twenties, with a medium complexion. (RT 3597-3598.) However, when Detective Dekas showed her the photo lineup which included appellant's picture, she wrote on the lineup form, "I do not think it is any of them." (RT 3426.) It was not until the time of the preliminary hearing a year later, that Ms. Morris decided that she did, after

all, recognize appellant. (RT 3591.)

Another witness, Irma Casteel, testified that on July 27, one day before the murder, she noticed a black man walking on the sidewalk in front of her house at 1245 144th Street, about five blocks away from the Figuerido home.[67] She saw him at about 11:30 a.m. (RT 3799.) She watched him pass her house, walk to the end of the block where there is a dead-end, and then come back past her house again and walk on. (RT 3799-3802.) The man she saw had no beard or mustache. (RT 3818, 3820.) The event made an impression on her because it was "odd" to see a black man there, since she was not aware of any black people living on her street. (RT 3812.) It was unusual enough that she mentioned it to her husband that evening. (RT 3813.)

Mrs. Casteel testified that the next day the newspaper carried a front page article about the murder of Mrs. Figuerido, which included a picture[68] of the man she had seen. When she saw the picture she exclaimed to her husband, "This man was on our street yesterday." (RT 3804.) She did not call the police, but mentioned it to a neighbor who worked for the police.

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[67]Mrs. Figuerido lived at 833 143rd Avenue (RT 3362); Mrs. Casteel lived at 1245 144th Avenue (RT 3799, 3803.) Their streets were one block apart (RT 3802), but the houses would have been five blocks apart.

[68]As explained previously, the "picture" had to have been a composite drawing. See Statement of Facts, part I, C, *supra*.

(RT 3804.)

Three weeks later, on August 19, 1987, Sergeant Borden of the San Leandro Police Department, presented Mrs. Casteel with a photo lineup that included appellant's photograph. Mrs. Casteel chose photo number 5, which was appellant's photo, but wrote on the back, "I won't say for sure but number five looks more closely onto [sic] it." (RT 3624-3626, 3805.)

As with the other cases, had this case been prosecuted on its own, the most that could have been established by the evidence was *an inference* that appellant was in Mrs. Figeurido's neighborhood that day. Without question, the evidence fell far short of establishing that appellant had murdered Mrs. Figuerido, and certainly could not have made the case *beyond a reasonable doubt.* Unable to compartmentalize the evidence supporting each of the individual cases, the jury could only have convicted appellant as the result of the "spillover" from the other counts.

e. Anna Constantin - San Leandro, August 13, 1987

The last case which the prosecution presented was the attack upon Anna Constantin. Although the evidence in this case was not strong, it was clearly the strongest of the five cases. It was the only case in which the prosecution had any physical evidence arguably linking appellant to the victim. Several items of jewelry taken from Mrs. Constantin's home,

particularly a heavy gold bracelet, were traced back to appellant.

Mrs. Constantin was found by her daughter, Vickie Constantin, on August 13, 1987, in her home at 595 Blossom Way, in San Leandro. (RT 3484.) Vickie came home around 5:45 p.m. to find her mother lying on the floor propped up against the back door. She had been severely beaten and was so swollen she was almost unrecognizeable. (RT 3485.) Mrs. Constantin asked her daughter to call 9-1-1 and she did. (RT 3537.)

Over defense objection (see Argument VIII, *supra*), Vickie was permitted to testify about conversations she had had with her mother concerning the attack. On the afternoon of the attack, Mrs. Constantin had gone outside to her garbage can and when she returned to her house, she latched the screen door but did not lock the back door. (RT 3538.) She fed her dogs every day around 3:30. (RT 3542.) After she fed the dogs, she went outside to water her yard, but then heard her dogs barking ferociously by the kitchen door. When she went inside to investigate, she was hit from behind. She was pushed to her knees and beaten. Her attacker stepped on her face and neck and beat her more. (RT 3539.) He threw a blanket over her, tied her hands and continued to beat her. She thought she had been hit with an iron. (RT 3541.) Vickie testified that although her mother did not see her attacker, she believed him to be a black man, due to his voice and

accent. (RT 3539.)

Mrs. Constantin's most serious injury was a 2-inch wound on the back of her head (RT 3669), believed to have been caused by the edge of a paint can, the edge of an iron, or by some other hard object. (RT 3672, RT 3678.) Her next most serious injury was a fractured right rib and injury to her lung cavity. (RT 3675.) On September 26, 1987, after several weeks in the hospital, Mrs. Constantin died (RT 3735) as the result of blood clots following the treatment of her injuries. (RT 3743.)

In terms of the property loss, Vickie testified that some of the rooms were "messy" and things were out of place. (RT 3544.) Several jewelry items had been taken, including a heavy gold bracelet from Russia with a charm attached, and two gold chain necklaces. The back screen door had been cut. (RT 3824-3825.)

The Russian bracelet was recovered from S&D Coin. It had been sold to the shop by appellant on August 13, 1987, between 4:45 and 5:00 p.m., the same day it had been taken from Mrs. Constantin's home. (RT 3700-3701; Exhibit 3A; RT 3708-3711.) The gold chain necklaces were recovered from Mackie Williams when he was arrested on August 20, 1987, for parole violations. Williams claimed that appellant had given him the chains as a gift the week before. (RT 3754-3756.)

Adele Manos testified that on August 13, at around 3:15 p.m., she was driving on Bancroft Avenue, near Blossom Way, when she noticed a black man coming out of some hedges. (RT 3496-3498.) The next day she read about the attack on Mrs. Constantin and a few days later saw a composite drawing in the newspaper. (RT 3502, 3520.) On August 20, she saw a photograph of appellant in the newspaper and contacted the police. That day the police came to her home and presented her with a photo lineup, and she identified appellant as the man she had seen on Bancroft. (RT 3503-3504; 3652-3654.) After having seen his picture in the paper or on television about 15 times, Mrs. Manos also identified appellant at the live lineup on November 4. (RT 3524.)

As the foregoing summaries reveal, except for the Constantin case, the evidence against appellant in each of the other cases was at best circumstantial and weak. This Court has often recognized the danger of joining several weak cases, or combining one strong case with one or more weak cases. Whether these five cases are all adjudged "weak" cases, or whether the Constantin case is viewed as an arguably "strong" case because of appellant's connection to the gold bracelet, makes little difference in terms of the legal analysis. In either event, the danger of joining these cases was the "spillover" effect of the combined evidence, which clearly changed

the outcome of the charges, and led to appellant's conviction and death sentence.

Although the trial court mentioned this criterion ["As far as the relative evidentiary strength or weakness of the various charges or counts. . . the defendant has not met his burden." (RT 37)], it simply ruled against appellant without explanation. However, had it fully addressed the issue, it would have necessarily concluded that the individual counts, standing alone, would not have sustained convictions.

By allowing the five cases to be tried together the evidentiary impact of each case ballooned as the evidence continued to pour in. By the time the evidence on the Constantin case was presented, in which appellant's fingerprint linked him to the gold bracelet stolen out of the Constantin home, convictions in all five cases were virtually assured. The jury simply would not have been able to separate that piece of evidence from the weak and contradictory evidence in the other cases.

In assessing this particular criterion, the prosecutor argued that none of the cases was "weak in evidentiary support *when compared with the others*." (CT 3108, emphasis added.) The prosecutor missed the point, as did the trial court. The test is whether a "'weak' case has been joined with a 'strong' case, *or with another 'weak' case,* so that the 'spillover' effect of

aggregate evidence on several charges might well alter the outcome of some or all of the charges." (*People v. Catlin, supra*, 26 Cal.4th at p. 110, emphasis added.) If in fact *all five cases were weak,* then the prosecutor would have been correct that none was weak, *when compared to the others*. Even the prosecutor admitted that the Durham case, standing alone, would not have supported a conviction. (RT 3907.) That admission alone, establishes that *at least one weak case was in fact joined with other cases, and if true, would indicate that severance was required.*

However, appellant has established that the evidence in all of the cases was weak, and the relatively stronger evidence in the Constantin case provided the basis for the convictions in all five cases. The prosecutor argued the wrong standard, and apparently the court accepted that standard in finding that appellant had failed to meet his burden of showing prejudice on that basis.

The trial court failed to properly consider the weakness of each of the cases individually. By allowing the joinder, the trial court dramatically lightened the prosecutor's burden of proof and severely prejudiced appellant.

2. The Evidence Was Not Cross-Admissible.

The next criterion which the trial court failed to properly analyze in

assessing whether the joinder of counts was prejudicial to appellant, was determining whether the evidence was cross-admissible; in other words, "whether evidence on each of the joined charges would have been admissible under Evidence Code section 1101, in separate trials on the others." (*People v. Jenkins, supra*, 22 Cal.4th at p. 948.)

Evidence Code section 1101, subdivision (a), prohibits admission of evidence of a person's character, including specific instances of conduct, to prove the conduct of that person on a specific occasion. Subdivision (b), however, provides an exception to this rule when such evidence is relevant to establish some fact other than the person's character or disposition. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Thus, subdivision (b) provides:

> Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity . . .) other than his or her disposition to commit such an act.

Because other crimes evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact" (*People v. Thompson* (1980) 27 Cal.3d 303, 314), such evidence can only "be received with 'extreme caution,' and all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People v. Alcala* (1984) 36 Cal.3d 604,

631, (citations omitted); see also, *People v. Holt* (1984) 37 Cal.3d 436, 451; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1395.)

In *People v. Ewoldt, supra*, this Court explained that most of the exceptions specified in subdivision (b) "can be lumped into three categories: intent, common design or plan, and identity." (*Id.* at p. 402.) The required degree of similarity between the current offense and the other offenses depends upon the purpose for which the evidence is to be admitted. The least degree of similarity is required to prove intent. For this purpose, the uncharged crimes need only be "sufficiently similar [to the charged offenses] to support the inference that the defendant "'probably harbor[ed] the same intent in each instance." [Citations.]'" (*Ibid.*)

A higher degree of similarity is required to establish relevance on the issue of common design or plan. (*Ewoldt, supra*, 7 Cal.4th at p. 402.) For this purpose, "the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Id.* at p. 403.)[69]

The highest degree of similarity is required to establish relevancy as to identity. To be relevant on the issue of identity, the other charges must "display a pattern and characteristics . . . so unusual and distinctive as to be

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[69]Hence, even if the other crimes are admissible to show a common plan or scheme, this does not allow them to be used to prove identity.

like a signature." (*People v. Kipp* (1998) 18 Cal.4th 349, 370, internal citations and quotation marks omitted.)

In the present case, both the prosecutor and the trial court virtually ignored these distinctions and essentially assumed that since there were *some general similarities* among the crimes, all five cases could be tried together. However, since the other crimes evidence could only have been offered to prove *identity of the perpetrator,* the highest level of similarity was necessary in order for the evidence to be admissible under Evidence Code section 1101, subdivision (b).[70]

The trial court failed to carefully evaluate the purpose for which the other crimes evidence could be offered, the level of similarity that would be required, or the probative value of such evidence in relation to its prejudicial effect. In short, the trial court abdicated its duty to make those required determinations in ruling on the severance motion. "In ruling upon the admissibility of evidence of uncharged acts . . . *it is imperative that the trial court determine specifically what the proffered evidence is offered to*

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[70]Neither the prosecutor nor the trial court articulated the use for which these other crimes could be offered, if the trials were separated. The defense's moving papers state: "The prosecution maintains that all of the cases charged have distinctive Modus Operandi by which the identity of the perpetrator can be proved." (CT 3100.) This is the only indication of the prosecution's position, but it is readily apparent that *identity of the perpetrator* was in fact the disputed issue and the other crimes would not have been admissible to prove intent nor common design or plan.

prove, so that the probative value of the evidence can be evaluated for that purpose." (*Ewoldt, supra,* 7 Cal.4th at p. 406.)

Instead, the trial court simply noted that the offenses "appear[ed] to share common characteristics" which were "arguably suggestive of a single common perpetrator." (RT 37.) By avoiding the underlying issues that were central to the ruling, the trial court reached the wrong result. "[T]his distinction, between the use of evidence of uncharged acts to establish the existence of a common design or plan as opposed to the use of such evidence to prove intent or identity, *is subtle but significant.*" (*Ewoldt, supra*, 7 Cal.4th at p. 394, fn.2, emphasis added.)

Thus, it must be very clear *why* the evidence would be offered, so that the proper standard can be applied. In *Ewoldt, supra,* this Court explained the difference between the three grounds for admitting the other crimes evidence, intent, common design or plan and identity:

> Evidence of intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. "In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it." (Citation omitted.)

(*People v. Ewoldt, supra*, 7 Cal.4th 380 at p. 394, fn. 2.)

In the present case the perpetrator's intent was not at issue, nor was the existence of a common design. Proving a common design or plan is

only relevant in very limited situations. *Ewoldt* offered several cases which illustrated how evidence of uncharged similar misconduct could be used to establish a common design or plan. In each of the six examples,[71] the identity of the perpetrator *was not at issue*. It was undisputed that the defendant was in a position to have carried out the crime upon the victim and the only issue was whether the defendant had *actually* carried out the act.

The six cases all involved defendants who were in a position of trust with, or close proximity to, the victim, and who had abused that trust in ways that could only be proven by offering other crimes evidence that demonstrated a common plan or design (husbands poisoning or drowning more than one wife; a father molesting minor children; a physician raping patients whom he had rendered unconscious) which negated any inference that the contact with the victim had been innocent.

Thus, when offering other crimes to prove the existence of a common design or plan, the offense must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts *are naturally to be explained as caused by a general plan of*

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[71]*People v. Lisenba* (1939) 14 Cal.2d 403; *People v. Peete* (1946) 28 Cal.2d 306; *People v. Ing* (1967) 65 Cal.2d 603; *People v. Sam* (1969) 71 Cal.2d 194, 205; *People v. Archerd* (1970) 3 Cal.3d 615; and *People v. Thomas* (1978) 20 Cal.3d 457.

which they are individual manifestations." (*Ewoldt, supra,* 7 Cal. 4th at p. 403, emphasis added.)

In *Ewoldt*, the Court recognized that in most criminal prosecutions, the common design or plan exception simply does not apply:

> [I]n most prosecutions for crimes such as *burglary and robbery*, . . . the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) *ordinarily would be inadmissible.* Although such evidence is relevant to demonstrate that, *assuming the defendant was present at the scene of the crime*, the defendant engaged in the conduct alleged to constitute the charged offense . . . , such evidence would be merely *cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value.*

(*People v. Ewoldt, supra*, 7 Cal.4th at p. 406, emphasis added.)

It is obvious from the examples cited in *Ewoldt* that other crimes evidence would not have been admissible in appellant's case to prove a common plan or design, for two important reasons. First, appellant's position has never been that he was in these women's homes for otherwise legitimate reasons, but that he was not responsible for the attacks. His defense was that he was not the perpetrator and was misidentified as having been in the neighborhood. Second, offering other crimes evidence to prove a common design or plan has absolutely no application where the identity of

the perpetrator is *the critical issue in dispute* and has in no way been conceded by the defendant.

In such a case, where identity *is the issue*, the uncharged conduct and the charged offense must be virtually identical, or "mirror images." (*People v. Huber* (1986) 181 Cal.App.3d 601, 622; *People v. Balcom* (1994) 7 Cal.4th 414, 425 ["The highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense"]; *People v. Wein* (1977) 69 Cal.App.3d 79, 90 [prior offense was "unique and peculiar" to the extent that it constituted defendant's "trademark"].) As the court explained in *Ewoldt*, in comparing the other offenses and the present offense, "the pattern and characteristics of the crimes must be *so unusual and distinctive as to be like a signature*." (*Ewoldt, supra*, 7 Cal.4th at p. 403, quoting 1 McCormick, section 190, pp. 801-803, emphasis added.)

In applying the signature test, the court looks at the common marks of the offenses by examining: 1) the degree of distinctiveness of the individual shared marks; and 2) the number of minimally distinctive shared marks. (*People v. Thornton* (1974) 11 Cal.3d 738, 756; see, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 333 [the existence of stolen credit cards in Crown Royal bags in both the charged and uncharged offenses is

sufficiently distinctive "signature" characteristic to support an inference that the same person committed both the charged and the uncharged acts]; *People v. Catlin, supra*, 26 Cal.4th at p. 120 ["the charged and uncharged crimes bore a number of highly distinctive common marks" – each victim was a close female relative of the defendant (wife or mother); the defendant stood to gain financially from each victim's death; and the victims had died from *paraquat poisoning*, which is "rare"]; *People v. Kipp*, *supra*, 18 Cal.4th at pp. 370-371 [the charged and uncharged offenses displayed common features that revealed a "highly distinctive" pattern: in *both* rape-murders, the perpetrator strangled a 19-year-old woman in one location, carried the victim's body to an enclosed area belonging to the victim, and covered the body with bedding; the bodies of both victims were found with a garment on the upper body, while the breasts and genital area were unclothed; in neither instance had the victim's clothing been torn, and the bodies of both victims had been bruised on the legs]; *People v. Medina* (1995) 11 Cal.4th 694, 748 [admission of uncharged murders was justified in murder prosecution; both charged and uncharged offenses involved robbery and murder of convenience store employee; each victim was shot in the head execution-style; and ballistics reports indicated use of the *same handgun*, later traced to the defendant]; *People v. Sully* (1991) 53 Cal.3d

1195, 1223-1225 [illicit sex, cocaine and the abuse of prostitutes were common to all crimes, and each crime occurred in defendant's warehouse, where he lived, worked, and controlled "what came in and out"].)

Moreover, the distinctiveness of the similarities must "logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety." (*People v. Sully, supra,* 53 Cal.3d at 1223, quoting *People v. Hasten* (1968) 69 Cal.2d 233, 246.) The second factor requires "enough shared characteristics to raise a strong inference that they were committed by the same person." (*People v. Rivera* (1985) 41 Cal.3d 388, 392.) Furthermore, to complete the analysis the court looks at the "points of dissimilarity between [the] offenses in order to ascertain whether there is a distinctive pattern of circumstances which give logical force to an inference of identity." (*People v. Nottingham* (1985) 172 Cal.App.3d 484, 499, quoting *People v. Harvey* (1984) 163 Cal.App.3d 90, 101.)

Where, as in the present case, it is not simply a matter of comparing one crime to another crime, but comparing similarities among five separate crimes, the process is far more complicated, but the same analysis must be made. Since the test for cross-admissibility is whether "evidence of each incident would . . . be admissible in the separate trial of the other" (*Williams v. Superior Court, supra*, 36 Cal.3d at p. 451), the trial court in

appellant's case was required to evaluate *each case against the other*, rather than to simply note that similarities among the cases existed.

Courts have determined on many occasions that the similarities between the charged and uncharged offenses were not so unusual and distinctive as to be admissible for establishing identity. In *People v. Gallego* (1990) 52 Cal.3d 115, the other uncharged offense and the charged offense shared the following similarities: 1) both crimes involved the defendant going out for a drive with his pregnant wife to undertake a "hunt" to lure young women into their car; 2) both victims' hands were tied behind their backs; 3) both victims were taken to remote locations; 4) both victims were removed from the pregnant wife's presence; 5) both victims were shot in a separate spot at point blank range with a handgun; 6) both times the gun was thrown into the Sacramento River the day after the killings. (*Id.* at p. 172.) Although the evidence was determined to be sufficient to show intent and motive, the trial court ruled "the crimes insufficiently similar to justify their use to prove identity" because of the higher standard of similarity required. (*Ibid.*)

In *People v. Alvarez* (1975) 44 Cal.App.3d 375, the court also determined the two crimes were insufficiently similar to allow evidence of another rape offense. The similarities between the charged offense and

another rape in *Alvarez* were: 1) both victims were extremely young (14 years-old and 13 years-old) and small in physical stature; 2) defendant was friendly with the victims before the crime and had a relationship with the victims' mothers; 3) the defendant was in a position to know the victims would be alone at the time of the attack; 4) the sexual techniques employed were similar in lowering the pants but not taking them off, and placing a hand over the victims' mouths to prevent crying out. (*Id.* at p. 385.)

The court pointed out that the second and third points of similarity offered by the prosecution were improper because they "assumed the *probandum* of the evidence; that the perpetrator of the attack on [the present victim] was defendant," and the court thus eliminated those falsely assumed points of similarity. (*Ibid.*) The other points of similarity were deemed to be "necessary concomitants of the crime" and thus insignificant similarities. (*Id.* at p. 386.) The court also noted that a basic difference existed between the two offenses because in the other offense the defendant had not attempted to disguise himself, whereas in the present offense the perpetrator used a disguise. (*Ibid.*) Based on this difference, the insignificance of the other similarities, and the elimination of the unjustified assumptions of similarities in the second and third points, the court determined the other offense evidence was inadmissible on the issue of identity. (*Ibid.*)

In *People v. Guerrero* (1976) 16 Cal.3d 719 and *People v. Nottingham, supra*, 172 Cal.App.3d 484, the court also prohibited admission of evidence of another rape despite many similarities between the other offense and the charged offenses. In *Guerrero*, the court determined that the similarities of 1) a maroon Pontiac Le Mans which the perpetrator drove in both offenses; 2) victims of approximately the same age; 3) the defendant drove initially with other males in the car; 4) the defendant drove around the city stopping at the same parking lot; 5) the parties made a stop to buy beer; 6) the crimes involved sexual activity; 7) defendant took or tried to take victims home alone; and 8) inference of the use of a wrench in both crimes, were insufficient to allow the evidence of the other offense to show identity. (*Id.* at p. 724.) The court noted that the evidence failed to support points number six and number seven, and the rest of the evidence was not distinctive enough to show that the present crime was "identical to a previous crime the defendant had committed." (*Ibid.*)

In *People v. Nottingham*, the court deemed the similarities insufficient where 1) both victims were young women; 2) both victims were casual acquaintances of defendant; 3) both victims resided in the same general neighborhood as defendant; 4) both crimes occurred in remote locations; and 5) both crimes involved the use of force applied to the

victims' necks. (*People v. Nottingham, supra*, 172 Cal.App.3d at p. 500.) The court noted that the fact that the victims resided in the same general neighborhood *was not distinctive*, and that "in the repugnant crime of rape it is not uncommon for the perpetrator to apply force to the neck of the victim." (*Ibid.*) Moreover, the court pointed to the dissimilarities between the two crimes: 1) one occurred during the day while the other occurred at night; 2) the use of force in one left no permanent physical injuries while in the other the force resulted in death. Based on these two distinct differences and the insufficiency of the similarities, the court determined the evidence of the other rape offense was inadmissible to prove identity. (Ibid.)

Likewise, in *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, the defendant was charged with raping and murdering Shirley Hill, an adult woman, and raping two minors. The trial court denied the defendant's motion to sever the cases and the defendant sought a writ of mandate on that issue. The prosecution argued that consolidation was proper because the crimes against the minors could be admitted in the trial of the charges involving Shirley Hill on the issue of identity because:

> (1) all three crimes were committed in the same geographical area; (2) all three crimes were committed during midday to midafternoon; (3) all three crimes were related in some way to school premises (though in each case, it is a different school);

> (4) defendant threatened to slap Denise around if she did not cooperate, and blood found near Shirley Hill's face suggests the possibility that she was slapped around. The People characterize the modus operandi as one "involving loitering near school grounds at midday, waiting for the chance appearance of a lone girl or young woman who could be coerced, or persuaded by means of a false story, to accompany him to a secluded area."

(*Coleman v. Superior Court, supra*, 116 Cal.App.3d at p. 137.) The appellate court, however, rejected the notion that the crimes had the type of signature marks required to prove identity. "[O]nly common marks having some degree of *distinctiveness tend to raise an inference of identity* and thereby invest other-crimes evidence with probative value." (*Id.*, quoting *People v. Thornton, supra*, 11 Cal.3d at p. 756.)

The *Coleman* court found that the only features which these sex crimes shared were that they were all committed during midday or soon thereafter and they all had some association with schools. "These facts are among the least distinctive with respect to each crime. The fact that they share these features and are all sex related does very little to suggest that they were all committed by the same person." (*Coleman, supra*, 116 Cal.App.3d at pp. 137-138.)

An analysis of the crimes which were joined in appellant's case demonstrates quite clearly that they simply did not share distinctive, unusual, rare or unique characteristics that set them apart from many other

common crimes. Any similarities among the cases were general in nature and did not begin to reach the level of similarity that this Court requires to prove identity. As the defense pointed out to the trial court, the dissimilarities were more striking than the similarities[72] and could not have singled out appellant as the perpetrator. (RT 3912-3913.)

At the time the defense moved for acquittal on the Durham counts, the prosecution conceded that the evidence was insufficient in the Durham case (RT 3907), but argued that the evidence from the other charged crimes

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[72]For example, Mrs. Larson was *strangled*, not beaten to death, and there were sexual overtones to the crime (RT 3248), not present in the other cases. (RT 3248.) Also, in her case, there was no evidence anything had been taken or that her belongings had been ransacked (RT 3130-3133), while three of the other four houses were ransacked. The other four crimes unquestionably occurred in the daytime, between noon and 6:00 p.m., but Mrs. Larson was found late at night, and no evidence was presented as to her time of death. Mrs. Durham lived alone, while the other four women lived with relatives. In the case of Mrs. Herrick, the attack took place while her husband was in the back yard, in full view of someone who might be passing by the house. There was no evidence that anything had been taken in the Larson case (RT 3130-3137), while jewelry, cash and other valuables were taken in the other crimes. Mrs. Constantin suffered a broken rib (RT 3670), while the others did not. In two cases, the back screen door was cut (Durham [RT 2752] and Constantin [RT 3824]), while in the Herrick case, entry was through the front door, after knocking. (RT 3104, 4021.) In the Constantin case, a weapon or heavy object was used in the attack (RT 3672) and the perpetrator yelled out obscenities and threats to the victim. (RT 3540.) There was no similar evidence in the other cases. In two cases, Constantin and Figuerido, cut electrical cords were used to tie the victims' hands behind their back. (RT 3541, RT 3368.) In the Larson case, a nylon stocking was used for binding (RT 3246), and her hands were tied in front of her (RT 3274). In Durham and Herrick, there was no evidence that the perpetrator had ever attempted to bind the victims.

established that appellant must have been responsible in the Durham case as well. The prosecutor argued that six points of similarity were "like a fingerprint." Those points were: "age, the house, the injuries, the loss, the search, the I.D.'s - - and I'll throw one more thing in just for good measure - - we have a slit to the screen back door area, the door Ruth Durham always used . . .[and] the Constantin, slit on the screen door." (RT 3911.)

However, those six (or seven) alleged points of similarity do not hold up, either factually or from a legal standpoint. The fact that all of the victims were elderly is *not a distinctive factor.* Crimes upon the weak and vulnerable are commonplace. Although the prosecutor argued that living in a corner house was one of the points of similarity, he conceded that neither Mrs. Durham nor Mrs. Figuerido lived in a corner house. (RT 3908.)

The injuries to the women were also distinct. Mrs. Larson was strangled to death and her facial injuries were minor. The bruising near her left eye was likely caused by a single blow, not sufficient to cause unconsciousness. (RT 3292.)

Mrs. Constantin's most serious injuries were a fractured rib, injury to her lung cavity and a deep wound on the back of her head caused by the edge of an iron. She survived her injuries for six weeks, until a blood clot killed her while she was recovering in a rehabilitation facility.

While the other three women (Mrs. Durham, Mrs. Herrick and Mrs. Figuerido) suffered injuries to the head and face, those types of injuries are certainly not distinctive, or signature-type marks in cases where people have been beaten.

In addition, of the five women, three survived their injuries,[73] and only Mrs. Figuerido and Mrs. Larson were found dead in their homes.

With respect to the fourth factor, loss, there was no evidence that anything had been taken from the Larson house, and in the other cases, the loss was different in each. Mrs. Durham lost three sweaters, a hearing aid and cash, but no jewelry. (CT 355, 357, 365.) The burglar left her with her watch and ring still on her finger. (CT 362, 373.) Mrs. Herrick lost a ring and cash. (CT 846, 862, 798-799, 837-838.) Mrs. Constantin lost several pieces of jewelry and Mrs. Figuerido lost jewelry and money. (RT 3544-3546, 3554-3555.) The fact that all incidents were charged as burglaries and robberies means that, by definition, valuables would be taken from the homes, and cash and jewelry are the most obvious items to be taken. They would not be considered *distinctive or unusual* by anyone's definition.

The fifth point, a messy search by the perpetrator, was also not a factor in two of the cases. Mrs. Herrick's house was not ransacked (RT

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[73]Mrs. Constantin eventually succumbed to complications stemming from her injuries, but she did survive the attack for six weeks.

3042), and while that could be explained by the fact that Mr. Herrick was in the back yard and may have interrupted the crime, that would not explain the Larson case. Gardeners were in and around her yard both before and after the time the prosecution claimed she was murdered[74] and there was no evidence that anyone had interrupted the perpetrator. Mrs. Larson's house was not ransacked and there was never even a determination made that anything had been stolen. (RT 3133, 3135.) Even so, ransacking a house while searching for valuables is probably *the most common occurrence* inside a burglarized home and can hardly be noted as a distinctive characteristic sufficient to identify an individual as the perpetrator.

Although the prosecutor said that "eyewitness identifications" in each of the cases also tied the cases together, the presence or absence of eyewitnesses is not a circumstance which would help to show that the crimes were committed in a "signature" fashion. In any event, there really

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[74]The gardener, Mr. Jolevia Jones, testified that he and his helper, David Wesley, arrived at the Larson home around 11:30 to 11:45 a.m., and that he last saw her about 10 minutes after he arrived. (RT 3159-3160.) Wesley began cutting grass with his power mower in the Larson yard. (RT 3147.) Jones left Wesley there, and came back about 40 minutes later and Wesley had already finished the Larson yard. (RT 3148.) Jones said that it took about 45 minutes to complete her yard, so Wesley would have been working with power equipment between about 11:30 and 12:15 that day. (RT 3148.) By 12:15 p.m., Mrs. Larson was not answering her phone (RT 3236.) The prosecutor argued that she was killed between 11:45 a.m. and 12:05 p.m. (RT 4111), when one or two gardeners were present on her property.

were no "eyewitnesses" in this case, only people who may have seen appellant in their neighborhood near the time of the crime. Although Frank Herrick testified that he saw appellant inside of his house hitting his wife, Mr. Herrick was *outside in the back yard* at the time he claimed to have seen this, and his conclusion may have been colored by the fact that he had just noticed a black man jogging past his house. (See also fn. 66, *supra*.)

Moreover, Herrick's description of the jogger's clothing was completely at odds with the clothing described by two other witnesses who also claimed to have seen appellant in the neighborhood at that same time. At least two of those three witnesses had to have been mistaken. The testimony of the "eyewitness" evidence was so contradictory and inconclusive, that had the cases been tried separately, the weakness of that evidence certainly would have been exposed.

Finally, a slit *back screen door* was a factor in only two of the five cases, Durham (RT 2752) and Constantin. (RT 3823.) In the Herrick case, Mrs. Herrick told the police she "answered" the front door, after which the attacker entered and punched her, a significantly different *modus operandi* than the other cases. (RT 3104.)

None of the "similarities" cited by the prosecutor occurred in *all five* cases. Those that occurred in *some* of the cases, such as the taking of

jewelry or the cutting of a screen, were all generic types of similarities that do not set them apart from the garden variety burglaries that could happen, and do happen, every day, everywhere. The crimes described in *People v. Mason* (1991) 52 Cal.3d 909, easily demonstrate this point. In that case, the defendant was charged with the burglary/robbery/murder of four elderly Oakland residents, between March and December of 1980. All four victims had been beaten and killed inside of their homes. In each case, jewelry was stolen, and in three of the four cases, money and jewelry. Those factors, far from a "signature," are common to many burglary/murders, including those charged in appellant's case.

In *Mason*, the defendant also argued that the cases should not have been tried together because the evidence was not cross-admissible to prove identity. However, this Court did not have to decide that question because it held that "whether or not the evidence was cross-admissible, defendant ha[d] not carried his burden of showing prejudice." (*Id.* at p. 936.) Mason had immediately confessed to the murders, on tape, upon his arrest and several times thereafter before trial, and numerous pieces of physical evidence gathered at the crimes scenes substantially corroborated his confessions. Thus, the Court found that "there was overwhelmingly strong evidence against him on every count." (*Id.* at pp. 935-936.) In short,

whether the cases had been tried separately or not, convictions in each case were virtually assured because of Mason's confessions and the corroborative physical evidence at the crime scenes.

As has already been discussed, there was no such "overwhelmingly strong" evidence in appellant's case. Even in the Constantin case, where there was physical evidence linking appellant to the victim's gold bracelet, it is unlikely that a jury would have convicted appellant of the burglary and robbery had the case been tried separately. The evidence of the other crimes tried in this case surely had a devastating impact on the jury's consideration of each individual case.

Finally, in *People v. Bean, supra*, 46 Cal.3d at p. 937, the defendant was charged with two murders and moved to sever the cases before trial. The murders took place three days apart, within 10 to 12 blocks of each other in the south area of Sacramento. Both victims were older women who were killed in their homes and suffered blunt trauma to the head. In both cases, the obvious motive was theft. Both victims had their wallets and cars taken, and their abandoned vehicles were then left in the same general vicinity. (*Ibid.*) Despite the seemingly strong similarities, this Court held that the common marks were insufficient for finding the evidence to be cross-admissible.

> To be admissible as modus operandi, . . . *[T]hese common marks must be distinctive rather than ordinary aspects of any such category of crime.* They must be sufficiently distinctive that they bear defendant's unique "signature."

(*Ibid.*, emphasis added.) The common factors were of the type that might be present in *many burglary/murders*: "These factors are not unique, however, and do not establish a unique *modus operandi*." (*Ibid.*)

The *Bean* case is particularly instructive here. Despite the obvious similarities between the two crimes in *Bean*: similar victims, similar injuries, and taking place within a few days in the same neighborhood, those factors were found to be more generic than unique and did not amount to a "signature" which would have allowed the evidence to have been cross-admissible. Based upon that decision, it is apparent that the crimes in this case are also not cross-admissible, for precisely the same reason.

Thus appellant met the first two criteria for establishing that joinder of the counts was prejudicial to him: the evidence was not cross-admissible and one or more of the charges against him was weak.

3. One Or More Of The Cases Was A Capital Case.

Although the trial court was certainly aware that this was a capital case, it also failed to give proper consideration to that factor in denying the motion to sever. Once again, the trial court may have relied upon the prosecutor's claim that severance should be denied because "the murder

cases all involve the death penalty." (CT 3108.) That statement is true, but does not support a denial of severance. Two of the cases that were joined for trial did not involve murders (Herrick and Durham), yet they were joined with three cases which *did involve murder* and for which the death penalty was sought. That is precisely the type of situation where severance of counts is appropriate because of the potential for prejudice.

4. One Or More Of The Cases Was Particularly Inflammatory.

The fourth criterion for showing prejudice, that one or more of the charges is more inflammatory than the others, is demonstrated by the attack on Mrs. Larson, because of its sexual overtones, and the attack on Mrs. Constantin, because of the detailed description of the attack including the vicious words which the attacker used against her.[75] Appellant met all four of the criteria that should have been considered by the trial court and which would have established the need to sever the counts to avoid the prejudice to appellant.

The trial court did not adequately address the prejudice issue in this

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[75]Mrs. Constantin described the beating to her daughter, who then testified at the trial. According to the daughter, the attacker said, "fuck you, bitch, I'll kill you," several times. (RT 3540.) The attacker stepped on her face and neck (RT 3539) and beat her "savagely" with his fists and an object believed to be an iron. He left briefly then came back, covered her with a blanket and beat her some more. (RT 3540-3541.)

case. Had the court carefully considered each of the required criteria, it would have concluded, as this Court must, that (1) the evidence was not cross-admissible; (2) the evidence supporting each of the cases was weak; and (3) because appellant's life was at stake, all possible precautions should have been taken to assure that appellant would only be convicted on the basis of the evidence in that particular case. Instead, "spillover" evidence, inevitable when multiple charges against a single defendant are joined, unquestionably led to the convictions in this case.

Appellant has made a strong showing of prejudice. Whether or not the trial court erred in its ruling, this Court must not allow the convictions and death sentence to stand, where, as here, the joinder of the counts deprived appellant of his right to a fair trial. But for the improper consolidation of these cases, appellant would not have been convicted and sentenced to death. Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, and its counterparts under the California Constitution, were violated. Where the "simultaneous trial of more than one offense . . . actually render[ed] [defendant's] state trial fundamentally unfair," (*Featherstone v. Estelle* (9th Cir.1991) 948 F.2d 1497, 1503), the defendant is entitled to a new trial.

D. The Prejudicial Effect of the Joinder Was Exacerbated By The Prosecutor's Argument To the Jury and The Trial Court's Refusal to Instruct the Jury With Defendant's Requested Special Instruction Number 1.

There is "a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible." (*Bean v. Calderon, supra*, 163 F.3d at p. 1084, quoting *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322; *People v. Grant, supra*, 113 Cal.App.4th at p. 572 ["prejudice is highly probably because the evidence on counts 1 and 2 improperly bolstered the strength of the evidence on the other count"].)

The dangers associated with joining multiple counts against a single defendant are readily apparent and are virtually identical to the prejudice arising from allowing so-called "propensity evidence." Both state and federal law prohibit the admission of evidence of a person's character, including specific instances of other crimes, to prove the conduct of that person on a specific occasion. (Evid. Code sec. 1101; Fed. Rules Evid., rule 404(b).) As discussed previously, because other crimes evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact," (*People v. Thompson, supra*, 27 Cal.3d 303, 314; *Michaelson v. United States* (1948) 335 U.S. 469, 476), such evidence

> is [deemed] objectionable, not because it has no appreciable probative value, *but because it has too much*. The natural and inevitable tendency of the tribunal - whether judge or jury - is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of the guilt of the present charge.

(*People v. Baskett* (1965) 237 Cal.App.2d 712, 715-716, emphasis added.)

Similarly, in *Michaelson v. United States, supra,* the Court stated:

> [It is not that] character is irrelevant, on the contrary, it is said to weigh too much with the jury and so to overpersuade them as to prejudge one with a bad general record and deny his a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

(*Michaelson, supra*, 335 U.S. at p. 476.) In appellant's case, the prejudice inherent in the joint trial of multiple offenses was further exacerbated by the prosecutor's argument to the jury, as well as the failure of the trial court to adequately instruct the jury.[76]

Just as the prosecutor in the *Bean* case had done, the prosecutor in appellant's case "repeatedly encouraged the jury to consider the . . . charges in concert, as reflecting the modus operandi characteristic of [defendant's]

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[76]The trial court's failure to instruct the jury with Defense Special Instruction No. 1, which would have warned the jury about the need to compartmentalize the evidence and to decide each count only on the basis of the evidence relevant to that count, is a separate ground for appeal and is fully briefed in Argument IV, which follows.

criminal activities." (*Bean, supra*, at p. 1084.) Under those circumstances, the *Bean* court held, the jury could not "reasonably [have been] expected to 'compartmentalize the evidence' so that evidence of one crime [did] not taint the jury's consideration of another crime." (*Bean, supra*, 163 F.3d at p. 1084, quoting *United State v. Johnson* (9th Cir. 1987) 820 F.2d 1065, 1071.)

Similarly, appellant's prosecutor repeatedly urged the jury to consider the "distinct modus operandi" (RT 4096) of the perpetrator, and argued that the "unique similarities" (RT 4096) of the five crimes could leave no doubt that the same person committed all five burglaries.

The prosecutor cited eight alleged points of similarity to support his theory: (1) female victims (2) senior citizens (3) daylight hours (4) corner houses (5) facial injuries (6) loss of money or jewelry (7) bindings and/or coverings and (8) ransacking. (RT 4096-4101.) In truth, of the similarities he cited, the only factors that actually applied in all five cases were that they all involved elderly women. The remaining factors[77] only applied to some

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[77]For example, there was no evidence that Mrs. Larson, who was found late at night, was attacked during the day, as the others clearly had been. Three of the victims lived in corner homes; two did not. Moreover, Agnes George, the murder case attributed to appellant in the penalty phase, had several neighbors living on both sides, so clearly did not live in a corner home. (RT 4417.) Mrs. Larson was strangled to death and suffered only minor facial scrapes and bruises. Mrs. Larson had not been robbed. Two of the victims were bound with electrical cords, one was tied with a nylon.

of the cases, not to others.

Nevertheless, the prosecutor argued:

> Those eight similarities, plus the cuts to the screen doors at the latch,[78] all prove a similar distinct M.O., a modus operandi, a distinct pattern of criminal conduct attributable to one and only one person. Five different people did not commit those five incidents for which we have [been] on trial here the last couple of months. Five different people didn't commit those crimes. One person did. *Those similarities are like a fingerprint.*

(RT 4100-4101, emphasis added.) The prosecutor claimed the charges had been proven beyond a reasonable doubt because of (1) the physical evidence, (2) the witnesses, and (3) "the uniqueness of the crime and the M.O." (RT 4101.)

The prosecution's case thus relied heavily upon the argument that if the jury found appellant to be the perpetrator in one of the cases, it would necessarily require that the jury find appellant to be the perpetrator in all of them. The jury certainly accepted the prosecution's argument.

Even though the jurors were given a single instruction to "decide each count separately (RT 4246)," such a general and cursory instruction would have done little to counter the prosecutor's very specific and

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The other two were not bound at all. Two victims were covered with a blanket, the other three were not.

[78]Only two of the five cases involved cut screen doors.

emphatic insistence that the jury should, in fact, consider the counts together. The prosecution argued that the five crimes had the same M.O. and as such, all five crimes bore the "signature" of Franklin Lynch. Once appellant's connection to the gold bracelet from the Constantin burglary was established by fingerprint evidence from the pawn broker, the otherwise weak and contradictory evidence from the other charges was immediately strengthened. Cases which would not have been able to stand on their own, in which the evidence would likely not have been sufficient to even bring formal charges, were literally turned into capital cases, at the State's urging.

The combined effect of the prosecutor's argument, and the trial court's failure to instruct the jury with Special Instruction No. 1 (see Argument IV, which follows), virtually guaranteed appellant's convictions. For the same reasons as were stated in *Bean, supra,* the denial of appellant's severance motion deprived him of his state and federal constitutional rights to a fair trial and reliable guilt and penalty determinations, guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments, and concomitant state constitutional protections. Appellant's convictions and death sentence must be reversed.

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IV.

THE TRIAL COURT'S REFUSAL TO GIVE SPECIAL INSTRUCTION NO. 1 DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL AND RELIABLE GUILT AND PENALTY DETERMINATIONS.

A. Factual Background

Prior to trial the defense had unsuccessfully sought to sever the counts in this case. (See Argument III, *supra*.) In light of the trial court's denial of the motion to sever, the defense requested that the jury be given a special instruction so that the inherent prejudice of joining so many separate counts and the danger of "spillover effect" might at least be minimized. Defendant's Special Instruction No. 1 provided:

> Each count charges a distinct crime. You must decide each count separately. The defendant may be found guilty or not guilty of any or all of the crimes charged, but your consideration of the evidence as to one count should not be influenced by the fact that other counts have been charged. For any count which has not on its own and independently of other charges been proven beyond a reasonable doubt you must find the defendant not guilty.

(CT 3241.) The trial court refused this instruction, claiming the subject matter "was adequately covered by [CALJIC No.] 17.02,[79] and it also could

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[79]CALJIC No. 17.02 provides: "Each count charges a distinct crime. You must decide each count separately. The defendant may be found guilty or not guilty of any or all of the crimes charged. Your finding as to each count must be stated in a separate verdict." This was the general instruction which was given to the jury. (RT 4246; CT 3312.)

be confusing." (RT 3926.) Thus, there was no instruction warning the jury about the need to compartmentalize the evidence and to decide each count only on the basis of the evidence relevant to that count.

B. Failure to Give the Special Instruction Was Reversible Error.

After having denied the severance motion, the trial court should have taken every precaution to assure that the jury was not unduly confused by the multiple counts, witnesses and cases against appellant. Defendant's Special Instruction No. 1 (CT 3241) should have been given to the jury. Without it, there was nothing to prevent the jury from doing exactly what the prosecutor urged it to do: to consider all of the evidence together and allow the evidence supporting each count to be considered as part of the evidence in each of the other counts. (See Argument III, *supra*; RT 4096.)

The state and federal courts have recognized that such an instruction is necessary and that simply giving the standard instructions, as the trial court did in this case, does not adequately protect the defendant when multiple counts are charged. (See *People v. Grant* (2003) 113 Cal.App.4th 579, 591-592 [CALJIC 17.02 held to be insufficient for informing the jury it could not convict defendant on one count by using evidence that was only admissible in another count] and *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084 [instructions failed to tell jury they could not consider evidence

of one set of offenses as evidence establishing the other].)

Although the trial court generally has no *sua sponte* duty to instruct the jury regarding the admissibility or use of other crimes evidence, upon request, the trial court must give an instruction limiting the evidence to its proper scope. (Evidence Code § 355; *People v. Falsetta* (1999) 21 Cal.4th 903, 924.)

In *People v. Grant, supra*, 113 Cal.App. 4th 579, although the appellate court found no abuse of discretion in the trial court's denial of the motion to sever, it nevertheless reversed the conviction because it found that joinder had substantially prejudiced defendant's right to a fair trial. The decision was due, in part, to the trial court's having failed to properly instruct the jury. The jury had been instructed with three standard instructions, all of which were also given in appellant's case: CALJIC No. 1.02 [the attorney's statement were not evidence], CALJIC No. 17.02 [each count charged a distinct crime; each count should be decided separately, and the jury could find defendant guilty or not guilty of any or all of the charged counts], and CALJIC No. 2.90 [the State had the burden of proving defendant guilty beyond a reasonable doubt]. The *Grant* court found that none of those instructions, considered separately or as a whole, was sufficient to overcome the prejudice resulting from the joinder and the

prosecutor's arguments. Just as in appellant's case, the prosecutor had urged the jury to consider evidence in one count in determining the defendant's guilt on another count. (*People v. Grant, supra,* 113 Cal.App.4th at p. 592.)

Similarly, in *Bean v. Calderon, supra,* 163 F.3d at p. 1084, the Ninth Circuit recognized that "[i]t 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." (*Bean, supra*, quoting *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322, emphasis added.) Keeping the evidence separate is made that much more difficult when, as in appellant's case, the prosecutor capitalizes on the joinder of counts by repeatedly arguing to the jury that if the defendant committed one of the crimes, he must have committed them all. (See Argument III, *supra.*)

In *Bean, supra*, the prosecutor had made similar arguments to the jury, and under those circumstances the court found that the jury could not reasonably have been expected to "compartmentalize the evidence" so that evidence from one of the crimes did not taint another. Significantly, the *Bean* court found that the *general instructions*[80] did little to ameliorate the

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[80]The sole instruction in *Bean* which dealt with multiple counts was virtually identical to the one given in appellant's case, CALJIC No. 17.02.

prejudice arising from the joinder of counts:

> We have expressed our skepticism about the efficacy of such instructions on at least one prior occasion: "To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities." [Citations omitted.] Apart from the intrinsic shortcomings of such instructions, however, the instruction here *did not specifically admonish the jurors that they could not consider evidence of one set of offenses as evidence establishing the other.*

(*Bean, supra*, 163 F.3d at p. 1084, emphasis added.) The *Bean* court thus recognized that jurors needed to be told that they could not use their consideration of the evidence in one count to influence their decisions with respect to the remaining counts.

That concept was precisely what appellant's counsel sought to include when it requested Special Instruction No. 1. Specifically, that instruction informed the jury that their "consideration of the evidence as to one count *should not be influenced by the fact that other counts have been charged*," and for "any count which has not *on its own and independently of the other charges* been proven beyond a reasonable doubt, you must find the defendant not guilty." (CT 3241, emphasis added.)

In *Bean*, it read: "Each count charges a distinct offense. You must decide each count separately. The defendant must be found guilty or not guilty of any or all of the offenses charged. Your finding as to each count must be stated in a separate verdict." (*Bean, supra,* 163 F.3d at p. 1083.)

The *Bean* court concluded that the combination of the trial court's joining of counts which were not cross-admissible, along with the State's urging the jury to consider the charges "in concert" led to a fundamentally unfair trial in violation of Bean's constitutional rights. (*Bean, supra*, 163 F.3d at p. 1084-1085.)

Appellant's case presents a nearly identical scenario, except that the evidence against appellant was even weaker than the evidence against Bean, and the joinder of five as opposed to two cases presented even more significant problems of prejudice for appellant. Just as in *People v. Grant, supra,* 113 Cal.App.4th at p. 591, the instructions given in appellant's case were completely inadequate in themselves, under these circumstances. Combined with the prosecutor's insistence that appellant could be proven guilty of all of the offenses by considering the evidence together, the outcome for appellant was inevitable. As in *Bean v. Calderon, supra*, 163 F.3d 1073, the combination of errors led to a fundamentally unfair trial and an unreliable guilt and penalty determination. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.) Reversal of appellant's convictions and death sentence is required.

V.

APPELLANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL AT THE LINEUP. THEREFORE ALL EVIDENCE OBTAINED AS A RESULT OF THE LINEUP SHOULD HAVE BEEN SUPPRESSED.

A. Factual Background

At about six o'clock on the evening of November 4, 1987, appellant was placed in a lineup at the Oakland Police Administration Building. The lineup was organized by Sergeants Mercado and Karczewski of the Oakland Police Department, and attended by representatives of various local police agencies and approximately twenty-one potential witnesses. (CT 502-504.)

It is undisputed that appellant participated in the lineup under protest. (CT 556, 575.) As he made clear to the officers, he did not wish the lineup to go forward until he had an opportunity to consult with his attorney, who at that time was Allan Hymer of the Alameda County Public Defender's office. That office had found appellant financially eligible for its services on October 27, 1987, and on that date the office was appointed and appeared generally on appellant's behalf. (CT 590; RT 10/27/87:4.) Prior to that time a felony complaint had been filed against appellant.[81]

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[81]The original felony complaint against appellant was signed August 19, 1987. (CT 1-3.) The first amended complaint was filed on September 30, 1987. (CT 6-8.)

On the following day Mr. Hymer interviewed appellant at the North County Jail. Mr. Hymer understood that he would be representing appellant through the pendency of the case, and he arranged the meeting so that the two could become acquainted. (CT 590.) At 10:50 on the morning of November 2, Mr. Hymer was informed by the prosecutor's office that a lineup had been scheduled for November 4, 1987. Between 3:00 p.m. and 4:20 p.m. on November 2, Mr. Hymer met again with appellant to "discuss legal matters that had arisen, further make his acquaintance [and] find out more about the case." (CT 591.) Throughout the meeting Mr. Hymer assumed that he would continue to act as appellant's attorney. (CT 591-592.)

Upon leaving the jail that afternoon Mr. Hymer believed that he would see appellant again at the time of the lineup. He planned to attend the lineup "as Mr. Lynch's attorney," and had arranged to have two investigators and a fellow attorney accompany him, both because of the number of witnesses expected and because, as he testified, "If I was going to be Mr. Lynch's attorney, I didn't want to be the only person at the lineup in case I had to be called as a witness." (CT 592-594.)

When Mr. Hymer returned to his office at about 4:40 p.m., on November 2, he was informed that his office would file a declaration of conflict of interest. Mr. Hymer conveyed this news to Inspector Whitson of

the prosecutor's office that evening. (CT 594-595.) Mr. Hymer testified that the next morning, November 3, he telephoned the jail and asked that appellant be informed "that I was no longer Mr . Lynch's attorney, [and] that I expected another attorney would be appointed by the Bar Association to represent him at some unspecified time in the future." There is no evidence that appellant received this message. Mr. Hymer took no other action with respect to the case, and did not appear at the lineup. (CT 595-596.)

In fact, a declaration of conflict was filed by the public defender on November 3. No other attorney was appointed to represent appellant until November 6, after the lineup had been held, when Michael C. Ciraolo appeared generally and accepted the appointment. (CT 587; RT 10/6/87.)

Thomas Surh, administrator of the Alameda County Bar Association's Court Appointed Attorney's program testified that his office was advised that the public defender was going to declare a conflict on November 2. Thereupon, an effort was made to find an attorney who would be available to represent appellant in this case. The choice had to be made from a pool of about 17 lawyers in the county who met the bar association criteria for appointment to capital cases. (CT 604-607.)

On November 3, after the process of finding counsel for appellant had begun, Mr. Surh's office was called by the court and asked to find an

attorney to be present at the lineup. Mr. Surh testified that his office normally recommended the appointment of attorneys at lineups other than those who would be representing the accused. He stated that

> it's pretty clear that we would not appoint the same attorney to witness a lineup for a particular individual and recommend that same attorney to represent the individual.... [because] *the purpose of the attorney being present at the lineup is to witness the lineup and to be available should a question arise later in that case as to the conduct the lineup. . . .*(Y)ou would want to avoid having an attorney representing a client who is also a witness potential witness.

(CT 607-612, emphasis added.)

Ultimately two attorneys were designated to attend the lineup. They were Joseph Stephens and Valerie West. Both attorneys were in "Class II" of the bar appointment panel, indicating that they were not among those considered qualified to represent a defendant in a capital case. (CT 605, 612.) Ms. West testified that she went to the police headquarters on November 4 "to be a witness in the lineup of Franklin Lynch." When she received the call from the bar association she asked who Mr. Lynch's attorney was, and was told that "they were looking for counsel." She testified that she understood that her role at the lineup was *not to serve as an attorney for appellant.* (CT 628-630, emphasis added.)

Similarly, Mr. Stephens testified that he attended the lineup on November 4 "basically, to see that the lineup was conducted in a fair fashion." He stated that he "absolutely (did) not" consider appellant to be

his client, or feel that he was there to represent appellant. (CT 682.) It was undisputed, by both counsel and the police sergeants, that appellant expected his public defender to be with him. (CT 564, 567, 633, 685.) Ms. West informed Sergeant Mercado that "Mr. Lynch did not want to participate in the lineup because he was not represented by counsel." (CT 634.)

Appellant was threatened by one or both of the sergeants that if he refused to participate he would be physically forced to do so, and Sergeant Karczewski told him that his refusal would constitute an admission of guilt. (CT 635, 686-687.) Sergeant Karczewski testified, and the preliminary hearing judge found, that no exigency existed which might have prevented the lineup from being postponed while representation was secured for appellant. (CT 543-544, 783-784.)

At the preliminary hearing, appellant moved to suppress the lineup identification evidence on the grounds that he had been deprived of his Sixth Amendment right to counsel. (CT 494.) Before ruling, the magistrate said, "This has been a difficult issue. At first blush it absolutely appears that something was done wrong." (CT 782.) Nevertheless, the court ruled that the presence of the witness attorneys was sufficient, and denied the motion to suppress the lineup evidence. (CT 789.)

On November 29, 1988, in the superior court, appellant again

challenged the lack of counsel at the lineup in a motion to dismiss the information, pursuant to Penal Code section 995. (CT 2970-2987.) That motion was heard and denied on December 16, 1988. (CT 3010.) Appellant filed a petition for a writ of mandate/prohibition with the Court of Appeal for the First Appellate District, raising this same issue, on December 22, 1988. The writ was later denied without opinion.[82] (CT 21.) Thereafter, appellant filed a motion to suppress the lineup identification at trial (CT 3078), which was also denied. (RT 30.)

At trial numerous witnesses testified as to having seen appellant in or around the neighborhoods where the crimes in this case took place, sometimes within hours of when they took place, and other times several days before or after the day of the crimes. Many of these witnesses had attended the physical lineup on November 4, 1987.

B. Appellant Had A Right To His *Own* Counsel At Lineup.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee to a defendant the assistance of counsel at any lineup held after the initiation of adversary judicial criminal proceedings. (*United States v. Wade* (1967) 388 U. S. 218; *Gilbert v. California* (1967)

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[82]Summary denial of the writ is not law of the case or *res judicata*. (*McGlothen v. Department of Motor Vehicles* (1977) 71 Cal.App.3d 1005, 1017-1018.)

388 U.S. 263.) Article 1, section 15 of the California Constitution affords the right to counsel at all lineups, whether before or after indictment or arraignment. (*People v. Bustamante* (1981) 30 Cal. 3d 88.) The lineup in the present case was held well after the accusatory pleading was filed. Thus the right to counsel attached under both the federal and the state Constitutions.

Evidence of a defendant's identification obtained in violation of his constitutional right to counsel may properly be challenged by a motion to suppress such evidence. (*People v. Lawrence* (1971) 4 Cal. 3d. 273; *People v. Martin* (1970) 2 Cal. 3d 822.) As explained above, appellant has preserved this issue at all stages of the proceedings against him and it is now properly before this Court.

In establishing the right to counsel at a post-indictment lineup, the United States Supreme Court specifically recognized the importance of the pretrial period, and the clear need to have "the guiding hand" of one's own counsel, actively engaged, and fully prepared to represent the interests of the criminal defendant. In the Court's words:

> As early as *Powell v. State of Alabama* [citation omitted], we recognized that the period from arraignment to trial was "perhaps *the most critical period of the proceedings*," [citation omitted] during which the accused "*requires the guiding hand of counsel*," [citation omitted] if the guarantee is not to prove an empty right.

(*United States v. Wade, supra*, 388 U.S. at p. 225, emphasis added.) The Court compared the lineup to other equally important pretrial stages, including the arraignment, post-indictment questioning by police agents, and to the trial itself, concluding that

> It is central to that principle that in addition to counsel's presence at trial, *the accused is guaranteed that he need not stand alone against the State* at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.

(*Id.* at p. 226, emphasis added.)

In the Court's view, the lineup was as critical a stage as the trial itself. (*Id.* at pp. 236-237.) In contrast, it found that certain other pretrial procedures were *not critical stages* to which the right to counsel attached. The Court was thus unwilling to extend the right to counsel to such investigative procedures as the analysis of blood or fingerprint evidence or voice or handwriting exemplars. Distinguishing those procedures from the physical lineup, the Court emphasized that having *one's own counsel* present is required only at those stages determined to be "critical stages" of the criminal proceeding:

> We think there are differences which preclude such stages being characterized as critical stages *at which the accused has the right to the presence of his counsel.*

(*Id.* at p. 227, emphasis added.) The Court did not say "*a* counsel," but rather, "*his* counsel." That concept is repeated throughout the *Wade*

decision. (See, e.g., "both Wade *and his counsel* should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct of the lineup, absent an intelligent waiver. (*Id.* at p. 237.) The idea that *any* attorney could simply be brought in, at a moment's notice, to take the place of one's own chosen or appointed counsel, was certainly not endorsed by the *Wade* Court. To the contrary, the Court acknowledged that the right to counsel usually means a right to the suspect's "own counsel," and left open the question "whether the presence of substitute counsel might not suffice," *but only* "where notification and presence of the suspect's own counsel would result in prejudicial delay." (*Ibid.*)

In appellant's case, Judge Hora, who presided over the preliminary hearing, and who first ruled upon this issue, stated:

> It is undisputed that *the lineup was a logistical nightmare.* There were no exigent circumstances requiring the lineup be held on November 4. *Indeed, there appears to be no reason why it could not have been held after November 4.*

(CT 783-784, emphasis added.) Thus while some cases conceivably would require the appointment of substitute counsel, *to avoid prejudicial delay*, the lower court here specifically found no such circumstances present. Thus under *Wade* appellant had the absolute right to his own court-appointed attorney to represent him at this most critical pretrial juncture.

No one would reasonably suggest that in a capital trial, one's own counsel could simply be replaced at the last minute, by an attorney unfamiliar with the facts of the case. At critical stages of a criminal proceeding it is assumed that the right to counsel means the right to your *own* counsel – someone legally and ethically *obligated* to be familiar with the case and fully prepared to advise and participate. Nowhere is this more true than in a capital case, where the stakes are unquestionably the highest.

The Supreme Court understood that what takes place at the physical lineup could well result in the development of the most critical evidence in the case: eyewitness testimony. The Court acknowledged that while eyewitnesses frequently have a powerful impact on the jury, and thus on the outcome of a trial, eyewitnesses are notorious for being mistaken and/or influenced by suggestion:

> [T]he confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence *is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.* The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.

(*Id.* at p. 228, emphasis added.) In the context of a physical lineup, one's own counsel, who *does have an obligation to be prepared*, has a limited, but nevertheless important role. Apart from being there to offer a "guiding hand" by advising the defendant of his rights and obligations at the moment,

and guaranteeing that "he need not stand alone against the State," the attorney is also there to "silently observe and to later recall his observations for purposes of cross examination at trial." (*People v. Bustamente, supra,* 30 Cal. 3d at p. 99, quoting from *People v. Williams* (1971) 3 Cal.3d 853, 860 (dis. opn. of Mosk, J.).) But in this context, the ability to *effectively* observe for purposes of *effective* cross examination, is almost entirely a function of knowing precisely what you are looking for.

A lineup may be "photo-biased" as described in the testimony of identification expert Elizabeth Loftus. (RT 4048.) This means that the lineup contains *only one person* who had been previously shown to the witnesses by way of a photo lineup. In appellant's case, as it turned out, he was in fact the only person in the physical lineup who had had his photo previously shown to the witnesses.[83] A substitute attorney who is brought in at a moment's notice to simply observe the lineup and who is completely

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[83]Sgt. Little confirmed that he did not attempt to have the individuals who were displayed in the photo lineup which he used, Exhibit 24A-F, included in the physical lineup. He did not give their information to the Oakland Police Department so that they could be included in the physical lineup. (RT 2914.) Those who were included in the other photo display, Exhibit 50A-F, are listed at RT 3307. Comparing that list to those who participated in the physical lineup, listed at RT 2695, it is clear that only appellant was in both. Although the record does not indicate which photos were included in Exhibit 41A-F, that display was shown only to Mrs. Harvey (RT 3061), and was shown on September 1, 1987, after appellant's name and picture had been widely publicized.

unfamiliar with the case, would not be in a position to know whether this type of bias is even present.

Attorneys who are brought in simply to observe necessarily have an extremely limited role. The suggestiveness of a lineup *may* have to do with how similar the defendant's features are to the other participants in the lineup, something that most careful observers, attorneys or otherwise, could handle. However, suggestiveness *may also* involve how closely those in the lineup match whatever physical descriptions have been given of the suspect by the various witnesses prior to the lineup. In this case, numerous witnesses gave varying descriptions, contained in numerous police reports, over a series of many months, in various locations. Only the attorney with the duty to be familiar with the case, that is, the attorney *representing* the defendant, would be in a position to judge whether or not the lineup was suggestive in that sense. By contrast, someone who attends the lineup prepared only to watch, but who is unfamiliar with what exactly he or she is looking for in that particular case, is virtually useless except in the most obvious or egregious of situations. The trial court's review of the lineup video presents exactly the same problem and certainly does not suffice as a replacement for having one's own counsel present.

In *Wade, supra*, the Supreme Court discussed this precise concept in explaining why a suspect at a lineup needs his *own representation*. Quoting

from a proposed model statute regarding the conduct of lineups, the Court noted:

> Provision should be made that any person, whether a victim or a witness, must give a description of the suspect before he views any arrested person. A written record of this description should be required, and the witness should be made to sign it. This *written record would be available for inspection by defense counsel for copying before the trial and for use at the trial in testing the accuracy of the identification made during the lineup and during the trial.*

(*United State v. Wade, supra*, 388 U.S. at p. 238, fn. 26, emphasis added.) The Court understood the importance of counsel's presence for evaluating the lineup in terms of the various descriptions given by the witnesses prior to the lineup.

The right to counsel clearly cannot mean simply having a person with a bar card being physically present, with no specific legal obligation to do anything more than watch. The Supreme Court's ruling that the physical lineup was a critical stage of the criminal proceeding necessarily means the right to *effective* counsel, which means an attorney who has reviewed the file, the police reports and the witness statements, who is familiar with both the client and the issues, knowledgeable of the relevant law, and fully prepared to advise, support and advocate for the client. In the present case, everyone involved agreed that did not happen.

In this case, the lineup took place during the short hiatus between the

Public Defender's filing of the declaration of conflict and the appointment of Mr. Ciraolo as successor counsel.[84] The attorneys who were present at the lineup did not advise or purport to represent appellant. Although they did urge the police to desist until appellant's own attorney could be present, this wholly appropriate suggestion fell on deaf ears.

Although the attorney/witnesses, Ms. West and Mr. Stephens, were able to testify about the procedures used during the lineup, that was no substitute for the active advisory role of appellant's personal attorney. The need for an effective counsel as opposed to passive observers is particularly evident in this case. Appellant was uncertain about his legal rights in the circumstances. His only advisors were the police, who told him that he could be bodily forced onto the stage, and that his refusal to cooperate

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[84]It should be remembered that at the time of the lineup, appellant was still represented by the public defender, whose office had already appeared with him. Although a conflict of interest had apparently arisen, the public defender's office had not yet been relieved of its duty to protect appellant's interests. A substitution of counsel is not effective on the unilateral decision of the erstwhile attorney to withdraw, but must be approved by the client or by the court upon noticed motion. (Code Civ. Proc., § 284; see also Cal. Rules of Court, rule 48(b); Rules Prof. Conduct, rule 2- 111.) The need to obtain leave to withdraw applies to attorneys who wish to be relieved due to conflicts of interest. (*Leverson v. Superior Court* (1983) 34 Cal. 3d 530; *Uhl vs. Municipal Court* (1974) 37 Cal.App.3d 426.) The court's approval of such a motion cannot be taken for granted. (*In re Jackson* (1985) 170 Cal. App. 3d 773.) Unless and until the motion is granted, the opposing party must recognize the former attorney. (Code Civ. Proc., § 285; *People vs. Bouchard* (1957) 49 Cal. 2d 438.)

would be used against him. Ms. West and Mr. Stephens did not give him any substantive advice on the subject. Had appellant's own lawyer been there, the legal issues which appellant was forced to face on his own, would have been properly and fully addressed. Instead, facing multiple capital charges, defendant was forced to go through this critical pretrial procedure without "the guiding hand," or even the presence of, his attorney.

Here, once the public defender filed the declaration of conflict, the prosecution treated appellant as though he were representing himself. This was belied by appellant's insistence that Mr. Hymer was his attorney. It must have been apparent to the officers that neither appellant nor Ms. West nor Mr. Stephens felt that appellant's attorney was present. If there was confusion on this point, "the government ha[d] an affirmative obligation to ensure counsel's presence at the lineup." (*United States v. LaPierre* (9th Cir. 1993) 998 F.2d 1460, 1463.) Thus, the police should have taken all reasonable measures to resolve the matter before proceeding with the lineup. Instead, the state's desire to get on with the event overrode all other considerations.

The state had no reason for going forward with the lineup on November 4. Having failed to show that it would be prejudiced by a brief delay, in this case it was just two days, the state had no grounds for forcing appellant to proceed with the lineup without his attorney. The lineup was

particularly critical in appellant's case. The lineup solidified the courtroom identifications of numerous trial witnesses, many of whom had previously *not identified* appellant when shown his photograph close to the time of the crimes.[85] The physical lineup was held two months after appellant's photograph had already been widely circulated in the print and television media throughout the Bay Area. Appellant thus became the well-recognized murder suspect after it had been learned that he had sold Anna Constantin's gold bracelet to the coin shop. (RT 2899, 2950, 3524, 3900.)

C. The Error Was Not Harmless Beyond a Reasonable Doubt

Pursuant to appellant's motion, not only should evidence of the lineup itself have been suppressed, but subsequent identifications should not have been introduced without proof beyond a reasonable doubt that the later identification had a source independent of the illegal lineup. (*United States v. Gilbert* (1967) 388 U.S. 263; *People v. Banks* (1970) 2 Cal. 3d 127; *People v. Fowler* (1969) 1 Cal. 3d 335.)

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[85]For example, on August 18, 1987, a sheriff's deputy showed Joseph Armstrong a group of six photos which included appellant's picture. Mr. Armstrong was asked to identify the man he saw walking in his neighborhood three days earlier, but could not do so. (RT 2825.) Between that time and the physical lineup, appellant's photo was widely circulated. Although Mr. Armstrong denied that he had seen those pictures, he admitted reading the paper and watching the news (RT 2834, 2836), and by November 4, picked appellant from the lineup. Mr. Armstrong was also reminded that when he testified at the preliminary hearing, he admitted to having seen a composite picture of the suspect prior to his identification. (CT 1974-1975.)

Unlike the substitute counsel in *People v. Carpenter* (1997) 15 Cal.4th 312, whom this Court found to have actively participated in the lineup (*id.* at p. 368), the two attorneys who appeared at appellant's lineup had no involvement in the process other than to urge the police to wait until appellant's counsel could be present. Although Mr. Stephens understood he was there to see that the lineup was conducted fairly, it is apparent from the foregoing discussion that he was not actually in a position to carry out that mandate, given his lack of familiarity with appellant's case.

Appellant concedes that this Court has routinely approved the use of unprepared substitute counsel at lineups, even in capital cases. (See, e.g., *People v. Carpenter, supra*, 15 Cal.4th 312.) However, that practice has apparently derived from a misinterpretation of the Supreme Court's suggestion that a substitute might suffice when obtaining the presence of "a suspect's own counsel would result in prejudicial delay." (*United States v. Wade, supra*, 388 U.S. at p. 237.) Over time, this possible exception has apparently swallowed the rule. The rule *requires the presence of one's own counsel.* No exception applies here. Under *Wade*, the pretrial lineup violated appellant's Sixth Amendment right to counsel. Under *Gilbert, supra*, 388 U.S. 263, all identifications which were the fruit of that illegal lineup should have been excluded.

The testimony of people who claimed to have seen appellant in the neighborhoods where some of these crimes took place was the heart of the prosecution's case. Appellant had a right to his attorney's presence to test the suggestiveness of the lineup and compare the appearance of the participants to the descriptions provided by the witnesses before that time. Judge Hora correctly found that there was no reason why the lineup could not have waited until appellant's counsel could be present. Appellant, on his own, did all he could to protest the lineup under the circumstances. Since the state cannot prove beyond a reasonable doubt "that the error complained of did not contribute to the verdict obtained," (*Chapman v. California,* (1967) 386 U.S. 18, 24), appellant's conviction and death sentence must be reversed.

VI.

THE TRIAL COURT'S REMOVAL OF JUROR ANDERSON WAS IMPROPER AND DEPRIVED APPELLANT OF HIS RIGHT TO A JURY TRIAL, REQUIRING REVERSAL OF THE CONVICTIONS.

A. Factual Background

On February 25, 1992, a week after the jury had been sworn, and after several guilt phase witnesses had already testified, the bailiff informed the judge that one of the jurors, Mrs. Susan Folks, had complained that a fellow juror, Mr. Ronald Anderson, had smelled of alcohol during the preceding week of trial. (RT 3118.) In an in-chambers discussion, Mrs. Folks reported that juror Anderson, who was seated next to her in the jury box, smelled of alcohol every day. Except for that, she made no other observations about his behavior. (RT 3120.) Following her interview, the judge and counsel agreed that they would all be more attentive to Mr. Anderson's demeanor that day, and then bring him into chambers for questioning. (RT 3122.)

At the close of the day, the judge explained to Mr. Anderson that "one or more members of the jury may have consumed alcoholic beverages" during the preceding week of the trial. (RT 3265.) The judge then asked Mr. Anderson if he or any other jurors had consumed alcohol "during the course of the court day itself." (RT 3266.) Mr. Anderson replied

emphatically, "No way," adding that he was well aware that consuming alcohol during trial was inappropriate. He was then excused and the parties discussed the matter further.

The judge stated his observation:

> If there is a person who could have been more shocked at that statement, I cannot imagine who it would be than Mr. Anderson. . . . He appeared cold stone sober to me.
>
> I also made a point of watching him throughout the day perhaps more closely than I would have . . . I even was standing right next to him while the video was being played this morning, and I smelled nothing. I have observed nothing out of the ordinary, and . . . as far as I'm concerned there is absolutely nothing or no basis at this stage that I can see whereby I could find that he is unable to perform his duties or just anything other than to accept his statement that he is not drinking.

(RT 3267-3268.)

The prosecutor confirmed the judge's observations, stating that he had stood in the same location and had also detected no odor of alcohol. Although he observed Mr. Anderson with his "head down out of sheer boredom," during one of the examinations and possibly with his eyes closed briefly, the prosecutor was not concerned: "I'm sure it was that pause in the proceeding [and] he was probably bored at the end of the day." Defense counsel concurred and noted that Mr. Anderson had been following the proceedings "probably in some regard better than other jurors." The judge

concluded that Mr. Anderson had apparently been the "subject of some sort of rash accusation" and the matter was deemed concluded. (RT 3269.)

Two days later, however, the bailiff informed the court that Mr. Anderson was embarrassed and concerned and wanted to discuss his feelings with the judge in chambers. (RT 3407.) During that meeting, the judge explained to juror Anderson that the previous interview had been necessary but that no disrespect had been intended. The judge said that other jurors had been questioned as well, and that everyone had full confidence in Mr. Anderson's ability to continue as a juror. The court apologized and asked Mr. Anderson to return to the jury room. (RT 3408-3409.)

Juror Anderson responded by saying that he had been furious the day before and resented whomever had made the accusation against him. Not knowing who had made the claim - - the court, counsel, the bailiff or another juror - - had "shaken [his] faith." (RT 3410.) He seemed deeply concerned about his inability to face his accuser:

> In the past, when it came to serving any type of jury trial, I felt that if the defendant did not want to get up on the stand, and look his accuser in the eye and say, "I did not do it," I was prejudiced against him. . . . And here, something had occurred, I don't know when, where, how, but somebody, in my mind made an accusation against me. And I cannot look that same person in the eye and say, " . . . this did not occur and I want to know why you're making these allegations

against me."

(RT 3409-3410.)

Concerned that he would have to sit with the other jurors, thinking that one had accused him, Mr. Anderson thought it might possibly interfere with his duties as a juror. (RT 3412.) Defense counsel then explained the situation to Mr. Anderson:

> Jurors may or may not like each other. They may or may not get along. They may not agree. They may arrive at the same conclusion from different methodology. And that's all the system and oath requires. . . .[M]y bottom-line question is, when you get in deliberations, whatever may or may not have occurred, whatever your feelings may or may not be, could you decide what the facts are and apply them to the law, based on your own independent judgment here in court?

(RT 3412-3413.) Juror Anderson replied, "*Regarding Mr. Lynch's trial, yes, I could.* But as stated earlier, there's some sort of a thing going on here now." (RT 3413, emphasis added.) When the judge asked for Mr. Anderson's assurance that he would be able to render a verdict in the case based solely on the evidence, Mr. Anderson replied, "I'd make it my utmost to try, utmost attempt, but I would want both counsel to know that I do harbor a lot of resentment right now at this time, not at either counsel [but] I do harbor a lot of resentment." (RT 3414.)

Mr. Anderson went on to explain that he had been involved in labor negotiations and arbitration cases since the mid-1970's and that he knew

that the rules were very clear with respect to drinking. "And that's what is most upsetting to me, that someone accused me of violating those rules." (RT 3416.) While he assured the court that he would carry out his duties, he admitted he felt a bit "tainted." (RT 3417.) Both the prosecutor and the defense attorney assured Mr. Anderson that he had been selected because they believed him to be fair and impartial and that nothing had occurred which had changed their minds. The prosecutor remarked that he was "totally delighted to have [Mr. Anderson] remain" and said he could see no reason to disqualify him. (RT 3419.)

Finally, the judge said, "We want to be sure you will be able to give both sides in this trial a fair trial, nothwithstanding this incident." Mr. Anderson replied, "I will give it one hundred percent, gentlemen." (RT 3420.) Mr. Anderson was then sent back with the rest of the jurors.

After a brief discussion, the trial court noted that no one had made a challenge to the juror and added, "I don't invite a challenge this morning." (RT 3421.) Both counsel agreed to review the transcript of the in-chambers proceeding and report back to the judge.

Five days later, on March 3, 1992, the parties met again with the judge to discuss the Anderson matter further. The prosecutor reported that he had observed Mr. Anderson with his head down and his eyes closed

during the cross-examination of one of the prosecution's witnesses. Based upon that as well as Mr. Anderson's statement that he felt tainted, the prosecutor challenged juror Anderson for cause. (RT 3727.) Defense counsel objected, noting that juror Anderson had indicated he would be fair and "give it one hundred percent." In addition, defense counsel noted that Mr. Anderson was a light complected black man, one of three black persons on the jury, and that cross-racial identification would be a significant issue in the case. Finally, appellant himself had specifically requested that his attorneys not agree to dismissing juror Anderson. For all of those reasons, the defense objected to the challenge. (RT 3728-3729.)

The trial court found that cause existed for removing juror Anderson and proposed that he be notified at the close of the proceedings that day:

> The juror was shaken and furious at this inquiry concerning possible misconduct. . . . He did say. . . that he might be unable to decide the case solely on the evidence. . . . He harbors a lot of resentment, although he did say he'd try to be as fair as possible to this. And to this record must be added the court's observation of his demeanor both in and out of chambers. While in chambers, he appeared very upset and visibly shaken and angry . . . .
>
> As I feared, this incident has taken on a life of its own. During sessions in court following the second in camera with him, he, at times, did not appear to be paying attention. Rather, he would sit with his arms folded and stare straight ahead not looking at the witness who was testifying or at counsel as they asked questions. At other times, he appeared to have his head down. *In fairness, most of the time during*

the presentation of evidence he did seem to act appropriately.

> In conclusion, I'm satisfied that cause exists to excuse Mr. Anderson in that his state of mind is such that I have grave concerns and doubts that he will be able to act with entire impartiality and without prejudice to the substantial rights of either party. Accordingly, the challenged is allowed.

(RT 3729-3730, emphasis added.)

The trial court proposed that juror Anderson remain on the jury for that day (March 3), but that he be notified of his dismissal at the end of the court day. (RT 3730.) The record does not reveal when or where the removal actually took place, but on the morning of March 5, 1992, the judge informed the rest of the jury that juror Anderson had been removed and replaced with alternate juror Cheryl Goldie. (RT 3933.)

B. The Trial Court Abused Its Discretion In Removing Juror Anderson Without Good Cause.

Once a juror has been sworn, the trial court has limited authority to discharge that juror. Penal Code section 1089, which governs removal of a juror by the court, provides, in relevant part:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or *upon other good cause shown to the court is found to be unable to perform his duty,* or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.

(Emphasis added.)

In *People v. Bowers* (2001) 87 Cal.App.4th 722, 729, the Court of Appeal traced the history of this statute, beginning with its enactment in 1895, when the only grounds for substitution of a juror were illness or death of the juror. In 1933, after this Court decided *People v. Howard* (1930) 211 Cal. 322, the statute was amended to allow for discharge in one more specific situation: when "a *juror requests a discharge* and good cause appears therefor. . . ." (*Bowers, supra,* 87 Cal.App.4th at p. 729, emphasis added.) As more situations arose in which it appeared desirable to discharge a juror for reasons other than those three situations, the Legislature amended the statute to allow for those exceptional cases.

Thus the statute, as amended in 1949,[86] *limits the authority of the trial court* to remove a juror to just these four circumstances: (1) death or (2) illness of the juror; (3) at the juror's request if good cause is shown, or (4) if "upon other good cause shown to the court" the juror is "unable to perform his duty." (Pen. Code, § 1089.) In the context of these historical limitations, California's process for substituting jurors "preserves the essential features of the jury trial required by the Sixth Amendment and due

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[86]Since appellant's trial in 1992 the statute was amended again. However, the 1949 version, in effect at the time of the trial, is the one applicable here.

process clause of the Fourteenth Amendment." (*Bowers, supra*, 87 Cal. App.4th at p. 729, citing *Miller v. Stagner* (9th Cir. 1985) 757 F.2d 988, 995.) Although "good cause" is not defined in the statute, the legislative history reflects

> a definite unwillingness on the part of the Legislature to either adopt a practice of unrestricted substitution of jurors or to authorize a wide discretion in the trial court beyond that required to apply the facts shown to any one of the four causes for substitution which are set forth in the statute.

(*People v. Bowers, supra,* 87 Cal.App. 4th at p. 730, quoting *People v. Hamilton* (1963) 60 Cal.2d 105, 126.)

Accordingly, when the trial court has been put on notice that good cause to discharge a juror may exist, the court should make whatever inquiry is reasonably necessary to determine whether the juror should be discharged. The decision whether to investigate the possibility of juror bias, incompetence, or misconduct - - like the ultimate decision to retain or discharge a juror - - rests within the sound discretion of the trial court. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1347-1348; *People v. Beeler* (1995) 9 Cal.4th 953, 980.) However, it is well settled that such discretion is *not unbridled* and, before a juror may be dismissed, "*the juror's inability to perform his functions must appear as a 'demonstrable reality,'*" (*People v. Williams* (1997) 16 Cal.4th 153, 231, quoting *People v. Van Houten*

(1980) 113 Cal.App.3d 280, 288, emphasis added.) Furthermore, "court[s] must not presume the worst" of a juror. (*Bowers, supra*, 87 Cal. App.4th at p. 729.)

In applying the facts of the present case to the applicable legal standards, it is apparent that the trial court did not have good cause to dismiss Ronald Anderson. Neither of the court's two stated reasons - - Mr. Anderson's emotional upset and his alleged inattentiveness - - constitutes good cause for the discharge of a sworn juror.

1. A Juror Is Not Subject To Discharge For Being Angry, Upset And "Visibly Shaken."

Appellant agrees that the record in this case adequately supports a finding that Ronald Anderson was angry, upset and "visibly shaken" after being examined about whether he had been drinking during the trial. However, appellant strongly disagrees that the trial court had statutory authority to remove Mr. Anderson for that reason. On the contrary, recent California decisions hold otherwise.

In *People v. Hernandez* (2003) WL 21744312 (unpub. opn.), it was "undisputed that Juror No. 8 was agitated and upset during questioning" by the court, but that did not support a finding that she could not carry out her duties as a juror. The *Hernandez* court acknowledged that a juror who has been "isolated from the panel and subjected to questioning by the court and

counsel" might well be annoyed or insulted by the ordeal. (*Id.* at p. 6.) But, as with the juror in the *Hernandez* case, Mr. Anderson, despite his agitation, promised to give the case "one hundred percent" and assured the court and the parties that "regarding Mr. Lynch's trial" he could set aside his feelings and decide the facts and apply them to the law, as he was required to do. (RT 3413.)

While the fact of Mr. Anderson's anger and frustration appears in the record as a "demonstrable reality," his "inability to perform as a juror," because of that anger, clearly does not. Although Mr. Anderson at one point said he "possibly" would have difficulty focusing on the evidence because of his concern that another juror might have something against him personally (RT 3412), that comment was overridden by later statements that he *would* do his duty as a juror with respect to Mr. Lynch's trial (RT 3413), that he would "try his utmost" (RT 3413), that his resentment was not directed at either counsel (RT 3413), that he would try to be as fair as possible, and that he would "give it one hundred percent." (RT 3420.)

Given that Mr. Anderson expressed no bias to one side or the other, that his anger over being singled out was both understandable and typical, and that he repeatedly promised to make every effort to carry out his duties and decide the case based upon the evidence, there simply was no rational

basis for the trial court's conclusion that Mr. Anderson's emotional upset would cause him to act with prejudice or partiality. Since the law requires that the juror's inability to perform as a juror appear in the record as a "demonstrable reality" it cannot be said that the trial court met that standard with respect to court's first stated reason.

2. A Juror Is Not Subject To Discharge For Occasional Periods Of Inattentiveness.

The second reason stated by the trial court for discharging Mr. Anderson was that "at times" he appeared not to be paying attention, and "at other times" appeared to have his head down. The record does not support a finding that Mr. Anderson was ever asleep, just that he appeared inattentive at times. But, even at that, the prosecutor initially defended Anderson, noting that there had been a pause in the proceedings and that he had probably become bored "at the end of the day." (RT 3269.) The defense likewise observed that Anderson was following along "in some regard better than other jurors." (RT 3269.) Similarly, the court found he was "at least as attentive as others." (RT 3269.) Even after Mr. Anderson had expressed his anger and resentment in the second chamber session, the trial court observed that "most of the time" Mr. Anderson acted appropriately during the presentation of the evidence. (RT 3730.) The record does not support a finding that inattentiveness made him unable to

perform his duties as a juror.

In *People v. Bowers, supra*, 87 Cal.App.4th at p. 731, the court stated that even when a juror has been accused of sleeping, he must not be discharged "unless there is convincing proof that the juror actually slept during trial." In *Bowers*, the juror was found to have been "inattentive at times" (*id.* at p. 730) during deliberations, but that was not enough to justify his discharge. (See also *People v. Bradford, supra,* 15 Cal.4th at pp. 1348-1349 [record revealed that juror had fallen asleep briefly on two consecutive days of the trial, but trial court had no duty to even conduct an inquiry absent "inattentiveness over a more substantial period."] .) Although misconduct can constitute grounds to believe that a juror will be unable to fulfill his or her functions as a juror, "such misconduct must be must be "serious and wilful." (*Id.* at p. 729, quoting *People v. Daniels* (1991) 52 Cal.3d 815, 864.)

In the present case, there is no evidence that juror Anderson was ever sleeping, only that at times he had his head down, or appeared not to be paying attention. If a juror may not be discharged without convincing proof that he is actually sleeping during trial, and even then, the sleeping must be shown to occur over a "more substantial period" than briefly during a couple of days, the record in this case obviously does not meet that burden.

Most importantly, the record simply does not demonstrate that juror Anderson was unable to perform his duties. Rather, the record fully supports a finding that he indeed *was performing his duties* as he promised to do many times. Because the trial court allowed Mr. Anderson to stay on the panel throughout the entire day, even after it had ruled to discharge him, this Court is in a unique position to decide the issue, not based upon speculation, but upon actual observation, as described by the trial judge. Even after the trial court concluded that juror Anderson *would not be able to perform his duties,* it still observed that *in fact* he had been acting "appropriately," most of the time during the presentation of evidence. In other words, the trial court observed the juror's behavior, found it appropriate and discharged him anyway.

Even more surprisingly, the trial court concluded that it had "grave concerns" about whether Mr. Anderson would be able to act with "entire impartiality and without prejudice" to the rights of the parties. That statement implies that Mr. Anderson had demonstrated some sort of bias towards one side or the other. But on that score there is absolutely nothing in the record to support such a conclusion. The fact that the prosecutor moved to dismiss Mr. Anderson is the only indication that at least one person, the prosecutor, believed that Mr. Anderson may have been biased

against the prosecution's side, perhaps because, as the defense noted, Mr. Anderson was a light complected black man in a case where cross-racial identification was a critical issue. The prosecutor also may have speculated that Anderson would be sympathetic to appellant who is also black. But the fact that the prosecution essentially used a peremptory challenge to remove a juror because of his race certainly does not establish that the juror himself was partial to one side or the other. As in *People v. Williams* (1997) 16 Cal.4th 153, 231, there is no evidence that the challenged juror had prejudged the issues. Accordingly, there was no duty on the part of the trial court "to conduct an inquiry, let alone to discharge [the juror]" (*Ibid.*, citing *People v. Davis* (1995) 10 Cal.4th 463, 547) on the grounds he could not be impartial.

The trial court ignored the law and discharged Anderson even though the record strongly supported findings that Mr. Anderson (1) had not been drinking; (2) was "at least as attentive" as others on the jury (RT 3269); (3) said he would decide the facts and apply them to the law based on his own independent judgment (RT 3413); (4) stated he harbored no resentment towards either the prosecution or the defense (RT 3413); and (5) promised to "give it one hundred percent" in seeing that both sides received a fair trial. (RT3420.) Although the judge told Mr. Anderson, "[We have] the

utmost confidence that you will be able to continue to fulfill your role as a trial juror in this case and in accordance with your oath (RT 3420)," without any more evidence to the contrary, Anderson was removed.

There is no basis for finding that Ronald Anderson's "inability to perform as a juror" "appears in the record as a demonstrable reality." Instead, the record demonstrates that after Mr. Anderson promised to give it one hundred percent, he acted appropriately during the presentation of evidence "most of the time." Removal of Anderson was error.

C. Reversal is Required

The improper removal of the juror during the trial in this case substantially interfered with appellant's rights to an impartial jury, reliable guilt and penalty determinations, due process and equal protection as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 15, 16, and 17 of the California Constitution. Reversal is required for these constitutional violations.

In jury selection in a capital case, exclusion of prospective jurors in violation of the principles of *Witherspoon*[87] and *Witt*[88] requires automatic reversal of the penalty determination. (*Gray v. Mississippi, supra*, 481 U.S.

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[87] *Witherspoon v. Illinois* (1968) 391 U.S. 510.

[88] *Wainwright v. Witt* (1985) 469 U.S. 412.

at pp. 666-667.) Similarly, exclusion of prospective jurors in violation of *Batson*[89] and *Wheeler*[90] requires reversal. (*People v. Silva* (2001) 25 Cal.4th 345, 386.) Given that such prosecution challenges resulting in improper exclusion of prospective jurors in the jury selection stage require automatic reversal, the remedy for improper removal of actual jurors should be at least as stringent.

A showing of prejudice on appeal might be appropriate where the trial court *sua sponte* excused a juror improperly. But where the prosecution challenges a juror without a legally adequate basis, prejudice to the defendant should be presumed and reversal should be automatic. As with the exercise of a challenge for cause in violation of *Witherspoon* and *Witt* because the prosecutor claims improperly that the prospective juror cannot impose the death penalty, a prosecutor' s improper challenge for cause of an actual juror should be at risk of reversal. Otherwise, prosecutors will be able to tamper with the jury makeup with impunity because appellate records will often be devoid of sufficient facts to establish prejudice. In cases such as the present one, where the record fails to establish "as a demonstrable reality" that the juror could not perform his

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[89]*Batson v. Kentucky* (1986) 476 U.S. 79.

[90]*People v. Wheeler* (1978) 22 Cal.3d 258.

duties, the clear error should not be without a remedy.

Obviously, the prosecutor had a motive to seek removal of the juror. If the prosecutor had truly altruistic concerns about whether juror Anderson would pay attention and deliberate properly, the only legitimate response would have been to wait and see if those possible concerns developed into a demonstrable reality establishing good cause for removal. Instead, the prosecutor used somewhat equivocal statements by Anderson earlier in the process to challenge him for cause while ignoring the juror's later assurances that he would perform his duties and ignoring the observations by the trial judge and counsel that Anderson had indeed paid attention to the evidence at least as well as the other jurors. During the hearing to explore the potential grounds for discharge, the prosecutor even told Anderson when the discharge issue arose that "I don't see anything that has happened which would disqualify you." (RT 3418.) Despite this express disavowal of any legitimate basis for discharge, the prosecutor decided to challenge Anderson anyway raising an inference of some ulterior motive. This improper challenge allowed the prosecutor to revamp the jury to his liking. This tampering with a properly selected jury, over appellant's strong objection, infringed on appellant's constitutional rights.

It is well established that an accused has a "valued right to have his

trial completed by a particular tribunal" or "chosen jury." (*Wade v. Hunter* (1949) 336 U.S. 684, 689; *Crist v. Bretz* (1978) 437 U.S. 28, 35; see also, *Downum v. United States* (1963) 372 U.S. 734, 736; *Stone v. Superior* (1982) 31 Cal.3d 503, 516, fn. 7.) Although this Court held in *People v. Hernandez* (2003) 30 Cal.4th 1, 9, that this right does not implicate double jeopardy principles when a particular juror is improperly discharged, the Court did hold that the defendant was "entitled to the benefit of a reversal of his conviction by reason of the error in excusing the juror." (*Id.* at p. 3.) The Court upheld the reversal even though the record did not show that the improper discharge of the juror "gave the prosecutor any concrete advantage." (*Id.* at p. 9.)

In the absence of the requisite showing of good cause for removal of the juror, appellant was entitled to a verdict from his chosen jury that included juror Anderson. Reversal should be automatic due to the failure to establish such good cause.

But even if a showing of prejudice is required, appellant is still entitled to reversal. In objecting to Anderson's removal, defense counsel pointed out that a strong consideration was the issue of cross-racial identifications in the case. (RT 3422, 3729.) Appellant had expressed concerns to his counsel with the "racial aspects" of the case. (RT 3729.)

Anderson was one of only three blacks on the jury. (RT 3729.) Appellant himself is black. Under these circumstances, it is probable that the prosecutor viewed Anderson as more likely to favor the defense theory of the unreliability of the cross-racial identifications and more sympathetic to appellant in general. The removal of this black juror without legitimate basis also raises concerns of a violation of appellant's equal protection right that members of his own race would not be excluded from the jury on the basis of race. (*Batson v. Kentucky, supra,* 476 U.S. at p. 85.)

The prosecutor is likely to have also viewed Anderson as biased in favor of the defense for other reasons. In his juror questionnaire, Anderson responded that he "wasn't happy" about the then recent political movement to remove Rose Bird as Chief Justice of the California Supreme Court. (CT 5277.) In voir dire, Anderson explained that even though Chief Justice Bird was removed "because of her liberal views" on the death penalty, she did a lot of things he supported, especially in labor law. (RT 225.) Although Anderson stated he supported the death penalty, he also indicated that his support was not strong. When asked by the prosecutor to rate himself on a scale of 1-10 with "1" being a "Mother Theresa" type always willing to forgive and a "10" being a "Rambo" type always seeking an "eye for an eye" whether the killing was accidental or intentional, Anderson rated

himself as only a "6." (RT 221-222.) Anderson also stated that he did not view the death penalty as a deterrent to others. (RT 221.) When asked if he found any particular types of crimes particularly upsetting, Anderson responded, "Nothing seems surprising nowadays." (CT 5274; RT 225.) Asked to elaborate, Anderson explained that he felt "almost callous now" and not shocked by anything. (RT 221.)

Although the prosecutor indicated expressly to Anderson that he saw no ground for disqualification, the prosecutor's position changed after being given a few days to review transcripts. Any competent attorney would have reviewed not only the transcripts specifically pertaining to the hearings on the discharge issue, but also Anderson's jury questionnaire and voir dire testimony to gauge the juror's impartiality. While the prosecutor had originally accepted Anderson as a juror, such a review is likely to have caused second thoughts. Anderson's professed callousness, his view that the death penalty does not operate as a deterrent, his tepid support of the death penalty and opposition to the removal of former Chief Justice Rose Bird all may have led the prosecutor to doubt Anderson's willingness to impose the death penalty in this case. Those concerns coupled with potentially favorable views to the defense theory of unreliable cross-racial identification and sympathy to appellant in general because of race, as

identified by defense counsel, may have also caused the prosecutor concern on both the guilt and penalty determinations.

It is reasonably likely that the prosecutor used the improper discharge to exclude a juror he considered favorable to the defense. Such prejudicial error to obtain an advantage in the jury composition requires reversal.

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VII.

APPELLANT WAS DEPRIVED OF HIS RIGHT UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO BE PRESENT AT ALL OF THE PROCEEDINGS AGAINST HIM.

A. Factual Background

Appellant was excluded from at least thirteen separate proceedings which took place throughout the pendency of his capital trial, beginning with several proceedings involving the jury selection process[91] and continuing through penalty trial proceedings.[92] In each instance, the trial court failed to obtain from appellant a valid waiver of his right to be present at the proceedings.

During the guilt phase of the trial, appellant was not present when four in-chamber proceedings were held concerning seated juror, Ronald

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[91]Specifically, appellant was absent, on December 5, 1991 (RT 157), December 18, 1991 (RT 824), January 13, 1992 (RT 1421) and January 21, 1992 (RT 1997.) At each of these proceedings the prosecutor and the defense attorneys were making decisions as to which jurors would remain in the venire.

[92]Later in the trial, during the presentation of the prosecution's evidence, defense counsel twice asked for an in-chambers hearing to discuss the problem of media personnel interrupting the proceedings, distracting the jury, and causing a commotion while witnesses were testifying. Those in-chamber proceedings were held on February 21, 1992 (RT 2971), and February 28, 1992 (RT 3615-3616), and both times appellant was again excluded, the first time at the suggestion of the trial court. (RT 2971.)

Anderson. (See Argument VI, *supra*.) Two of those hearings took place on February 25, 1992 (RT 3118, RT 3265); another was held on February 27, 1992 (RT 3407), and the final hearing, held on March 3, 1992, resulted in the removal of juror Anderson from the jury. (RT 3724.)

Appellant was also absent from an all-day hearing, covering several matters, held on March 4, 1992, at the close of the prosecutor's guilt phase case-in-chief. (RT 3903-3927.) The morning session involved the admissibility of numerous trial exhibits, including the videotape of the TV news interview of Mrs. Herrick, and a defense motion pursuant to Penal Code section 1118.1 for a judgment of acquittal on counts 4, 5 and 6. The afternoon session dealt with the guilt phase jury instructions. Appellant missed all of the proceedings which took place that day.

Appellant was also absent on March 17, 1992, when an in-chambers discussion was held in response to a juror's question during guilt phase deliberations. (RT 4275.) He was also absent from an in-chambers discussion held on March 24, 1992 (CT 3387), which was never reported but which appears to have involved both the inconsistent Larson verdicts (see Argument XIII, *infra*) and discussions regarding penalty phase jury instructions. (RT 4291-4292.) Another hearing to discuss penalty instructions and resolve exhibit issues, on March 31, 1992, also took place

without appellant. (RT 4596-4607.)

In each instance in which appellant was not present his counsel purported to waive his presence on the record. In some cases the trial court *suggested* that defense counsel put the waiver on the record (RT 2970) and at other times the trial court asked counsel to confer with appellant and notify the court if appellant wished to be present. (RT 4292.) In most cases, however, the trial court simply asked if appellant's presence was waived, to which defense counsel would respond affirmatively. (See, e.g., RT 1997, 3616, 3724 and 3903.) At no time did the trial court obtain a written waiver from appellant of his right to be present at these hearings.

B. The Right To Be Present is Rooted in the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution and Article I, Section 15 of the California Constitution

A cardinal principle of our criminal justice system is that "after indictment found, nothing shall be done in the absence of the prisoner." (*Sturgis v. Goldsmith* (9th Cir. 1986) 796 F.2d 1103, 1108, quoting *Lewis v. United States* (1892) 146 U.S. 370, 372.) The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment. (*United States v. Gagnon* (1985) 470 U.S. 522, 526, citing *Illinois v. Allen* (1970) 397 U.S. 337, 338 ["One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to

be present in the courtroom at every stage of his trial."].)

It is well-recognized that even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a right under the Due Process Clauses of the Fifth and Fourteenth Amendments, "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745, quoting *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-106.) Nor does the right of presence attach only to proceedings which take place during the trial itself.

In *Sturgis v. Goldsmith* (9th Cir. 1986) 796 F.2d 1103, the defendant argued that the trial court's determination of his competency at a pre-trial hearing held in his absence violated his constitutional right. The Ninth Circuit agreed, holding that a competency hearing was "intricately linked to the fullness of a defendant's ability to defend against the charge." (*Id.* at p. 1108.) Citing *Bustamante v. Eyman* (9th Cir.1972) 456 F.2d 269, 271-74, the court noted that the interests underlying the right to be present at trial applied with equal force to defendant's competency hearing. In fact, the court stated that "The competency hearing was a *critical stage of Sturgis's trial*." (*Sturgis v. Goldsmith*, *supra*, 796 F.2d at p. 1109, emphasis added.)

Similarly, the California Constitution, article I, section 15, provides that:

> The defendant *in a criminal cause* has the right . . . to have the assistance of counsel for the defendant's defense, *to be personally present with counsel*, and to be confronted with the witnesses against the defendant.

(Emphasis added.) In using the words "criminal cause" rather than "criminal trial," the state Constitution extends the right of presence to the entire criminal cause, including pretrial and post trial proceedings, rather than just the trial itself. Like the federal courts, the California courts recognize that under *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-108, the due process right to be present at a criminal proceeding depends on whether the defendant's presence would "contribute to the fairness of the procedure." (See, e.g., *People v. Robertson* (1989) 48 Cal.3d 18, 60 ["Defendant's constitutional and statutory right to be present at the sentence modification hearing and imposition of sentence is not in dispute"] citing Cal. Const., art. I, § 15; *People v. Jackson* (1980) 28 Cal.3d 264, 309-310; Penal Code sections 977, 1043.)

Thus both the state and federal courts recognize the "character of the proceeding" (*Hegler v. Borg* (9th Cir. 1995) 50 F.3d 1472, 1477) must be evaluated to determine whether or not the defendant has a constitutional right to be present. The defendant must show that if he had he been present at the proceeding he would have had some "active role to play." (*Rice v.*

Wood (9th Cir. 1996) 77 F.3d 1138, 1141.)

> Stated in another way, 'When the presence of the defendant *will be useful, or of benefit to him and his counsel, the lack of his presence becomes a denial of due process of law.*'

(*People v. Jackson*, *supra*, 28 Cal.3d at p. 309, emphasis added, quoting *In re Dennis* (1959) 51 Cal. 2d 666, 673.) See also, *United States v. Clark* (2d Cir. 1973) 475 F.2d 240. [conviction reversed because defendant was not present at pre-trial suppression hearing where he might well have contributed to the proceeding]; *Stein v. United States* (9th Cir. 1962) 313 F.2d 518 [defendant's absence from in-chambers discussion re admissibility of co-conspirators' tape was error, though harmless because evidence embodied in tape was not admitted.].)

In the present case, many of the hearings from which appellant was excluded, were ones where his presence *would have been useful*, and both a benefit to himself and to his counsel. For example, appellant's presence would have been useful, and a benefit to his defense, at all four of the in-chambers hearings which involved juror Ronald Anderson. Ronald Anderson had been accused by another juror of having had alcohol on his breath during the first week of trial, prompting the court to bring that juror

into chambers to discuss the matter.[93] At this first hearing, all present agreed that they would watch Mr. Anderson closely throughout the day's proceedings, and then speak with him. Had appellant been included in that discussion he would have understood just exactly what type of conduct to look for that day, and could have assisted in the process along with his counsel and the court. While his own counsel was busy keeping track of testimony and conducting cross-examination, appellant himself could have been watching the juror, observing his conduct and reporting back to trial counsel. Appellant could have been a useful participant in these proceedings, but instead he was kept out of the conversation altogether.

At the end of the day, the juror Ronald Anderson was questioned in chambers, and once again appellant was excluded. Had appellant been present, it may very well have had an impact on the process. For one thing, juror Anderson and appellant are both African-American men. Having someone of one's own race present might very well have helped Mr. Anderson feel less threatened by what he later perceived to be an accusation which he took personally. Appellant's presence may well have changed the dynamics during the in-chambers conferences and, in turn, changed Mr. Anderson's perceptions.

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[93]The removal of juror Ronald Anderson is discussed with full citations to the record in Argument VI, *supra*.

Two days later, at Mr. Anderson's request, another in-chambers hearing was held to discuss the matter further. Appellant was once again excluded. At this conference juror Anderson was quite upset. When the juror was released from the chambers, the attorneys discussed the meeting with the judge and expressed reservations about the juror. Had appellant been present he could have actively participated in the process. Given the opportunity to express his feelings about the juror immediately, appellant would have arguably had a greater influence on his attorney when the time came to make the case for retaining Mr. Anderson on the jury.

Instead, appellant's viewpoint that he wished to keep Mr. Anderson on the jury was never expressed on the record until five days later, when the parties met again with the judge to discuss the matter. Appellant's position, that he was opposed to removing Anderson, was stated for the record but little more was said. (RT 3728-3729.) Although no one had ever produced any credible evidence that Mr. Anderson had been drinking during the trial, and despite repeated statements by all of the parties and the court that they saw no signs of drinking, the court ruled to excuse Mr. Anderson from the panel. Anderson's removal appeared to have been predicated solely on Anderson's poor reaction to having been falsely accused.

Appellant had a federal constitutional right to be present at this

hearing, where "his presence would [have] contributed to the fairness of the procedure." (*Kentucky v. Stincer, supra*, 482 U.S. at p. 745; *Faretta v. California, supra*, 422 U.S. at p. 819, fn. 15 [accused entitled "to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings"].) Had appellant been present throughout this process, where he would have been in a position to fully participate, observe, and offer suggestions to his counsel, it is quite likely that the outcome would have been different and juror Anderson might well have been allowed to remain on the panel. In any event, there can be little doubt that appellant had a right to be present at this important stage of his capital trial, particularly where it can be demonstrated that his presence would have been useful, and a benefit to both himself and to his counsel.

The same can be said of the other hearings from which appellant was excluded. Appellant was absent when jury selection decisions were being made (see fn.91, *supra*), when arguments were being made regarding the admission of crucial pieces of evidence and when a deliberating juror had questions about the verdict form and the failure to reach agreement on certain issues. While any of these proceedings obviously *could be conducted* without appellant present, as indeed they were, that is not the question. The critical question is whether or nor appellant's presence would

have been a benefit to himself or to his counsel. (*Rice v. Wood, supra*, 77 F.3d at p. 1141.)

Appellant had sought to represent himself prior to the start of the trial and had filed his own pleadings in support of the *Faretta* motion. (See Argument I, *supra*.) Many times throughout the trial appellant demonstrated that he was interested, alert, involved and wished to be an active participant in the proceedings. Nevertheless, his presence was waived on thirteen separate occasions, by his counsel, in violation of the statutory requirements for a capital defendant's presence at his own trial. The fact that these proceedings did not involve the presentation of sworn testimony is irrelevant. As the Ninth Circuit has recently ruled, a criminal defendant has a constitutional right to be present during many different types of proceedings, including proceedings such as the readback of testimony to a jury, where it would seem that there is little opportunity or even need for input from the accused. (*LaCrosse v. Kernan* (9th Cir. 2000) 211 F.3d 468, 474; *Hegler v. Borg* (9th Cir. 1995) 50 F.3d 1472, 1476-77.) Moreover, the defendant "must personally waive his right to be present at the readback." (*Lacrosse v. Kernan, supra*, 211 F.3d at p. 474, citing *United States v. Kupau* (9th Cir. 1986) 781 F.2d 740, 743.)

Given the nature of the proceedings from which appellant was

excluded, including several related to jury selection and jury deliberation, as well as a motion for judgment of acquittal on several counts, it cannot be said that appellant's presence at these hearings would have been useless or of no benefit to himself or his counsel.

C. Appellant Had a Statutory Right to Be Present At These Hearings. His Attorney's Oral Waiver, Made Outside of His Presence, Did Not Satisfy the Statutory Requirements.

California Penal Code section 977, subdivision (b)(1), states in pertinent part:

> In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. *The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided by paragraph (2).* (Emphasis added.)
>
> Paragraph 2 provides that:
>
> The accused may execute a *written waiver of his or her right to be personally present, approved by his or her counsel, and the waiver shall be filed with the court.* However, the court may specifically direct the defendant to be personally present at any particular proceeding or portion thereof. (Emphasis added.)

The statute then sets forth the form which must be substantially followed in order to comport with the waiver requirement.

Penal Code section 1043 provides that a felony defendant "shall be personally present at trial," (Pen.Code, § 1043, subd. (a)), but also provides that the trial may continue in the defendant's absence if (1) he is persistently disruptive; or (2) if he is voluntarily absent (except in a death penalty case). In any case, a felony defendant, including one in a capital case, may waive his right to be personally present at any stage of the trial if he "waive[s] his right to be present in accordance with Section 977." (Pen. Code, § 1043, subd. (d).)

> This Court has held that these two sections, when read together, permit a capital defendant to be absent from the courtroom only on two occasions: (1) when he has been removed by the court for disruptive behavior under section 1043, subdivision (b)(1), and (2) when he voluntarily waives his rights pursuant to section 977, subdivision (b)(1).

(*People v. Jackson* (1996) 13 Cal.4th 1164, 1210.) Moreover, the "Legislature evidently intended that a capital defendant's right to voluntarily waive his right to be present be severely restricted." (*Id.* at p. 1211.)

Thus, the trial court erred in allowing several critical hearings to proceed without appellant being present and without obtaining a written waiver, filed in open court. Not only was appellant's presence constitutionally required, but the mandatory language of Penal Code sections 977 and 1043 creates a substantial right which may not be arbitrarily abrogated by the state without violating the Due Process Clause

of the Fourteenth Amendment. (See *Vansickel v. White* (9th Cir. 1999) 166 F.3d 953, 957; see also *Moran v. Godinez* (9th Cir.1994) 57 F.3d 690, 698 ["the denial or misapplication of state procedures that results in the deprivation of a substantive right will implicate a federally recognized liberty interest."].) In the present case, appellant was unquestionably deprived of his substantive right to be present at all proceedings in which his participation may have had a bearing on the outcome of the proceedings. Appellant was deprived of this right as a direct result of the trial court's failure to abide by the plain mandatory language of these two statutes.

Although this Court has held that sections 977 and 1043 do not require the defendant's presence, or a written waiver, unless the proceedings bear a "reasonable, substantial relation to [the defendant's] opportunity to defend the charges against him" and that it is the defendant's burden to demonstrate this prejudice (*People v. Ervin* (2000) 22 Cal.4th 48, 74), appellant has met that requirement here.

This Court has held that a defendant may waive his right to be present by engaging in disruptive conduct, (*People v. Price* (1991) 1 Cal.4th 324, cert. denied, 113 S.Ct. 102; *People v. Sully* (1991) 53 Cal.3d 1195, cert. denied, 112 S.Ct. 1494), or by *personally* asking the court to be excused from proceedings, (*People v. Pride* (1992) 3 Cal.4th 195, cert.

denied, 113 S.Ct. 1323), but appellant did neither here. This Court has only permitted defense counsel alone to waive the client's right to be present, when the proceeding was one "in which defendant and his counsel have no significant role." (*People v. Thompson* (1990) 50 Cal.3d 134, 175.) The hearings in question were all ones which required the presence of *both* appellant and his counsel. The court committed error by not ensuring that appellant was present at these critical proceedings or, in the alternative, obtaining a valid personal waiver from appellant pursuant to the statutory requirements.

The failure of the trial court to abide by Penal Code sections1043 and 977, mandating appellant's presence at this proceeding when there is no written waiver, implicates a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by the state. Appellant's conviction and death sentence must be reversed.

D. Appellant Did Not *Personally* Waive His Constitutional Right to Be Present And His Counsel's Waiver, Outside of Appellant's Presence, Was Insufficient as a Matter of Law.

Although a criminal defendant can waive a constitutional right, "[t]he right 'may be waived only by voluntary and knowing action.'" (*Carter v. Sowders* (6th Cir. 1993) 5 F.3d 975, 981 quoting *Boyd v. Dutton* (1972) 405 U.S. 1, 2-3; see also, *People v. Robertson* (1989) 48 Cal.3d 18,

61.) Whether the waiver has been made knowingly and intelligently "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

Although a criminal defendant may, through disruptive behavior, voluntarily forfeit his right to be present (*Illinois v. Allen, supra*, 397 U.S. at p. 343), some courts have held that, short of this type of conduct, the defendant *cannot* waive his right to be present at a capital trial. (*Bustamante v. Eyman, supra*, 456 F.2d at p. 274.) Many courts have held that, in any event, *defense counsel* cannot effectuate a waiver in the client's absence. (*United States v. Felix-Rodriguez* (9th Cir. 1994) 22 F.3d 964, 967; *Larson v. Tansy* (10th Cir. 1990) 911 F.2d 392, 396; *Bustamante v. Eyman, supra*, 456 F.2d at p. 274; *United States v. Gordon* (D.C. Cir. 1987) 829 F.2d 119, 124-126; *Proffitt v. Wainwright* (11th Cir. 1983) 706 F.2d 311, 312, cert. denied, 464 U.S. 1002, 1003 (1983); *Cross v. United States* (D.C. Cir. 1963) 325 F.2d 629, 631-33.) At the very least, there must be some evidence from the record that the defendant knew and understood the nature of the right he was waiving and that his waiver was voluntary. (*United States v. Nichols* (2d Cir. 1995) 56 F.3d 403, 416.) Consequently, even when the waiver is expressly made before the court, the court should

not accept the waiver unless it is satisfied that the defendant actually understood the significance and consequences of a particular decision and that the decision was uncoerced. (*Ibid.*, citing *Godinez v. Moran* (1993) 509 U.S. 389, fn. 12.)

Here, in most cases, appellant was locked in his cell when his attorneys announced his supposed waiver. His attorneys did not explain appellant's absence, nor did the court make any inquiry about the circumstances of this purported waiver. Consequently, the record is silent as to whether appellant was fully informed of his constitutional rights, whether he understood the nature of the hearing that was about to take place, whether he was told how his presence could be of use to his defense, or whether, with a full understanding of his rights, he voluntarily relinquished his right to participate. Under these circumstances, it cannot be said that counsel's purported waiver, outside of appellant's presence, was valid.

In *Carter v. Sowders, supra,* 5 F.3d 975, the court found there had been no waiver by counsel where defense counsel informed his client by letter of a scheduled deposition and told the client that he *might* wish to be present. The client's failure to attend was not deemed a waiver because no evidence in the record established that (1) Carter had been informed of his

constitutional right to attend, (2) that Carter was *encouraged* to attend or (3) that Carter *understood the consequences* of his failure to appear. In the absence of such a showing, the court held that there could be no finding of a knowing and intelligent waiver. (*Id.* at p. 981.)

That is precisely the situation here. Appellant had a constitutional right to be present at these hearings. For reasons that are not clear, defense counsel purported to waive appellant's presence. However, in each instance the trial court failed to satisfy its obligation to ascertain the circumstances surrounding this alleged waiver. Thus, there was no valid waiver. Appellant's absence from these proceedings unconstitutionally deprived him of his right to participate in his own defense and requires reversal of his conviction and death sentence.

E. It Was Prejudicial Constitutional Error to Permit These Hearings to Proceed Without Appellant. The Convictions and Death Sentence Must Be Reversed

The right to be present at critical proceedings is recognized for its own sake. The interest at stake is not only the defendant's interest, but also the societal interest in avoiding "the loss of confidence in courts as instruments of justice, which secret trials would engender." (*Badger v. Cardwell* (9th Cir. 1978) 587 F.2d 968, 978, quoting *United States v. Gregorio* (4th Cir. 1974) 497 F.2d 1253, 1258 and fn. 10.) For this reason,

when this right is violated, the violation constitutes structural error that is prejudicial per se.

For example, in *Campbell v. Rice* (9th Cir. 2002) 302 F.3d 892, the defendant's due process rights were violated when he was excluded from an in-chambers hearing involving the trial judge, defense counsel and the prosecutor, at which the trial judge "considered, on the record, defense counsel's conflict of interest as disclosed by the prosecutor." (302 F.3d at p. 894.) The Ninth Circuit Court of Appeals concluded that this violation of the defendant's right to be present was "a structural error that was prejudicial per se." (*Ibid.*)

In reviewing what took place at the in-chambers hearing, the court found that Campbell's presence "would [have] contribute[d] to the fairness of the procedure." (*Campbell v. Rice, supra,* 302 F.3d at p. 899, quoting *Kentucky v. Stincer, supra,* 482 U.S. at p. 745 [internal quotation marks omitted; brackets in original].)

> If Campbell had been present at this conference, or had the trial court appointed another attorney to represent Campbell during the conference, Campbell or his appointed counsel could have asked questions to more fully flush out the nature of [defense counsel's] conflict. Because Campbell was never informed of the conflict, Campbell could neither assert his objections to [defense counsel's] continued representation or waive his right to conflict-free counsel. Accordingly, we conclude that Campbell's due process right to be present at the conference was violated.

(*Campbell v. Rice, supra,* 302 F.3d at p. 899.)

The appellate court also concluded that Campbell's constitutional deprivation fit within "the class of cases in which prejudice must be presumed" (*ibid.*); that is, cases where the absence of the defendant undermined the integrity of the trial process itself, because he was excluded from a stage of the criminal proceedings where he had an "active role to play." (*Ibid.*, citing *Rice v. Wood* (9th Cir. 1996) (*en banc*) 77 F.3d 1138, 1141.) This was in contrast to cases where the defendant's ability to "influence the process was negligible." (*Ibid.*, quoting *Hegler v. Borg, supra,* 50 F. 3d at pp. 1476-1477.) The erroneous exclusion of a defendant from a proceeding in which he had an active role to play must, "like the denial of an impartial judge or the assistance of counsel, affect the trial from beginning to end." (*Ibid.*, quoting *Rice v. Wood, supra,* 77 F.3d at p. 1141 [internal quotation marks omitted].)

The appellate court concluded that Campbell's exclusion from the in-chambers hearing amounted to a structural error because Campbell "would have been able to 'influence the process' in a significant way had he been present at the hearing." (*Campbell v. Rice, supra*, 302 F.3d at p. 899.)

For the same reasons, appellant here must be granted a new trial. Appellant was excluded from hearings in which his presence was required

and in which he had a right to participate. The constitutional error committed in this case is thus of the type that, by its nature, prevents the aggrieved party from documenting the full extent of the harm done.[94] In *United States v. Crutcher* (2d Cir. 1968) 405 F.2d 239, the court held that the defendant's absence during jury selection could not be treated as harmless error because there was "*no way to assess* the extent of the prejudice, if any, a defendant might suffer by not being able to advise his attorney during the impanelling of the jury." (*Id.* at p. 244, emphasis added.) That is precisely the situation in the present case.

However, even assuming *arguendo* that appellant's absence from these hearings constituted only "trial error," the error here was not harmless. The standard for determining whether constitutional error is harmless is whether the prosecution has satisfied its burden of showing "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Odle v. Vasquez* (N.D. Cal. 1990) 754 F.Supp. 749, 768, quoting *Chapman v. California, supra,* 386 U.S. at p. 24; accord:

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[94]In *Arizona v. Fulminante* (1991) 499 U.S. 279, the Court distinguished trial error from "structural error" by noting that "[t]he common thread connecting the []cases . . . involv[ing] 'trial error'" is that this type of error may be "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Id.* at p. 307.) In the present case, the effect that appellant's presence might have had at this crucial pretrial hearing is impossible to assess.

Hegler v. Borg (9th Cir. 1993) 990 F.2d 1258.) Applying this standard to the present case, it is apparent that the State cannot meet this burden.

Appellant was absent from numerous hearings, including ones in which critical decisions about the makeup of the jury were being discussed and decided. Appellant could have played an active role by offering his views, participating in the process and influencing the outcome of the decisions, but he was prevented from doing so. The trial court committed prejudicial error in failing to require appellant's presence throughout all of the proceedings which took place after the trial began, or, at the very least, obtaining the proper written waiver that the law requires for appellant's protection. Because the State cannot prove beyond a reasonable doubt "that the error complained of did not contribute to the verdict obtained," (*Chapman v. California, supra*, 386 U.S. at p. 24), appellant's conviction and death sentence must be reversed.

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VIII.

ANNA CONSTANTIN'S STATEMENTS, LATER TRANSLATED INTO ENGLISH BY HER DAUGHTER, WERE UNRELIABLE AND NOT SUBJECT TO CROSS-EXAMINATION. ADMITTING THEM INTO EVIDENCE WAS REVERSIBLE ERROR.

A. Factual Background

Anna Constantin, an elderly Russian woman who spoke little English, was attacked inside the home she shared with her daughter, on August 13, 1987, sometime between noon and 5:45 p.m. The last person to speak to Mrs. Constantin before then was her daughter Vickie, who called from work around noon that day. (CT 2009.) When Vickie returned to the house at 5:45 p.m., she found her mother on the floor, propped up against the back doorway. (RT 3537.) In describing her mother's condition, Vickie said that her mother was "very lucid." (CT 104; RT 2596.) Anna instructed her daughter to call 9-1-1 (RT 3537); numerous police officers were on the scene within minutes. (RT 3686-3687.)

Mrs. Constantin was taken by ambulance to the hospital, where she arrived at 6:06 p.m. (RT 3683.) On the way there, Vickie asked her mother what had happened, but her mother told her, "I will talk to you later." (CT 2008.) Later at the hospital, Mrs. Constantin described the events surrounding her attack. Her statement was in Russian, which Vickie

understood. Based upon Mrs. Constantin's physical condition, Dr. Chuc Van Dang concluded that Mrs. Constantin's injuries had been incurred somewhere between 2 and 6 hours before his exam. (CT 2189.)

At the preliminary hearing, the prosecutor attempted to offer Vickie Constantin's testimony, recounting what her mother had told her at the hospital about the attack. The defense objected on the grounds that Vickie's testimony was hearsay which did not fall within the spontaneous declaration exception under Evidence Code section 1240,[95] due to the passage of time. The hearsay problem was further complicated by the fact that Vickie Constantin's testimony would have been her own translation, in English, of what her mother had told her in Russian. Moreover, the typewritten statement which was being used as the offer of proof,[96] appeared to include opinions and conclusions of the daughter. (CT 1996.)

Citing *People v. Poggi* (1988) 45 Cal.3d 306, 319, the judge sustained appellant's objection and would not allow the hearsay statement

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[95]Evidence Code section 1240 provides: Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

[96]There are several references in the record to the prosecutor's offer of proof (CT 1997, RT 3475, 3478), which was based on the transcribed interview of Vickie Constantin found at CT 104-108.

to be admitted at the preliminary hearing. The judge found there was insufficient evidence to determine whether the victim's statement to her daughter was made two hours after the attack, or as much as five and one half hours after the attack, making it impossible to guarantee its trustworthiness, under section 1240. (CT 2010, 2014, 2016.) It is important to note that although the issue became clouded later on, at the preliminary hearing there was no dispute about *where* Mrs. Constantin had related the information to her daughter: *it was at the hospital.*[97]

Prior to trial, on January 8, 1992, the prosecution filed an *in limine* motion to again request that Ms. Constantin's hearsay testimony be admitted pursuant to Evidence Code section 1240. (CT 3183-3188.) The defense filed its opposition on January 23, 1992 (CT 3206-3212), and the motion was argued on February 5, 1992. (CT 3224; RT 2591-2598.) Once again, the offer of proof regarding Vickie's proposed testimony was the transcript of a tape recorded interview conducted the day after the attack, by Sergeant Joseph Kitchen, from the investigation division of the San

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[97]In the prosecutor's moving papers, it states: "Let's review what our fact situation indicates: Vickie Constantin arrived home from work on August 13, 1987, at 5:45 p.m., and found her mother sprawled on the floor. . . . *At the hospital her mother related what had happened to her.*" (CT 3187, emphasis added.)

Leandro Police Department. (CT 104-108.)[98] After a brief hearing, and based upon that offer of proof, the trial judge ruled that Vickie Constantin's statement was admissible under Evidence Code section 1240. The court held that the victim's

> statements to her daughter *at the hospital*. . . were made at a time when Mrs. Constantin was under the influence of the attack. . . . She was not merely an uninjured witness whose excitement might wane and would thus be in a position to fabricate the answers. *The responses were not self-serving*."

(RT 2598, emphasis added.)

Just before Vickie was to testify at the trial, the defense sought to clarify the matter further. Although the offer of proof of August 14, 1987, contained no reference to the race, voice or accent of the attacker, in an interview with the police several weeks later on September 2, 1987, Vickie said that her mother had identified her attacker as a black man. The trial court confirmed that the first statement included no reference to race. (RT 3478.)

In the "second interview,"[99] which would have been held after

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[98]See RT 3475, where trial counsel refers to Sgt. Kitchen's interview with Vickie Constantin on August 14, 1987, and RT 3478, where the trial court refers to the statement which was "reviewed."

[99]Although both the parties and the trial court made reference to this September 2, 1987 statement, likely given by Vickie Constantin to Detective Meenderink (RT 3478-3479, 2594, 3476), it does not appear to be part of the appellate record.

appellant's photograph had been widely circulated in the media, Vickie Constantin said that although her mother had never seen her attacker, she believed from his voice and accent that he was black. (RT 3477.)

In light of this significant discrepancy, the defense sought to restrict Vickie's testimony to the information that was contained in the offer of proof, Sgt. Kitchen's August 14th *tape recorded interview*. In the words of defense counsel, "I think we're dealing with hearsay and dealing with opinions and conclusions . . . that was not said by Mrs. Constantin, the victim, at the time of the spontaneous declaration." (RT 3476.) The trial court acknowledged the problem:

> The statement I reviewed *did not include references to the race of the attacker*, but if those were statements that were made at that same time, then I see no reason why they wouldn't fall within the same spontaneous statement exception to the evidence code. . . .I guess. . . *there was some confusion as to whether or not the daughter would be relating events that her mother told her on September 2nd as opposed to what she heard in the hours immediately after the attack.*

(RT 3478, emphasis added.) Rather than ruling the evidence inadmissible, as Judge Hora had done, the trial court said it would resolve the problem by having Vickie first testify outside the presence of the jury. (RT 3479.) Her voir dire examination ultimately confirmed the defense's position that, regardless of whether certain statements were made at home or at the hospital, Vickie's testimony was not simply a repetition of her mother's

excited utterance. Rather, it was a compilation of information from different times and different sources.

It was impossible to separate things her mother may have told her at the hospital, from things her mother told her weeks later and from information that Vickie herself had gleaned from her observation of the crime scene.

For example, on voir dire Vickie testified that her mother told her that the attacker had put a blanket over her head and then tied her hands with an electrical cord. (RT 3489.) On cross-examination, however, she was asked:

> Q. Did she say she was aware it was electrical cord that was being wrapped around her, or is that something you surmised?
> A. *That is what I found lying by her.*
> Q. . . . Did your mother tell you she was bound by an electrical cord?
> A. If that is what I said in the testimony, then that is what I meant to say. That is what she told me.
> Q. She knew?
> A. There were no ropes in that part of the house, there was only the iron and the extension cord, the wire extension cord, and he was only gone for 30 seconds. *That was the only thing it could have been.*

(RT 3491-3492, emphasis added.) Her voir dire also included opinions about the actions of the attacker which her mother could not have observed (e.g., that while she was downstairs, the attacker "went upstairs and ransacked the house." [RT 3543.]).

Despite the "confusion" about what information Vickie had learned

from her mother on the evening of the attack, as opposed to things that Vickie and her mother may have concluded much later, the court permitted Vickie to testify with no limitations. Vickie was allowed to testify that it was her mother's opinion that the man, whom she did not see and whose language she did not speak, was in fact black. (RT 3539-3540.)

B. There Was Insufficient Evidence To Support the Trial Court's Finding That The Declarant's Statement Was Not The Product of Reflection.

The trial court correctly articulated the requirements for determining whether a hearsay statement may be admitted under the exception created for spontaneous declarations. To qualify, (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it. (*People v. Poggi, supra,* 45 Cal.3d at p. 318.)

Whether the requirements of the spontaneous statement exception have been satisfied is, in general, a question of fact, and the trial court's determination will be upheld if it is supported by substantial evidence.

(*People v. Phillips* (2000) 22 Cal.4th 226, 236.) The length of time that passes between the startling event and the spontaneous utterance is just one of several factors that the trial court should consider. Ultimately, however, "each fact pattern must be considered on its own merits," (*People v. Brown* (2003) 31 Cal.4th 518, 541, quoting *People v. Farmer* (1989) 47 Cal.3d 888, 904), in order to determine whether the declaration is sufficiently reliable to be admissible as a hearsay exception. The circumstances surrounding the statements Vickie purportedly obtained from her mother did not support a finding that the statements were sufficiently reliable to be admitted against appellant.

First of all, the lengthy trial testimony which was ultimately given by Vickie Constantin in front of the jury, was different in several critical respects from the offer of proof which the prosecutor used as the substance of what the mother allegedly told her daughter about the attack.[100] Her trial

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[100]At trial Vickie testified that her mother's statement was made at the house, just after Vickie called 9-1-1. She said that her mother told her "step by step exactly what happened." (RT 3538.) Her statement allegedly included a description of her two trips to the garbage can that day; a description of her feeding the dogs; her trips up and down the stairs, a blow by blow account of her beating and her mother's opinion that the attacker was a black person, which she discerned from his accent and voice. (RT 3539.) In her statement to Sgt. Kitchen, she said that her mother was very lucid and that after dialing 9-1-1, her mother said she was beaten. Her mother said, "It came from behind and hit me. He put something over my head and he beat me up." (CT 105.) However, it was not until later at the hospital that Vickie said her mother gave a more detailed account.

testimony also differed from her preliminary hearing testimony.[101] The fact that there were material differences between (1) what Vickie told Sgt. Kitchen on August 14, the day after the attack, (2) what she said at the preliminary hearing and (3) what she testified to at the trial, in itself demonstrated that Vickie's recollection of *what* her mother told her and *when* she told her, was not reliable. While there is no reason to believe that Vickie was deliberately untruthful in her testimony, the discrepancies clearly demonstrate that each time Vickie recounted what her mother told her, the story changed. While minor or insignificant differences might be expected and might well be tolerated, in this case there was one important difference which was extremely prejudicial to appellant. Appellant is a black man, and Vickie's original statement to Sgt. Kitchen made no mention of the race of the attacker, while her trial testimony identified him as black.

Part of the problem with allowing this lengthy, detailed, and varied

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Nevertheless, her statement to Sgt. Kitchen never mentioned her mother making any reference to the race, voice or accent of the attacker. (CT 105-106.)

[101]The prosecution attempted to fix the time of the attack and relied upon Vickie's recounting of how her mother had determined the time. At the preliminary hearing Vickie said that her mother fed the dogs every day at 4:00 p.m. (CT 2015.) At the trial she testified that they were always fed at 3:30 p.m. (RT 3542.)

narrative into evidence as an "excited utterance," was the fact that it was so much more than just an "utterance." While the Evidence Code places no limit on the length of the statement, reason and common sense would suggest that the statement could not be so long that a witness would be unable to keep track of what was said. Cases in which an excited utterance was admitted as an exception to the hearsay rule generally involve a statement which is brief enough that the witness's recollection would not be called into question strictly because of the length of the statement.[102] If critical details are necessarily allowed to be added or removed each time the utterance is repeated, the statement is necessarily too long to be reliably allowed into evidence as a hearsay exception.

The best recollection of what Mrs. Constantin said is most likely the version that was permanently recorded after the event took place – in this case, the statement taken by Sgt. Kitchen which the prosecutor deemed to be the offer of proof of what Vickie would testify to regarding her mother's excited utterance. That statement to Sgt. Kitchen was made the day after the attack and included no reference to the race of the attacker.

Her statement two weeks later, on September 2, which may have

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[102]See, e.g., *People v. Brown* (2003) 31 Cal.4th 518, 540 ["I know he shot her. I know she is hurt bad."] and *People v. Riva* (2003) 112 Cal. App.4th 981, 994-995 ["He was trying to shoot us, but we ducked."]. Both statements qualified as spontaneous declarations.

been when she first told the police that the attacker was a black man, should not be relied upon as the "excited utterance" that her mother made following her attack.

Moreover, the mother's statement, whenever and wherever it was made, was made in Russian, not English. It's reliability was dependent on the translation given by her daughter, an interested party who may have already had preconceived ideas about the race of her mother's attacker, before ever hearing anything from her mother on the subject.[103] Within a few days after the attack, appellant's name and photo were widely publicized and may very well have influenced the conversations that Anna Constantin had with her daughter in the days and weeks following the attack. What exactly was said, and when it was said, was indisputably clouded over time. Nevertheless, the trial court ignored these problems which were properly raised by the defense, and simply allowed Vickie to

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[103]The defense raised this issue with the trial court. (CT 3210-3211; RT 2596-2597.) In *Correo v. Superior Court* (2002) 27 Cal.4th 444, 458-459, this Court held that the trial court "should consider 'a number of factors which may be relevant in determining whether the interpreter's statement should be attributed to the [declarant]. . . , such as which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated.'" Here, the trial court considered none of those factors, despite the fact that it had evidence before it that the statement, as originally given to Sgt. Kitchen, was not the same as the one later testified to before the jury.

testify without limitation.

There is no doubt that by the time the police were involved in the case and taking statements from Vickie, she and her mother had had sufficient time to discuss the matter at length. In fact, each time Vickie recounted the story, the details changed, both as to the time of the attack, the time of the statement and whether the statement made reference to the attacker's race.

Vickie testified that the attack took place just after the dogs were fed, which at the preliminary hearing she said was always 4:00. However, at the trial she testified they were always fed at 3:30. Initially, Vickie said her mother's statement was made at the hospital, later she testified it took place at the house. The most prejudicial discrepancy was her reference to the race of the attacker, omitted from the offer of proof. Ultimately, that became the story that evolved into the "excited utterance" to which she testified at the trial.

These discrepancies demonstrate that there simply were not sufficient indicia surrounding the statement to guarantee its trustworthiness for purposes of the spontaneous declaration exception to the hearsay rule. The prosecution should have been required, at a minimum, to be held to the offer of proof that was made at the preliminary hearing, which contained no

description of the attacker in terms of race. The trial court erred in concluding that the statement Mrs. Constantin made at the hospital, which Vickie later claimed was made while still at the house, was sufficiently reliable to overcome appellant's hearsay objection.

C. Appellant Was Deprived of His Sixth Amendment Right To Cross-Examine Mrs. Constantin. Her Daughter's Testimony Should Have Been Excluded.

Even if this Court upholds the trial court's ruling that the hearsay statement was sufficiently reliable to be admissible under the California Evidence Code, that test no longer satisfies the requirements of the Confrontation Clause of the Sixth Amendment of the United States Constitution, as articulated in *Crawford v. Washington* (2004) 541 U.S. ___, 124 S.Ct. 1354. Although spontaneous declarations have traditionally been considered a "firmly rooted hearsay exception," for which the cross-examination requirements of the Confrontation Clause were presumed not to apply, *Crawford* now challenges that presumption.

In *Crawford*, the defendant's wife gave a tape recorded statement to the police during her interrogation. The defendant invoked the marital privilege to prevent her from testifying, but the prosecutor offered her taped statement as a declaration against penal interest. The trial court admitted her statement, finding it sufficiently trustworthy under the test of *Ohio v.*

Roberts (1980) 448 U.S. 56, which allowed the admission of hearsay statements, despite a lack of confrontation and cross-examination, so long as the declarant was unavailable and the hearsay statement bore "adequate indicia of reliability." (*Id.* at p. 66.)

Rejecting the "open-ended balancing tests" of the *Ohio v. Roberts'* framework, the Supreme Court reversed. Despite whatever indicia of reliability may have accompanied the wife's statement, the defendant had been denied his right to confront and cross examine her, a necessary element under the Sixth Amendment. The Court ruled that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." (*Crawford, supra*, 541 U.S. ___, 124 S.Ct. at pp.1364-1365.)

In reconsidering its ruling in *Roberts*, the *Crawford* Court repeatedly rejected the claim that "reliability" is demonstrated by any means other than cross examination. On this point, Justice Scalia wrote:

> Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, *and only where the defendant has had a prior opportunity to cross-examine.*

(*Crawford, supra*, 541 U.S. ____, 124 S.Ct. at p. 1369, emphasis added.)

> Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. *This is not what the Sixth Amendment prescribes.*

(*Id.* at p. 1371, emphasis added.) Although the Court declined to "spell out a comprehensive definition of 'testimonial,'" (*Id.* at p. 1374), it ruled that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Ibid.*) That was all the definition that was required in *that* case to find the testimony of Mr. Crawford's wife inadmissible under the Sixth Amendment.

While the *Crawford* Court was not called upon to decide the constitutionality of the spontaneous declaration exception to the hearsay rule, as set out in Evidence Code section 1240, the Court did suggest that such exceptions might no longer be viable, particularly where the statement is given as part of a criminal investigation, and therefore testimonial. (*Crawford v. Washington, supra,* 541 U.S. ___, 124 S.Ct. at p. 1368, fn. 8.)

Since the *Crawford* decision, the California court of appeals has considered what statements are "testimonial" in nature, so as to trigger the protections of the Confrontation Clause. In *People v. Sisavath* (2004) 118 Cal.App.4th 1396, the court found that a statement which was "made under circumstances which would lead an objective witness reasonably to believe

that the statement would be available for use at a later trial," (*Crawford, supra*, 124 S.Ct. at p. 1364), was testimonial, and therefore inadmissible under the Confrontation Clause. (*People v. Sisavath, supra,* 118 Cal.App. 4th at p. 1402.)

In appellant's case, Mrs. Constantin's statement was taken under circumstances clearly connected to a criminal investigation. There is every reason to believe that, had it not been for the language barrier, the police would have obtained the information about the attack directly from Anna Constantin, rather than from her daughter, who translated.[104] As in the cases of Mrs. Durham and Mrs. Herrick, the police were involved with this case within minutes after Vickie Constantin discovered her mother at 5:45 p.m.

Mrs. Constantin was "very lucid" and instructed her daughter to call 9-1-1. Vickie repeatedly asked her mother what happened so that "if she could not speak for some reason, that I would know what happened." (RT 3489.) Mrs. Constantin's statement was given at the hospital while she was certainly still suffering from the effects of the attack. But there can be no

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[104]For example, in the case of Bessie Herrick, the police came to the hospital on the night of the attack to question her and present her with a photographic lineup. (RT 2997.) Similarly, the police officer who arrived at the scene in the Durham case, followed the ambulance to the hospital and interviewed Mrs. Durham after she was moved to the intensive care unit of the hospital that same evening. (RT 2715-2716.)

doubt that her statement was also part of a formal investigation by the police. It was "made under circumstance which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*People v. Sisavath, supra,* 118 Cal.App.4th at p. 1402, quoting *Crawford v. Washington, supra,* 124 S.Ct. at p. 1364.) To the extent that Mrs. Constantin's statement was formalized in her daughter's tape recorded and transcribed interview with Sgt. Kitchen, it was a "formal statement to government officers." (*Id.* at p. 1364 ["An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."].) Under the rationale set forth in *Sisavath* and *Crawford*, her statement was testimonial, not subjected to cross-examination and therefore admitted in violation of appellant's rights under the Confrontation Clause. The trial court's decision to allow Vickie Constantin to testify regarding her mother's hearsay statements was reversible error.

Because *Crawford* affects the conduct of a criminal prosecution, "it is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final. . . ." (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328; see, *People v. Sisavath, supra*, 118 Cal.App.4th 1396.)

D. Admission of the Constantin Statements Was Prejudicial

Appellant did not deny his possession of stolen property, namely, the antique gold bracelet which was sold to the coin shop on August 13, 1987. But appellant strongly objected to the admission of Vickie Constantin's hearsay statements, particularly the portion which identified the attacker as a black man. This testimony provided the jury with a critical link between the attack on Mrs. Constantin and appellant's possession of the stolen bracelet. As such, admission of the testimony was instrumental to appellant's conviction of the burglary, robbery and murder of Anna Constantin. These convictions also contributed to the guilt findings in the other four cases, all of which were based on weak and conflicting evidence and absolutely no physical evidence. It cannot be said, beyond a reasonable doubt, that the admission of this testimony did not contribute either to the guilt or the penalty verdict. (*Chapman v. California,* (1967) 386 U.S. 18, 24; see also *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [penalty reversal required unless the prosecution can show that the constitutional error had "no effect" on the death verdict].) Appellant's convictions and death sentence must be reversed.

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IX.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN EXCLUDING EVIDENCE WHICH WOULD HAVE CHALLENGED THE PROSECUTION'S CASE AND RAISED A REASONABLE DOUBT THAT APPELLANT WAS THE PERPETRATOR.

A. Factual Background

Just before it began its case-in-chief, the defense informed the court that it intended to call several defense witnesses who would testify about having seen certain individuals in and around the neighborhoods where the various crimes took place. Citing *People v. Kaurish* (1990) 52 Cal.3d 648, the prosecution objected to the proposed testimony, arguing it was not relevant and would confuse the jury. (RT 3930.) The prosecution was opposed to any attempt by the defense to suggest that someone other than appellant had committed the crimes: "I'm renewing my objection on any hint of trying to show a third party was responsible for this." (RT 3930.) The defense made an offer of proof describing the intended testimony. (RT 3928-3929.)

The trial court allowed one of the proposed witnesses, Thomas Ivory, to testify regarding a man seen in Mrs. Figuerido's neighborhood. However, the court refused appellant's request to present the testimony of Steven Berger, a witness in the Durham crime. Had he been permitted,

Berger would have testified that he was the first person to assist Ruth Durham after she was attacked. He found her sitting dazed on her front porch and immediately notified Durham's relatives next door. Shortly after that Berger was questioned by the police. They asked him if he had observed anything unusual in the neighborhood around that time and he said that he had. Berger described a van he saw with three black males; they were laughing and driving around the neighborhood. (RT 3928.) According to defense counsel, there were other witnesses who had observed this same van, but the defense only contemplated calling Mr. Berger on this point. (RT 3929.)

In ruling that Steven Berger's testimony was inadmissible, the trial court held:

> This evidence has little, if any, relevance and doesn't seem to be capable of raising a reasonable doubt of the defendant's guilt. There doesn't appear to be anything that links these people to the actual perpetrator of the crimes. And under [Evidence Code section] 352, I'll find that any probative value that evidence has is substantially outweighed by the possibility of confusing the jury.

(RT 3931.)

As discussed below, the trial court erred in refusing to allow appellant to call Steven Berger as a witness.

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B. The Trial Court Deprived Appellant of His Right to Present a Defense in Both the Guilt and Penalty Trials.

A defendant's right to due process under the federal Constitution includes the right to present witnesses and evidence in his own defense. (*Washington v. Texas* (1967) 388 U.S. 14, 18-19.) "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law." (*Id.* at p. 19.) These rights are also guaranteed by the California Constitution. (Cal. Const., art.1, § 15; see *People v. Cudjo* (1993) 6 Cal.4th 585, 638 (dis. opn. of Kennard, J.).)

Similarly, the United States Supreme Court has interpreted the Sixth Amendment right of compulsory process to include not only the right to compel the attendance of favorable witnesses at trial, but "the right to put before a jury evidence that might influence the determination of guilt." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.)

Under these principles, the state may not arbitrarily deny a defendant the ability to present testimony that is "relevant and material, and . . . vital to the defense." (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867, quoting *Washington v. Texas*, *supra*, 388 U.S. at p. 16.) Moreover, the

state may not apply a rule of evidence "mechanistically to defeat the ends of justice." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302; see also *Green v. Georgia* (1979) 442 U.S. 95 [exclusion of reliable hearsay mitigating evidence violated due process].)

The Ninth Circuit has outlined a test to be applied in evaluating whether the exclusion of defense evidence violates due process. (*Tinsley v. Borg* (9th Cir. 1990) 895 F.2d 520, 530.) The reviewing court must first consider five factors: whether the evidence (1) has probative value on the central issue; (2) is reliable; (3) can be evaluated by the trier of fact; (4) is the sole evidence on the point or "merely cumulative;" and (5) constitutes a major part of the defense. (*Ibid.*) The court must "balance the importance of the evidence against the state interest in exclusion." (*Ibid.*)

In this case, the trial court excluded significant evidence relevant to appellant's guilt phase defense as well as appellant's lingering doubt mitigation defense. Accordingly, the ruling violated appellant's federal and state due process rights to present a defense, his Sixth Amendment right to compulsory process, and his right to a fair and reliable penalty determination. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. 1, §§ 7 & 15.)

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1. Appellant's Proposed Evidence Was Essential For Demonstrating the Weakness of the Prosecution's Case.

As has been discussed throughout this opening brief, appellant was convicted almost exclusively on the basis of cross-racial identifications that were not only conflicting and contradictory, but likely influenced by the widespread dissemination of appellant's photograph throughout the Bay Area in the print and television media. (See Argument III, part C. 1. a., *supra*.) Although appellant had had possession of a piece of jewelry stolen from the Constantin house, no physical evidence connected appellant to any of the attacks on the victims.

Appellant's defense was mistaken identity. He had hoped to demonstrate to the jury that merely being seen in certain neighborhoods was an insufficient basis for concluding that he had perpetrated the attacks. He hoped to show that many others, including other black males like himself, had been walking or driving in those areas around the time of the crimes, but that once his picture had been circulated his face became the one that many of the witnesses had settled upon. In short, appellant hoped to demonstrate in a real and tangible way the inherent weaknesses in the prosecution's case.

To present this defense of mistaken identity, appellant had the right to present the testimony of Steven Berger. Berger's testimony was no

different in kind than the testimony of Thomas Ivory, whom the court did allow to testify. More importantly, Berger's testimony was virtually identical to the type of testimony that was used over and over again, throughout the trial, to *convict appellant of these crimes.* This was true particularly with the Durham case, the case about which Steven Berger might have presented evidence.

In the Durham case, when the police first questioned the witnesses in the neighborhood, only one of four witnesses was able to place appellant in the neighborhood around the time of the burglary. Patricia Armstrong identified appellant as the man she saw walking down the street, near the Durham house, on the day of the attack. Although three months later her husband Joseph picked appellant out of the physical lineup, that was only after appellant's photograph had been well-publicized. (RT 3999-4000.) Two other neighbors told the police that they saw a suspicious individual in the neighborhood at the time of the attack, that roughly fit appellant's description (black male, 5 feet 9 inches tall, and 200 pounds), but neither woman identified appellant from the photo lineup. The man they saw they believed to be about 19 years of age. (RT 2912-2913.) Thus, at the time of the crime, there was just a single witness who believed she had seen appellant *merely walking in the neighborhood.* Such scant evidence was

surely not sufficient to convict appellant of the Durham attack. However, when that evidence was combined with the equally scant evidence from the other four cases, it became the basis for appellant's multiple murder convictions and death sentence.

Appellant's defense depended upon being able to show that other individuals were also being spotted in these neighborhoods at or around the times of the attacks. While it is true that the evidence appellant sought to introduce demonstrated only that other individuals had *the opportunity* to commit these crimes, that is in fact all that most of the evidence against appellant showed - - that he had the opportunity. The motive in each of these cases, with the exception of the Larson case[105], appeared to be theft. Such a motive could be ascribed to anyone in the neighborhood who was otherwise disposed to commit the crime. It was not a motive that was unique to appellant vis-a-vis these particular victims.

By depriving appellant of the right to put on evidence that was virtually identical to the type of evidence that was being routinely used against him, appellant was deprived of his right to fully present his defense in this capital case. In *People v. Hall* (1986) 41 Cal. 3d 826, this Court

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[105]In the Larson case, where there was no evidence that any property had been taken or that the house had been ransacked, appellant was acquitted of the robbery charge. (CT 3351.)

rejected a "distinct and elevated" standard for evidence of third-party culpability. *(People v. Hall, supra*, 41 Cal.3d at p. 834.) Instead, it held that this type of evidence should be treated like any other: "If relevant it is admissible unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion." (*Ibid.*) Thus, the Court recognized that in a guilt trial, evidence of third party culpability "need only be capable of raising a reasonable doubt of defendant's guilt." (*Id.* at p. 833.)

Moreover, under the Ninth Circuit's standards of admissibility for evidence of third party culpability, the evidence also should have been admitted: (1) The central issue in this case was the accuracy of the witnesses who claimed to have seen appellant in the neighborhood and whether those supposed "sightings" were sufficient to prove that appellant was the intruder. The fact that there were other strangers walking or driving through these same neighborhoods was certainly relevant to this central issue; (2) the Berger evidence was as reliable as the other neighbors who testified for the prosecution about what they saw; (3) Berger's testimony could be evaluated by the jury; (4) Berger's testimony was not cumulative, but rather was the sole evidence regarding the van which was present in the neighborhood; and finally, (5) Berger's testimony, like that of

Thomas Ivory and Mrs. Sullivan and her daughter Stacie Reznes[106], would have helped to establish that they were numerous other black males present in these neighborhoods when the crimes took place and would have contributed significantly to appellant's primary defense that he had either been (a) misidentified or (b) identified, but doing nothing illegal. Under both state and federal standards, the trial court should have allowed appellant to present a full and complete defense.

The testimony of Steven Berger, when taken with the testimony of Mrs. Sullivan and her daughter Barbara, as well as the testimony of Thomas Ivory, may well have caused at least one of the jurors to doubt the credibility of the witnesses who believed they saw appellant in each of the neighborhoods in question. Appellant was deprived of his right to present a full and complete and effective defense, his right to a fair trial and to a reliable guilt and penalty determination. (U.S. Const., 6th, 8th & 14 Amends.; Cal. Const. art. 1, §§ 7 & 15.)

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[106]Ivory, Sullivan and Reznes all told the police that they saw a black man in their neighborhood, but none identified appellant as the individual. Ivory saw someone in Mrs. Figuerido's neighborhood and Sullivan and Reznes saw someone in Mrs. Durham's neighborhood. See Statement of Facts, *supra*.

2. Appellant's Proposed Evidence Was Relevant to his Lingering Doubt Defense

The testimony of Steven Berger was also necessary to support appellant's lingering doubt defense in the penalty phase. Although there were several witnesses who claimed to have seen appellant in the neighborhoods, the testimony was often conflicting in terms of the various descriptions, and many of the witnesses told the police that the person they saw was not in the photo lineup that included appellant's picture. For example, Joseph Armstrong (RT 2825, 2906), John Wulf (RT 4012), Jan Morris (RT 3588) and Jacqueline Brown (RT 3192-3193) initially all told the police that the man they saw was not in the photo lineup, or else picked other photos as being the person they saw. However, by the time of the trial, all four witnesses positively identified appellant.

As expert witness Elizabeth Loftus explained, eyewitnesses are often influenced to a great degree by how many times they have seen a particular suspect on the television or in the newspaper. Equally problematic are the "photo-biased lineups," such as the one which took place in appellant's case, where appellant was the only person in the physical lineup who had also been previously included in a photo lineup that was shown to the same witnesses. (RT 4041-4042, 4048.)

Presenting the testimony of witnesses who saw other black males in

the neighborhood at the time of these crimes was thus a critical part of appellant's defense, including in the penalty phase when lingering doubt as to the identity of the perpetrator could still be used as a factor in determining whether to sentence appellant to life in prison or to death. Challenging the accuracy of the witnesses who placed him in the victims' neighborhoods was the heart of appellant's defense. Depriving him of the right to present a full defense was so prejudicial to appellant that it cannot be considered harmless. (*Tinsley v. Borg, supra*, 895 F.2d at p. 530 [state court's decision to exclude certain evidence must be so prejudicial as to jeopardize the defendant's due process rights].)

The trial court erred in excluding this relevant evidence from a witness who was present at the scene of the Durham attack almost immediately after it had taken place. Appellant is entitled to a new trial in which he is permitted to present a full defense in both the guilt and penalty phases of his trial. Reversal of his convictions and death sentence is required.

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X.

THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON COUNTS 4, 5, AND 6, THE ATTACK ON RUTH DURHAM, WAS REVERSIBLE ERROR.

A. Factual Background

At the close of the prosecution's case in chief in the guilt phase of the trial, appellant's counsel moved for a judgment of acquittal, pursuant to Penal Code section 1118.1[107], with respect to the charges relating to the attack on Ruth Durham, specifically counts 4, 5 and 6 of the information[108]. (RT 3906-3915; CT 2946-2948.) Mrs. Durham was attacked and robbed in her home, but never identified appellant as her assailant. (CT 353.) Four of Mrs. Durham's neighbors claimed to have seen a black man in the neighborhood around the time of the attack, but only one, Patricia Armstrong, identified appellant from a photo lineup presented a few days

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[107]Penal Code section 1118.1 provides: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right."

[108]Count 4 alleged burglary, count 5 alleged robbery and count 6 alleged attempted murder of Ruth Durham.

after the sighting. (RT 2825; 2844; 2906; RT 2912-2913.)[109] Thus, Mrs. Armstrong was the only witness who believed, at the time of the attack, that appellant was even in the neighborhood that day. Although three new sweaters, in boxes, were taken in the Durham burglary, the person Mrs. Armstrong saw was *not carrying anything*, running, or out of breath. He was simply walking down the sidewalk with his coat thrown over his shoulder. (RT 2807.)

The prosecutor conceded that if this evidence was considered by itself, it would be insufficient to support a conviction. (RT 3907.) However, the prosecutor relied on the evidence supporting the *other counts* to establish that appellant was the perpetrator in the Durham counts as well: "I think there is a common scheme plan of modus operandi, which this court should take cognizance of." (RT 3907.)[110]

After hearing arguments, which focused primarily on the similarities and dissimilarities of the incidents, the trial court denied the motion for

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[109]Mr. Armstrong did not pick appellant from the photo lineup, but eventually chose appellant from the physical lineup several months later. (RT 2827.) Two other neighbors, Barbara Sullivan and daughter Stacie Reznes, saw a black man in the neighborhood that did not fit appellant's description, and they did not pick appellant from the photo lineup. (RT 3974, 3982.)

[110]In Argument III, *supra*, appellant argues the trial court erred in failing to sever the five cases.

acquittal, finding simply that "there would be sufficient evidence to sustain a conviction for these offenses." (RT 3914-3915.) The jury convicted appellant of count 4 (burglary) and count 5 (robbery), but acquitted appellant on count 6, the attempted murder of Mrs. Durham.

B. There Was Virtually No Evidence Connecting Appellant To the Durham Crimes. Therefore The Motion For Acquittal Should Have Been Granted.

The trial court denied the motion for acquittal on the three Durham counts because it found sufficient evidence to sustain a conviction. However, such a motion may only be denied if there is *substantial evidence*, including all reasonable inferences to be drawn from the evidence, *of the existence of each element of the offense charged.* (*People v. Mendoza* (2000) 24 Cal.4th 130, 175, cert. den. 532 U.S. 1040, emphasis in original.) There was no such substantial evidence that appellant committed the burglary, robbery or attempted murder of Mrs. Durham. At best, the evidence only suggested that appellant may have been present in the neighborhood that day.

The prosecutor understood that the Durham case could not stand simply on the testimony of Patricia Armstrong, particularly when three other witnesses, including Mrs. Armstrong's husband, had failed to identify

appellant in the photo lineup.[111] Given the scant evidence merely connecting appellant to the neighborhood, the prosecutor's only hope for winning the Durham counts was to lump the evidence from all of the cases together. If the jury could be convinced that appellant committed one of the charges, they would be inclined to conclude that he must have committed them all, regardless of the paucity of evidence to support particular counts.

Since Mrs. Armstrong's testimony standing alone was insufficient for a conviction, the prosecutor relied on the purported "similarity" between the Durham crimes and the other four crimes, to make his case. However, if this Court accepts the prosecutor's reasoning, then it must also conclude that there was no need to have *any witness* testify that appellant was present in the neighborhood that day. If the crimes were, in fact, so similar that the perpetrator could *only* have been appellant, then obviously no further identification was needed. Under the prosecution's theory, any daytime burglary of an elderly female could have been attributed to appellant, regardless of any other evidence tying appellant to the crime.

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[111]Mr. Armstrong did not pick appellant from the photo lineup, but several months later identified appellant in the physical lineup, after appellant's photo had been widely publicized in the media. (RT 2827, 2816, 3999-4000.) Two other neighbors, the Sullivans, saw another black man in the neighborhood on the day of the attack, who did not fit appellant's description. The Sullivans did not pick appellant's photo from the photo lineup. (RT 2912-2913.)

It is well settled, however, that when the circumstances of other crimes are introduced for the purpose of proving identity, such evidence is only admissible when the similarities among the crimes are so unique that the similarities amount to a "signature." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) Without question, that was not the case here.

The circumstances of the Durham case have almost nothing in common with any of the other cases, except that Mrs. Durham, like the other victims, was an elderly woman. The *dissimilarities*, on the other hand, were many. (See Argument III, *supra*, for a full discussion.)

For example, although the prosecutor claimed that living in a corner house was a common feature of all the crimes, two of the victims, including Mrs. Durham, did not live in a corner house. (RT 3908.) She was also the only victim who lived by herself. (CT 360.) The other four women all lived with relatives.[112] Only two of the women, including Mrs. Durham, were by themselves when the attack took place. Mrs. Herrick was attacked while her husband was watering in the back yard. (RT 2982.) Mrs. Larson had one or more gardeners working in her yard around the time of her attack; and Mrs. Constantin had two barking dogs inside of the house with

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[112]Mrs. Constantin lived with her daughter. (RT 3533.) Mrs. Herrick lived with her husband. (RT 2974-2975.) Mrs. Larson lived with her grandson. (RT 3247; CT 161.) Mrs. Figuerido lived with her two daughters. (RT 3362.)

her. (RT 3538.)

Although Mrs. Durham's house was ransacked, as were two others, that factor cannot be considered a "signature" of appellant since there was no evidence of ransacking in either the Larson or Herrick cases.

The back screen door of Mrs. Durham's house had been cut, as was also true in the case of Mrs. Constantin. (RT 2715, 3824-3825.) But since they were the only two to have their screens cut, that factor does not establish a "signature" type of entry to the homes. To the contrary, in the Herrick case the attacker was believed to have entered from the front door, possibly after knocking. (RT 3104.)

Although the other cases involved tying of the hands or covering the heads or bodies,[113] *neither Mrs. Herrick nor Mrs. Durham were bound or covered in any way.* In the case of Mrs. Herrick, the prosecutor attempted to explain away the discrepancies by saying the perpetrator had no *time* for

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[113]In two of the cases, Constantin and Figuerido, the victims' hands were bound with an electrical cord. (RT 3368, 3489.) Figuerido's hands were tied *behind* her. (RT 3368.) Mrs. Larson's hands were bound with a nylon, but tied in *front*. (RT 3248.) In two cases, the victim's face was bound with a cloth: Mrs. Larson had some type of garment tied around her face from the chin to the forehead, and tied in the back. (RT 3275.) Mrs. Figuerido was found with a bedspread wrapped many times around her head. (RT 3378.) Two of the five victims, Constantin and Figuerido, had blankets thrown on them. (RT 3541, 3378.) Thus, tying of hands occurred in three of the five cases (Constantin, Larson, Figuerido); covering the face occurred in two (Larson, Figuerido); and covering with a blanket occurred in two (Figuerido, Constantin).

these things, since Mr. Herrick may have interrupted the attack. But no such argument could be made in the Durham case. There was no evidence of an interruption. Mrs. Durham was alone when the attack occurred and the crime was not even discovered until she was seen afterwards by a neighbor, sitting on her front porch.

Since the Durham attack had significant differences from the other incidents, its circumstances were clearly not the "signature" of a particular perpetrator that might tie the Durham crime to the other crimes. Appellant certainly cannot be tied to the Durham crime simply because the victim, like the other victims, was an elderly female.

The trial court accepted the prosecutor's position without properly analyzing the evidence. The court lumped all of the cases together and concluded, just as the jury had done, *that if appellant were guilty of any of the charged crimes*, particularly the theft of Mrs. Constantin's gold bracelet, then he must be guilty of *all of the charged crimes.*

Although the jury ultimately acquitted appellant of the attempted murder charge (count 6), appellant was entitled to an acquittal on *all of the Durham counts*, including the burglary and robbery counts. Given that there was no evidence from which a rational trier of fact could have found appellant guilty of the Durham counts beyond a reasonable doubt, the trial

court's denial of the motion for acquittal violated appellant's right to due process and a fair trial. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 ["the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."]; U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7 & 17.) The denial of the motion was reversible error. (*Jackson v. Virginia, supra,* 443 U.S. at p. 318.)

As discussed in Argument XVIII, *infra*, the reversal of the Durham counts also requires reversal of appellant's death sentence.

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XI.

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN HIS FINAL ARGUMENT, REQUIRING A MISTRIAL TO BE DECLARED.

A. Factual Background

During his final argument in the guilt phase of the trial, the prosecutor argued that appellant had fled from the Northern California area because he knew that the authorities would be looking for him. He subsequently said, "*Isn't it strange that after Mr. Lynch fled our county, there has been no other cases - - .*" (RT 4200, emphasis added.) This statement was not supported by *any* evidence.

The prosecutor was immediately interrupted by an objection and the court instructed the prosecutor to limit himself to the evidence. The prosecutor completed his rebuttal argument, after which the court recessed. After the jury left the courtroom, the defense moved for a mistrial on the grounds that the remark was outside of the evidence and implied that the prosecutor had some further knowledge about the case that had not been presented to the jury. (RT 4217.)

The trial court denied the motion for a mistrial, speculating that "I don't think the jury heard anything." (RT 4218.) The judge had told the prosecutor to "move on" (RT 4200) because "it sounded to me you would

be headed in a direction that would not be appropriate. . . ." (RT 4218.) However, the court concluded that there was no misconduct and that the jury needed no admonition. (*Ibid.*) Because the prosecutor's remark was made during his rebuttal, the defense had no opportunity to further address the problem with the jury. When the jury returned, regular instructions followed. (RT 4220.)

The harm from the remark is obvious: By telling the jury that the crimes in the community had stopped after appellant had left the jurisdiction, the jury could reasonably conclude that appellant must have been the responsible party. However, there was no evidence, only the word of the prosecutor, that any crimes stopped. As will be discussed below the court erred in finding no misconduct, in refusing to admonish the jury and in denying the motion for a mistrial. The prejudice to appellant requires reversal of the convictions and death sentence.

B. The Prosecutor's Remarks Constituted Serious Misconduct. The Trial Court Erred in Finding Otherwise.

Although prosecutors in their closing arguments have wide latitude to draw inferences from the evidence presented at trial, it is well-settled that mischaracterizing the evidence or referring to facts not in evidence is clearly misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 828; *People v.*

Avena (1996) 13 Cal.4th 394, 420; *People v. Pinholster* (1992) 1 Cal.4th 865, 948; *People v. Kirkes* (1952) 39 Cal.2d 719, 724.) Moreover, this Court has long held that the intention of the prosecutor is irrelevant to a finding of misconduct. "Injury to appellant is nonetheless injury because it was committed inadvertently rather than intentionally." (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214; accord *People v. Hill, supra*, 17 Cal. 4th at pp. 822-823.)

In the present case, the prosecutor told the jury that after appellant "fled" the county there had been no more such crimes. Not a shred of evidence supported this claim. This was exactly the type of conduct condemned in *People v. Hill, supra.* In that case, the prosecutor told the jury that since the defendant had been arrested and locked up, "it hasn't happened over there again [referring to the parking lot where the stabbing took place]." (*People v. Hill, supra*, 17 Cal.4th at p. 828.) However, no evidence established any such reduction in violent crime in that area.

> [The prosecutor] thus committed misconduct by suggesting, with no factual support in the record, *that she had information not presented to the jury that pointed to defendant's guilt.*

(*Ibid.*, emphasis added; see also *People v. Newman* (1931) 113 Cal.App. 679, 684 [misconduct to argue, without supporting facts, that the number of arson fires in the county were significantly reduced when the defendant,

charged with arson, was placed in custody].)

In the present case neither side presented any evidence about the crime rate in Alameda County or any other county in the State. The prosecutor presented facts outside of the evidence for the purpose of convincing the jury that he had inside information pointing to appellant's guilt. Nor was it the only instance in which the prosecutor had, in effect, "testified" during his closing argument.[114] The trial judge's belief that the jury *had not heard* the remark was wishful thinking that cannot be reconciled with the trial transcript. Since the record shows that the court reporter, the defense attorney and the judge all heard the remark, it must be assumed that the jurors heard it as well. Neither does the fact that the prosecutor was interrupted by an objection lessen the impact of what he *did say*: "After Mr. Lynch fled our county, there has been no other cases." (RT 4200.) His remark is nearly identical to the one condemned in *Hill*. Without question, it was prosecutorial misconduct and the trial court erred in failing to find misconduct and admonish the jury, or declare a mistrial.

This issue is properly before the Court. The defense raised an immediate objection and during the recess asked for a mistrial. Although

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[114]In arguing that if appellant had had any alibi evidence he would have presented it, the prosecutor also told the jury, "I know Mr. Ciraolo [the defense attorney]. We go back one long, long time, and if there were alibi evidence out there you would have it." (RT 4215.)

the defense did not specifically ask that the remark be stricken and that the jury be admonished to disregard it, it is clear from the Court's ruling on appellant's motion for a mistrial, that any such request would have been denied, and therefore would have been futile. In finding that "nothing rose to the level of misconduct," the court concluded on its own that no admonition was necessary. (RT 4218.) Since the defense did all that was required to preserve the issue, it is fully cognizable on appeal. (*People v. Mayfield* (1997) 14 Cal.4th 668, 753; cf. *People v. Lucas* (1995) 12 Cal.4th 415, 472 [failure to object forfeited claim of misconduct for misstating facts].)

C. The Prosecutor's Misconduct Deprived Appellant of his Right to Confront Witnesses, To a Fair Trial, and To a Reliable Penalty Determination. The Trial Court Should Have Ordered a Mistrial.

The misconduct in this case was the most serious type for two reasons: (1) the remark went to the single most important issue facing the jury – whether appellant was indeed the perpetrator of the many charged crimes; and (2) the remark came from the prosecutor himself – the person clothed with the authority of the state and, next to the judge, the person with perhaps the most credibility before the jury. [115] The prosecutor's remarks

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[115]"A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the

were, in effect, unsworn testimony and though outside rules of evidence, "such testimony can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor. . . ." *(People v. Hill, supra*, 17 Cal.4th at p. 828, citing *Bolton, supra*, 23 Cal.3d at p. 213.) Coming from a prosecutor, "[s]tatements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal." (5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Trial, § 2901, 3550.)

Unlike instances of misconduct in which one of the prosecution's *witnesses* refers to tangential matters that should not have been mentioned in front of the jury (see, e.g., *People v. Valdez* (2004) 32 Cal.4th 73 [officer testified that his interview with the defendant took place at a prison]; *People v. Bolden* (2002) 29 Cal.4th 515, 555 [officer mentioned "parole office" when asked about defendant's address]), this case implicates the prosecutor himself, who effectively testified to facts which strongly suggest that appellant must have been guilty.

This Court has long recognized that when the prosecutor serves as "his own unsworn witness, he is beyond the reach of cross-examination." (*People v. Bolton, supra,* 23 Cal.3d at p. 214, fn.4; see also *People v. Hill, supra,* 17 Cal. 14 at p. 828.) The federal constitutional implications of this

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state. (*People v. Kelley* (1977) 75 Cal.App.3d 672, 690.)" (*People v. Hill, supra*, 17 Cal.4th at p. 820.)

type of prosecutorial misconduct were explained in *People v. Harris* (1989) 47 Cal.3d 1047:

> If a prosecutor's argument refers to extrajudicial statements not admitted at trial, *the defendant may be denied his right under the Sixth Amendment to confrontation and cross-examination,* thus requiring reversal of the judgment unless the court is satisfied beyond a reasonable doubt that the misconduct did not affect the verdict. *(Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643, fn. 15.) (Citatations omitted.) Short of misconduct of that nature which infringes on a specific guaranty of the Bill of Rights, however, prosecutorial misconduct implicates the defendant's federal constitutional rights only if it is so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*Id.* at pp. 642-643.)

(*Harris, supra,* 47 Cal.3d at p. 1083, emphasis added.)

In the present case, the prosecutor's misconduct unquestionably violated appellant's Sixth Amendment right to confront and cross-examine all witnesses against him. Having "denied [appellant] the benefit of a *specific provision of the Bill of Rights*," (*Donnelly v. De Christoforo, supra*, 416 U.S. at p. 643, emphasis added), reversal is required under the *Chapman* standard[116]. In addition, because the prosecutor's unsworn testimony involved the most critical issue in this case, the identity of the perpetrator, his misconduct infected the trial with such unfairness that appellant's conviction is also a denial of his due process rights under the

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[116]*Chapman v. California* (1967) 386 U.S. 18, 24.

Fourteenth Amendment. Moreover, because the jury's finding of guilt had to have been based, at least in part, upon the prosecutor's unsubstantiated claim that the crimes stopped after appellant "fled [the] county," appellant was also denied his right to fair and reliable guilt and penalty determinations under the Eighth Amendment.

The trial court erred in finding no prosecutorial misconduct and in refusing a curative instruction informing the jury that the prosecutor's statement was improper and unsupported by any evidence. The court also abused its discretion in refusing to grant the motion for a mistrial. As discussed below, the errors require reversal since it cannot be demonstrated beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

D. The Prosecutor's Unsupported Claim Was a Powerful Tool Used To Obtain a Conviction. It Cannot Be Said That This Misconduct Was Harmless Beyond a Reasonable Doubt. Reversal Is Required.

In most cases where prosecutorial misconduct is argued on appeal, the reviewing court rejects the claim because the issue was not properly preserved below, because the defendant did not object to the misconduct and request a curative instruction. (*People v. Hardy* (1992) 2 Cal.4th 86, 171; *People v. Benson* (1990) 52 Cal.3d 754, 794; *People v. Green* (1980) 27 Cal.3d 1, 34.) In those cases where an objection *is raised* in the trial

court, the reviewing court often agrees there was misconduct, but concludes nonetheless that the trial court's admonition to the jury, striking the remark of the prosecutor or the witness and informing the jury to disregard it, was sufficient to cure the harm. (*People v. Lucero* (2000) 23 Cal.4th 692, 718; *People v. Jones* (1997) 15 Cal. 4th 119, 180.)

In appellant's case, however, the trial court's precipitous and unsupported speculation that the jury had not heard the prosecutor's remark, led to the erroneous finding that there had been no misconduct, and therefore no need for a curative instruction. Appellant was therefore left with no remedy whatsoever in the trial court, despite a contemporaneous objection and a request for a mistrial.

The prosecution's case against appellant was far from conclusive. The evidence failed to conclusively establish that appellant had been responsible for the many burglaries and three murders that had taken place in several locations over several months. No physical evidence connected appellant to the crimes[117] and the identification testimony was conflicting and inconclusive. For the most part, the witnesses could only place appellant in or around the neighborhoods where the crimes had taken place.

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[117]The only physical evidence used against appellant, the gold bracelet that he sold to the coin dealer, only established his possession of stolen property in the Constantin case.

Often their descriptions were contradictory, and many of the witnesses originally could not identify appellant until his picture had been repeatedly displayed in the television and print media. The posture of the instant case was very similar to that in *Chapman v. California, supra*, 386 U.S. 18. In *Chapman*, this Court refused to reverse for improper prosecutorial comments because evidence of the defendants' guilt "must be deemed overwhelming." (*People v. Teale* (1965) 63 Cal.2d 178, 197.) The United States Supreme Court reversed, holding

> though the case . . . *presented a reasonably strong "circumstantial web of evidence" against [the defendants]*, it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors *might very well have brought in non-guilty verdicts*. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments . . . did not contribute to [the defendants'] convictions."

(*Chapman, supra*, 386 U.S. at pp. 25-26, emphasis added.) This is precisely the situation in appellant's case. The prosecution's case was built entirely on circumstantial evidence. The only physical evidence connecting appellant to one of the cases was the gold bracelet, which certainly established that appellant had sold stolen property. But that did not establish him as the murderer, either in the Constantin case, or any of the other cases. In the Durham case, he could not have even been prosecuted,

had it not been prejudicially joined with the other cases, since the only evidence connecting him to that case, was one witness who claimed to have seen him walking in the neighborhood on the afternoon of the crime. (See Arguments II and X, *supra.*) The entire case was built upon conflicting, cross-racial identifications, nearly all of which were made *after appellant's photograph had been publicized.* (See Statement of Facts, *supra.*) Any doubts that the jury might have entertained were blown apart by the "dynamite" which the prosecutor threw into his final argument. Once the jury was told that the cases stopped after appellant left the county, the jury could be assured by the one person who was in a position to know, that the State had charged the right person.

Had the trial court swiftly stepped in and admonished the jury that the prosecutor had made a statement which was outside of the evidence, for which there was no basis, and which would have to be thoroughly ignored by the jury in considering the evidence, arguably the harm might have been ameliorated. But that did not happen. The trial court simply told the prosecutor to move on, which may well have left the jury believing that the statement was true. The trial court's failure to act exacerbated the harm.

This Court need not speculate, however, as to what might have been. The record is clear that the trial court did nothing to cure the harm, and the

jury was left with the impression that the prosecutor had additional information causing him to believe that appellant was the perpetrator. It simply cannot be concluded, beyond a reasonable doubt, that the prosecutor's explosive remark did not contribute to any of appellant's convictions. Under *Chapman*, the convictions and the death sentence must be reversed.

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XII.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT.

A. Factual Background

At the request of the prosecution and over defense objection, the trial court delivered three instructions that permitted the jury to infer appellant's consciousness of guilt. The first instruction, CALJIC No. 2.03, referred to false statements and read as follows:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(CT 3263; RT 4225.) The second instruction, CALJIC No. 2.06, referred to destroying or concealing evidence and stated:

> If you find that defendant attempted to suppress evidence against himself in any manner, such as by destroying evidence or by concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(CT 3264: RT 4225.) Finally, the third instruction, CALJIC No. 2.52, referred to flight and read as follows:

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

> crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in considering the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

(CT 3281; RT 4231-4232.) Although jury instruction discussions were held off the record, the trial court briefly summarized those discussions at the time it made its ruling. (RT 3921-3926.) From that summary and the prosecutor's closing argument (RT 4196-4200), it is apparent that the three consciousness of guilt instructions were meant to address the following evidence:

1. False statements and destroying evidence (CALJIC Nos. 2.03 and 2.06)

The prosecutor claimed that appellant had altered Mrs. Constantin's bracelet and made false statements about jewelry allegedly stolen during the Constantin burglary. Mrs. Constantin's daughter Vickie identified two gold chains, People's Exhibits 65A and 65B, and a gold bracelet, People's Exhibit 3, (RT 3545) as items taken from her mother's house. She said that the gold bracelet looked just like her mother's except for a small envelope charm that was missing. (RT 3553-3554.)

The prosecutor argued that appellant must have removed the charm before selling it to the coin shop, in order to make it less identifiable as a

piece of stolen property. (RT 4197-4198.)

Mackie Williams, an acquaintance of appellant's, testified that when he was arrested on August 20, 1987, he was wearing a gold chain with an ivory elephant (People's Exhibit 65A) and another gold chain with a pearl attached to it. (People's Exhibit 66B; RT 3754-3755.) He claimed that appellant had given him both chains in the week before August 20. (RT 3756.) Appellant, during his interrogation, denied that he had ever given anything to Mackie Williams. (RT 3854-3855; RT 3892.)

The prosecutor also argued that appellant had lied to the police when he denied that a lady had ever chased him out of her yard. (RT 3874.) Lavinia Harvey testified that when she found appellant in her yard she confronted him, asked him what he wanted, and after giving him permission to look for someone in her back yard, ordered him to leave. (RT 3054-3058.) The prosecutor cited appellant's denials as another example of making a false statement. (RT 4197.)

2. Flight after a crime (CALJIC No. 2.52)

During appellant's interrogation he told Sgt. Kitchen that when he read in the newspapers that the police were looking for him in connection with the stolen bracelet, he left for Reno and later Los Angeles. (RT 3866-3838.) He did not want to go to jail for possession of stolen property,

particularly when the authorities were connecting him with various other crimes. (RT 3860.) The prosecutor argued that appellant's flight was evidence of his guilt for the charged crimes. (RT 4198-4199.)

Appellant did not deny that he sold the gold bracelet, or that he later learned from the newspaper it had been stolen. (RT 3892, 3850.) But he repeatedly denied that he had done anything more than sell the bracelet, and denied any involvement with the burglaries, robberies and murders for which he was later charged. (RT 3892, 3876.) The only issue in dispute was the identity of the perpetrator of those crimes. The three above-quoted instructions unfairly highlighted the prosecution's evidence and invited the jury to draw critical but irrational inferences against appellant on the only disputed issue in the case. As discussed herein, the instructional errors deprived appellant of due process, equal protection, a fair jury trial, and a fair and reliable jury determination of guilt, special circumstances, and penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal.Const., art. I, §§ 7, 15, 16 & 17.)

B. The Consciousness of Guilt Instructions Were Unfairly Partisan and Argumentative

The trial court must refuse to deliver any instructions which are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan

argument disguised as a neutral, authoritative statement of the law. (See generally, *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly single out and bring into prominence before the jury isolated facts favorable to one party, thereby, in effect, "intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]." (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions which "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and hence must be refused. (*Ibid.*)

Judged by this standard, the consciousness of guilt instructions given in this case, are impermissibly argumentative. Structurally, they are almost identical to the defense "pinpoint" instruction which this Court found to be argumentative in *People v. Mincey*, *supra*, 2 Cal.4th 408, 437.[118] All four

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[118]The defense instruction reviewed in *Mincey* read as follows:

"If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense wilful, deliberate, or premeditated." (*People v. Mincey*, *supra*, 2 Cal.4th at p. 437, fn. 5.)

instructions – the three in this case and the one in *Mincey* – tell the jurors that if they find certain preliminary facts, they may rely on those facts to find additional facts favorable to one party or the other. Since the instruction in *Mincey* was held to be argumentative, the three instructions at issue here should be held argumentative as well.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness of guilt instructions based on analogy to *People v. Mincey*, *supra*, 2 Cal.4th 408, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction which "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" However, this holding does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"'There should be absolute impartiality as between the People and defendant in the matter of instructions, . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510;

Wardius v. Oregon (1973) 412 U.S. 470, 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law (*Lindsay v. Normet* (1972) 405 U.S. 56, 77).

To insure fairness and equal treatment, this Court should reconsider those cases that have found California's consciousness of guilt instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th 705, 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC No. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]) and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence" (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137).

The alternative rationale this Court employed in *People v. Kelly* (1992) 1 Cal.4th 495, 531-532, and a number of subsequent cases (e.g., *People v. Arias* (1996) 13 Cal.4th 92, 142), is equally flawed. In *Kelly*, the Court focused on the allegedly protective nature of the instructions, noting that they tell the jury that the consciousness of guilt evidence is not sufficient by itself to prove guilt. From this fact, the *Kelly* court concluded that: "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly,

that it may at least consider the evidence." (*People v. Kelly*, *supra*, 1 Cal.4th at p. 532.)

More recently, this Court abandoned that rationale, holding that the error in not giving a consciousness of guilt instruction was harmless because the instruction "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th 598, 673.) Moreover, the allegedly protective aspect of the instructions is weak at best and often entirely illusory. The instructions do not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt and therefore permit the jury to seize upon one isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use that *in combination* with the consciousness of guilt evidence to conclude that the defendant is guilty.

Finding that a flight instruction unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming recently held that, in future cases, delivery of a flight instruction will always be reversible error. (*Hadden v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, it joined a number of other state courts that have found similar flaws in the flight instruction.

Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill*

v. State (Ind. 2001) 741 N.E.2d 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E,2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App. 1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].)[119]

The reasoning of two of these cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E.2d 1230, the Supreme Court of Indiana relied on that state's established ban on argumentative instructions to disapprove delivery of flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

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[119]Other state courts have also held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant discussion. (See, e.g., *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Supreme Court of Kansas cited a prior case which had disapproved delivery of a flight instruction (*id.* at p. 748) and extended its reasoning to cover all similar consciousness of guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745 [holding that the reasons which led to the disapproval of flight instructions also applied to an instruction on the defendant's false statements].)

The argumentative consciousness of guilt instructions invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution and placing the trial court's imprimatur on the prosecution's theory of the case. They therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 & 15), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., Amends. 6 & 14; Cal. Const., art. I, § 16), and his right to a fair and reliable capital trial (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, § 17).

C. The Consciousness of Guilt Instructions Embody Irrational Permissive Inferences

All of the consciousness of guilt instructions given in this case state permissive inferences. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 977.) They each permit the jury to infer one fact, appellant's consciousness of guilt, from other facts, i.e., false statements (CALJIC No. 2.03), efforts to suppress evidence (CALJIC No. 2.06), and flight (CALJIC No. 2.52).

The constitutionality of a permissive inference instruction depends upon whether there is a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 296 (*en banc*).) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.)

In this context, a rational connection is not merely a connection that is logical or reasonable; it is rather a connection that is "more likely than not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 [noting that the Supreme Court has required "'substantial assurance' that

the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend'"].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County Court*, *supra*, 442 U.S. at pp. 157, 162-163.)

In appellant's case, it cannot be said, that simply because appellant denied giving the chains to Mackie Williams it is more likely than not that appellant was responsible for the attack on Mrs. Constantin. Similarly, appellant's leaving the Bay Area after he learned that his name had been associated with the murders does not make it more likely than not that appellant committed those crimes, since appellant explained that his possession of the gold bracelet, which he learned had been taken from Mrs. Constantin, was the reason for his leaving the area. (RT 3856.)

Moreover, the fact that the small charm was missing from the bracelet at the time it was recovered, certainly does not establish that appellant had anything to do with its removal. It could have come off accidentally, or it could have been removed by the coin shop dealer. The loss of the charm was not an indication that appellant had purposely removed it, or that its removal was part of an effort to "destroy evidence."

D. Use Of These Instructions Was Prejudicial To Appellant.

There was no physical evidence in this case which connected appellant to these murders. His possession of one item of jewelry from one

of the burglaries did not establish appellant as a serial killer. In some cases, the only evidence connecting him with the crime was his possible presence in the neighborhood on the day the crime took place. Because these three instructions permitted the jury to draw an irrational inference of guilt against appellant, their use undermined the reasonable doubt requirement and denied appellant his rights to a fair trial and due process of law. (U.S. Const., 14th Amend.; Cal.Const., art. I, §§ 7 and 15.)

Their use also violated appellant's right to have a properly instructed jury find that the elements of all the charged crimes had been proven beyond a reasonable doubt. (U.S. Const., 6th and 14th Amends.; Cal.Const., art. I, § 16.) By reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, it violated his right to a fair and reliable capital trial. (U.S. Const., 8th and 14th Amends.; Cal.Const., art. I, § 17.) Given the weakness of the evidence in this case, it cannot be said that the use of these instructions was harmless beyond a reasonable doubt. (*Chapman v. Californa, supra*, 386 U.S. at p. 24.) The convictions and death sentence must be reversed.

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XIII.

SINCE APPELLANT WAS ACQUITTED OF THE ROBBERY OF PEARL LARSON, THE TRIAL COURT'S REFUSAL TO STRIKE THE ROBBERY SPECIAL CIRCUMSTANCE WAS REVERSIBLE ERROR. THE BURGLARY AND THE BURGLARY SPECIAL CIRCUMSTANCE FAIL AS WELL.

A. Factual Background

Appellant was charged with the burglary, robbery, and murder of Pearl Larson. (Counts 10, 11 and 12; CT 2951-2952.) Two special circumstances were alleged with respect to the Larson murder: burglary (CT 2954) and robbery (CT 2954-2955.) The robbery special circumstance alleged that appellant:

> while he was engaged in and was an accomplice in the commission, the attempted commission, and the flight thereafter of a felony, to wit: Robbery, in violation of Section 211 of the Penal Code, intentionally killed PEARL LARSON (DOB - 3-4-11).

(CT 2954-2955.)

In the closing argument, the prosecutor argued that Pearl Larson lost money in the robbery, which he claimed was established by a photo showing a wallet next to her on the bed. "It was open. There were three pennies lying on the bed, no currency." (RT 4099.)[120] Despite the

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[120]The prosecutor's description of the evidence was not supported by the only witness who was asked about the crime scene, Officer Paul

prosecutor's claim of robbery, the jury acquitted appellant of the Larson robbery (count 11 of the Information). (CT 3351.) Acquittal on the robbery count was likely due to the fact that Mrs. Larson's house had not been ransacked (RT 3130-3133), and no property was shown to have been taken. Nevertheless, the jury found appellant guilty of the residential burglary of Mrs. Larson, alleged in count ten. (CT 3374.)

However, with respect to the *murder* of Mrs. Larson, the jury found both the burglary and the *robbery special circumstances* to be true. (CT 3382-3383.) After the guilty verdicts were returned, the defense moved to strike the fourth special circumstance (robbery), in light of the jury's finding that appellant was *not guilty* of the same robbery, as alleged in count 11. (RT 4460.) The prosecutor conceded that retaining the robbery special, after the jury had acquitted Mr. Lynch of robbery, had initially confounded him. However, on the advice of his supervisor who suggested he should "run with it" (RT 4461), the prosecutor would not stipulate to a

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Henning. He said he did not recall what items were lying on the bed (RT 3253) and when specifically asked whether he recalled seeing any pennies next to the victim, he said, "I can't recall that." (RT 3254.) Nor did he recall finding a wallet or any purse in the area. (RT 3254.) Officer Henning admitted that while he did not *see* any currency while he was in the house, neither did he *search* for any currency in the house. (RT 3255-3256.) The prosecutor's claim regarding an open wallet and pennies lying on the bed appears to have been based upon his own interpretation of one of the crime scene photos. (RT 3253.)

dismissal, and instead contested the defendant's motion to strike the fourth special circumstance.

Speculating about what the jury might have intended from this seemingly erroneous verdict, the trial court surmised:

> It could well be that the jury decided *there was an attempted robbery rather than a robbery*, which would be consistent with the finding of the special circumstance, even though they found the defendant not guilty of the robbery.

(RT 4461, emphasis added.) Although the prosecutor had never suggested this theory, and the jury had never been instructed about the elements of an attempted robbery, the trial court denied the defense's motion to strike the fourth special circumstance and allowed the robbery special circumstance finding to stand.

B. The Trial Court's Failure to Strike the Robbery Special Circumstance Was Error

While the court fully instructed the jury with the standard robbery instructions, CALJIC No. 9.40[121] and CALJIC No. 9.41[122] (CT 3296-3297;

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[121]CALJIC No. 9.40 provided: "Defendant is accused in Counts 2, 5, 8, 11, and 14 [of] the information of having committed the crime of robbery, a violation of Section 211 of the Penal Code.

"Every person who takes personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specific intent permanently to deprive such person of such property, is guilty of the crime of robbery in violation of Penal Code Section 211.

"In order to prove such crime, each of the following elements must be proved:

RT 4238-4239), as well as the robbery special circumstance instruction, CALJIC No. 8.81.17[123] (CT 3308), none of the instructions defined the meaning of *attempt* or *attempted* robbery. Given that the prosecutor vigorously argued that Mrs. Larson was *in fact robbed of money* (RT 4099), it must be presumed that omitting an attempted robbery instruction was not

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1. A person had possession of property of some value however slight,
2. Such property was taken from such person or from her immediate presence,
3. Such property was taken against the will of such person,
4. The taking was accomplished either by force, violence, fear or intimidation, and
5. Such property was taken with the specific intent permanently to deprive such person of the property." (CT 3296.)

[122]CALJIC No. 9.41 provided: "The element of fear in the crime of robbery may be either: (1) The fear of an unlawful injury to the person or property of the person robbed or to any of the person's relatives or family members, or (2) The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery." (CT 3297.)

[123]The robbery special circumstance instruction read as follows: "To find that the special circumstance, referred to in these instructions as murder in the commission of robbery, is true, it must be proved:

[1] The murder was committed while the defendant was engaged in the commission or attempted commission of a robbery;

or The murder was committed during the immediate flight after the commission or attempted commission of a robbery by the defendant;

and [2] The murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder." (CT 3308; RT 4243-4244, emphasis added.)

an oversight, but merely a reflection of the prevailing understanding on everyone's part that if appellant was guilty of *something* he was guilty of the robbery itself.

That no one considered an attempted robbery also appears to have been confirmed from the prosecutor's response, when appellant's motion to strike the robbery special was first raised. The prosecutor appeared to have been taken by surprise, and made no attempt to explain or reconcile the jury's finding. If anyone had considered this a case of *attempted robbery*, certainly one of the parties or the court would have included CALJIC No. 6.00 [Attempt - Defined] with the jury instructions.

CALJIC No. 6.00 is a rather lengthy instruction which explains to the jury that in order to find an attempt to commit a crime, two elements must be proven: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission. The instruction then explains, also in some detail, the difference between mere preparation for and the actual commencement of the criminal deed, sufficient to constitute an attempt. Without this instruction, the jury simply had no basis upon which to make a determination as to *whether there had been* an attempted robbery.

Attempted robbery had never been the prosecutor's theory. He did not argue it, nor did he submit instructions to cover the possibility of

attempted robbery. As explained further below, the trial court's effort to "save" what was on its face an erroneous special circumstance finding, deprived appellant of his rights under the Sixth, Eighth and Fourteenth Amendments, to a fair trial, reliable guilt and penalty determinations and due process. Even if the court had been correct in speculating that the jury *might have been thinking of an attempted robbery*, such speculation by the court cannot be substituted for what is constitutionally required in a capital case. Special circumstance findings must be found by a jury beyond a reasonable doubt. (*Ring v. Arizona* (2002) 536 U.S. 584.) In this case, without the legal framework, the jury was prevented from making such a finding. [124]

C. The Trial Court's Failure to Provide Any Instruction on Attempted Robbery Precluded the Jury From Making a Finding of An Attempted Robbery Special Circumstance.

Under the Fifth Amendment right to due process and the Sixth Amendment right to a jury trial, made applicable to the states through the Fourteenth Amendment, the prosecution must prove every element of a crime to a jury beyond a reasonable doubt. (*People v. Sengpadychith*

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[124]Evidence that the jury was floundering or, at the very least, confused about how to handle the fourth special circumstance (the Larson robbery special) in light of the fact that it had acquitted appellant of the Larson robbery, is demonstrated by how it completed the verdict form. Initially, the foreperson wrote "NOT TRUE," but then apparently changed it to read "TRUE." (CT 3383.)

(2001) 26 Cal.4th 316, 324, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) Although this Court had held, prior to the Supreme Court's decision in *Ring, supra*, that "there is no right under the Sixth or Eighth Amendments. . . to have a jury determine the existence of all of the elements of a special circumstance" (*People v. Odle* (1988) 45 Cal.3d 386, 411), that is no longer so. It is now settled law that special circumstances, like elements of a crime, must also be determined by a jury beyond a reasonable doubt. (*People v. Prieto* (2003) 30 Cal.4th 226, 256.)

Moreover, this Court has confirmed that the California Constitution requires the trial court to *instruct* the jury on *every material element* of an offense. (*People v. Flood* (1998) 18 Cal.4th 470, 480.) Instructional error which has the effect of relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States and California Constitutions. (*People v. Cox* (2000) 23 Cal.4th 665, 676; *People v. Flood, supra,* 18 Cal.4th at pp. 479-480.) However, the proper standard of review when such instructional errors have arisen, has been the subject of many recent Supreme Court decisions.

In *Neder v. United States* (1999) 527 U.S. 1, the Court was asked to decide the proper standard of review when the issue of materiality in a tax

fraud case was removed from the jury's consideration. The defendant had argued that the omission was structural error, not subject to harmless error analysis, citing *Sullivan v. Louisiana, supra*, 508 U.S. 275.

In *Sullivan*, the defendant had been convicted by a jury trial using a reasonable doubt instruction which misdescribed the prosecution's burden of proof. The Court held the defective instruction was not subject to harmless error analysis, because there had been "no jury verdict of guilty-beyond-a-reasonable-doubt," and therefore "no object . . . upon which the harmless error scrutiny [could] operate." (508 U.S. at p. 280.) Such an error "vitiate[d] all the jury's findings," and was therefore reversible per se. (*Sullivan, supra*, 508 U.S. at pp. 281-282.)

In *Neder, supra*, the Court refused to extend the *Sullivan* holding to cases in which the omission of a single element had not rendered the trial "fundamentally unfair." (*Neder, supra*, 527 U.S. at p. 9.) However, *Neder* did not exclude the possibility that some types of instructional error still might give rise to the type of structural error found in *Sullivan*, especially when there was not "overwhelming evidence" supporting the missing element. The *Neder* Court compared the situation before it to that presented in *Johnson v. United States* (1997) 520 U.S. 461, where the failure to include the materiality instruction "did not warrant correction in

light of the 'overwhelming' and 'uncontroverted' evidence supporting materiality." (*Id.* at p. 470.) Referring to the *Johnson* decision, *Neder* held: "That conclusion cuts against the argument that the *omission of an element will always render a trial unfair.*" (*Neder, supra*, 527 U.S. at p. 9, emphasis added.) While thus leaving open the possibility that the omission of an element in a jury instruction might, in some cases, render the trial fundamentally unfair, *Neder* held that generally instructional error will be subject to *Chapman* harmless error analysis.[125]

Nevertheless, *Neder* did conclude that although the omission of the materiality element had not "vitiated all the jury's findings," it did "*prevent the jury from making a finding on the element of materiality.*" (*Neder, supra*, 527 U.S. at p. 11, emphasis added.) Thus, under *Neder*, when the jury has not been instructed with respect to a certain required fact, element or issue, it must be said that the jury has *not made a finding* with respect to the missing element. The *effect* of the missing element is a separate matter.

In appellant's case the record is clear that the jury was not given the standard attempt instruction, nor any other special instruction which would have supplied the meaning of an attempted robbery. Applying the

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[125]Under that standard, the conviction must be set aside unless the State can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra*, 386 U.S. at p. 24.)

reasoning of *Neder supra, Sullivan, supra,* and *Prieto, supra,* the omission of the attempt instruction "prevented the jury from making a finding" on the issue of attempted robbery. (*Neder, supra*, 527 U.S. at p.11.) Although the trial judge tried to save the purported special circumstance finding by offering his theory that the jury might have been considering an attempted robbery, without the instruction, no such finding was possible. (*Neder, supra*, 527 U.S. 1.) And unlike the situation in *Neder*, there was no such "overwhelming evidence" to support a finding of attempted robbery. (*Id.* at p. 9.) Harmless error analysis, as was applied in *Neder*, is inapplicable here. The appropriate remedy is to strike the robbery special circumstance as an invalid finding.

Although not binding on this Court, a recent decision from the Fourth Circuit further illuminates why an exception to *Neder's* harmless error analysis is especially appropriate in a capital case where the missing element involves a special circumstance. In *Esparza v. Mitchell* (4th Cir. 2002) 310 F.3d 414, the jury had never been instructed on the elements of a "capital specification."[126] The Fourth Circuit found the "post-hoc

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[126]A capital specification is comparable to special circumstances under California law. Ohio law requires that the jury find that the defendant was "the principal offender or that he committed the aggravated murder with prior calculation and design." (*Id.* at p. 419, fn.1.) In *Esparza* the finding had been made by the trial judge.

determination by an appellate court of what the jury would have done if the capital specifications question had been presented to it" to be "particularly troubling," and refused to apply harmless error analysis under *Neder*. Supplying the missing capital specification was, in the court's view

> not the same as dispensing with the minor element of "materiality" in a federal white collar tax case. . . . There is no suggestion in the Chief Justice's opinion in *Neder* that harmless error would protect a directed verdict for the State on a crucial finding under the Eighth Amendment in a capital case. In *Neder*, Justice Stevens specifically points out in his concurring opinion that such harmless error would not apply to capital cases where "there is a special danger that elected judges may listen to the voice of voters rather than witnesses."

(*Id.* at pp. 421-422, quoting *Neder, supra*, 527 U.S. at p. 28.) Using *Neder's* harmless error approach may well be inappropriate in a capital case particularly when, as here, the entire instruction has been omitted.

However, even if this Court concludes that *Chapman* harmless error analysis applies, it cannot be said that the error here was harmless beyond a reasonable doubt. Unlike the many cases in which the evidence to support the missing element was "overwhelming," in appellant's case the evidence was merely speculative. There was no evidence that anything had been taken in the course of the Larson burglary-murder, or even that the house had been ransacked. The prosecutor apparently referred to a photograph, allegedly showing a wallet near the victim, to support his claim that money

must have been taken. However, that theory was never supported by any witnesses, only the prosecutor's interpretation of a crime scene photo.[127] More importantly, since the jury in fact acquitted appellant of the robbery of Mrs. Larson, it appears that it rejected the prosecutor's view of the evidence. In any event, it cannot be said that "overwhelming evidence" supported a finding of a robbery special circumstance, even if it *were* possible to base it upon the theory of attempted robbery.

Appellant's case is easily distinguishable from the cases in which the instructional error has been found harmless beyond a reasonable doubt because the missing element was "uncontested and supported by overwhelming evidence," (*Neder, supra*, 527 U.S. at p. 17; *Johnson v. United States* (1997) 520 U.S. 461, 501 [evidence supporting materiality was overwhelming and essentially uncontroverted]; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1211 [firearm use was uncontroverted]), or where the court correctly instructed the jury on the missing element in connection with another charge for which the jury returned a guilty verdict. (See, e.g., *United States v. Whitmore* (9th Cir. 1994) 24 F.3d 32, 37, conc. opn.)

In contrast, in appellant's case, there was no other issue before the

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[127]The pathologist testified that Mrs. Larson had abrasions near her ring finger which were "suggestive" of someone trying to remove her ring. (RT 3276-3277.) However, this evidence was never argued to the jury nor can it be considered "overwhelming" evidence of an attempted robbery.

jury which would have required them to find that appellant *attempted* to rob Mrs. Larson. The only issue presented to the jury was whether there had been a *robbery,* and on that issue appellant had been acquitted. The jury found that Mrs. Larson *had not been robbed.* While an attempted robbery might have been *possible*, that is certainly not the test for determining whether the error was harmless. None of the cases applying the *Chapman* analysis have found that a missing element could be supplied by the reviewing court simply because facts might be *surmised.* It cannot be said that the evidence of an attempted robbery was overwhelming, and since the prosecutor did not make attempted robbery an issue for consideration, there was no need for appellant to contest such a claim.

If the robbery special circumstance was in fact *an attempted robbery* special circumstance, then appellant had a right to that decision by a jury beyond a reasonable doubt, which necessarily requires that it be based upon instructions that included the crime in question. The robbery special circumstance must fail since the jury found that Mrs. Larson was not robbed, and indeed all of the evidence supported that conclusion. An attempted robbery special circumstance must also fail because the failure to instruct the jury "prevented the jury from making a finding" of attempted robbery. (*Neder, supra.*)

D. The Robbery Special Circumstance Instruction Was Inadequate for Purposes of an Attempted Robbery Finding.

As discussed above, there is no legal basis for allowing the jury's robbery special circumstance finding to be interpreted as a finding *of an attempted robbery special circumstance.* But even if such an interpretation were possible, the robbery special circumstance instruction that was given precludes that possibility.

A review of that instruction[128] reveals that in order to find the robbery special circumstance to be true, the jury was required to make two findings: (1) that the murder was committed during the commission or attempted commission of a robbery, or the immediate flight afterward; *and* (2) that the murder was committed *in order to advance the commission of a robbery or to avoid detection therefrom.* (CT 3308.) Even assuming that the jury made the first finding, concluding that Mrs. Larson's murder was committed during an *attempted robbery* rather than a robbery, there was no factual basis for the jury to have made the second finding, since the jury's verdict was that *there had been no robbery.* (See CT 3351, acquittal on count 11.) If the perpetrator *did not commit the crime of robbery*, then the murder of Mrs. Larson could not have been to "advance the commission of

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[128]See fn.123, *supra*, for the text of the instruction, also found in the record at CT 3308 and RT 4243-4244.

a robbery." Even using the trial court's interpretation of the verdict, if the murder was committed to advance anything, it could only have been to advance the commission of an *attempted robbery.* However, the special circumstance instruction did not allow for this possibility, since it specifically excluded the language necessary for proving an attempted robbery special circumstance.

It is apparent that the lack of appropriate instructions, combined with the jury's finding that appellant *had not robbed Mrs. Larson*, leads to only one possible conclusion: that the robbery special circumstance finding was in error and must be reversed. The trial court committed prejudicial error in refusing to strike that special circumstance when the defense requested it. In addition, as explained below, appellant's acquittal of the Larson robbery necessarily requires that the Larson burglary conviction and the burglary special circumstance be reversed for insufficiency of evidence.

E. Both The Burglary Conviction And The Burglary Special Circumstance Must Be Reversed For Insufficient Evidence.

With respect to the residential burglary of Mrs. Larson, the jury was instructed with a modified version of CALJIC No. 14.50, which provided as follows:

> Defendant is accused in Counts 1, 4, 7, 10, and 13 of the information the information [sic] of having committed the

crime of burglary, a violation of section 459 of the Penal Code.

Every person *who enters any building with the specific intent to steal, take and carry away the personal property of another* of any value and with the further specific intent to deprive the owner permanently of such property, is guilty of the crime of burglary in violation of Penal Code, Section 459.

It is immaterial whether the intent with which the entry was made was thereafter carried out.

In order to prove such crime, each of the following elements must be proved:

1. A person entered a building;
2. *At the time of entry, such person had the specific intent to steal and take away someone else's property*, and intended to deprive the owner permanently of such property.

(CT 3259, emphasis added.)

In addition, the jury was instructed with the burglary special circumstance, which provided as follows:

To find that the special circumstance, referred to in these instructions as murder in the commission of burglary, is true, it must be proved:
That murder was committed while the defendant was engaged in the commission or attempted commission of a burglary; or

The murder was committed during the immediate flight after the commission or attempted commission of a burglary by the defendant; and

The murder was committed in order to carry out or advance the commission of the crime of burglary or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the burglary was merely coincidental to the

commission of the murder.

(CT 3307.) In order to find a burglary of Mrs. Larson, the jury needed some evidence that the intruder had entered Mrs. Larson's home with the specific intent to take her property. There was no such evidence. Similarly, in order find that the burglary special circumstance was true, the jury needed evidence that the murder was carried out for the purpose of burglary, which again required evidence of the intent of the intruder - - that he intended to steal property.

In acquitting appellant of the robbery of Mrs. Larson, the jury rejected the charge that property had been taken from Mrs. Larson. The effect of that finding is simply that Mrs. Larson was found dead in her home, without any evidence that the killer ever took any property. The fact that Mrs. Larson was found with her housedress pulled up above her waist with no underwear on, may have been an indication that the intruder had the intent to sexually assault the victim, rather than to take her property. (RT 3248.) But sexual assault was neither charged nor proven. More importantly, the evidence simply does not indicate what the intruder's intentions were at the time he entered the house. The fact that the jury rejected the prosecution's theory that appellant had taken property from Mrs. Larson, highlights the lack of evidence to support an intent to steal.

Given the lack of evidence, it would be utter speculation for a jury to conclude that the person who killed Mrs. Larson did so in the course of *either* a burglary or a robbery. The fact that the jury acquitted appellant of the robbery leads to the logical and necessary conclusion that appellant should have similarly been acquitted of the burglary *and* the burglary special circumstance, as well as the robbery special circumstance. Without evidence to support those verdicts, both the burglary conviction and the burglary special circumstance must therefore be reversed.

F. The Felony Murder of Pearl Larson Must Also Be Reversed

Without evidence to support an intent to take property, the felony murder theory upon which the prosecution based its first degree murder charge must also fail. In his closing argument, the prosecutor told the jury:

> If you find the attacker of these five women went into that house, obviously, that's a burglary with the intent to commit theft and did rob, automatically, no matter how those people died, it's automatically murder of the first degree. Automatically. That's the law.

(RT 4143.) Following the prosecutor's urging, the jury returned a guilty verdict on the first degree felony murder charge. (CT 3352.) However, since the jury concluded that Mrs. Larson had not been robbed, and since there was no evidence at all about the intruder's intent, the jury had no basis for concluding that Mrs. Larson was killed *during the commission of either*

a burglary or a robbery. It is well settled that felony murder based upon the underlying felony of burglary must establish an intent to commit a felony *other than* the crime of murder. In *People v. Wilson* (1969) 1 Cal.3d 431, this Court explained that under the doctrine of merger, an entry with the specific intent to commit murder cannot support a felony-murder conviction. (See also *People v. Garrison* (1989) 47 Cal.3d 746 [jury was improperly instructed that a person who enters a structure with the specific intent to commit murder is guilty of burglary.]

Looking at the evidence in the Larson murder case, as well as the jury's verdict, all that can be said is that someone killed Mrs. Larson in her home. The intent of the intruder was not apparent from the circumstances of the crime. The position of her housedress above her waist might have indicated that sexual assault was a motive, but no sexual crime was charged. The prosecution believed that Mrs. Larson was robbed, but the jury disagreed, finding no robbery. In the end, there simply was no basis for concluding that this crime was a felony murder. Since the murder was charged *only* as a felony murder and since there was no underlying felony, the first degree felony murder conviction, count 12 of the Information, must be reversed as well.

Moreover, as discussed in Argument XVIII, *supra*, the reversal of

any of the counts for which appellant was convicted also requires reversal of appellant's death sentence.

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XIV.

CALJIC NO. 8.85, AS GIVEN, DEPRIVED APPELLANT OF A FAIR AND RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. Facts

The defense requested that CALJIC No. 8.85 be modified to eliminate parts (d), (e), (f), (g), (h) and (i) since those factors were not relevant to case. The defense expressed concern that the jurors would treat the absence of those potentially mitigating factors as aggravating factors, and argued that the situation was no different than ones in which the court deletes a portion of an instruction where there is no evidence to support the instruction. "The court does not instruct on matters where there is no evidence or it's not relevant." (RT 4610.) The prosecutor objected to any deletions and the trial court ruled to give CALJIC No. 8.85 in its entirety.[129]

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[129]The court had previously decided to instruct the jury about lingering or residual doubt, following CALJIC No. 8.85. (RT 4601.) Consequently, the modified version of CALJIC No. 8.85 that was given to the jury provided: "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

(b) The presence or absence of criminal activity by the defendant,

other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant s character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

You may consider as a mitigating circumstance the existence of any residual or lingering doubts about defendant's intent to kill the victims of the murder of which he has been convicted.

Lingering or residual doubt is defined as the state of mind between beyond a reasonable doubt and beyond all possible doubt.

The concept of residual or lingering doubt does not mean you are to relitigate or readjudicate the determination of defendant's guilt or the findings of the special circumstances that were resolved by you in the guilt

During the prosecutor's penalty phase argument he went through the list of statutory mitigation factors, as listed in the instruction, and pointed out that none of those factors applied to appellant. (RT 4628-4629.) After eliminating all of the factors, (d) through (j), the prosecutor said that all that was left was factor (k), and that measured against the many aggravating factors:

> That's it. That is all you can consider in mitigation. That is it. You know the factors in aggravation, and all you can consider are any factors of sympathy or things that will extenuate the gravity of the three murders for which you found him guilty already.

(CT 4629.) Although the prosecutor described factor (k) as one that could be used by appellant to evoke mercy or sympathy from the jury, he argued that appellant should only be shown the same mercy that he showed the victims, i.e., none. (RT 4637.) The prosecutor argued that all three aggravating factors applied to appellant while none of the list of mitigating factors, which defense counsel had sought to strike, applied. (RT 4615-4616, 4627-4630.) CALJIC No. 8.85, as given in this case, with its numerous irrelevant factors in mitigation and as used by the prosecutor, deprived appellant of a fair, reliable penalty determination.

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phase of this case." (RT 4684-4686; CT 3422-3425.)

B. The Trial Court Should Have Deleted The Irrelevant Factors .

Instructing the jury about mitigating factors for which there was no evidence in this case was highly prejudicial to appellant. Because the defense presented no evidence to support factors (e) and (f), inclusion of those factors in the instruction could only have prejudiced appellant. The murders in the instant case were not rendered more heinous than others because the victims did not consent to the killing [factor (e)], or by the fact that they were not "committed under circumstances which the defendant reasonably believed to be a moral justification . . . for his conduct" [factor (f)]. Yet, the instruction improperly suggested otherwise. Thus, there was a real risk that the jury would aggravate appellant's sentence based on factors that should have played no role in its determination of penalty in this case.

Moreover, with respect to factors (d) and (g), the court should have deleted the words "extreme" and "substantial" before submitting those factors for consideration. Factor (d) requires evidence of an "*extreme* mental or emotional disturbance" and factor (g) requires "*extreme* duress" or "*substantial* domination." The restrictive language of factors (d) and (g) acted as unconstitutional barriers to consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments. (*Stringer v. Black* (1992) 503 U.S. 222; *Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v.*

Ohio (1978) 438 U.S. 586.) There is an impermissible risk that the jury would either understand these factors, or their absence, to be aggravating, or would interpret the language to mean that mental or emotional disturbance, duress, and impaired capacity could not be given any mitigating weight *unless* those conditions were extreme or substantial.

In addition, factors (d) and (h) both impermissibly restrict the described conditions to the time of the offense, implying that unless they existed at that time, they could not be considered as mitigating evidence. This language -- i.e., at the time of the offense -- creates a substantial and impermissible risk that the jury would believe that evidence relevant to such factors could not be given mitigating weight if they did not influence the commission of the crime. (See *People v. Lucero* (1988) 44 Cal.3d 1006, 1030; U.S. Const., 8th & 14th Amends.) Inferences that do "not relate specifically to [the defendant's] culpability for the crime he committed" may nevertheless be mitigating under the Eighth Amendment. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5.)

The restrictive language of factors (d), (g) and (h), acted as instructional commandments to the jury, rendering those factors unconstitutionally vague, overbroad, arbitrary, capricious, and incapable of principled application. (*Maynard v. Cartwright* (1988) 486 U.S. 356;

Godfrey v. Georgia (1980) 446 U.S. 420.) The jury's consideration of these factors, in turn, introduced impermissible unreliability into the sentencing process, in violation of the Eighth and Fourteenth Amendments.

The trial court had a duty to review each of the eleven factors listed in CALJIC No. 8.85 to determine which were relevant to the penalty phase evidence. In every other context, a jury only receives instructions that are relevant to the evidence. Including instructions that deal with matters outside of the evidence is not only unnecessarily burdensome for jurors, but is highly confusing for them. For this reason, the trial court is obligated to ensure that the instructions are relevant to the evidence.

By permitting irrelevant and overly restrictive factors to remain in the instruction, the trial court enabled the prosecutor to go down the list, and demonstrate to the jury that of all of the possible circumstances in mitigation, appellant was not able to establish anything, other than factor (k), which the prosecutor characterized as "factors of sympathy." (RT 4629.) The only reasonable inference a juror could draw was a negative one: an inapplicable factor was just one more strike against the defendant. With more inapplicable mitigating factors than applicable ones, it was virtually guaranteed that the number of strikes and their cumulative negative effect would be significant.

Instructing on irrelevant or overly restrictive factors unnecessarily created the risk, if not the likelihood, that jurors would use the mitigating factors in a way that made the imposition of death more likely. Permitting the jury to consider factors not anchored in evidence denied appellant his rights to due process, a reliable death verdict and equal protection, in violation of the Sixth, Eighth, and Fourteenth Amendments and article I, section 7 of the California Constitution. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 280; *Maynard v. Cartwright, supra*, 486 U.S. at p. 362; *Godfrey v. Georgia, supra*, 446 U.S. at pp. 427-428.) Accordingly, appellant's death sentence should be reversed.

C. The Jury Should Have Been Told That the Absence of a Mitigating Factor Could Not Be Considered Aggravating

The prosecutor's use of the long list of inapplicable mitigating factors to show that aggravation outweighed mitigation could have been prevented had the court dropped the factors for which there was no evidence. Failing that, the court should have at least instructed the jury that the absence of any mitigating factors could not be considered as aggravating. The court's refusal to eliminate those inapplicable factors was exacerbated by their wording, in that each of those factors, except for factor (i), is prefaced with the words "whether or not." Appellant's jury was told to consider "whether or not" any of these various circumstances were

applicable. (RT 3423.) This formulation plainly invited the jurors to consider *whichever* of the two possibilities was borne out by the evidence. The unambiguous inference was that if a juror found the factor not proved, the juror could use that as a circumstance favoring death or disfavoring life.[130]

This Court has held that the "presence or absence" formulation used in factors (b) and (c) connotes that the presence of those factors is aggravating while their absence is mitigating. (See, e.g., *People v. Sanders* (1990) 51 Cal.3d 471, 528, fn. 27.) The "whether or not" formulation used in most of the other factors gives rise to the converse but otherwise identical connotation.

As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289).

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[130] If only the presence of the factor was relevant, the jury should have 'been told to consider "whether" or "if" the factor was present, not "whether *or not*" it was present. See C. Haney and M. Lynch, "*Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*," 18 Law and Human Behavior 411, 419, fn. 6 (1994).

This language, combined with the prosecutor's argument, was reasonably likely to mislead the jury into believing that the absence of the cited factors could be considered in aggravation,[131] a result prohibited by California law. (*People v. Davenport* (1985) 41 Cal.3d 247, 288-89.) Because it is reasonably likely that the jury sentenced appellant to death in part because of their reliance on aggravating factors not permitted by the death penalty statute, his sentence is constitutionally flawed. This deprivation of an important state procedural protection and liberty interest violated appellant's right to federal due process. (*People v. Boyd* (1985) 38 Cal.3d 762; *Walton v. Arizona* (1990) 497 U.S. at 653; *Hicks v. Oklahoma* (1980) 447 U.S. 343.)

Finally, in order to minimize the risk of arbitrary and capricious capital sentences, it is essential that the state channel and limit the sentencer's discretion in choosing the penalty to be imposed. (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 973; *Maynard v. Cartwright,* supra, 486 U.S. at pp. 362-363.) By insisting that capital juries receive the full list of

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[131] A 1994 study confirms this likelihood. Researchers conducted in-depth interviews with 30 individuals who had sat on capital juries in California. They reported that "many . . . jurors cited what could only be characterized as the *absence of mitigation* as a reason for sentencing the defendant to death." (C. Haney, L. Sontag, S. Costanzo, *Deciding to Take a Life: Capital Juries Sentencing Instructions, and the Jurisprudence of Death*, 50 Journal of Social Issues 149, 169 (1994), emphasis added.)

factors, when some are clearly inapplicable, California fails to meet the constitutional requirement. Indeed, giving CALJIC No. 8.85 in its present form is not rational. It effectively guarantees precisely the kind of arbitrary and capricious decision-making forbidden by *Furman v. Georgia* (1972) 408 U.S. 238, and the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Reliance by a jury on an invalid aggravating factor requires per se reversal. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-87.) It is both reasonably probable *(Strickland v. Washington* (1984) 466 U.S. 668, 693-95) and reasonably possible (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Brown* (1988) 46 Cal.3d 432, 448-49) that the errors contributed to the judgment of death. It certainly cannot be found that the errors had "no effect" on the penalty verdict. (*Caldwell v. Mississippi* (1985) 472 U.S. 320.) The judgment of death must be reversed.

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XV.

THE TRIAL COURT SHOULD HAVE GIVEN DEFENDANT'S SPECIAL INSTRUCTION NO. 3 CONCERNING MITIGATING EVIDENCE.

A. Factual Background

The trial court instructed the jury with CALJIC No. 8.88, which informed the jury that a mitigating circumstance was "any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (CT 3445; RT 4695.) The court gave a similar explanation throughout the jury selection process.[132]

In order to clarify the meaning, effect and use of mitigation evidence, the defense requested the following special instruction:

> If the mitigation evidence gives rise to compassion or sympathy for the defendant, the jury may, based upon such sympathy or compassion alone, reject death as a penalty.
>
> A mitigating factor does not have to be proved beyond a reasonable doubt to be considered. You may find that a mitigating factor exists if there is any substantial evidence to support it.

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[132]The court explained that "the defense . . .is permitted to present evidence of what are called mitigating circumstances or mitigating factors, extenuating circumstances. . . . Evidence that arguably would point to the punishment of life in prison without possibility of parole. (See, e.g., RT 337, 355-356, 831, 911.)

> Moreover, the law does not require that you find the existence of any mitigating fact before you choose life without the possibility of parole over death. You may find, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death.

(CT 3393.) The trial court refused this instruction, offering in its place what it called "a modified version of the defendant's requested instruction No. 3." (RT 4597.) The court's instruction read as follows:

> I have previously instructed you that sympathy was not to play any part in your determination of whether the defendant was guilty of the crimes charged. However, we are now at the penalty phase of the trial, where sympathy and mercy for the defendant are proper considerations.
>
> If a mitigating circumstance or an aspect of the defendant's background or his character, as shown by the evidence, or your observation of the defendant, arouses sympathy or compassion such as to persuade you that death is not the appropriate penalty, you may act in response thereto and impose a punishment of life imprisonment without the possibility of parole on that basis.

(CT 3401.) While the court's instruction properly informed the jury that sympathy was an appropriate consideration in the penalty deliberations, the instruction still fell short in several respects. First, it failed to clearly inform the jury that *sympathy alone* could be a basis for a sentence less than death. Related to that, it also failed to inform the jury that even if it found *no mitigating* evidence, the jury could still return a verdict of life without the possibility of parole. Finally, the instruction failed to inform the jury

that a mitigating factor need not be proved beyond a reasonable doubt.

Given the mitigating evidence which was presented, as well as the prosecutor's arguments to the jury, it is apparent that the jury needed to know each of the facts set out in the defense's special instruction. The trial court's refusal to clarify the role of mitigation evidence in this manner requires reversal of appellant's death sentence.

B. The Court's Narrow Definition of Mitigation Improperly Precluded the Jury From Considering a Punishment Less than Death.

In urging the trial court to give special instruction number 3, the defense cited *People v. Taylor* (1990) 52 Cal.3d 719. (CT 3393.)[133] In *Taylor*, the defendant argued that the definition of mitigating evidence given by the court was too restrictive in that it referred only to the offense and did not relate to the defendant's background or character. This Court rejected Taylor's claim, but only because, in addition to the standard CALJIC instruction, an instruction *identical to the one offered by appellant* had been given, ["If this had been the only instruction on the subject, defendant's point might have merit." (52 Cal.3d at p. 746.)]. The *Taylor*

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[133]The discussions concerning the proposed jury instructions were held off the record. Consequently, the substance of the defense argument must be gleaned from the Defendant's Requested Special Instructions (CT 3393-3394), and the trial court's brief summary of those discussions. (RT 4597-4602.)

court noted however, that the jury had been instructed with a description of factor (k) in CALJIC 8.85, and that the court had also instructed the jury: "If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may, based upon such sympathy or compassion alone, reject death as a penalty." (*Ibid.*) In light of those instructions, this Court found there was no reasonable likelihood that the jurors had misinterpreted the court's definition of mitigation.

In appellant's case, however, the very same clarifying instruction which this Court relied upon in *Taylor*, was specifically rejected by the trial court. In failing to clarify for the jury that even if there *was no mitigating evidence* presented, or even if aggravating evidence *outweighed mitigating evidence*, the jury could properly reject the death penalty, the trial court improperly tipped the scales in favor of the death penalty.

Throughout the jury selection process, the court and the prosecutor repeatedly emphasized that the seated jurors would have to be open to imposing the death penalty, if they found that aggravating evidence substantially outweighed mitigating evidence. (See, e.g., RT 2202, 2212-2213, 255-257.) In stressing the importance of being *willing and able* to impose the death penalty should the evidence support such a penalty, the jury was likely left with the impression that if they found *no mitigation*

evidence, or if aggravating evidence outweighed mitigating evidence, they were more or less bound to return a death verdict. It was therefore important for the trial court to make it absolutely clear to the jury, particularly in the closing instructions, that life without the possibility of parole was *always a permissible option*, since sympathy alone could trump the aggravating evidence.

The defense presented no evidence that appellant had suffered abuse or neglect in his family. His father testified that they were a religious family that attended church (RT 4587), that he held a steady while job raising his three children and that we was able to take care of the family's economic needs. (RT 4586.) Appellant's parents both testified that they loved him very much and asked the jury to spare his life. (RT 4583, 4586.) The mitigation evidence that was presented thus did not demonstrate a deprived background, abuse, neglect, mental illness or otherwise make any attempt to explain the crimes. Rather, appellant's family simply made a plea to the jury for sympathy. Under these circumstances it was critical that the jury clearly understand that they could reject the death penalty *solely because of a desire to show mercy*, and nothing more.

But the jury was never given that instruction. Instead, the prosecutor told the jury in his closing argument, that "[The defense has] shown you

absolutely nothing except for a mother and father who love their son and who want him spared. Give me a break. . . . Mitigation. That's a crock." (RT 4630-4631.) The prosecutor's argument that dismissed the sympathy factor as "a crock," thus fit well with the standard jury instructions, which placed heavy emphasis on the balancing of aggravating and mitigating factors.

But in appellant's case, because of the type of mitigation evidence which was presented, the weighing process was all but irrelevant. It would have been very easy for the average juror to conclude, in light of the defense evidence and the standard instructions, that the death penalty was the *only appropriate penalty* under the law. Without the clarifying instruction which the defense proposed, a sentence of death was virtually assured. The trial court had no valid reason for rejecting the defendant's proposed instruction, since it was a correct statement of the law and a better fit with the type of mitigation evidence in this case. The instruction, as given, was constitutionally inadequate.

There is a reasonable likelihood that the jury applied the flawed instruction in such a way as to improperly consider the aggravating and mitigating evidence presented in this case (*Boyde v. California* (1990) 494 U.S. 370, 380), rendering the death verdict in this case unreliable under the

Eighth Amendment to the United States Constitution. Appellant's death sentence must be reversed.

C. The Jury Should Have Been Told That Mitigating Factors Need Not Be Proven Beyond A Reasonable Doubt.

The special instruction proposed by the defense would have made it clear to the jury that the factors in mitigation did not need to be proved beyond a reasonable doubt. Since the jurors were instructed that consideration of the alleged aggravating factors relating to prior felony convictions and other criminal activity must be proved beyond a reasonable doubt (CT 3427), there is also a reasonable likelihood that some jurors improperly applied a similar burden to consideration of mitigation evidence. The absence of any instruction clearly informing the jurors that no such burden of proof applied to the consideration of mitigation evidence violated the Eighth and Fourteenth Amendments because of the likelihood that the instruction error precluded the jurors from considering all mitigation. (*Lockett v. Ohio, supra*, 438 U.S. at pp. 603-605.)

D. The Instructional Errors Require Reversal.

The final instruction which the court gave in this case, CALJIC No. 8.88, without the modifications requested by the defense, failed to specify that mitigation need not be established beyond a reasonable doubt or that sympathy for the defendant alone could be grounds for rejecting the death

penalty. It is reasonably likely that at least some of the jurors applied erroneous standards to consideration of mitigation, or were confused as to whether they were permitted to sentence appellant to life without the possibility of parole. These instructional errors violated the Eighth and Fourteenth Amendment rights to a reliable penalty determination and due process of law and require that the jury's decision to impose death be set aside. (*Zant v. Stephens, supra*, 462 U.S. at p. 885.) The likelihood that the jurors in this case did not properly give effect to mitigation evidence requires reversal under federal due process principles that prohibit depriving appellant of crucial protections afforded under California law. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) This likelihood renders the resulting verdict unreliable and reversible under the Eighth Amendment as well. (See *Godfrey v. Georgia, supra*, 446 U.S. at p. 428, quoting *Gregg v. Georgia, supra,* 428 U.S. 153, 198 ["a State wishing to authorize capital punishment . . . must channel the sentencer's discretion by 'clear and objective standards'"].) Appellant's death verdict must be reversed.

* * * * *

XVI.

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

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime, even circumstances squarely opposed to each other, to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the

"special circumstances" section of the statute, which was passed for the purpose of making *every* murderer eligible for the death penalty.

California's statute fails to provide safeguards during the penalty phase that would ensure the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is a truly "wanton and freakish" system that arbitrarily chooses from the thousands of murderers in California a random few who will receive the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

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

California's 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. The statute

therefore violates the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." [citations omitted].

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v. Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This

initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-six special circumstances[134] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons

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[134]This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-two.

eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).)

It is quite clear that these theoretically possible noncapital, first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at p. 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

B. Appellant's Death Penalty is Invalid Because Penal Code § 190.3(a) As Applied Allows the Arbitrary and Capricious Imposition of Death.

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

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional

scrutiny, 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.[135] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[136] or having had a "hatred of religion,"[137] or threatened witnesses after his arrest,[138] or disposed of the victim's body in a manner that precluded its recovery[139].

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial

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[135]*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

[136]*People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10, 765 P.2d 70, 90, fn.10, *cert. den.*, 494 U.S. 1038 (1990).

[137]*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, 817 P.2d 893, 908-909, *cert. den.*, 112 S. Ct. 3040 (1992).

[138]*People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S. Ct. 498.

[139]*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, 774 P.2d 659, 697, fn.35, *cert. den.* 496 U.S. 931 (1990).

Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue as a "circumstances of the crime"aggravating factor to be weighed on death's side of the scale:

a. That the defendant struck many blows and inflicted multiple wounds[140] or that the defendant killed with a single execution-style wound.[141]

b. That the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest,

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[140]See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[141]See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

sexual gratification)[142] or that the defendant killed the victim without any motive at all.[143]

c. That the defendant killed the victim in cold blood[144] or that the defendant killed the victim during a savage frenzy.[145]

d. That the defendant engaged in a cover-up to conceal his crime[146] or that the defendant did not engage in a cover-up and so must have been proud of it.[147]

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[142]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[143]See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[144]See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[145]See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[146]See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[147]See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

e. That the defendant made the victim endure the terror of anticipating a violent death[148] or that the defendant killed instantly without any warning.[149]

f. That the victim had children[150] or that the victim had not yet had a chance to have children.[151]

g. That the victim struggled prior to death[152] or that the victim did not struggle.[153]

h. That the defendant had a prior relationship with the

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[148]See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

[149]See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[150]See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[151]See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[152]See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[153]See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

victim[154] or that the victim was a complete stranger to the defendant.[155]

These examples show that absent any limitation on factor (a) ("the circumstances of the crime"), different prosecutors have urged juries to find aggravating factors and place them on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of factor (a) to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[156]

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[154]See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[155]See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

[156]See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in

b. The method of killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[157]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[158]

d. The time of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in the middle of the night, late at night,

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her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[157]See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[158]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

early in the morning or in the middle of the day.[159]

e. The location of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in her own home, in a public bar, in a city park or in a remote location.[160]

The foregoing examples of how factor (a) is actually being applied in practice make clear that it is being relied upon as a basis for finding aggravating factors in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[161]

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[159]See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[160]See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

[161]The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].)

C. California's Statute Contains No Safeguards To Avoid Arbitrary Sentencing And Deprives Defendants Of Their Right To A Jury Trial On Each Factual Determination Prerequisite To A Sentence Of Death.

As shown above, California's death penalty statute fails to effectively narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of

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of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating.

death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

1. Appellant was deprived of his right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of death.

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

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona, supra,* 536 U.S. 584 [hereinafter *Ring*]; and *Blakely v. Washington* (2004) 124 S.Ct. 2531 [hereinafter *Blakely*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The court acknowledged that in a prior case reviewing Arizona's capital

sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.*, at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of an element of the offence, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

This year, in *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington*, *supra*, 124 S.Ct. at 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 2543.)

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be

submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 2537, italics in original.)

As explained below, California's death penalty scheme, as interpreted by this Court, does not comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*, and violates the federal Constitution.

a. In the Wake of Apprendi, Ring, and Blakely, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[162] Only

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[162]See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim.

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

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

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Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985). On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumtances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az., 2003) 65 P.3d 915.)

section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[163] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (RT 4695),"an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[164] These factual determinations

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[163]This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

[164]In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with

are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[165]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*], and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) This holding

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respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: '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.'" (*Id.*, 59 P.3d at p. 460)

[165]This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

is based on a truncated view of California law. As section 190, subd. (a),[166] indicates, the maximum penalty for *any* first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorised by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 124 S.Ct. at 2431.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only

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[166]Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

in a formal sense." (*Ring, supra*, 536 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 134 Cal.Rptr.2d at 621 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the

sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[167] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[168] There is no meaningful difference between the processes followed under each scheme.

"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*, 536 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer pointed out, " a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the

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[167]Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

[168]Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."

way in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow*, *supra*, 30 Cal.4th at 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at 589-590, fn.14.) The Court has repeatedly sought to reject Ring's applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, 30 Cal.4th at 275; *Snow*, 30 Cal.4th at 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a

distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California* (1994) 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (*Prieto*, 30 Cal.4th at 263; emphasis added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance

is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See, *People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d 915, 943 ("Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency."); accord, *State v. Whitfield,* 107 S.W.3d 253 (Mo. 2003); *State v. Ring,* 65 P.3d 915 (Az. 2003); *Woldt v. People,* 64 P.3d 256 (Colo.2003); *Johnson v. State,* 59 P.3d 450 (Nev. 2002).[169])

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[169]See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the state's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 124 Sup.Ct. at 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made

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findings are essential predicates for a sentence of death).

beyond a reasonable doubt.[170]

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and

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[170]In *People v. Griffin* (2004) 33 Cal.4th 536, this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, analogies were no longer made to a sentencing court's traditional discretion as in *Prieto* and *Snow*. The Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437 [hereinafter *Leatherman*], for the principles that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation"].) (*Griffin*, *supra*, 33 Cal.4th at 595.)

In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> "Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?"

Leatherman, *supra*, 532 U.S. at 429. This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*.

Leatherman was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. *Id.*, 532 U.S. at 437, 440. *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

Blakely are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? The maximum sentence would be life without possibility of parole. (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*Prieto*, 30 Cal. 4th at 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(*Ring, supra*, 536 U.S. at p. 606, quoting with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at p. 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[171] As the high court stated in *Ring, supra*, 536 U.S. at pp. 589, 609:

> 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.

The final step of California's capital sentencing procedure , the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural

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[171]The *Monge* court, in explaining its decision not to extend the double jeopardy protection it had applied to capital sentencing proceedings to a noncapital proceeding involving a prior-conviction sentencing enhancement, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added).)

protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. The Requirements of Jury Agreement and Unanimity

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord*, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death

penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[172] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. The U.S. Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than

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[172]See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

decisions of much less consequence. (*Ring, supra*; *Blakely, supra.*)

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.[173]) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732; *accord, Johnson v. Mississippi, supra,* 486 U.S. at p. 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Penal Code sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501

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[173]In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (*Johnson v. Louisiana* (1972) 406 U.S. 356; *Apodaca v. Oregon* (1972) 406 U.S. 404.) Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances.

U.S. 957, 994), and certainly no less (*Ring*, 536 U.S. at p. 609).[174]

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[175] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the U.S. Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal

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[174]Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

[175]The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.*

(*Richardson*, *supra*, 526 U.S. at p. 819 (emphasis added).)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered

aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

2. The Eighth and Fourteenth Amendments Require That a Capital Jury Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth

Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*Winship*, *supra*, 397 U.S. at 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982)

455 U.S. 743, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value," *Speiser*, *supra*, 375 U.S. at 525, how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *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. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" *Santosky*, *supra*, 455 U.S. at 755, the United States Supreme Court

reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at 755.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at 763.) Nevertheless, 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 363.)

The final *Santosky* benchmark, "the countervailing governmental

interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake; see *Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418,

423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

Appellant is aware that this Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See *People v. Griffin* (2004) 33 Cal.4th 536, 595; *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is

> somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (2003) 266 Conn. 171, 238, fn. 37 [833 A.2d 363, 408-409, fn. 37].)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at 732 ["the death penalty is unique in its severity and its finality"].) Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

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3. At a minimum, proof by a preponderance of the evidence would be constitutionally compelled.

Even if proof beyond a reasonable doubt were not the constitutionally required burden of persuasion for finding (1) that an aggravating factor exists, (2) that the aggravating factors outweigh the mitigating factors, and (3) that death is the appropriate sentence, a burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon.

The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46 [historical practice given great weight in constitutionality

determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.*, *supra*, 59 U.S. (18 How.) at pp. 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

Accordingly, appellant respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, the question

whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana*, *supra*.) That should be the result here, too.

4. Some burden of proof is required in order to establish a tie-breaking rule and ensure even-handedness.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S 104, 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v.*

Florida (1976) 428 U.S. 242, 260) – the "height of arbitrariness" (*Mills v. Maryland, supra,* 486 U.S. at p. 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

5. Even if there could constitutionally be no burden of proof, the trial court erred in failing to instruct the jury to that effect.

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury. The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra.*) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[176] This raises the constitutionally unacceptable possibility a juror

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[176]See, e.g., *People v. Dunkle*, No. S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*.)

6. California law is unconstitutional because it fails to require that the jury base any death sentence on written findings regarding aggravating factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) Of course,

without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[177] The same analysis

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

applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Penal Code section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland, supra,* for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *Mills, supra,* 486 U.S. at p. 383, fn. 15.) The

fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[178]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual

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[178]These nineteen states, with their respective statutory citations have been cited on many previous occasions in numerous opening briefs in death penalty cases pending before this Court and will not be repeated here. (See, e.g., the Appellant's Opening Brief in *People v. David Earl Williams*, Case No. S029490, filed March 19, 2002, p. 148, fn. 84.)

findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

7. California's statute, as interpreted by this Court, forbids inter-case proportionality review, thereby guaranteeing arbitrary, discriminatory, or disproportionate impositions of the death penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that

reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.)).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.)

As we have seen, that greatly expanded list fails to meaningfully

narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See section A of this Argument, *ante*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia* (2002) 536

U.S. 304, 316 fn. 21; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596.)

Twenty-nine of the thirty-eight states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman* [*v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Proffitt v. Florida, supra,* 428 U.S. at p. 259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[179]

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the

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[179]The states and their respective statutes have been cited to this Court on many previous occasions in other capital cases and will not be repeated here. (See e.g., the Appellant's Opening Brief in *People v. David Earl Williams*, Case No. S029490, filed March 19, 2002, p. 155, fn.88.)

relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 192, citing *Furman v. Georgia*, *supra*, 408

U.S. at p. 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. The prosecution may not rely on unadjudicated criminal activity in seeking death. But in any case such activity must be found to be true beyond a reasonable doubt by a unanimous jury.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) In this case, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant and devoted a considerable portion of its closing argument to arguing these alleged offenses.

The United States Supreme Court's recent decisions in *Blakely v. Washington, supra, Ring v. Arizona, supra,* and *Apprendi, supra,* confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury

acting as a collective entity. The application of these cases to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

D. The California Sentencing Scheme Violates Equal Protection By Denying Procedural Safeguards to Capital Defendants Which Are Afforded To Non-Capital Defandants.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-

capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "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 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In *Prieto*,[180] as in *Snow*,[181] 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. However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding

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[180]"As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, 30 Cal.4th at 275; emphasis added.)

[181]"The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, 30 Cal.4th at 126, fn. 3; emphasis added.)

that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See sections C.1-C.5, *ante*.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike proceedings in most states where death is a sentencing option or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See section C.6, *ante*.) These discrepancies on basic procedural protections are skewed against persons subject to loss of life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection

challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen, supra,* 42 Cal.3d at pp. 1286-1288.) In stark contrast to *Prieto* and *Snow*, there is no hint in *Allen* that capital and non-capital sentencing procedures are in any way analogous. In fact, the decision rested on a depiction of fundamental differences between the two sentencing procedures.

Appellant was sentenced on April 28, 1992. Until September 14, 1992, California required inter-case proportionality review for non-capital cases. (Former Pen. Code § 1170, subd. (f).)[182] The Legislature thus

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[182]Penal Code section 1170, subdivision (f) formerly provided as follows:

> (f)(1) Within one year after the commencement of the term of imprisonment, the Board of Prison Terms shall review the sentence to determine whether the sentence is disparate in comparison with the sentences imposed in similar cases. If the Board of Prison Terms determines that the sentence is disparate, the board shall notify the judge, the district attorney, the defense attorney, the defendant, and the Judicial Council. The notification shall include a statement of the reasons for finding the sentence disparate.
>
> Within 120 days of receipt of this information, the sentencing court shall schedule a hearing and may recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if the defendant had not been sentenced previously, provided the new sentence is no greater than the

provided a substantial benefit for all prisoners sentenced under the Determinate Sentencing Law (DSL): a comprehensive and detailed disparate sentence review. (See *In re Martin* (1986) 42 Cal.3d 437, 442-444, for details of how the system worked while in practice). In appellant's case, such a review might well be the difference between life and death. Persons sentenced to death, however, are unique among convicted felons in that they are not provided this review, despite the extreme and irrevocable nature of their sentence. Such a distinction is irrational.

The Court initially distinguished death judgments by pointing out

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> initial sentence. In resentencing under this subdivision the court shall apply the sentencing rules of the Judicial Council and shall consider the information provided by the Board of Prison Terms.
>
> (f)(2) The review under this section shall concern the decision to deny probation and the sentencing decisions enumerated in paragraphs (2), (3), and (4) of subdivision (a) of Section 1170.3 and apply the sentencing rules of the Judicial Council and the information regarding the sentences in this state of other persons convicted of similar crimes so as to eliminate disparity of sentences and to promote uniformity of sentencing.
>
> (g) Prior to sentencing pursuant to this chapter, the court may request information from the Board of Prison Terms concerning the sentences in this state of other persons convicted of similar crimes under similar circumstances.

This language was removed by an amendment (Stats 1992 ch 695 §§ 10 (SB 97)), which took effect on September 14, 1992.

that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal. 3d at 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia*, *supra*, 433 U.S. 584) or offenders (*Enmund v. Florida, supra,* 458 U.S. 782; *Ford v. Wainwright*, *supra*; *Atkins v. Virginia*, *supra*.)

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See section 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.)

The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under

the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal. 3d at p. 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.J.].) (See also *Reid v. Covert* (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 187 [opn. of Stewart, Powell, and Stevens, J.J.]; *Gardner v. Florida* (1977) 430 U.S. 340, 357-358; *Lockett v. Ohio*, *supra*, 438 U.S. at

p. 605 [plur. opn.]; *Beck v. Alabama* (1980) 447 U.S. 625, 637; *Zant v. Stephens*, *supra*, 462 U.S. at pp. 884-885; *Turner v. Murray* (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [plur. opn.], quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994; *Monge v. California*, *supra*, 524 U.S. at p. 732.)[183] The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply procedural safeguards used in noncapital settings to capital sentencing.

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as

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[183]The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington, supra*, 466 U.S. at p. 704 (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.)

supporting the different treatment of felons sentenced to death. (*Allen, supra*, at p. 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference – and one that was recently rejected by this Court in *Prieto* and *Snow*. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has also been cited by this Court as justification for the arbitrary and disparate

treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*.)

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases [*Allen*, *supra*, 42 Cal.3d at p. 186]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Blakely v. Washington*, *supra*; *Ring v. Arizona*, *supra*.)[184]

California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence

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[184]Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at pp. 589, 609.)

possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California*, *supra*.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

E. 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.

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a

large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*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; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe – plus Canada, Australia, New Zealand and the Czech and Slovak Republics – have abolished the death penalty. Almost all Eastern European, Central American and South American nations have also absolished the death penalty either completely or for ordinary crimes. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of August 2002) at <http://www.deathpenaltyinfo.org>.)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot, supra*, 159 U.S. at p. 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461, 31 L.Ed. 430]; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra*, 408 U.S. at p. 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the

progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100; *Atkins v. Virginia*, *supra*, 536 U.S. 304, 325.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U. S. at 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the

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

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[185] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

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[185]Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).)

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

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XVII.

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AND ALSO VIOLATES THE EIGHTH AMENDMENT.

A few years ago, the Supreme Court of Canada placed the use of the death penalty in the United States for ordinary crimes into an international context:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan ... According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.) The California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on

state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant raises this claim under the Eighth Amendment as well. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 (dis. opn. of Brennan, J.).)

A. International Law

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1992, and applies to the states under the supremacy clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2.) Consequently, this Court is bound by the ICCPR.[186] The United States Court of Appeals for the Eleventh Circuit has

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[186]The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (See 138 Cong. Rec. S4784, § III(1).) These qualifications do not preclude appellant's reliance on the treaty because, inter alia, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the

held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; but see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. He recognizes that this Court previously has rejected international law claims directed at the death penalty in California. (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779; see also *id.* at pp. 780-781 (conc. opn. of Mosk, J.); *People v. Hillhouse, supra,* 27 Cal.4th at p. 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero, supra*, 208 F.3d at p. 1284; *McKenzie v. Daye* (9th

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object and purpose of the treaty, which is to protect the individual's rights enumerated therein (see Riesenfeld & Abbot, *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties* (1991) 68 Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (see 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty (see Quigley, *Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582).

Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).) Thus, appellant requests that the Court reconsider and, in the context of this case, find Lynch's death sentence violates international law. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

B. The Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason – as opposed to its use as a regular punishment for ordinary crimes – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 (plur. opn. of Stevens, J.)). (See Argument XVI, part E, *supra*.)

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because our Founding Fathers looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their

public law.'" (*Miller v. United States* (1870) 78 U.S. 268, 315 (dis. opn. of Field, J.), quoting 1 Kent's Commentaries 1; *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress's power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. (*Miller v. United States*, *supra*, 78 U.S. at pp. 315-316, fn. 57 (dis. opn. of Field, J.).)

"Cruel and unusual punishment" as defined in the Constitution is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) And if the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world – including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (See

Atkins v. Virginia, *supra*, 536 U.S. at p. 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

Assuming arguendo that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Hilton v. Guyot*, *supra*, 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) Thus, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and appellant's death sentence should be set aside.

XVIII.

IF ANY OF THE CONVICTIONS OR SPECIAL CIRCUMSTANCES IS REVERSED, THE PENALTY OF DEATH MUST ALSO BE REVERSED.

At the penalty phase of appellant's trial, the jury was instructed that in determining which sentence to impose it should "consider. . . . take into account and be guided by . . . (a) The circumstances of the crime of which the defendant was convicted in the present proceeding, and the existence of any special circumstance found to be true." (CALJIC No. 8.85; CT 3422; RT 4684-4685.)

In Argument X, *supra*, appellant has demonstrated that his motion for acquittal on the Durham counts (counts 4, 5 and 6 of the Information) should have been granted, and that those convictions should be reversed. In addition, appellant has demonstrated in Argument XIII, *supra*, that there is no evidence to support the jury's guilty verdict on either the Larson burglary or either of the Larson special circumstances, requiring a reversal of the Larson first degree felony murder conviction. If this Court reverses any or all of these convictions or findings, the judgment of death against appellant must likewise be reversed. (See *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849 [court found prejudice, noting that three of the four special circumstances the jurors found to be true were invalidated on appeal].)

As noted above, the jury was instructed to consider the convictions (which formed part of the circumstances of the crime) and the special circumstances in determining which sentence to impose. If this Court reverses any or all of the counts related to the Larson murder (counts 10, 12 and special circumstances 3 and 4) or the counts related to the Durham attack (counts 4, 5, and 6), the legitimacy and reliability of the death judgment would be severely undermined since those were factors which led to its imposition. California is a "weighing state," where the jury is required to balance aggravation against mitigation. The jury's consideration of unauthorized factors in aggravation added improper weight to death's side of the scale and violated appellant's right to a fair and reliable penalty determination. (U.S. Const., Amends. 8, 6 &14; Cal. Const., art. I, § 17; *Stringer v. Black, supra,* 503 U.S. at p. 232; see also *Johnson v. Mississippi, supra,* 486 U.S. at p. 586.)

Moreover, in *Ring v. Arizona, supra,* 536 U.S. 584, the United States Supreme Court applied the rule of *Apprendi, supra*, 530 U.S. 466, to capital sentencing procedures and concluded that specific findings the legislature makes as a prerequisite to a death sentence must be made by a jury and proven beyond a reasonable doubt. In this state, the trier of fact has two critical facts to determine at the penalty phase of the trial: (1) whether one

or more aggravating circumstances exists, and (2) if one or more aggravating circumstances exists, whether they outweigh the mitigating circumstances. (Pen. Code, § 190.3.) Therefore, those findings must be made by the jury beyond a reasonable doubt. (U.S. Const., Amends. 6, 8 & 14; Cal. Const., art. I, § 17.) If this Court reverses any of the convictions or special circumstances, the delicate calculus the jury must undertake is necessarily skewed, and there is no longer a valid finding that the aggravation outweighs mitigation beyond a reasonable doubt.

This Court cannot conduct a harmless error review of the death sentence without making findings that go beyond the facts reflected in the verdict itself (see *Ring v. Arizona*, *supra*, 536 U.S. at p. 588; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483), and under *Ring*, the power to make those findings is the jury's alone. Findings *by the jury* regarding the existence and weight of the factor supporting an increased sentence are constitutionally required. Therefore, a new determination that aggravating factors outweigh mitigating factors and that death is the appropriate sentence must be made when any count or special circumstance is reversed. Accordingly, appellant's death sentence must be set aside.

XIX.

THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS REQUIRES REVERSAL OF THE GUILT JUDGMENT AND THE PENALTY DETERMINATION.

In some cases, although no single error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc), cert. den. (1979) 440 U.S. 974 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S.637, 642-43 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) Accordingly, in this case, all of the guilt phase errors must be considered together in order to determine if appellant received a fair guilt trial.

Appellant has argued that a number of serious constitutional errors occurred during the guilt phase of trial and that each of these errors, alone,

was sufficiently prejudicial to warrant reversal of appellant's guilt judgment. It is in consideration of the cumulative effect of the errors, however, that the true measure of harm to appellant can be found. The errors in this case were numerous and serious including the trial court's removal of qualified jurors from the venire, especially *seated* juror Ronald Anderson; the court's refusal to sever the five separate incidents; its denial of appellant's motion for acquittal on the Durham counts; its failure to strike the robbery special circumstance in the Larson case; its failure to declare a mistrial when the prosecutor argued, without any support in the record, that the crimes had stopped once appellant left the county; the failure to allow appellant to offer evidence of third party culpability. The combination of these errors, however, was greater than the sum of their parts and resulted in egregious error mandating reversal of appellant's guilt judgment.

The death judgment rendered in this case must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) This Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact

during penalty trial.

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a "reasonable probability" that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-37; see also *People v. Brown, supra,* 46 Cal.3d at p. 466 [state law error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].) Error of a federal constitutional nature requires an even stricter standard of review. *(Yates v. Evatt* (1991) 500 U.S. 391, 402-405; *Chapman v. California, supra,* 386 U.S. at p.24.) Moreover, when errors of federal constitutional magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22

Cal.App.3d 34, 58-59.) Appellant has shown that serious errors occurred throughout these proceedings: He was forced to participate in a lineup without the assistance of his public defender; after over nearly four years of delay in having his case tried, he was improperly denied his right to represent himself; the trial court refused to sever the cases against him, resulting in a five convictions in cases that likely would not have gone to trial, had they been separated. Several jurors were improperly removed for cause, including one of the sworn jurors, several days into the trial. Appellant was improperly excluded from several important parts of his trial, and the prosecutor engaged in extraordinary misconduct in the guilt phase closing argument. These and other serious errors, fully described herein, together require reversal. Even if this Court were to determine that no single error, by itself, was prejudicial, the cumulative effect of these errors sufficiently undermines the confidence in the integrity of the trial so that reversal is required. Respondent cannot demonstrate that the errors individually or collectively had no effect on the penalty verdict. (*Skipper v. South Carolina, supra*, 476 U.S. at p. 8; *Caldwell v. Mississippi, supra*, 472 U.S. at p. 341; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.)

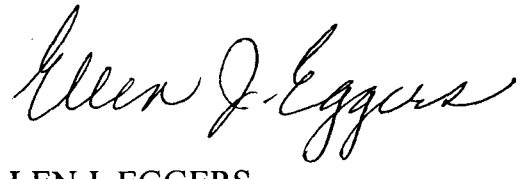
CONCLUSION

For all of the foregoing reasons, the convictions and sentence of death must be reversed.

DATED: October 7, 2004

Respectfully submitted,

OFFICE OF THE STATE PUBLIC DEFENDER



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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I am the Deputy State Public Defender assigned to represent appellant, Franklin Lynch, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates, contains approximately 101,270 words.

Dated: October 7, 2004

Ellen J. Eggers

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Franklin Lynch***

Supreme Court No. S026408
Superior Court No. H 10662

I, the undersigned, declare as follows:
I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814.

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APPELLANT'S OPENING BRIEF

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 7, 2004, at Sacramento, California.

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