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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LESTER WAYNE VIRGIL, Defendant and Appellant.	Supreme Court No. S047867 Los Angeles County Superior Court No. YA016781

APPELLANT'S OPENING BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

HONORABLE STEVEN C. SUZUKAWA, JUDGE PRESIDING

SUPREME COURT
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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LESTER WAYNE VIRGIL, Defendant and Appellant.	Supreme Court No. S047867 Los Angeles County Superior Court No. YA016781

STATEMENT OF APPEALABILITY

This appeal is from a final judgment that disposes of the issues between the parties on appeal and is authorized by Section 1237. (Calif. Rules of Court, rule 14(a)(2)(B).)

STATEMENT OF THE CASE

A Felony Complaint for Arrest Warrant was filed in the Municipal Court of the South Bay Judicial District, County of Los Angeles, on August 20, 1993, alleging that appellant, Lester Wayne Virgil [hereafter "Mr. Virgil"], committed one count of murder against Soy Sung Lao [hereafter "Ms. Lao"], the special circumstance of murder during the commission of robbery, personal use of a knife, one count of robbery against Ms. Lao, and one count of robbery against Beatriz Addo [hereafter "Ms. Addo"]. (CT 184-187.) [1] At that same hearing, the court appointed the Los Angeles

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[1] Unless provided to the contrary, all statutory references are to the Penal Code. In addition, all references to the Clerk's Transcript will be preceded by "CT," all references to the Supplemental Clerk's Transcripts by "Supplemental Clerk's Transcript" followed by the set number of the Clerk's Transcripts, and all references to the Reporter's Transcript by "RT" followed by the date of the hearing when applicable.

County Public Defender's Office [Deputy Public Defender Michael O. Clark, hereafter "defense counsel"] to represent Mr. Virgil. (*Ibid.*)

An Amended Felony Complaint was filed on November 3, 1993, realleging the crimes against Ms. Lao and Mrs. Addo and further alleging that on October 31, 1992, Mr. Virgil committed the crimes of robbery and assault with a deadly weapon against Samuel Draper [hereafter "Mr. Draper"]. (CT 192-197.) The preliminary examination was conducted on November 3, 1993, and Mr. Virgil was held to answer on all charges and allegations. (CT 1, 179-180, 197.)

An Information was filed on November 18, 1993, alleging the following against Mr. Virgil:

> Count 1 Violation of Penal Code section 211 [robbery] against Ms. Addo on or about October 13, 1992; it was further alleged that Mr. Virgil personally used a knife in the commission of the robbery within the meaning of Section 12022, subdivision (b);
>
> Count 2 Violation of Section 187, subdivision (a), [murder] against Ms. Lao on or about October 24, 1992; it was further alleged that the murder was committed during the course of robbery within the meaning of Section 190.2, subdivision (a)(17) and that Mr. Virgil personally used a knife during the commission of murder within the meaning of Section 12022, subdivision (b);
>
> Count 3 Violation of Section 211 [robbery] against Ms. Lao on or about October 24, 1992; it was further alleged that Mr. Virgil personally used a knife during the commission of the robbery within the meaning of Section 12022, subdivision (b);
>
> Count 4 Violation of Section 211 [robbery] against Mr. Draper on or about October 31, 1992; it was further alleged that Mr. Virgil personally used a knife during the commission of the robbery within the meaning of Section 12022, subdivision (b);
>
> Count 5 Violation of Section 245, subdivision (a)(1) [assault with a deadly weapon], against Mr. Draper on or about October 31, 1992.
>
> In addition, it was further alleged that Mr. Virgil had been convicted of violating Section 459 [second degree burglary] in the

Superior Court in and for the County of Los Angeles on or about November 1, 1983, and of committing "Burglary" in the District Court of the State of Louisiana in and for the Parish of Caddo on or about January 9, 1989, within the meaning of Section 1203, subdivision (e)(4).

It was finally alleged that Mr. Virgil served a prior prison term within the meaning of Section 667.5, subdivision (b), as a result of his prior conviction for the crime of Burglary in Louisiana on January 9, 1989. (CT 207-211.)

Mr. Virgil was arraigned on the Information in the Superior Court on November 18, 1993, and the Los Angeles County Public Defender's Office [Deputy Public Defender Clark] was again appointed to represent him. (CT 213.)

On December 5, 1994, and February 8, 1995, the prosecution filed Notices to introduce "Victim Impact Evidence" pursuant to Section 190.3 concerning the psychological and emotional impact of Ms. Lao's homicide on her sister, Lynne Ngov, and brother-in-law, Ty Ngov, and to introduce evidence relating to the victim's background, in the event Mr. Virgil was convicted of murder and the special circumstance was found true. (CT 214, 228.)

On August 15, 1994, the prosecution filed a Notice in "Aggravation Regarding the Death Penalty Pursuant to Penal Code § 190.3." (CT 245-245A.) On December 19, 1994, the prosecution filed a second Notice in "Aggravation Regarding the Death Penalty Pursuant to Penal Code § 190.3." The latter Notice realleged Mr. Virgil's two prior convictions for second degree burglary [§ 459], his convictions for robbery and assault with a deadly weapon and enhancement for inflicting great bodily injury [§§ 211, 245, subd. (a)(2), 12022.7, respectively] and, as "Other Violent Criminal Activity," alleged the same conduct underlying his reported

convictions and enhancement for robbery, assault with a deadly weapon, and inflicting great bodily injury. (CT 215-216.) [2]

On February 8, 1995, the prosecution filed a motion pursuant to Evidence Code sections 352 and 402 seeking to prevent either party from mentioning the pending case of *People of the State of California v. O.J. Simpson* during Mr. Virgil's trial. (CT 229-231.) The prosecution's motion was granted. (CT 261.)

Also on February 8, 1995, the defense filed a motion regarding Ella Ford's out-of-court, photographic identification of Mr. Virgil [Ford reportedly saw the suspect in Ms. Lao's homicide fleeing from the scene]. In that motion, the defense asked that (1) the prosecution not be allowed to mention Ford's identification in its Opening statement; (2) the court conduct an evidentiary hearing about the circumstances of Ford's out-of-court photographic identification or order that a new in-person lineup be conducted so Ford could attend; or (3) the jury should be instructed that the prosecution was obligated to give the defense notice of its photographic lineup with Ford and the failure to give such notice could be considered a factor in deciding the reliability of Ford's identification. (CT 232-233.) The motion was denied. (CT 261.)

Jury selection began on January 30, 1995. (CT 257.) On February 7, 1995, the selection of the 12 jurors was completed, the jury was sworn,

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[2] The allegations in the section entitled "Other Violent Criminal Activity" were based on the same conduct that resulted in Mr. Virgil's convictions [based on a plea of nolo contendere] for robbery and assault with a deadly weapon and the enhancement for inflicting great bodily injury against Benita Rodriguez on October 29, 1992. [Los Angeles County Superior Court No. BA068764]. Because these crimes occurred <u>after</u> the date of Ms. Lao's homicide, the prosecution modified its Notice of Aggravation before trial by striking the allegation that Mr. Virgil suffered prior convictions for these crimes and alleging only that his conduct against Rodriguez constituted "Other Violent Criminal Activity." (RTA 74-75.)

and the selection of four alternate jurors began. (RT 487-488.) The next day and before any alternate jurors were selected, Juror Roberto Staben disclosed at the sidebar that he had personal knowledge of the crime scenes [the Donut King and the Southwest Bowl]. After an in limine hearing with Staben at the sidebar, the court ruled that Staben had to be replaced as a juror and that jury selection would be reopened, but only to select one replacement juror with each side having one additional peremptory challenge to replace the juror. (RT 530-534.) After the 12-person regular jury was selected and sworn, the selection of alternate jurors resumed. Jury selection concluded on February 8, 1995, after four alternate jurors were selected and sworn. (CT 260, 261; RT 535-594.)]

On February 23, 1995, the court granted Juror Olivia Duarte's request to be discharged from the jury because of a death in her family, but granted Juror Saundra Farley's request to remain on the jury, despite her Mother's recent death. (CT 265, 267, 268; RT 1892.)

On March 2, 1995, the prosecution rested the guilt phase of its case and the defense also rested, after presenting no evidence. (CT 275.) On Monday, March 6, 1995, Juror Saunders told the court's clerk that she went to work on Friday [Friday, March 3 was a recess day] and saw Mr. Virgil standing in line waiting to go to court. (RT 3205-3207.) [3] Saunders denied that her contact with Mr. Virgil at the jail would affect her ability to

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[3] During the selection of alternate jurors, the defense unsuccessfully challenged Ms. Saunders for cause because she worked as a nurse at the Main Jail where Mr. Virgil was housed and had treated him several times. (RT 582-585.) The court denied the challenge because Ms. Saunders did not recognize Mr. Virgil at the time she was challenged and it believed that defense counsel's concerns of future contact between them at the jail were unfounded [the court believed that Ms. Saunders would not go to work during the pendency of Mr. Virgil's trial]. (RT 584-585.) The court randomly selected alternate juror Tracey Saunders to replace Juror Duarte. (RT 1892-1893.)

serve as a juror. (CT 277; RT 3207-3208.)

About two hours after the jury began deliberating on March 7, 1995, Elvin Clay, Juror No. 11, sent the court a note asking to be excused from the jury. (CT 278; RT 3378-3383) The court questioned Juror Clay during a hearing and found no good cause to excuse him. Nevertheless, the court excused him because he was reluctant to continue serving as a juror and after both counsel stipulated to his removal. (RT 3383-3389.) Alternate Juror Duvall Green was selected at random to replace Clay and the jury was instructed with CALJIC No. 17.51 [disregard all past deliberations and begin anew]. (RT 3391.) On March 9, 1995, after several other notes from the jury and read backs of testimony, Mr. Virgil was found guilty of all charges, including the allegations of personal use of a weapon and the special circumstance of murder during the commission of robbery. (CT 385-387.)

The penalty phase began on March 10, 1995, the day after the guilt phase concluded. (CT 388.) Because Mr. Virgil appeared in court dressed in his jail clothing, the trial court questioned him in limine about his attire and Mr. Virgil indicated that he wanted to remain dressed "[j]ust like I am." (CT 388; RT 3412-3413.) The court then addressed its security concerns, based on Mr. Virgil's reported possession of a large staple that he was seen using in what a Sheriff's deputy thought was an attempt to "uncuff" another prisoner. (RT 3414.) Defense counsel requested an evidentiary hearing before any action was taken and urged the court to take the least restrictive security measures possible because of the potential negative effect of shackling on Mr. Virgil's federal constitutional rights. (RT 3414-3415.)

The court conducted an in limine hearing where several deputies testified about courtroom security and the circumstances of the reported discovery of the staple. (RT 3414-3422, 3443-3505.) Over defense counsel's objection, the court ruled that Mr. Virgil possession and use of

the staple suggested an attempt to escape and he must wear a 20,000 volt, reactor stun belt for the remainder of the trial. (CT 388; RT 3502.)

On March 15, 1995, after the defense and prosecution presented their respective cases, the jury was instructed and began its penalty deliberations just after the lunch recess. (CT 410; RT 3904-3915.) After deliberating for several hours on March 16, 1995, the jury sent a note to the court asking about the effect[s] of a hung jury and whether jurors could be polled by number, rather than name, after their penalty verdict. (CT 411; RT 3917.) [4] Over defense objection, the court instructed the jury not to consider the effect[s] of a hung jury, to make all reasonable efforts to reach a verdict, and not to consider the method of polling during its deliberations. (RT 3917-3928.)

On Friday, March 17, 1995, the court denied the defense motion to ask the jury if it was deadlocked, but agreed with the defense's request to question the Jury Foreperson [William Mosby], a law student, about whether he conducted out-of-court research about the effects of a hung jury on penalty. (CT 412; RT 3929-3942.) Mosby denied conducting any out-of-court research on "criminal law" and talking with the jury about such matters. The court directed the jury to resume its deliberations. (RT 3940-3942.) After deliberating several hours on Monday, March 20, 1995, the jury returned a penalty verdict of death and the court set the sentencing hearing for May 19, 1995. (RT 3944-3950.)

The defense filed its Motion for New Trial and Modification of the

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[4] The Foreperson's note asked if the court would determine penalty if the jury hung on penalty or whether the sentence would automatically become life without possibility of parole. (RT 3917.) According to defense counsel, the nature of the Foreperson's note suggested that someone on the jury had researched the 1977 version of California's death penalty scheme. (RT 3930.)

Verdict pursuant to Penal Code section 190.4, subdivision (e) on May 9, 1995. In the Motion, the defense challenged the judgment on the following grounds: (1) there was insufficient evidence that Mr. Virgil was guilty of homicide and robbery against Ms. Lao [his identification was insufficient and the taking of money was an afterthought to the homicide]; (2) the death penalty was disproportionate to Mr. Virgil's circumstances and culpability [only one person killed and death was not sought against a multiple killer like O.J. Simpson]; (3) Mr. Virgil left property at the scene, suggesting either that he wanted to be caught, was under the influence of drugs, or killed as a result of uncontrollable rage; (4) Mr. Virgil was a chronic, crack cocaine addict who could have been suffering from drug-induced psychosis that rendered him unable to appreciate the gravity of his actions when he repeatedly stabbed Ms. Lao; (5) there was insufficient evidence of first degree murder based on premeditation and deliberation and/or felony murder because the motive for the killing could have been simple rage and not robbery; (6) the trial court improperly limited the defense's closing argument at the penalty phase under Factor (k) by refusing to allow a proportionality argument; (7) the trial court erred by allowing evidence of the victim's character and flight from Cambodia and attendance at the University of Southern California; (8) the trial court erred by coercing a verdict and not allowing the defense to voir dire the jury about whether further deliberations would be fruitful; (9) the trial court erred by failing to instruct the jury that the penalty phase would be retried if the jury could not reach a penalty verdict; (10) the trial court erred by modifying CALJIC No 2.90; and (11) the trial judge committed judicial misconduct by failing to notify the defense that his spouse was a Deputy District Attorney and assigned to the courthouse where Mr. Virgil's trial was conducted. (CT 421-436.)

On May 19, 1995, the court acknowledged its receipt of the defense

motion to disclose the names and addresses of jurors pursuant to Code of Civil Procedure 206 and to continue the hearing on the defense "Motion for New Trial and to Modify the Verdict" to allow time to conduct a jury investigation. (CT 415-420; RT 3951.) The court noted that it previously had sealed the jurors' personal information pursuant to Code of Civil Procedure 237, jurors were statutorily entitled to notice regarding the motion to unseal their information, the court would schedule a hearing on June 15, 1995, to consider the Motion to Unseal after notice to the jurors, and, thereafter, the court would consider the defense Motion for New Trial and Modification of the Verdict. (RT 3951-3953.)

Concerning the trial judge's failure to disclose that his spouse was a Deputy District Attorney assigned to the courthouse in Compton, defense counsel asked for an evidentiary hearing before a different judge to explore the impropriety suggested by these circumstances. (RT 3953-3964.) The court continued the hearing on the Motion for New Trial and Modification of the Verdict to June 29, 1995, and noted that it would consult with authorities at the Superior Court and the County about how to handle this matter. (RT 3964.)

The prosecutor then complained that the defense sent an 8-page, 15-question facsimile to Jury Foreperson Mosby in violation of Code of Civil Procedure sections 206, subdivision (c) and 237, and he requested an order prohibiting the defense from any further [or attempted] contact with the jurors about their deliberations. (RT 3964-3965.) Defense counsel replied that he obtained the jurors' contact information legitimately through public records [voter registration list] and he questioned whether the court had authority to prevent the defense from using such information to conduct its investigation. (RT 3965.) The court agreed with defense counsel, but noted for the record that some jurors contacted the court and expressed concern about the defense efforts to contact them. (RT 3965.) Defense

counsel replied that he attempted to minimize jurors' concerns by advising them that they did not have to answer questions and they were not contacted by telephone. (RT 3965.)

Defense counsel emphasized that jury investigation was necessary because of Foreperson Mosby's suspected misconduct during trial, especially because he seemed "nervous and very uncomfortable" and gave "evasive" responses when questioned about whether he conducted legal research. (RT 3965-3966.) Defense counsel added that jury investigation was further necessary, given the published news article about Mr. Virgil's "alleged escape attempt and aborted killing of the bailiff on the elevator after being chained up to another Crip accused of a triple homicide." (RT 3966.) The court agreed to continue the hearing on the defense Motion for New Trial and Modification of the Verdict to June 29, 1995. (RT 3967-3968.)

After a hearing on June 29, 1995, the trial court found true that Mr. Virgil suffered a prior conviction within the meaning of Section 667.5, subdivision (b). (RT 3983-3985.) Next, the court addressed the defense Motion for New Trial and Modification of the Verdict. After hearing defense counsel's argument, the court denied the defense motion in all regards and ruled that Mr. Virgil "shall suffer the death penalty." (CT 442-444; RT 4043-4046.)

The court sentenced Mr. Virgil as follows: a judgment of death for Count 2 [Ms. Lao's murder] plus a one-year consecutive term for use of a knife; the upper term of five years for Count 1 [robbery against Ms. Addo] plus one year consecutive for personal use of a knife; the upper term of five years for Count 3 [robbery against Ms. Lao] and stayed that sentence and the one-year enhancement for personal use of a knife pursuant to Section 654; the upper term of five years for Count 4 [robbery against Mr. Draper] plus one-year consecutive for personal use of a knife concurrent to the

sentence for Count 1; and, the upper term of four years for Count 4 [assault with a deadly weapon against Mr. Draper] and stayed that sentence pursuant to Section 654. (RT 4043-4045.) Also, the court imposed a one-year enhancement for Mr. Virgil's prison prior, concurrent to the principal term in Count 1. (CT 458; RT 4045.) In the interests of justice, the court stayed the additional terms of imprisonment for Counts 1, 3, 4 and 5, during the pendency of the automatic appeal as to Count 2 with the stay to become permanent when the sentence for that Count was carried out. (CT 458-459; RT 4045.) Finally, the Commitment Judgment of Death was filed on July 5, 1995. (CT 460-465.)

INTRODUCTION

This case involves a series of crimes committed between October 13, 1992, and October 31, 1992. The crimes all occurred within several miles of each other and were committed in the jurisdictions of the Gardena Police Department, the Los Angeles County Sheriff's Department, and the Los Angeles Police Department. The primary offenses of murder and robbery and the special circumstance of murder during commission of robbery were committed at the Donut King, a small, family-owned donut shop in Gardena and involved the stabbing death of Soy Sung Lao, a part-time employee whose family owned the donut shop.

The police had no leads regarding Ms. Lao's homicide until June 1993, when a detective at the Sheriff's Department saw the Gardena Police Department's flier about the October 24, 1992, homicide. Though the detective only briefly interviewed Mr. Virgil following his arrest for a minor, unrelated incident on October 26, 1992, and had investigated hundreds of cases during the intervening eight months, he reportedly remembered Mr. Virgil and believed from information in the flier that he might be a suspect in Ms. Lao's homicide. The detective communicated his

suspicions to the Gardena Police Department and later provided the Gardena detectives with Mr. Virgil's booking photograph following his minor, unrelated arrest on October 26, two days after Ms. Lao's homicide.

The Gardena detectives prepared photographic lineups that included Mr. Virgil's October 26 booking photograph [and later, other photographic lineups containing booking photographs taken of Mr. Virgil on November 3, 1992, following his arrest for suspected auto burglary in Gardena] and showed those lineups to several witnesses of the events at the Donut King. After some of these witnesses identified Mr. Virgil as the man they saw inside and leaving the donut shop just after Ms. Lao was stabbed, the Gardena detectives interviewed Mr. Virgil at Wasco State Prison and arrested him for Ms. Lao's homicide at the end of the interview. [5] After his arrest for Ms. Lao's homicide, Mr. Virgil was charged with committing other robberies and an assault with a deadly weapon at other locations in the general area surrounding the Donut King [LaBargain Grocery in Gardena – robbery of Beatriz Addo, and Southwest Bowl in Los Angeles – robbery and assault with a deadly weapon against Samuel Draper].

The prosecution's case against Mr. Virgil for Ms. Lao's homicide was based mainly on eyewitness identification and included the testimony of one eyewitness who admitted lying about her identification and another eyewitness who refused to attend the court-ordered live lineup, but made a photographic identification of Mr. Virgil years after the crime and on the eve of trial. In addition, a partial palm print [later believed to be Mr. Virgil's right palm print] was found on a table at the Donut King. There

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[5] Mr. Virgil's statement was not admitted into evidence. At the time of the interview, Mr. Virgil was serving an 8-year prison sentence following his plea of nolo contendere for charges involving his conduct against Benita Rodriguez at the Hilltop Motel in Los Angeles on October 29, 1992, five days after Ms. Lao's homicide.

were, however, many other palm and fingerprints found at the scene, including in the bathroom where Ms. Lao was stabbed, but Mr. Virgil was excluded as the source of all those prints and their sources were never established.

The Gardena Police Department used to contract with the Los Angeles County Sheriff's Department to investigate homicides within its jurisdiction, but decided [probably as a cost saving measure] around the time of Ms. Lao's homicide to conduct its own such investigations. Because the Gardena Police Department is a relatively small police agency, it lacked the resources and equipment to conduct adequate and complete crime scene investigations. In Mr. Virgil's case, this resulted in a series of inexplicable and unexcused failures to collect and preserve important evidence that could have been used to identify Ms. Lao's actual killer with scientific certainty. The poor quality of the investigation also cast doubt on the evidence actually collected. According to the prosecution's serology expert [a nationally renowned criminalist from the Los Angeles County Sheriff's Department and now an Executive Producer of the "CSI" television shows], she would have directed that the crime scene investigation at the Donut King be handled much differently, had she been called there or even consulted during the on-scene investigation.

The prosecution compounded the many problems with the police investigation by engaging in a consistent pattern of late discovery and investigation that intentionally or otherwise kept the defense off-balance and scrambling to deal with an endless stream of last minute disclosures and revelations. The trial court cast further doubt on the fairness and reliability of Mr. Virgil's guilt and penalty verdicts by its many erroneous and prejudicial rulings including jury selection issues, evidentiary rulings, limitations on the defense penalty argument and refusing to instruct the jury with the defense requested instructions, including instructions taken almost

verbatim from California Supreme Court opinions, shackling Mr. Virgil without just cause and concealing information from the defense that suggested the appearance of judicial impropriety and bias. As discussed in detail below, Mr. Virgil's convictions for the crimes against Ms. Lao and his penalty of death must be reversed because his convictions for those crimes and penalty violate his federal and state constitutional rights to due process, the assistance of counsel, confrontation, trial by a fair and impartial judge and jury, and a fair and reliable penalty determination.

STATEMENT OF FACTS

PROSECUTION CASE – GUILT PHASE:

A. LA BARGAIN GROCERY STORE – COUNT 1, ROBBERY OF BEATRIZ ADDO

On October 13, 1992, Beatriz Addo and her husband, Baffour Addo, owned and operated the LaBargain Grocery store in the City of Gardena. (RT 659.) The grocery store was located in an alley near the intersection of Van Ness Ave. and El Segundo Blvd., just across the street from the Donut King [the location of the murder and robbery charged in Counts 2 and 3] (RT 660, 662.) Ms. Addo was primarily Spanish-speaking, spoke a limited amount of English and was assisted by a Spanish interpreter at trial. She testified, however, that she spoke English well enough in 1992 to communicate and transact business with her customers. (RT 658-659, 727.) Most of the customers at the store were black, but Ms. Addo was familiar with African-Americans and could distinguish between them, in part because her husband was a black émigré from Ghana, a country in western Africa. (RT 697-698, 714-715, 772-773, 821, 823.)

Ms. Addo was working alone at the store that morning [10:00 AM - 11:00] and talking with a female customer when an African American male entered and asked if Ms. Addo or her customer wanted to buy his bicycle.

(RT 668, 671-672, 726, 739-741, 753, 828, 842-843.) Ms. Addo refused and the man asked if they sold "Magic Shave," a shaving cream often used by people of the "Black race." (RT 673, 727.) Ms. Addo told the man that they did not carry that brand, but he was welcome to look for it. (RT 673-674.) After returning from the aisle where the shaving cream was kept, the man asked Ms. Addo if she had a job for him at the store. (RT 674.) Ms. Addo agreed to talk with her husband about a job and the man reportedly wrote a note in her presence containing his name and phone number so she could contact him in the future about a job. (RT 673-677, 724.) The man then left the store and rode away on his bicycle. (RT 677-678.)

About 4-5 minutes later and after the female customer had left the store, the man returned, said that he was going to buy "just any shaving cream," and walked back to the shaving cream display. (RT 680-682.) Ms. Addo turned her back to the man and resumed her work at the cash register. (RT 682-683.) About a minute later, the man grabbed her from behind [right hand around her throat], pressed a sharp object against her back, and directed her from the front of the store to the bathroom at the rear of the store. (RT 683-685, 729, 742, 774-775, 873.)

Once in the bathroom, the man told Ms. Addo to sit on the toilet and not to move. (RT 687.) Ms. Addo, however, knelt on the floor and prayed because she was very afraid. (RT 687-688.) Though it was somewhat dark in the restroom, Addo testified that she recognized the man as the same person who earlier offered to sell his bicycle and asked about a job. (RT 688.) After Ms. Addo told the man that her husband would arrive in about five minutes, the man left the bathroom and closed the door behind him. (RT 688-689.) Ms. Addo remained in the bathroom for about 10 minutes. During that time, she heard the cash register open. (RT 689-690.)

Ms. Addo tried to make a telephone call after leaving the bathroom, but could not because the phone cord had been cut. (RT 690.) Ms. Addo

then noted that the cash register was open and only pennies were left inside. (RT 691-692, 770.) Because she was afraid that the man might return, she closed the front door and waited until she could call out to a passerby for help. (RT 690-692.) About 15 minutes later, an employee of a nearby restaurant walked past and agreed to notify the police, though the Gardena Police Department never responded to his reported call. (RT 693, 828.)

Ms. Addo's husband arrived at about 12:30 PM, but he waited an hour before calling the police because the robber had long since departed and the phone line had been cut. (RT 768, 827-829, 869, 1665-1666, 1682-1683.) Ms. Addo described the robber to her husband who helped her talk with a police officer, after he arrived in response to a call about the reported robbery. (RT 698, 768, 773, 865, 871.) Ms. Addo reported that the robber was black and about the same height as her husband, who was 5'9" tall; the robber weighed about 155-165 pounds and had a normal frame [slim] that was not muscular, and he was 20-35 years old with somewhat short hair. (RT 694, 716-717, 720, 743, 744, 753, 773, 774, 826-827.) According to Ms. Addo, she did not smell alcohol on the man's breath and he did not seem to be under the influence of alcohol, though she had no idea if he was under the influence of drugs/cocaine. (RT 744-745.) The Addos estimated that approximately $660 was taken from the store. (RT 763.)

Ms. Addo testified that the man was wearing a black T-shirt, though she did not remember any details about it, and either dark-colored, blue or green long pants. (RT 695, 725, 773, 874.) She also described the man as having medium complexion, a big nose, thin lips that were not too thick, and a mustache with hair on the side of his face that was not too thick or long [about 3-4 days growth]. Ms. Addo testified that the man did not appear to be a transient [not too dirty and not too clean], but Mr. Addo testified that his wife told him that the man looked like a street-person. (RT

695-696, 723, 724, 774.) Ms. Addo reportedly told the investigating officer that she could identify the robber if she ever saw him again and she gave that officer the note written by the man [People's Exhibit No. 3]. (RT 699, 754, 800, 854.)

David Golf, a police officer for the City of Gardena, was dispatched to the LaBargain Grocery at 1:40 PM for a reported robbery. (RT 850-851, 1682.) According to the officer, Addo described the robber as a black male with dark complexion and a beard with a mustache, 35 years old, 5 feet, 9 inches tall [Ms. Addo said she was not a good estimator of height], wearing all black clothing, thin build, short but thick head hair, and an unusual nose. (RT 754, 852-853, 866, 867, 870-871.)

Golf did not request that the Gardena Police Department's crime scene technician come to the scene and assist in obtaining fingerprints. Though he had only limited training and the minimal equipment given to patrol officers, he attempted to obtain fingerprints himself. (RT 858, 859-860, 861, 872, 880.) Golf failed to find any fingerprints on the cash register or anywhere else and took possession of the note, but failed to submit it for ninhydrin testing for fingerprints because Ms. Addo had touched the note. (RT 857, 862-865, 880.) At trial, Ms. Addo identified Mr. Virgil as the man who robbed her [he was similar in height, but a little heavier now with different facial hair – goatee and not a beard – and the hair on his head was shorter. (RT 672-673, 696-697, 722.)

B. ST. FRANCIS CABRINI CHURCH – REPORTED TRESPASSING / THEFT

David O'Connell was the priest at St. Francis Cabrini Church in Los Angeles [located several miles from the LaBargain Grocery store] and heard about a parishioner's report that a man had stolen a pie from the church's bake sale on October 18, 1992. (RT 784-786.) On October 26, 1992, the church's janitor told Father O'Connell that the man who had

stolen the pie had returned and was in the auditorium. (RT 786-787.) Father O'Connell approached the man and began talking with him, but the man soon tired of the conversation and left the auditorium. (RT 787-788, 794.) Father O'Connell testified that the man never harmed or threatened him in any way, and the man was arrested by Sheriff's deputies without incident. (RT 792, 794.) Father O'Connell identified Mr. Virgil as the man he talked with in the auditorium on October 26, 1992, and testified that Mr. Virgil had a beard and was thinner in 1992 when he weighed about 160 pounds. (RT 788-789.) [6]

Based on his work at the church, Father O'Connell was familiar with people under the influence of alcohol and drugs. Father O'Connell did not smell alcohol on Mr. Virgil's breath and he testified that Mr. Virgil was articulate, had no trouble walking, and did not have a glazed look in his eye. (RT 789, 790, 793, 794.) Mr. Virgil just looked tired, was "[p]retty much well-kempt," and did not look like a bum or transient street person. (RT 795.) Father O'Connell was shown People's Exhibit No. 4-A [a copy of Mr. Virgil booking photograph taken after his arrest at the church on October 26] and testified that the photograph approximated Mr. Virgil's appearance that day [same facial hair, length of head hair, skin color, and general demeanor]. (RT 791, 884-885.) Father O'Connell did not remember anything about Mr. Virgil's clothing from that day. (RT 796.)

Sheriff's Detective Richard Cohen interviewed Mr. Virgil for 10-15 minutes on October 27, about 24 hours after his arrest at the church. (RT 882-884, 890, 898.) Detective Cohen testified that Mr. Virgil was the person he interviewed that day, People's Exhibit No. 4-A was a copy of the

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[6] Though Mr. Virgil was confronted and searched at the church on October 18 and people were screaming at him, he did not react violently and simply left without incident. (RT 786-787, 896-898.)

booking photograph taken just after Mr. Virgil's arrest, and he watched Mr. Virgil sign the interview sheet and write a handwritten note on the back about the events at the church [People's Exhibit No. 13]. (RT 884-885, 888-890, 896; CT Supp. II, 386-387.) Mr. Virgil was not hostile or angry during the detective's interview; he freely admitted being at the church on October 18, and stealing a pie there; and he said that he returned to the "bowling alley" after the incident to get food because the pie was spoiled. (RT 890-891, 897-898.) The detective testified that on October 26 Mr. Virgil was unshaven, but did not have a full beard; he was not "disheveled by any means," though he did look like a transient who lived from place to place; and he looked "quite skinny. A lot skinnier than he is now" [at trial]. (RT 893-894.) Mr. Virgil's booking report reflected that he was 6 feet tall and weighed 170 pounds, though the detective thought Mr. Virgil looked "possibly even a little bit lighter" than that. (RT 899.) Finally, the detective testified that no weapons were found on Mr. Virgil's person when he was arrested and he did not seem to be under the influence of alcohol or drugs at the time of the interview. (RT 891-892, 896.)

C. DONUT KING – COUNTS 2 AND 3, MURDER AND ROBBERY OF SOY SUNG LAO

1. OBSERVATIONS OF THE SUSPECTED PERPETRATOR INSIDE THE DONUT KING [LAVETTE GILMORE, SGT. DONALD TILLER, DEBRA TOMIYASU, AND DEANDRE HARRISON]

The Donut King was a small, family-owned business that was open 24 hours a day, 7 days a week, and located in a strip mall at the intersection of El Segundo Blvd. and Van Ness Ave. in Gardena, just across the street from the LaBargain Grocery store. (RT 661-662, 925, 1705-1706, 1709, 1711.) Police officers and nearby merchants often went to the donut shop for coffee and donuts. (RT 777-778, 926, 1784-1785, 2859, 3076-3077.)

On October 24, 1992, Lavette Gilmore ["Peaches"] worked as a hairdresser at the Girls Will Be Girls Hair Salon that was located in the same strip mall as the Donut King. (RT 2859.) Gilmore decided to take a break between customers and walked to the donut shop to buy donuts. (RT 2859-2860, 2863.) As she walked past the donut shop and looked through the front window, she saw a man seated at one of the customer service tables. (RT 2861, 2864.) Gilmore did not "really take a good look at him" (RT 2860, 2919), but noted that he was wearing a hat [with a Malcolm X logo on it and similar to one she wears] and dark, black clothing [black jacket with a black shirt that also had the color red on it] (RT 2861-2863, 2902), and there was a gym bag and a small, Styrofoam cup on the table where he was seated [she saw him pick-up the cup with his hand]. (RT 2861-2862, 2902.) [7] According to Gilmore, she noticed the man and was quite suspicious of him because he looked "ugly, dirty, rugged" [unkempt, dirty face, smelly, thin and possibly under the influence of some substance], and just out of place at the donut shop. (RT 2864-2865, 2906-2907, 2918.) At trial, Gilmore recalled telling the police that the man was a "black adult, six foot two, 150, black hair, brown [eyes], clean shaven [she denied at trial that the man was clean shaven], sweaty looking, wearing a black shirt, unknown colors, and black jeans." (RT 2906.) [8]

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[7] Gilmore testified that the bag on the table was similar to the one depicted in People's Exhibit No. 24-B, a photographic exhibit that also contained a photograph of a Styrofoam cup and a Malcolm X hat. (RT 2862.)

[8] Gilmore identified photographs of Mr. Virgil as the man in the donut shop [RT 2889-2890, 2906-2908] and testified that his profile was similar [RT 2871-2872], but she did not identify him in court as the person she saw in the donut shop that day. (RT 2865-2866.) Gilmore later admitted lying during the identification process, reportedly at her husband's request to avoid involvement in the case. (RT 3092-3093.)

Gilmore was in the shop between 3:30 – 4:00 PM [about 20-25 minutes] talking with other customers and Ms. Lao, whom she knew from her prior visits to the shop. (RT 2860, 2879-2880.) Gilmore was carrying a lot of money that day so she was anxious about the man's presence and glanced back at him when she removed money from her rear pocket to pay for the donuts. (RT 2879-2880, 2896, 3052.)

Gilmore testified that many customers entered the shop while she was there, including a short, white policeman that she talked with outside and to whom she expressed concerns about the man's presence in the shop. (RT 2880-2882, 2887, 2894, 2896-2897, 2923, 3090.) After talking with the policeman, Gilmore returned to work and ate her donuts while seated in a chair by the front window. (RT 2882-2883, 2913.)

Ms. Lao's sister and brother-in-law, Lynne and Ty Ngov, owned the shop and Ms. Lao often worked there alone on the weekends so her relatives could get some rest because they worked at the shop seven days a week. (RT 938-939, 1708-1709, 1711, 1720, 1767, 1863-1864.) According to Ms. Ngov, Ms. Lao was often careless and did not pay much attention to security matters, including suspicious people in the shop. (RT 1888-1889.)

Sergeant Donald Tiller of the Los Angeles Park Police was on duty on Saturday, October 24, 1992, and stopped at the Donut King for coffee at about 3:40 PM. (RT 926, 929, 934, 937, 935, 937, 975, 991, 993, 1003.) 9 Tiller was a frequent customer and had gotten to know all of the people

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9 Tiller told the police that day and testified at the preliminary examination that he arrived at the donut shop at 3:15 PM. (RT 982-983, 991, 1019.) Tiller wanted to help the Gardena Police Department solve the case so he talked with his partner [Officer Sorrell] much later and revised his time of arrival to about 3:40 PM, a time more consistent with the prosecution's theory of when the homicide was committed. (RT 982-983.)

who worked there. (RT 927-928, 981, 3035-3037.) That day, Tiller was in full uniform and driving a marked black and white patrol vehicle that he parked in front of the shop. (RT 936-937)

When Tiller entered the small shop, he noticed a man seated to his left at a table in the shop's customer dining area. (RT 939, 987, 1206.) The man kept his head turned to his right so Tiller only saw the left side of the man's face [profile view only]. (RT 941, 942, 1206-1207.) ***10*** Ms. Lao moved near the cash register when Tiller entered and they stood there talking for about three minutes. Ms. Lao was usually a pretty quiet person and it was unusual for her to talk with him that long. (RT 942, 945.) Tiller turned and looked at man several times as he talked with Ms. Lao because the man kept staring out the window and never looked at him directly. (RT 942-943.) This was suspicious behavior to Tiller because people normally turned and looked at him in public places when he was on duty and in uniform. (RT 942-943.))

Tiller did not notice anything unusual about the man's demeanor that suggested he was under the influence of any controlled substance, but Tiller conceded that he likely could have made such a determination if he watched the man longer and more closely. (RT 946-948, 985, 988.) ***11*** Despite Tiller's concerns about the man's "unusual" conduct, he never spoke with him because he felt there was no basis to detain or arrest him. (RT 948.) When Tiller left, he saw an orange gym bag and a white

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10 At trial, Tiller testified that Mr. Virgil's left facial profile resembled the man's profile at the donut shop. (RT 941-942.)

11 Tiller, however, had little expertise in determining independently if someone was under the influence. That was because he usually made that determination if he found the person in possession of illegal drugs or the person volunteered that he was under the influence of a certain drug. (RT 986.)

Styrofoam cup on the table next to where the man was seated and believed that Ms. Lao and the man were the only people in the shop. (RT 942, 948, 1988.) *12*

Tiller testified that the man was wearing a dark, jacket-type shirt [long sleeves], a dark hat and dark jeans; he appeared to be about six feet tall and weighed 165-170 pounds; and he had a prominent goatee with facial hair on the side of his face ["scraggly (unkempt and untrimmed) beard"]. (RT 951-953, 974, 989, 996.) Tiller also believed the man was a transient because he was somewhere between clean and real dirty, his hair extended from underneath his hat [1/4 inch long], and he wore layers of clothing. (RT 954.) According to Tiller, People's Exhibit No. 4-A [Mr. Virgil's booking photograph from October 26] more resembled the person in the donut shop, than the person depicted in People's Exhibit No. 4-B [Mr. Virgil's booking photograph from November 3, 1992, after his arrest for auto burglary]. (RT 896, 953-954, 1253, 1932-1933, 1960.) Though Tiller was "positive" that Mr. Virgil was the man in the donut shop, he also conceded that his identification was tentative because he only saw the man's general [facial] profile and never the front of his face. (RT 956-957, 1209.) Further, Tiller could not tell if the man had any smudges or smears on the side of his face, whether the man's nose was broad or narrow or had a narrow bridge. (RT 1207, 1209.)

At about 6:15 PM, Tiller received a police radio broadcast directing him to return to Van Ness Ave. and El Segundo Blvd. [the Donut King] and

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12 Tiller testified that People's Exhibit No. 19 [the orange bag was later booked into evidence by the police] resembled the one he saw in the donut shop that day and his in-court identification of the bag was based partly on the fact that it was an item in evidence. (RT 951, 980, 981, 3068.) Similarly, Tiller could only say that People's Exhibit No. 19-A [the jacket found on the dining room table in the Donut King] was "consistent" with the one worn by the man in the donut shop. (RT 951-952, 996-997.)

meet with officers from the Gardena Police Department. (RT 955.) On his arrival, Tiller was visibly upset and told Gardena Officer Nick Pepper that the man in the donut shop was a "male black adult, six-foot-one, 175 pounds . . . black, brown eyes, 30s, dark complexion, unkempt goatee" with "Afro-type" facial hair that was a "little longer than average [1/4 inch]." (RT 956, 990, 995-996, 1830-1832, 1833, 1834, 1985.) Tiller added at trial that the man was wearing a hat, though he did not tell Pepper that important fact. (RT 998.)

On October 24, 1992, Debra Tomiyasu went to the Girls Will Be Girls Hair Salon to get her hair styled. (RT 1028.) While waiting for her appointment to finish, she decided to walk to the Donut King and buy a donut. (RT 1028, 1029, 1098, 2883-2884.) *13* (RT 1029, 1097.) As she passed by the front window of the donut shop and looked inside, she saw an orange duffel bag and a black Malcolm X hat on one of the customer dining tables, but there was no one in the dining room or behind the counter. (RT 1031-1032, 1033, 1035, 1098, 1118, 1128, 1192, 1202.)

Tomiyasu activated the front entrance buzzer [it made a "ding ding" sound] when she entered, but no one came to the front counter to assist her. (RT 1034, 1148, 1717.) Tomiyasu called out several times in a loud voice for assistance, but still no one responded. (RT 1034, 1037.) Tomiyasu was in the shop for 60-90 seconds when a large, African American teenager [DeAndre Harrison] entered the shop through the front door [the only way in or out of the shop]. (RT 1037-1038, 1258, 1261, 1300, 3102.) The buzzer sounded when Harrison entered, but still no one came out to assist them. (RT 1038.)

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13 Before she testified at the preliminary examination and at trial, Tomiyasu read several newspaper articles that discussed the evidence in the case. (RT 1099-1101, 1189-1190, 1964-1965.)

Tomiyasu told Harrison that she had been waiting for assistance and that probably someone was working in the back and had not heard them enter. (RT 1038, 1129.) Harrison, however, testified differently that he first mentioned the lack of service and Tomiyasu commented to him that she had been waiting for assistance. (RT 1262.) Harrison decided not to wait and returned to his car, but soon changed his mind. After returning to the shop, Harrison repeatedly triggered the door buzzer by walking back and forth through the doorway [Tomiyasu testified that he did this 5-6 times and Harrison testified that he did this 3-4 times]. (RT 1038, 1263, 1329, 1715-1717, 3102.) [14] Just after Harrison did this, Tomiyasu and Harrison heard what sounded like muffled, continuous, high-pitched screams that continually got louder. (RT 1038-1040, 1129, 1265-1266, 1329-1330.) Tomiyasu and Harrison could not tell whether the screams were made by a male or female, whether they came from inside or outside the shop, or whether they were from children playing nearby. (RT 1039, 1265-1266, 1582-1583.)

After the screams had gotten louder, Tomiyasu and Harrison saw an African American male suddenly appear from the kitchen area [15-20 feet from Harrison], walk to the customer service area behind the counter, and stop at the cash register. (RT 1040-1042, 1269-1270.) The man did not say anything to them, but made eye contact with Tomiyasu and Harrison who reportedly focused on him as he walked to and stopped at the cash register, approximately 3-4 feet from where they were standing. (RT 1040-1045, 1050, 1107, 1149-1150.) Harrison, a longtime customer at the donut shop, was surprised and felt that something was wrong because he had only seen

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[14] According to Ms. Lao's brother-in-law, Ty Ngov, someone inside the employee's bathroom at the rear of the shop could hear the front door buzzer, unless the bathroom's fan was on. (RT 1717, 1774, 1820.)

"Chinese people working there." (RT 1275, 1300.) According to Tomiyasu, the man's right hand was empty, he used his left hand to open the drawer further, and he removed an unknown amount of money from the drawer. (RT 1040-1045, 1050, 1150.)

At trial, Harrison was unsure about his testimony regarding the cash register. (RT 1305, 1318, 1321-1323, 1332.) _15_ He was questioned extensively at the preliminary examination about the cash register [he testified then that the man pushed the button to open the register], but he could not recall that testimony at trial, even though he read his testimony from the preliminary examination just before trial. (RT 1304-1307, 1317-1318, 1320.) Harrison also testified that he tried to be honest when he testified at the preliminary examination, but he might not have remembered "some of the stuff" then and his memory of the events in question improved over time, after he reviewed materials and talked with the prosecutor and investigating officer. (RT 1303, 1304, 1318, 1319.) Harrison could only say at trial that he remembered the man's hand going into the register, the "register just came out," and his memory of the incident might have been better at the preliminary examination. (RT 1318-1324.) Harrison estimated the man took about 12, $1 bills because he only grabbed money with his right hand from the end slot in the cash drawer. (RT, 1273-1274, 1281, 1321, 1324, 1330, 1583, 1590.) _16_ Despite saying that his memory improved after talking with the prosecutor and Sgt. Lobo about the case,

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_15_ Harrison told an officer at the scene that he was unsure if the man opened the register or if it was already open before he removed the money. (RT 1346, 1527-1528.)

_16_ Mr. Ngov believed that not much money was taken from the register that day. (RT 1875-1877, 1879.)

Harrison denied changing his testimony in response to those conversations. (RT 1306.)

About 2-3 seconds after the man appeared and 2-5 minutes after Tomiyasu first entered the donut shop, Tomiyasu saw a woman [Ms. Lao] appear behind the man in the customer service area [she seemed to have come from the same area that the man had come from]. (RT 1040, 1042, 1047-1048, 1104, 1117-1118, 1142, 1144, 1266-1267, 1269, 1590, 1591.) After making eye contact with Tomiyasu, Ms. Lao took several steps, pressed the silent alarm button near the service window, and collapsed to the floor. (RT 1040, 1048, 1057, 1267, 1680-1681, 1725, 1729-1730.) Tomiyasu believed that Ms. Lao was the source of the earlier screams because she screamed after making eye contact with Tomiyasu and before she collapsed. (RT 1049.))

Ms. Lao was fully clothed and was wearing pants, a blue shirt and an apron that were both covered in blood, and she had an unknown white object covered in blood wrapped around her neck. (RT 1048-1050, 1062, 1151, 1152, 1244.) Harrison focused on Ms. Lao and believed that she was seriously injured because of the amount of blood on her clothing and the scared look on her face. (RT 1267, 1271, 1333.)

After taking money out of the register, the man disappeared from view, but soon reappeared when he walked into the front customer service area through the door leading from the back employee area. (RT 1286, 1590, 1736.) [17] Tomiyasu and Harrison reportedly saw the man for a total

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[17] The door leading from the employee area to the customer area was normally kept locked, the door could only be locked from the inside and the Ngov's did not have a door key, the door had to be opened and closed manually, and employees going out to clean the customer dining area used that door, but were supposed to lock it after returning to the employee area. (RT 1737, 1747, 1809-1810.)

of about 30 seconds from the time he appeared at the cash register to when he left the shop by walking past them [2-3 feet away] and out the front door. (RT 1042, 1045, 1052, 1054, 1104-1105, 1124, 1145-1148, 1192, 1266, 1268, 1271-1272, 1302, 1312.)

The man easily could have harmed Tomiyasu as walked past her, but he never threatened or touched her in any way. (RT 1124.) Also, the man made no attempt to retrieve the gym bag and hat from the table, though he easily could have grabbed these items before he left. (RT 1202-1203.) (RT 1205.) According to Tomiyasu and Harrison, they did not see or hear anything in the donut shop suggesting that someone other than themselves, Ms. Lao, and the man were in the donut shop. (RT 1055, 1061, 1276-1277.)

After he left the donut shop with the money clenched in his right hand, the man jogged slowly/walked fast diagonally across the strip mall's parking lot. (RT 1051, 1097, 1105-1106, 1275, 1333-1334, 1341-1342.) Tomiyasu and Harrison followed the man out of the donut shop and watched him for 3-4 seconds as he hurried through the parking lot and out of sight around the corner of the Mini-Mart at the end of the L-shaped strip mall. (RT 1055, 1106-1107, 1114, 1276, 1280, 1282, 1325.) From the time they saw him leave the donut shop and until he disappeared from their view, the man never turned and looked back to the donut shop. (RT 1056, 1144, 1193, 1275-1276, 1326-1328.)

After seeing Ms. Lao appear covered in blood and concluding that the man inside the donut shop was the person who injured her, Tomiyasu began screaming for help and ran down the sidewalk to the Girls Will Be Girls hair salon to summon help for Ms. Lao. (RT 1047-1048, 1055, 1057, 1112, 1130, 1148-1149.) As Tomiyasu ran to call the police from the hair salon and Harrison ran to call the police from Conway Cleaners [the business immediately next to the Donut King], they both had their backs

turned to the donut shop. For that reason, they could not tell if anyone left the donut shop immediately after them and before the police and other witnesses arrived. (RT 1058, 1059, 1113, 1194, 1280, 1282, 1283, 1327-1328, 1990.) [18]

By the time Tomiyasu was allowed into the hair salon, the 911 dispatcher was already on the phone and the first police officers were arriving on scene so Tomiyasu did not provide much information to the dispatcher. (RT 1058, 1059, 1111-1112, 1119-1120, 1194, 1196, 1200, 1204, 1463-1464, 1678, 1683-1684, 2882-2883, 2903-2904.) During his 911 call [the first 911 call received about the incident], Harrison described the man in the donut shop as in his 30s, 6'2" with a thin build and a mustache, though he also may have said the man had a full beard with a "ruddy complexion" [dirty and scroungy looking]. (RT 1307-1310, 1344-1345, 1536, 1666-1667, 1673, 1676, 1679.)

Tomiyasu described the man as looking like a transient with a round face and head, dark complexion with dark, dirty-looking, shiny smudges on his face [both sides of his jaw and cheek], "average" size nose with a thin bridge at the top, rough, scraggly beard and mustache [several days of growth – significantly more facial hair than Mr. Virgil had two days after the homicide, as depicted in People's Exhibit No. 4-A], kind of wavy, very close shaven hair [not quo vadis length (close shaven and wavy), but close], very thin build with a drawn-in face, 5'9" – 5'10" tall, late 20s to early 30s, and "wild" looking eyes. (RT 1045-1046, 1052, 1053-1054, 1109, 1123,

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18 Tomiyasu did testify that she could see the donut shop in her peripheral vision as she entered the hair salon and she did not see anyone leave the shop then. (RT 1059, 1196.) It remains, however, that another person could have been present and left the shop while Tomiyasu and Harrison were running away with their backs turned to the donut shop.

1125, 1127, 1128, 1131, 1152, 1197-1198, 1962-1963, 1977.) [19] Tomiyasu testified that the man was wearing a short-sleeve, black T-shirt with the continent of Africa on the front outlined in white with some red colors and some writing, dark blue jeans, and dark shoes. (RT 1051-1052, 1109-1110.) Tomiyasu could not tell if the man was under the influence of cocaine, any drug or alcohol [she did not get close enough to him to smell his breath] and she did not see any blood on his face/person. (RT 1132, 1152-1153, 1156.)

Harrison testified that the man appeared startled by the events [his eyes were not real big but were kind of "medium mellowed-out eyes"] and he initially described the man as being about 6'2" tall with a thin build and a rough ["scroungy looking"] beard, but not necessarily a full beard [the man had much more facial hair than Mr. Virgil had at trial (a goatee)]. (RT 1277, 1278, 1279, 1280, 1308, 1309, 1312, 1342.) [20] Also, the man had medium brown complexion [like Harrison] and was wearing a short-sleeve black T-shirt with the continent of Africa on the front depicted in red, yellow and green colors and dark blue jeans. (RT 1277, 1279, 1308, 1310, 1548.) According to Harrison, the man was fairly nondescript except for his multi-colored T-shirt. (RT 1280, 1308, 1313.) Harrison did not see

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[19] At trial and with Mr. Virgil sitting before her, Tomiyasu described Mr. Virgil as being dark complected, not "dark-dark" but darker than medium complected, with a large, broad nose, and testified that the back of his head was identical to the back of the man's head in the donut shop. (RT 1126, 1197-1198, 1200.) As noted above, Tomiyasu had previously described the suspect as having only an average size nose, but testified at trial in a way more consistent with Mr. Virgil's appearance. (RT 1197.)

[20] Harrison told the police at the scene that the man was "dark complected" ["dark ruddy skin"]. (RT 1308-1310.) Harrison testified differently and explained the discrepancy by saying for the first time at trial that the man looked dark complected at the time because he seemed dirty. (RT 1309-1310.)

any blood on the man's face or person [including his clothing] when the man was two feet from him. According to Harrison, he is able to see fresh blood on his own skin that is similar in color to Mr. Virgil's skin. (RT 1311.) Like Tiller and Tomiyasu, Harrison could not tell if the man was under the influence of alcohol or any drug when he saw him in the donut shop. (RT 1313.)

Harrison, who saw Mr. Virgil at the live lineup, changed his estimate of Mr. Virgil's height and build by the time of trial by testifying that Mr. Virgil was 5'9" – 5'10" [not 6'2"] tall with a build that was not too thin and not too big. (RT 1278, 1308.) Harrison explained that his initial description was wrong because he had never witnessed events like those in the donut shop and was "tripping out" at the time. (RT 1278.) Finally, Harrison testified that his testimony at trial was more accurate than his testimony at the preliminary examination, though he also conceded the opposite by testifying that his prior statements may have been more accurate. (RT 1278, 1318-1319.) 21

2. EVENTS IMMEDIATELY AFTER THE SUSPECTED PERPETRATOR LEFT THE DONUT KING AND EYEWITNESS STATEMENTS TO THE POLICE [FELIPE SANTOYO, TRINA SIMMONS, LAVETTE GILMORE, ELLA FORD, BLANE SCHMIDT, AND JODY SCHNABL]

Felipe Santoyo worked at the Bates Fish Market that was in the same strip mall as the Donut King. (RT 1211-1213.) Between 3:40 PM and 4:00 PM on October 24, 1992, he heard someone outside the Girls Will Be Girls Hair Salon [located next to the market] yelling out for someone to call 911. (RT 1212-1213, 1229, 1230.) After going outside in response and hearing

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21 There was no expert testimony at trial concerning eyewitness testimony generally, the effects of stress on a person's ability to make an accurate identification, or the effects of repetitive viewing of the same suspect on the accuracy of an identification.

"Peaches" [Lavette Gilmore, a part owner of the hair salon] say that someone was bleeding at the donut shop and the police would be called, he ran to the donut shop to investigate and help the injured person. (RT 1214-1215, 1230-1231, 1464-1465, 2885.) As he ran to the shop, Santoyo did not see anyone running/hurrying though the parking lot. (RT 1235.) Trina Simmons, another customer at Girls Will Be Girls, was looking at the donut shop as she ran there in response to the shouts for help and she too did not see anyone running from the shop. (RT 1442-1444, 1446-1447.)

Santoyo was familiar with the interior of the donut shop because he worked at Conway Cleaners before going to work at the Fish Market and knew the injured woman [Ms. Lao]. When Santoyo entered, he saw Ms. Lao lying on the floor bleeding heavily, mostly from her right side, and he tried to make her more comfortable by retrieving some white bags and placing them under her head. (RT 1215-1217, 1221, 1234, 1247, 1248, 1492.) Santoyo believed that Ms. Lao was very badly injured because she was bleeding very heavily. (RT 1218, 1241, 1243-1244, 2920-2921.)

Lavette Gilmore entered the shop with Santoyo and together they turned Ms. Lao onto her back and heard her pleas for help (RT 1220, 1238, 1247, 2885.) Ms. Lao provided no information about her attacker or what happened and they only asked for her family's phone number so they could contact them about what happened to her. (RT 1221-1222, 1240, 1456, 2886, 2912.) Ms. Lao was cold and had trouble speaking, but managed to provide a phone number that Santoyo used to call her family from the Fish Market. (RT 1222-1223, 1247.) During the time Gilmore was kneeling next to Ms. Lao, she could not tell if anyone else was inside or had left the shop. (RT 2914-2915.)

When Santoyo returned to the shop, he saw a 40-45 year old black woman [Ella Ford] who was wearing a black and white dress standing outside Conway Cleaners holding many clean clothes on hangers. (RT

1228-1229, 1233-1235, 1239, 1392, 1427, 1432, 1751.) According to Santoyo, the woman [Ford] told him that she was inside the cleaners when she saw a man run/hurry through the parking lot. (RT 1236-1237, 1244.)

Gardena police officers Blane Schmidt and Jody Schnabl were the first officers on scene and arrived about a minute after the radio broadcast about the stabbing. (RT 1477-1480, 1482, 1536-1542, 1607-1608, 1669, 1692-1693, 1701-1702, 1964, 1981-1982.) [22] Schmidt, the senior officer, was familiar with the donut shop and Ms. Lao [Gardena police officers often went there for coffee] and noted there were about 15-25 people at the scene, some on the sidewalk outside the shop and some inside. Schmidt did not see anyone running from the area with blood on their person or anyone or who appeared suspicious. (RT 1481, 1541, 1694-1695, 1697, 1703.) When Schmidt entered, bystanders told him that the suspected perpetrator was last seen running eastbound through the parking lot and Schmidt broadcast that information over the radio. (RT 1499, 1547, 1579.) [23] Schmidt told Schnabl to remain at the front door and secure the crime scene and later to accompany Ms. Lao to the hospital. (RT 1696, 1702, 1988.)

Schmidt looked around the shop for the victim and a black woman motioned for him to come behind the counter. (RT 1482, 1495.) Schmidt entered the employee service area by walking down the hallway and through a closed but unlocked door and found Ms. Lao lying on the floor

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22 The detailed radio broadcast about the suspect's description was "male Negro adult, 30's, six-two, thin build, mustache," wearing a black, short sleeve T-Shirt with continent of Africa on it and dark colored pants running northbound on Van Ness and south of El Segundo Blvd. (RT 1538, 1546, 1548-1549, 1607-1608, 1670, 1677.)

23 Schmidt broadcast that the suspect appeared to be a transient and was last seen running eastbound on Van Ness Ave. and south of El Segundo Blvd. (RT 1524-1525.)

soaked in blood with a black female [Trina Simmons] rendering first aid by applying Vaseline to Ms. Lao's upper body wounds. (RT 1483-1484, 1492, 1495, 1496, 1544-1545, 1552-1553, 1589.) *24* Schmidt did not notice any blood on the floor when he walked through the doorway leading to the employee service/counter area. (RT 1489.) *25* Because of the nature and severity of Ms. Lao's injuries and the amount of blood loss, Schmidt believed it was likely Ms. Lao would die so he attempted [unsuccessfully] to get a statement from her. (RT 1486, 1492, 1497, 1500, 1560.) Schmidt did not see anything around Ms. Lao's neck and no one told him about any such object. (RT 1589.)

Schmidt did not make a detailed record of Ms. Lao's injuries, but noted after paramedics arrived and exposed her injuries that she had over 10, approximately 1/2" wounds to her upper torso. (RT 1497, 1498, 1499.) Because Schmidt believed Ms. Lao was likely to die from her injuries, he followed his Department's reporting protocols by notifying his Sergeant whose responsibility it was to decide whether detectives should be dispatched to the crime scene. (RT 1498, 1951.)

Schmidt saw no blood on the service/counter area and noted that the cash register drawer was open 1-2 inches, but he did not check the

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24 Schmidt could not recall whether the door leading from the hallway to the employee service/counter area [depicted in People's Exhibit Nos. 17 and 42-A] was open or closed when he arrived, but also testified that he grabbed the door knob and turned it to open the door. (RT 1484-1486.)

25 In People's Exhibit No. 43- B, there were traces of blood on the floor between the doorway leading to the employee service/counter area, but Schmidt believed those traces were boot prints made by the paramedics who treated Ms. Lao at the scene. (RT 1489-1491.) No photographs were taken of the reported boot prints, nor was there any attempt to preserve this potentially critical evidence. Instead, the crime scene investigators merely presumed that they were made by the paramedics at the scene. (RT 1946.)

register's contents because he did not want to disturb the crime scene. (RT 1487, 1491, 1509-1510, 1552, 1557, 1584.) After the paramedics arrived on scene and assumed caring for Ms. Lao, Schmidt began searching for suspects inside the shop by following a parallel trail of blood [he presumed the trail was made by Ms. Lao] that extended from the employee service/kitchen area where Ms. Lao had collapsed to the back [employee] bathroom that was 37-38 feet away. (RT 1487, 1492, 1499, 1500, 1533, 1561, 1945, 1971, 1982, 1982, 3053.) 26 Schmidt did not find any suspects and only interviewed Simmons who said that she attempted to help Ms. Lao by providing first aid. (RT 1499, 1520, 1565, 1589.)

As Schmidt followed the continuous trail of blood from the employee service/cash register area to the back [employee] bathroom (RT 1502, 1562, 1572, 1602), he did not see any smudges or footprints in the blood trail and he saw a number of items adjacent to the trail that were splattered in blood. (RT 1602.) The door leading into the employee bathroom was closed and Schmidt noted that there was a plunger [closing] device at the top of the door, but could not recall whether that device was operational. (RT 1502, 1568.) 27 Instead of preserving the crime scene intact, Schmidt decided to grab the door knob with his bare hand, turn it, and open the door so he could look inside. Inside the bathroom, he found a

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26 Like Schmidt, the investigating detectives assumed that all of the blood at the scene came from Ms. Lao. This theory was not supported by scientific evidence and was contrary to competent investigative practice, especially given the defense theory that someone other than the man seen at the cash register was present and killed Ms. Lao and recognition in the law enforcement community that the attacker in a stabbing crime often cuts himself and leaves blood at the scene. (RT 1941, 1945-1947, 1971-1972, 1982-1983, 2106, 2175-2177, 2197, 2373.)

27 The plunger closing device was fully operational on October 24, 1992. (RT 1739, 1774.)

large pool of blood on the flo(
blood smears in many different
concluded that Ms. Lao was sta
1570-1571, 1602-1604.)

In addition, Schmidt sa
belong to a female and a white
the door. (RT 1502-1503, 157
where the paramedics were trea
them about Ms. Lao's conditior
he left the scene intact by leavir
and all doorways] and he avoid
second return walk to where th
1505, 1509, 1606.)

Schmidt believed that the
IV [intravenous line] on Ms. La
veins had collapsed making trac
1505, 1506, 1618.) After being
placed Ms. Lao on a gurney
parking lot. (RT 1506.) A
paramedics left boot prints in th
back, employee bathroom and
believed were made by someone
worn by the suspected perpetr

and he included that information in his
about the suspect (RT 1526, 1592-159
believed both witnesses indicated that th
shaved for several days]. (RT 1585-1586

Ella Ford went to Conway's Clea
PM on October 24, 1992, to pick up he
1421.) Ford was a frequent customer a
across the parking lot from the entrance
away]. (RT 1351-1352, 1393-1394, 139
cleaner's owner about having some altera
that seemed to come from the donut sho
door to the cleaners. (RT 1353, 1391.)
thought the sounds were from children p
if the person screaming was a female. (R
for her cleaning, Ford left the cleaner's a
door when she saw a man [to her left] run

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34 Schmidt conceded that he learned f
reports to omit information that might
accuracy/validity of a witness's identific
concession, it is hard to know what Tomi
Schmidt and what portion, if any, of his t
the witnesses' statements that day.

the parking lot. (RT 1354-1355, 1400-1401, 1406, 1411.) [35]

Ford testified that she paid attention to the man because he almost ran her over and it seemed odd for someone to be running in the area. (RT 1354-1355, 1359, 1415, 1436-1437.) According to Ford, the man was in his late 20s to early 30s, approximately 5'6" tall, wearing a black shirt with the continent of Africa on it, dark blue jeans and possibly white tennis shoes, very short hair and his face was unshaven. (RT 1398-1399, 1437, 3039-3040.) The man's hands were at his sides and he appeared to be clutching something in his left hand, the hand closest to her. (RT 1356-1358, 1361-1362, 1402.) [36] Ford watched the man run diagonally across the parking lot, away from the Donut King, until he disappeared around the

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[35] During her statement to the police and prosecutor years later, Ford gave a different version and then added a completely different version when she testified. Ford told the police and prosecutor years after the fact that that she was putting laundry into the trunk of her car when she heard shouting that someone had been stabbed, turned back to look at where the shouting had come from, and saw a man walk past her. (RT 1399-1401.) Ford explained this difference by saying that she must have been confused when she talked with the police and the prosecutor years after the crime. (RT 1401.) Further, Ford attempted to explain her different statements by saying for the first time at trial that she saw the man twice, once as she was coming out of the cleaner's and the man was coming out of the donut shop and a second time when she was at her car and turned to look back in response to the shouting about a stabbing. (RT 1399-1401, 1437-1438.)

[36] The man would have been to Ford's left if they had both left the respective businesses at the same time, and the man's left side [and hand] would have been the furthest from her. (See People's Exhibit No. 15.) After Ford's version of the events was challenged at trial, Ford explained that she saw the man's left hand when at her car. (RT 1360.) Ford was pressed about her observation and testified that the man looked back at the shop in response to the shouting about the stabbing and his right side and hand were closest to her when he turned and that is when she saw his left hand [reason dictates, however, that the man's body would have blocked her view of the man's left side]. (RT 1361.)

corner of the 8-Day Mini-Mart that was at the opposite end of the L-shaped strip mall from the Donut King. (RT 1359, 1407-1409.)' [37]

After Ford heard someone shouting "[h]e stabbed her. He stabbed her" and "[c]all the police. Call the police," she turned back towards the donut shop and saw a young woman with curlers in her hair [Tomiyasu] run from the donut shop to the hair salon and then a teenage male [Harrison] run from the shop to the cleaners. (RT 1359-1360, 1362-1363, 1364, 1401-1402, 1403, 1407, 1408, 1409-1410, 1411, 1412, 1439-1440.) [38] Ford testified that the man turned back and looked at the donut shop after the shouts about the stabbing and to call the police, as if to see whether anyone was following him. (RT 1360-1362, 1402, 1408, 1411, 1413, 1422, 1433-1434.) According to Tomiyasu and Harrison, however, the man never turned back to look at the donut shop. (RT 1056, 1144, 1193, 1275-1276, 1326-1328.)

About 30 seconds after Tomiyasu's screams, Ford saw people from other businesses in the strip mall go to the donut shop and help the woman there. (RT 1367, 1368, 1383.) After placing the laundry into the trunk of

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[37] Baffour Addo was inside the LaBargain Grocery across the street from the Donut King on October 24, 1992, when he heard shouting and looked out to see a man running past that was a medium-complected black male, slim, 5'9" – 5'10", weighing 150-155 pounds, wearing a short-sleeve back T-shirt with a pattern on the front, dark jeans and tennis shoes, with a nappy, uncombed, short Afro and unshaven with a scraggly unkempt beard. (RT 777-782, 3046-3047.) According to Mr. Addo, Mr. Virgil fit the description of the man he saw running past his business, except that Mr. Virgil appeared to have been "eating well" since that time. (RT 780-781.)

[38] Ford did not tell the police in January 1995 about seeing Harrison leave the donut shop. (RT 1404-1405.) Ford testified that her recollection of the events improved after she was placed in a patrol car with Harrison and Tomiyasu on the day of the incident and again during her testimony at trial, several years later. (RT 1410-1411.)

her car, Ford walked to the intersection of Van Ness Ave. and El Segundo Blvd. to see where the man had gone because she suspected that he was responsible for stabbing the woman at the donut shop. (RT 1366-1367, 1411, 1412, 1414-1415, 1440.) Ford's back was turned to the donut shop from the time from the time she left the cleaner's to when she turned back to look at the donut shop in response to Tomiyasu's shouting and during the one minute it took her to walk from her car to the intersection to see where the man had gone. (RT 1367, 1369, 1373, 1412-1413, 1435, 1440.) According to Ford, the only people she saw leaving the donut shop after the man left were two young people [Harrison and Tomiyasu]. (RT 1373, 1435.)

Ford testified that she is a poor estimator of height and described the man in the parking lot as an African-American male, 5'5"-5'6" tall, with an oval head and short hair [1/8-1/4" and too long to be quo vadis], a full beard [several weeks growth] that was heavy and neat but not shaggy, 155-160 pounds with a thin to medium build, and wearing white tennis shoes [no blood seen on the shoes from 5-6 feet away], dark-colored jeans, a T-shirt with African colors [red, green and orange] on the back [she did not recall if the shirt had a design on it]. (RT 1373-1374, 1417-1418, 1419, 1420-1421, 1422, 1424-1426, 1429-1430, 1431, 1433.) Ford had a good opportunity to view the man's face and profile and looked at him closely during her approximately 45-second view because it was unusual for someone to be running from the donut shop. (RT 1359, 1415.)

At trial, Ford testified that the man did not appear to be dirty or transient and that Mr. Virgil's height and facial features were consistent with the facial features of the man she saw that day. (RT 1375, 1419-1420, 1432, 1434.) In addition, Ford testified that Mr. Virgil now seemed heavier and his facial hair was different [goatee instead of a full beard]. (RT 1375-1376, 1432.) According to Ford, she has been mistaken before about

thinking she knew a person, but not to the point where she actually approached the person thinking they were someone else. (RT 1436.)

As Ford returned to the donut shop and before she looked through the barred service window located closest to El Segundo Blvd., she did not see anyone running across that street (RT 1380-1381, 1414, 1435-1436.) Inside the donut shop, Ford saw a woman lying on the floor wearing a bloody T-shirt and several woman from the beauty salon and a Hispanic man kneeling next to the woman and trying to make her as comfortable as possible. (RT 1381, 1382-1383, 1393.) Because seeing the injured woman on floor made her uncomfortable, Ford left the window area, but remained at the scene and gave a statement to police officers [Officers Pepper and Schmidt] later that afternoon. (RT 1382, 1383, 1387, 1391, 1392, 1607, 1830.) According to Ford, her statement at the scene was a true and accurate reflection of her belief about the man's description. (RT 1384, 1405-1406.) [39]

D. Ms. Lao's Injuries, Treatment, And Cause Of Death

Jeff Audet, a firefighter-paramedic for the City of Gardena, was on duty with firefighter-paramedic Doug Roberts when they were dispatched Code 3 [lights and sirens] to the Donut King on October 24, 1992. (RT 1611-1614, 1626.) Audet had responded to 20-30 scenes where there was considerable blood loss, but independently recalled this incident [as did Roberts] because of the great blood loss [1200-1500 cc out of a total blood volume of 5000-6000 cc] and the seemingly violent nature of Ms. Lao's

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[39] Ford told Officer Pepper that she was some distance from the man whom she described as a male black, six-two, 150 pounds, black hair, brown eyes, 20s, a full beard "lightly grown," wearing a black T-shirt with the continent of Africa in red, green and yellow, and blue jeans and unknown color shoes. (RT 1830-1831, 1836-1837.)

many injuries. (RT 1612-1614, 1623, 1635-1636, 1641, 1642.)

The paramedics did a primary survey and noted that because Ms. Lao had so many stab wound, they could not dress/treat each wound separately [Audet estimated 15 wounds]. (RT 1615-1617, 1637.) Ms. Lao was actively bleeding and had lost a great deal of blood so it was important for the paramedics to start an IV to replace her lost blood volume. The paramedics were unsuccessful because her blood pressure was so low and they could not obtain venous access [the paramedics estimated that her blood pressure was about 60 because she had a carotid pulse, but no pulses in her arms]. (RT 1618, 1624-1625, 1636, 1637.)

Audet could not remember whether they removed Ms. Lao's clothing, but testified that their habit and custom are to remove all clothing on a trauma patient so they can inspect the patient's entire body for life threatening injuries. (RT 1620-1621, 1637, 1643.) [40] It took Audet and Roberts about three minutes to arrive at the scene, they were on-scene for about 10 minutes, and it took 9 minutes to transport Ms. Lao to the hospital. (RT 1621, 1624, 1698.) Ms. Lao never talked with the paramedics and she deteriorated rapidly en route to the hospital [her breathing slowed dramatically and the paramedics had to assist her respirations]. (RT 1622, 1638, 1645.) Ms. Lao's heart was beating at an extremely fast rate upon arrival at the hospital, consistent with her heart's attempt to compensate for the blood loss by beating faster. (RT 1629-1630, 1638-1639.) Paramedic Audet correctly surmised that Ms. Lao would die from her injures [she died

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[40] Officer Schnabl noted that Ms. Lao's clothing was cut off by the paramedics [her bloody T-shirt and bra were found at the scene] and he recalled seeing Ms. Lao wearing underpants that appeared to be intact. (RT 1697-1698, 1861.) Officer Schnabl later booked Ms. Lao's bloody clothing into evidence, after receiving those items from hospital personnel. (RT 1700.)

the next day despite a number of blood transfusions]. (RT 1626, 1752.)

Ogbonna Chinwah is a medical doctor and a forensic pathologist for the Los Angeles County Coroner's Office and performed the autopsy on Ms. Lao. (RT 2256, 2262-2264.) According to Dr. Chinwah, Ms. Lao died from massive blood loss caused by 30 stab wounds to various parts of her body, some of which were defensive wounds. (RT 2264-2271, 2272-2289, 2292-2293, 2307-2308, 2311, 2313.) Most of the wounds were superficial and not potentially lethal, but there were three wounds that would have been fatal by themselves [Wound No. 16 to the chest/lung area and Wounds Nos. 27 and 28 to the abdominal cavity/liver]. (RT 2290-2291.) [41] The doctor could not discern the order of Ms. Lao's wounds, whether the assailant was left or right-handed, or if the knife was serrated (RT 2312-2313, 2317-2318, 2321), but estimated that the knife was about 5/8" wide and 5-6" long. (RT 2299-2300, 2320.) Based on Ms. Lao's size and the infliction of her wounds within 1-2 minutes, the doctor estimated that she would have remained conscious for not more than a few minutes after being stabbed. (RT 2301, 2305-2306, 2323-2324.) [42] There was no evidence

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[41] Given the nature of Ms. Lao's wounds and that she was fully clothed when stabbed, Dr. Chinwah testified that it was unlikely that a substantial amount of blood would have been transferred to her assailant. (RT 2308, 2329-2330.)

[42] Dr. John Stroh, the Associate Director of Emergency Medicine at Gardena Memorial Hospital, testified that under the circumstances, Ms. Lao would have remained conscious for no more than 5 minutes after the stab wounds were inflicted. (RT 2823-2827, 2829-2831, 2833, 2834-2835, 2842, 2844, 2854-2856.) According to Dr. Stroh, it would be customary for a severely injured person like Ms. Lao to be transported to the nearest hospital [Gardena Memorial in this case], but the paramedics chose to transport her further to the nearest trauma center [Harbor General] because the trauma center was better equipped to care for Ms. Lao under the circumstances. (RT 2839.)

that Ms. Lao was strangled or that she had been sexually assaulted. (RT 2314-2315, 2327, 2328, 2334-2335.)

E. THEFT OF RAFFLE TICKETS FROM A CAR AT THE SOUTHWEST BOWL, THE ROBBERY AND ASSAULT WITH A DEADLY WEAPON AGAINST SAMUEL DRAPER [COUNTS 4 AND 5], MR. VIRGIL'S PRESENCE IN THE AREA OF THE SOUTHWEST BOWL AND THE HILLTOP MOTEL; AND HIS ARREST FOR SUSPECTED AUTO BURGLARY IN GARDENA

On a Saturday morning in early to mid-October 1992, Joe Vaouli went to see his friend, Samuel Draper, at the Southwest Bowl in Los Angeles [the bowling alley was located several miles from the Donut King]. (RT 1914, 2427, 2431, 2445, 2501, 2507, 3094.) In September or October 1992, Vaouli had purchased a number of raffle tickets from Estella Reid [his daughter's dance instructor] for a fundraising event at her Polynesian dance studio and a raffle ticket from one of his employees for a fundraising event at St. Justin's church in Anaheim. (RT 2408-2409, 2424-2427.) According to Vaouli, he left the raffle tickets in a business folder that he kept inside the car that he drove to the bowling alley that day. (RT 2427.) While Vaouli was inside the mechanics, shop with Draper, the tickets and other items were stolen from his unlocked car. (RT 2427, 2434, 2436-2437, 2501.) Vaouli told Ms. Reid about the theft of the tickets, but did not file a police report because auto break-ins were so common at the bowling alley. (RT 2419-2422.)

Samuel [Joe] Draper was a longtime employee of the Southwest Bowl and usually worked alone in the mechanics shop at the rear of the bowling alley. (RT 2444-2445.) On October 31, 1992, between 1:00 - 2:00 PM, Draper was in the shop when he noticed a man standing in the doorway. (RT 2448-2449, 2463, 2464.) Draper had seen the man several times inside the bowling alley [during a two-three week period before that day] so he agreed to give the man a $1 bill from his shirt pocket when the

man asked for bus fare. (RT 2449-2451, 2464, 2509, 2514-2515.) The man left after taking the $1 from Draper, but returned about a minute or so later and asked for return bus fare. (RT 2452.) Because Draper had the remainder of his money in his wallet and he did not want to display his wallet in front of the man, he told the man to wait so he could walk to the rear of the shop and remove a $1 bill from his wallet. (RT 2452-2453, 2467-2468.) When he returned, he handed the man the $1 bill and then turned back to his work. The man left, but returned a second time with a clear plastic grocery bag and asked Draper to keep the bag for him. (RT 2454, 2469-2470, 2539.) Draper said to leave the bag outside and no one would take it. (RT 2454.) The man, however, pressed Draper to take the bag and he agreed to keep it for him. [Draper thought the bag contained clothing]. (RT 2454, 2470, 2538-2539.) [43]

After Draper placed the bag in a basket inside the shop and turned his back to the doorway, someone grabbed Draper from behind, placed an [right] arm around his neck while holding a knife with a single-edged blade to his throat. (RT 2455-2456, 2461, 2470-2471, 2476, 2510, 2526-2527.) [44] Draper grabbed the man's arm with his right hand and then in a fist-like grip with his left hand tried to bend or pull the knife away from his throat. (RT 2456-2458, 2472, 2528.) According to Draper, the knife cut his fingers and he had scars for some time, though the scars were fully healed

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[43] The bag remained in the shop until the owner of the bowling alley found it and told Draper to throw it out. (RT 2539.) Draper never told the police about the bag. (RT 2540.)

[44] Draper did not see the knife, but described it as a flexible, steak-type knife that was less than 1 inch wide and about 6 inches long. (RT 2474-2475, 2510-2511, 2513, 2518., 2570-2571, 3076.) In an apparent attempt to bolster the prosecution's case against Mr. Virgil, the detective investigating Ms. Lao's homicide testified the knife was possibly the same one used to kill Ms. Lao. (RT 3076.)

by the time of trial. (RT 2456-2459, 2512, 2525.) Despite his active and forceful resistance, the man never tried to stab Draper or intentionally cut him with the knife. (RT 2546-2547.) [45]

Draper continued struggling with the man and trying to get the knife from his throat when the man reportedly said "Get down and I won't hurt you." (RT 2457.) Draper continued struggling, but soon complied as the man forced him to the ground and then tied his hands behind his back with an extension cord, bound his feet with a belt, tied a rag around Draper's mouth so he could not call out, and took Draper's wallet from his pants pocket. (RT 2459-2461, 2478-2480, 2482-2483, 2531.) Because he was not tied tightly, Draper soon managed to free himself and went to the front counter inside the bowling alley and asked the person working there [Mike Fredericks] to call the police because he had just been robbed. (RT 2480, 2483, 2485, 2529, 2553.) Draper's empty wallet was found inside the shop about a month after the incident, but it was never checked for fingerprints. (RT 2531-2532.)

According to Draper, the man who robbed/assaulted him was wearing a gray sweat suit with a long-sleeved, plain black shirt and baggy, whitish-colored sweatpants that made it more difficult to determine the man's weight. (RT 2488, 2518-2519, 2523, 2524.) [46] Draper estimated that the man was in his middle to late 30s, about six feet tall, weighed about 180 pounds, and had a medium build with a mustache and small goatee. Draper identified Mr. Virgil as the man in the mechanics, shop that day and

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[45] The prosecutor theorized during his closing argument that Mr. Virgil killed Ms. Lao because she resisted him. (RT 3251.)

[46] Draper did not notice any colors or designs on the shirt and could not recall if the shirt had long or short sleeves. (RT 2518-2519, 2537.)

testified that was the last time he saw him at the bowling alley. (RT 2489, 2518, 2520, 2524, 2545, 2548, 2566-2567.)

Draper testified that Mr. Virgil's booking photographs from November 3, 1992 [People's Exhibit No. 4 - B and C] best depicted how he looked on October 31, 1992. (RT 2489-2490, 2525.) [47] Draper was familiar with people under the influence of drugs and saw nothing during his reported encounter with Mr. Virgil to suggest that he was under the influence of drugs or alcohol. (RT 2490-2491, 2503.) Draper, however, thought that Mr. Virgil's eyes were unique because they looked like he was half asleep, the same way he looked at trial. (RT 2503.) The person who robbed Draper was not wide-eyed and did not have wild looking eyes. (RT 2548.)

Los Angeles County Sheriff's Deputies Everett and Garrett arrived within five minutes of the call about the robbery and interviewed Draper. (RT 2485, 2529, 2665-2667.) Draper was very angry, upset and in mild shock when interviewed and described the robber as a black male with brown eyes and hair, approximately 6,1" tall, 180 pounds, 30-35 years old, wearing a black sleeveless T-shirt, gray jogging pants, and perhaps a hat. (RT 2670.) After talking with the deputies, Draper talked with Mike Washington, a jobless and homeless bowling hustler who lived in a car behind the bowling alley, about what happened to him and Washington expressed his belief that Mr. Virgil, who lived in an abandoned van behind the bowling alley, might be the perpetrator. (RT 2486-2488, 2505-2507, 2508, 2554, 2562-2563, 2671, 2573, 2575-2577, 2582-2583, 2598-2599, 2607.) The deputies did not locate any suspects and did not go into the

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[47] Mr. Virgil was arrested for suspected auto burglary in Gardena on November 3, 1992. The two booking photographs taken after his arrest were introduced into evidence as People's Exhibit Nos. 4 – B and C. (RT 1009, 1932-1933.)

bowling alley to retrieve any items of physical evidence since this case would be assigned to a detective for follow-up investigation. (RT 2674.) [48]

Washington had seen Mr. Virgil carrying a gym bag and wearing a Malcolm X hat that resembled the ones found in the donut shop one week before Draper was robbed. (RT 2579-2580, 2603, 2605, 2610.) Washington could not recall if Mr. Virgil had the gym bag with him when he last saw him and he had never seen Mr. Virgil wearing a black shirt with writing [or the continent of Africa] on it. (RT 2580-2581, 2587, 2603, 2609-2610.) Washington often smoked marijuana and used cocaine, but never saw Mr. Virgil use or be under the influence of cocaine or rock cocaine. (RT 2581-2582, 2598-2600.)

Willie and Gerole Jackson owned the nursery/daycare businesses [Little People and Western Boulevard Educational Center] that were located at the back of the Southwest Bowl's rear parking lot. (RT 2611-2612.) About two weeks before Draper was robbed, Jackson and his wife drove into the parking lot late at night to check their business and found Mr. Virgil sleeping in the Jackson's 1975 Dodge van. (RT 2615-2616.) Jackson was concerned about Mr. Virgil's presence, given the nature of his business, but allowed him to remain after Mr. Virgil furnished proof of his identity, told him he was homeless and needed a place to stay, and Jackson concluded that Mr. Virgil posed no danger to him, his wife, or anyone associated with his childcare business. (RT 2616-2620, 2628-2629, 2632-2634, 2647.)

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[48] According to Deputy Everett, the crimes against Draper were minor and not noteworthy and he treated them as such during his brief, two-minute encounter with Draper and in his brief police report. (RT 2689-2691, 2728, 2748-2750.) Sgt. Lobo of the Gardena Police Department, the investigating officer concerning Ms. Lao's homicide, believed that Everett's minimalist approach and documentation were appropriate. (RT 3118-3119.)

Jackson even hired Mr. Virgil to work for him, though he got upset once because he paid Mr. Virgil in advance to rake leaves, but Mr. Virgil disappeared for a few days and failed to complete the job. When Mr. Virgil reappeared, he told Jackson that he had gotten arrested for an incident at St. Francis Cabrini Church and on his own initiative finished the job for which he had been paid. (RT 2617-2620, 2625-2627, 2629, 2632-2634, 2637, 2639, 2647-2648, 2661.) Jackson searched the van several times while Mr. Virgil was living inside for contraband [drugs and/or weapons], but found only clothing and discarded food containers/wrappers. (RT 2642-2646.) [49]

Jackson had seen a hat in the van occupied by Mr. Virgil, but could not say that it was the same one shown to him in court [the Malcolm X hat seized from the donut shop]. (RT 2623-2624.) [50] Jackson had seen Mr. Virgil wearing a black T-shirt with the continent of Africa on the front, but said that such shirts were very common and popular in the community [even his wife had one]. (RT 2623, 2635.) Jackson found it hard to believe that Mr. Virgil would have committed the charged offenses because he always behaved appropriately around him and his wife, he thought those crimes were out of character, and Mr. Virgil seemed to be a lot smarter than someone who would do such things. (RT 2629.)

Sheriff's Detective Jacques LaBerge was assigned Draper's case, talked with him on the phone, and made arrangements for him to view a sixpack, mug show-up folder. (RT 2492, 2541-2545, 2675, 2723-2725.)

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[49] According to Jackson, Mr. Virgil once showed him a little pocket knife that was about 2 1/2 inches long. (RT 2642, 2652-2653.)

[50] Jackson testified that Mr. Virgil had a gym bag in which he kept his personal belongings and thought it was similar to the one shown to him in court [People's Exhibit No. 19, found in the donut shop], but also thought that Mr. Virgil's bag was blue and white and not orange like the one in court. (RT 2649-2651, 2657, 2659-2660.)

LaBerge learned from Draper that the suspect in his case was believed to have lived in a van in the bowling alley's parking lot; he learned from Mr. Jackson that the suspect was involved in another incident being investigated by the Sheriff's Department [the St. Francis Cabrini Church incident]; and he obtained Mr. Virgil's October 26, 1992, booking photograph regarding the church incident from Detective Cohen. (RT 2729-2731, 2757.) LaBerge prepared a sixpack lineup with Mr. Virgil's booking photograph and five other photographs that he felt looked similar, but not identical [People's Exhibit No. 12]. (RT 2729-2731, 2733, 2761-2762.) Draper looked at the sixpack carefully for 10-15 minutes before selecting and identifying the person in position No. 3 [Mr. Virgil] as the person who robbed him. (RT 2492-2496, 2519-2520, 2569-2570, 2734-2736, 2751, 2753.) [51]

Draper was certain at trial that Mr. Virgil was the person who robbed him, though he also conceded it was possible that someone other than Mr. Virgil was the actual robber. (RT 2520-2521, 2535, 2549.) Draper explained that Mr. Virgil was the person who asked him for bus fare and gave him the plastic bag full of clothing to hold, but his identification of Mr. Virgil was based also on some degree of speculation [there was only a brief lapse of time between those events and when he was grabbed at knifepoint, forced to the ground, and his wallet was taken so he believed Mr. Virgil was the culprit]. (RT 2533-2535, 2551.)

Deputy Everett also testified that about three weeks before Draper's robbery, he and his partner had a series of contacts with Mr. Virgil and a man named "Irwin" near the Southwest Bowl and the nearby Hilltop Motel

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[51] Contrary to Draper's testimony, LaBerge testified that Draper only viewed the sixpack photographs for 2-4 minutes, though he admitted that Draper looked at the photographs longer than most people [the usual time is about 30 seconds]. (RT 2735, 2759.)

(RT 2675-2676, 2686.) The deputies never found any weapons or drugs on Mr. Virgil, but did find auto burglary tools and a make-shift pipe used to smoke rock cocaine. Mr. Virgil was also deemed to be under the influence of cocaine during some of these encounters. Everett never arrested Mr. Virgil for these offenses because they were relatively minor crimes, given the high [violent] crime area that he patrolled. (RT 2678-2681, 2693-2694.) Despite his reported familiarity with Mr. Virgil, Everett did not consider him a suspect in the crimes against Draper. (RT 2688.)

Everett believed that Mr. Virgil was homeless and testified that he had seen him wearing a Malcolm X cap, a black T-shirt with the continent of Africa [red, green and yellows colors] on it, and a black, zip up sweatshirt with a hood [consistent with the description of the sweatshirt found in the gym bag at the donut shop]. (RT 2682-2684, 2699.) The deputy recalled that Mr. Virgil was thinner then, was always wearing the T-shirt, and had facial hair [relatively close-shaven beard with a mustache]. (RT 2683-2684.) According to the deputy, Mr. Virgil was not seen in the area after Draper was robbed. (RT 2685, 2699.) [52]

On November 3, 1992, Alvin Duncan was driving his friend David Akimsaya's car and parked it behind the M&M Soul Food restaurant on Rosecrans Blvd. in Gardena. (RT 2767-2768.) Later that evening [between 9-11 PM], Duncan picked up Akimsaya in his own car and they drove to the M&M restaurant so Akimsaya could get his car. (RT 2769, 2771.) On their arrival, Akimsaya found a man [Mr. Virgil] inside his car

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[52] Everett testified that he would have prepared Field Identification cards after his reported encounters with Mr. Virgil and Irwin, but he could not locate those cards in the Sheriff's Department's records. (RT 2686-2687, 2704-2705.) The deputy also claimed the he had a good recollection of his contacts with Mr. Virgil and that he volunteered his detailed information about Mr. Virgil to the prosecutor and Sgt. Lobo without any prompting by them. (RT 2687, 2694, 2695, 2698-2699, 2706-2707.)

who claimed he was homeless and needed a place to stay because it was cold outside. (RT 2769, 2772, 2774.) After Akimsaya looked inside the car and saw that the ignition switch had been tampered with, Mr. Virgil ran off with Duncan and Akimsaya in close pursuit. (RT 2772-2773, 2775-2776.)

Mr. Virgil, who seemed agile and did not appear under the influence, ran to a nearby grocery store and sought refuge inside by saying that the men chasing him were trying to kill him. (RT 2775-2776, 2781.) Someone inside the store called the police who soon arrived and arrested Mr. Virgil for suspected auto burglary. (RT 2773, 2775-2777, 2778, 2785.) Duncan identified Mr. Virgil at trial as the man in Akimsaya's car and testified that he looked like the person depicted in People's Exhibit No. 4-A [Mr. Virgil's booking photograph following his arrest at St. Francis Cabrini Church on October 26]. (RT 2773, 2779, 2880.) [53]

F. POLICE INVESTIGATION AND THE IDENTIFICATION PROCESS

Gardena Police Detective Bartlebaugh and another detective went to Ms. Tomiyasu's workplace on October 26, 1992, November 3, 1992, and February 23, 1993, and her home on November 21, 1992, and showed her a series of mug show-up folders containing photographs of possible suspects [People's Exhibit Nos. 27-30], but Tomiyasu did not make an identification. (RT 1070-1075, 1073-1075, 1159-1164; Supp. CT II 401-411.) With Gardena Evidence Technician Swobodzinski's assistance, Tomiyasu attempted unsuccessfully to reconstruct the face of the man at the donut shop using the Identi-Kit system. (RT 1156-1157, 2174-2175.)

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[53] Mr. Virgil's booking photographs after his arrest on November 3 were People's Exhibits 4-B and 4-C. (RT 1933-1934, 2785-2786, 2788, 2790.) Duncan explained that his memory of Mr. Virgil's appearance that night was affected by the lighting in the photographs. (RT 2780-2781.)

Sergeant Hernandes Lobo supervised Gardena's Detective Bureau. In January 1993, Lobo assigned himself to Ms. Lao's homicide case and in June or July 1993 [reportedly because Bartlebaugh was busy with other cases] removed Bartlebaugh from the case. (RT 1931-1932, 2399-2400, 2402, 2926-2927, 3081.) [54] Lobo began his investigation by following up on the raffle tickets found in the gym bag at the Donut King – he learned that Estella Reid sold some of the tickets to Joe Vaouli [who had them stolen from his car at the Southwest Bowl a few days before Ms. Lao was killed]. (RT 2402-2406, 2926, 2929.) After connecting the tickets found inside the gym bag to the Southwest Bowl, Lobo had a fellow Gardena police officer prepare a flier about Ms. Lao's homicide and directed that it be sent to all neighboring police agencies, especially the Sheriff's Department, Lennox Division, because the Southwest Bowl was within its jurisdiction. (RT 2929-2931, 2932, 2935.) [55]

Sheriff's Detective Cohen, the officer who interviewed Mr. Virgil following his arrest at St. Francis Cabrini Church, saw the flier [People's Exhibit No. 86] on June 25, 1993, and called the Gardena Police Department in response to say that he might have a lead on Ms. Lao's homicide. (RT 2709-2710, 2715-2717, 2719-2720, 2763-2764, 2789-2790, 2936.) According to Cohen, he remembered that Mr. Virgil's face resembled the composite sketch included in the flier and that Mr. Virgil had

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[54] According to Lobo, patrol officers in the Gardena Police Department were pressuring the detective bureau to solve the case. (RT 3084.)

[55] The four-page flier contained a compilation of the various descriptions given by witnesses, the composite sketch of the suspect [People's Exhibit Nos. 11 and 26] prepared on November 10, 1992, at Tomiyasu's direction, a description of the gym bag and its contents found at the donut shop, and a photograph of those items [People's Exhibit No. 24-B]. (RT 1068-1069, 1134-1138, 1930-1931, 1960-1961, 2931-2934; Supp. CT II 384, 400.)

a connection to the Southwest Bowl [the raffle tickets were stolen there and Detective LaBerge, the investigator in Draper's robbery/assault, told him that Mr. Virgil also was a suspect in the crimes against Draper]. (RT 2715-2719, 2743-2744, 3071.) [56]

In response to Cohen's call, Lobo and Gardena Detective Otake met with Deputies Cohen and LaBerge on June 25. (RT 2936.) The deputies provided information about the incidents at St. Francis Cabrini Church and the Southwest Bowl and showed the Gardena officers the mug show up folder containing Mr. Virgil's photograph [People's Exhibit No. 4-A] that was shown to Joe Draper, who identified Mr. Virgil as the person who robbed/assaulted him. (RT 2939-2938, 3071) Because Draper had marked the folder, Lobo asked the detectives to provide him with a clean copy of the folder and booking photograph in the same position [People's Exhibit No. 12 was a clean copy of the folder and booking photograph and was provided to Lobo in September 1993]. (RT 2737, 2939, 2742, 2938-2939.) During the meeting on June 25, Otake remembered that he interviewed Mr. Virgil after his arrest for suspected auto burglary in Gardena on November 3, 1992. (RT 2939.)

After the meeting on June 25, Lobo returned to the Gardena Police Department, retrieved the Polaroid photograph taken of Mr. Virgil following his arrest on November 3, and gave it to Detective Bartlebaugh. (RT 2939-2940.) Bartlebaugh then prepared a mug show-up folder with Mr. Virgil's picture and five additional photographs of black males from

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[56] The composite sketch depicted a person with virtually no facial hair and Mr. Virgil had a full beard on October 27 when Cohen interviewed him briefly. (RT 2720.) Cohen testified that his focus was on the similarity between Mr. Virgil's facial features and the suspect's face in the composite and the homicide flier provided that the suspect had facial hair. (RT 2720.)

Gardena police records that he felt were similar in appearance to Mr. Virgil – all had facial hair and all appeared similar in age. (RT 2940-2941.)

On June 28, 1993, Bartlebaugh and Lobo met with Debra Tomiyasu and showed her the mug show-up folder [People's Exhibit No. 6] containing Mr. Virgil's November 3 booking photograph [People's Exhibit No. 4-B] in Position No. 2 (RT 1076-1078, 1080, 1921, 2940-2942 CT Supp. II 379, 413.) [57] After Tomiyasu looked at the photographic lineup for some time, she said that the person depicted in Position No. 2 most looked like the man she saw in the donut shop. (RT 1078-1081, 2942.) Tomiyasu was unsure of her identification – she said the man in Position No. 2 was lighter in color than the man in the donut shop, his beard was different [it was not the scraggly beard she remembered], and his face was different because he had a "fold" across his nose [Lobo said the "fold" was from Mr. Virgil frowning in the photograph] (RT 1134, 2942-2943; CT Supp. II 413.) [58]

Next, Lobo and Bartlebaugh interviewed Harrison and showed him the same photographic lineup [People's Exhibit No. 6]. (RT 1289, 1291, 2943, 2945.) According to Lobo, Harrison looked at all the photographs and then said "[t]hat's him" [the person in Position No. 2] and added that

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57 Lobo denied prejudicing any of the witnesses, identifications in this case by telling them that they should make an identification, this was a capital case, or that Mr. Virgil was the prime suspect. (RT 3068-3069, 3075.) Lobo admitted there were news stories regarding Ms. Lao's homicide, but to his knowledge there were no photographs of Mr. Virgil in the newspapers. (RT 1099-1101, 3069, 3088.)

58 Lobo conceded that eyewitnesses often make significant mistakes regarding a suspect's physical characteristics during the first part of an investigation [clean shaven vs. a beard], the lighting conditions when photographs are taken can contribute to such mistakes, and even police officers can become confused during the identification process. (RT 3087-3088.)

his beard was fuller when he saw him in the donut shop. (RT 1292, 1925, 2944-2947.) Lobo was struck by Harrison's seemingly positive identification after viewing the photographs for several seconds and that reinforced his belief that Mr. Virgil killed Ms. Lao. (RT 2946-2947, 3087.)

The next day, Lobo interviewed Sgt. Tiller at the Gardena Police Department about his observations of the suspect at the Donut King. (RT 2949, 2954.) Lobo treated Tiller like any other witness and did not tell him about the identifications reportedly made by Tomiyasu and Harrison. (RT 965, 2949-2950.) Lobo showed Tiller People's Exhibit No. 6 [the sixpack containing Mr. Virgil's November 3 booking photograph], but Tiller did not respond even though he looked at the photographs for a long time. (RT 1007, 2950, 2951.) Tiller eventually asked to see a sixpack containing only profile views because he only saw a profile of the man's face in the donut shop. (RT 960-961, 2951.)

Lobo agreed and fairly quickly prepared a new sixpack [People's Exhibit No. 22-B] – the sixpack included Mr. Virgil's profile booking photograph following his arrest on November 3 [People's Exhibit No. 4-C] and profiles of four of the five other men depicted in People's Exhibit No. 6. (RT 964, 2952-2954.) [59] Tiller took his time viewing the photographs before saying that the person in Position No. 2 [Mr. Virgil] had the same look as the person he remembered seeing at the donut shop]. (RT 966, 2955, 3109.) Tiller, however, was unsure of his identification because the person in Position No. 2 had different facial hair and merely resembled the person in the donut shop and the person in Position No. 3 was the "right age" and had "the facial hair" that he recalled. (RT 966-967, 972-973,

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[59] Lobo selected a profile photograph of a different person and substituted that photograph for the fifth person in People's Exhibit No. 6 [Lobo believed the substitute had the same dark complexion and approximately the same facial features as the fifth person]. (RT 2953.)

1009, 2955-2957, 3109-3110; CT Supp. II 393, 397.)

Between the time he showed Tiller the first and second sixpacks, Lobo interviewed Beatriz Addo about the incident at the LaBargain Grocery 11 days before Ms. Lao's homicide and showed her People's Exhibit No. 6. (RT 700-703, 2958, 2960-2961.) Reportedly, Ms. Addo looked at the photographs for about 10 seconds and then identified the person in Position No. 2 [Mr. Virgil] as the person who robbed her. (RT 703-704, 2958-2960; CT Supp II 378.)

On August 18, 1993, Lobo showed Lavette Gilmore People's Exhibit No. 6. (RT 2963-2964.) Because Gilmore could not decide between the men in Position Nos. 1 and 2, Lobo told her to focus on her memory of the man in the donut shop. (RT 2867-2869, 2964-2966.) After Gilmore still could not decide between these men in People's Exhibit No. 6, Lobo showed her the same profile photographic lineup that he showed Sgt. Tiller [People's Exhibit No. 22-B]. (RT 2869, 2967.) According to Lobo, Gilmore identified the person in Position No. 2 [Mr. Virgil] as looking closest to the person she saw in the donut shop. (RT 2871-2872, 2968; CT Supp II 654.)

Based on the joint request of the prosecutor and defense counsel, a Municipal Court Judge ordered on September 29, 1993, that a live lineup be conducted before the preliminary examination scheduled for November 1993. (RT 12-14; CT 232-233.) The live lineup was conducted on October 19, 1993, at the Main Jail by Sheriff's deputies who admonished the witnesses, controlled the lighting conditions, and conducted the actual lineup. (RT 3038-3039, 3091-3092.) Lobo testified that the deputies attempted to keep the lineup fair and objective and he described the process as follows: the six subjects were directed to walk in at an even pace, they were directed to stop and face the audience, and they were finally directed to turn and show their profiles. (RT 3038.) Lobo testified that no one

person was singled out or treated differently during lineup and that the lineup was conducted "very, very evenly and formally" in order to keep the lineup objective. (RT 3038-3039, 3091-3092.)

Lobo had made the arrangements for Ms. Addo, Tomiyasu, Sgt. Tiller, Harrison, Gilmore and several others [Ella Ford] to be transported in the same police van to the live lineup. (RT 1168-1169, 2976, 2872; CT Supp II 383.) At the time, Tomiyasu knew that the police had someone in custody regarding Ms. Lao's homicide and testified that the people in the van talked en route, but denied that anyone talked about going to the lineup to select a suspect. (RT 1169-1170.)

At the live lineup, Ms. Addo identified the person in Position No. 4 [Mr. Virgil] and said in Spanish that "[b]efore [he] had more hair and beard." (RT 2976.) Sgt. Tiller identified the person in Position No. 4 as the person from the donut shop, as did Harrison who said he also remembered Mr. Virgil's photograph from the sixpacks shown to him and added that Mr. Virgil "[p]ut on a little more weight and cut his hair shorter and shaved his beard off." (RT 967-971,1016-1017, 1296-1297, 1347-1348, 2676-2977.) [60] Tomiyasu was unsure at the live lineup and could not decide between the men in Position Nos. 1 and 4. (RT 1083-1084, 1086-1088, 1172-1174, 1184-1186 2978; CT Supp II 415.) According to Tomiyasu, there was no discussion in the van en route back to the Gardena

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[60] Tiller testified that the people in the lineup were similar in height and all had short hair, but looked substantially different because of their facial hair – the person in Position No. 4 [Mr. Virgil] stood out because he was the only man with a prominent goatee. (RT 1011, 1016-1017.) Tiller also testified that Mr. Virgil was the only person in the lineup who was also in the photographic lineups and his identification of him at the lineup, while intended to be of the man in the donut shop, was also a confirmation of his photographic identification. (RT 1010-1011, 1014.)

Police Department because the witnesses were told not to discuss the lineup. (RT 1175.)

Lobo was very concerned about Tomiyasu's failure to make a positive identification at the live lineup. On October 28, 1993, he decided to show her another sixpack show-up folder [People's Exhibit No. 12] that contained Mr. Virgil's October 26 booking photograph. (RT 1088-1089, 1090-1092, 2979-2980; Supp. CT II 419.) After viewing that sixpack, Tomiyasu identified the person in Position No. 3 [Mr. Virgil] and said "'[t]hat's definitely him in No. 3.'" (RT 1090-1093, 2980; Supp. CT II 419.) According to Tomiyasu, she was positive that the person depicted in Position No. 3 was the man in the donut shop and explained that her confusion at the live lineup was because Mr. Virgil appeared to have gained weight between October 1992 and October 1993. (RT 1089-1091; CT Supp II 417.) *61*

Ms. Ford [the woman who reportedly saw the man leave the donut shop and go past her in the parking lot] refused to attend the live lineup. Further, she avoided contact with the police for years because she was afraid of possible retaliation, though there was no evidence of gang involvement and she had never been threatened by anyone. (RT 1384-1385, 3040-3041.) *62*

On eve of trial [January 6, 1995], several years after the events on October 24, 1992, Ford gave a statement to Lobo and the prosecutor describing the man she saw in the parking lot. (RT 1376, 1388-1389, 1396,

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61 According to Lobo, he had seen Mr. Virgil twice in the Summer of 1993 and again in September 1993 and Mr. Virgil had gained weight during that period. (RT 2978-2979.)

62 Despite her reluctance to speak with the police after the incident, Ford did remain at the homicide scene on October 24, 1992, and gave a statement to the police. (RT 1387.)

1398, 3042-3043.) After her statement, Lobo showed her a sixpack show-up folder [People's Exhibit No. 12] that included Mr. Virgil's booking photograph following his arrest at St. Francis Cabrini Church on October 26, 1992 [People's Exhibit No. 4-A]. (RT 1376-1377, 3043-3044.) Lobo denied influencing Ford's identification in any way. She selected the person in Position No. 3 [Mr. Virgil] and wrote [and testified] that he most closely resembled the person she saw outside the Donut King on the day of Ms. Lao's homicide. (RT 1378-1380, 1385, 1415-1416, 1428, 3044; CT Supp. II 429.) Ford explained that the person depicted in People's Exhibit No. 4-A, looked like the man in the parking lot because his beard growth was similar, the hair on his head was cut very, very short, and his face and head were oval. (RT 1422-1424.) Ford also testified, however, that she had no reason to lie and her identification was tentative because of the passage of time, though she was about 90% certain that Mr. Virgil was the person she saw going across the parking lot. (RT 1379-1380, 1389-1390.)

Lobo and the prosecutor met with Lavette Gilmore on January 20, 1995, and the night before her testimony on March 1, 1995, to address her failure to identify Mr. Virgil at the live lineup. (RT 2888, 2969-2971.) Gilmore was reportedly emotional during the latter interview and said she lied about her identification at the live lineup because her husband encouraged her to lie so she could avoid any further involvement in the case. (RT 2872-2875, 2890-2892, 2971-2972, 3092-3093.) According to Gilmore, she was shown People's Exhibit No. 6 just before her testimony and she was more than 100% certain then that the person in Position No. 2 [Mr. Virgil] was the man she saw in the donut shop before Ms. Lao was killed. (RT 2888-2890, 2895.)

At trial, Tomiyasu and Harrison identified Mr. Virgil as the man they saw in the donut shop [his height was consistent with the man in the donut shop, he appeared heavier at trial and had a goatee instead of a beard,

and his head was shaped the same way as the man's head in the donut shop]. (RT 1045, 1053, 1094, 1199-1200, 1267, 1297-1299, 1314-1315, 1349.) Tomiyasu, however, conceded that at some point during the identification process, she noticed that Mr. Virgil's photograph repeatedly was included in the photographic lineups and he was the only person from the photographic lineups that was included in the live lineup. (RT 1121-1122, 1176-1178.) Tomiyasu denied that her repeated observations of Mr. Virgil had any effect on her certainty that he was the man she saw in the donut shop on the day Ms. Lao was stabbed. (RT 1179, 1181, 1916-1920.)

G. "SCIENTIFIC EVIDENCE" REPORTEDLY CONNECTING MR. VIRGIL WITH THE CHARGED OFFENSES

1. EVIDENCE FROM LA BARGAIN GROCERY AND ST. FRANCIS CABRINI CHURCH

The note written by the robber at the LaBargain Grocery store [People's Exhibit No. 3] and Mr. Virgil's handwritten statement after his arrest at St. Francis Cabrini Church on October 26, 1992 [People's Exhibit No. 13] were compared by Melvin Cavanaugh, a document's examiner from the Los Angeles County Sheriff's Department's, Scientific Services Bureau. (RT 904906, 909, 2804-2805.) On January 20, 1994, Cavanaugh concluded that the person who wrote the statement probably also wrote the note. (RT 906, 919.) Cavanaugh was not positive, but believed there was a "strong likelihood" that the same person wrote both documents [it was unlikely there were different authors]. (RT 908-910, 914-918.) [63]

2. CLEANING PRACTICES AT THE DONUT KING AND EVIDENCE REPORTEDLY FOUND IN THE SHOP

The cleaning practices at the Donut King were important evidence

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[63] Cavanaugh would have liked to compare more writing samples, but did not because of cost and other considerations. (RT 913-914, 919.)

because of the reported testimony that Mr. Virgil's palm print was found on the dining room table where the suspect was seen sitting. (RT 645.) Despite the importance of that evidence, the police failed to photograph the print in place on the table [due to inadequate photographic equipment], the investigating detectives allowed Mr. Ngov to return to the shop that night and destroy all remaining evidence by cleaning the donut shop, and they waited almost two years after the homicide before interviewing Ms. Lao's relatives about the cleaning procedures at the shop. (RT 1758, 1772-1773, 1778-1779, 1787-1788, 1811, 1955, 2026, 2150, 3028, 3091.)

The Donut King had many customers in the morning, including weekends, and the dining room was usually cleaned between 11 AM and 4 PM. (RT 1727-1728, 3027.) When business was slow, employees would clean the tables first and then would sweep and mop the dining room floor. (RT 1741, 1764, 1865-1866.) Ms. Lao was familiar with the cleaning practices at the shop, including cleaning the dining room tables with a wet towel after customers got them dirty. (RT 1719, 1750, 1727-1729, 1740-1741, 1800-1801, 1806-1807.)

The Donut King was a small, family-owned business and the days blended together so Mr. Ngov could not say with any certainty, especially years after October 24, 1992, that anyone cleaned the customer tables on the day Ms. Lao was killed. (RT 1762-1763, 1767, 1790-1791, 1795, 1796.) Despite that testimony, Mr. Ngov also testified that it was busy during the morning of October 24, his wife cleaned often and they tried to keep the shop clean to avoid problems with health inspectors, and he recalled Ms. Lao using a mop to clean that day. (RT 1739, 1748, 1762-1763, 1774, 1785-1786, 1790-1791, 1804-1805, 1808, 1869, 3031.)

Ms. Lao's sister, Ms. Ngov, testified about the cleaning practices at the Donut King, she trained Ms. Lao about how and when to clean the shop [clean tables only when dirty], and she remembered cleaning the shop that

day because it had been busy, though she did not recall cleaning the table where the suspect was reported to have been seated. (RT 1865-1868.) [64] Similarly, the family only cleaned the floor in the employee bathroom when it was dirty or messy and hardly ever cleaned the interior side of the employee's bathroom door because it was seldom dirty. (RT 3024-3025, 3027-3028, 3031-3032, 3034.) After Mr. Ngov left the donut shop between 2 PM – 3 PM on October 24, 1992, Ms. Lao was the only employee left in the shop. (RT 1745, 1774, 3031.)

When Detective Bartlebaugh [the initial lead investigator] arrived at the scene hours after Ms. Lao had been stabbed, he noted that the floor and the tables in the customer dining room were clean and that there were several items on one of the dining room tables [black hat, orange duffel bag, and a Styrofoam cup with water inside]. (RT 1897-1899, 1911.) Bartlebaugh also noted that the door leading to the customer bathroom was closed but unlocked; the door leading to the back employee area [marked "Employees Only"] was closed and locked; the office door in the employee area was closed and locked; and the customer restroom and storage room were clean and appeared undisturbed. (RT 1901-1902.)

Bartlebaugh also touched and opened the door leading to the employee's bathroom [apparently with his bare hand]. Inside, he saw a large pool of blood, a pair of women's shoes, and a white knotted towel on the floor. (RT 1905-1906, 1913.) Because the employee bathroom door had an operational, pneumatic closing device, Bartlebaugh decided to prop the door open with a white bucket. (RT 1908.) Despite Bartlebaugh's belief that the stabbing occurred in the bathroom, he never told the

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[64] Despite her earlier testimony about whether she cleaned the table in question on October 24, Ms. Ngov also testified she was certain that she cleaned that table that day shortly after 10 AM. (RT 1867-1869.)

evidence technician to check the doorknob [inside and outside] for fingerprints. (RT 2138.) 65 Finally, even though Bartlebaugh suspected that the person seated at the dining room table committed the homicide by entering through the door leading from the hallway to the employee service area [the first door on the right in People's Exhibit No. 42-A and People's Exhibit No. 44], Bartlebaugh let his curiosity get the best of him by touching and attempting to open that door before it was tested for fingerprints. (RT 1936-1937, 1940-1941, 1947.) 66

Kim Swobodzinski was the Gardena Police Department's crime scene technician who worked this and other crimes scenes with Detective Bartlebaugh and at his direction collected evidence [including latent fingerprints] and photographed the crime scene. (RT 1601-1602, 1859, 1911-1912, 1936, 1995-1998, 2213, 2121, 2124, 2135, 3097.) Swobodzinski had been a crime scene technician for the Gardena Police Department for 5 1/2 years and previously worked for the Hawthorne Police Department. (RT 1995, 2121.) 67 In her experience, crime scene technicians are usually the last to arrive and the vast majority of crime

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65 The failure to photograph and fingerprint that door was an oversight and occurred because Bartlebaugh failed to provide the crime scene technician with complete information about the crime scene. (RT 2140-2141.)

66 Bartlebaugh also believed that this door could have been used by employees when coming out to clean the dining room area. (RT 1945.)

67 The Gardena Police Department formerly contracted with the Los Angeles County Sheriff's Department to investigate homicide scenes, but the Department decided by the time of Ms. Lao's homicide to conduct its own investigations, even though its resources were limited. (RT 3077-3080.) The Sheriff's Department was still available and could have provided serology assistance that could have been used to identify the perpetrator of the crimes against Ms. Lao with certainty, but Bartlebaugh never asked for such assistance. (RT 2175, 2178, 3078-3079, 3098.)

scenes are contaminated by the first responders on the scene [police officers, firefighters, and paramedics]. (RT 1998.) Swobodzinski testified that the first priority in evidence collection is to preserve the scene intact. The collection/preservation process must be very systematic and begins with an officer securing the scene and limiting access to necessary personnel. Everything must be carefully recorded and photographed in place because the importance of evidentiary items as inculpatory or exculpatory might not be known until a later time. (RT 1998, 2211-2212, 2121-2123.)

On her arrival, Swobodzinski was directed to the customer dining area where she saw an orange colored duffle bag, a black baseball cap, and a Styrofoam cup on one of the tables. (RT 2011) Like Bartlebaugh, Swobodzinski noted that the dining room tables appeared clean and free of stains and food debris. (RT 2011, 2043, 2051-2052.) When she got close to the table with the items on it, Swobodzinski noticed a shoelace on the floor with several [2-3 or more] knots tied in it. (RT 2011-2012.)

Swobodzinski told Bartlebaugh that she collected a palm print from the table where the items were found and latent fingerprints from the employee bathroom. (RT 1954, 2023, 2024, 2025, 2038, 2053, 2209.) [68] Other than the palm print, no other identifiable fingerprints were found at

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[68] Consistent with her Department's limited resources, Swobodzinski could not photograph the palm print she reportedly found on the table in-place because she lacked the equipment necessary for that important purpose. (RT 2149-2150, 2192.)

the scene, [69] including on the Styrofoam cup and the items inside the gym bag, and Mr. Virgil was excluded as a source of the identifiable fingerprints. (RT 2016-2023, 2030-2031, 2038-2047, 2051, 2054-2056, 2059-2060, 2099-2100, 2166, 2184-2191, 2201-2202, 2798-2799, 2803, 2807.) [70]

Swobodzinski spent a great deal of time in the employee bathroom photographing the blood spatters, the victim's shoes and the white towel on the floor because Bartlebaugh suspected that the stabbing occurred there. (RT 1983-1985.) Despite the suspicion that the person seated in the customer service area likely committed the homicide and that he touched doors and the cash register, the investigator did not direct Swobodzinski to photograph the door leading from the customer dining area in the back of the shop, check that door for fingerprints, or take possession of the cash register and drawer so the items could be subjected to more rigorous and determinative testing for fingerprints. (RT 2198-2199, 3096-3099.)

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[69] The Ngovs had employed two additional workers, a male baker and female clerk, but neither could be located and checked for fingerprints by the time Lobo got around to that aspect of the case. (RT 2157, 2222, 3063-3064.) Similarly, no efforts were made to locate the regular delivery personnel at the donut shop and compare their prints to the potentially identifiable ones found inside the employee bathroom. (RT 2097-2098, 2203-2204, 2214-2222, 3082.) Instead, these prints were never identified and there is no indication that they were run though federal or state fingerprint databases for identification.

[70] Mr. Virgil's fingerprints were not found anywhere on or near the cash register. (RT 2038-2039.) Though it was possible that the suspect washed his hands after stabbing Ms. Lao and touched the employee's bathroom door [a wet fingerprint was found there], Swobodzinski failed to check the cold and hot water faucets in the employee's bathroom for fingerprint evidence. (RT 2192-2193.) Further, Swobodzinski did not take a detailed, enlarged photograph of the interior bathroom door [only a photograph from a distance]. (RT 2185-2187.)

On June 2, 1994, Swobodzinski obtained palm and fingerprints from Mr. Virgil in court and testified that the palm print she lifted from the table in the donut shop was made by Mr. Virgil, though she had no idea when the print on the table would have been made. (RT 2027-2029, 2043, 2051-2052, 2169, 2170, 2206.) 71 Initially, Swobodzinski, who had limited training in identifying palm prints, could not identify the palm print from the table [she was looking at it wrong] so she contacted Linda Schuetze, her former colleague at the Hawthorne Police Department, who examined Mr. Virgil's known prints, compared them to the palm print, and concluded with 100% certainty that Mr. Virgil made the palm print on the table. (RT 2048-2050, 2206-2207, 2237-2238.) Similarly, Donald Keir, a latent fingerprint examiner for the Los Angeles County Sheriff's Department, also examined Mr. Virgil's known prints, compared them to the palm print from the table, and concluded that Mr. Virgil made the palm print found on the table. (RT 2050, 2207, 2227-2230.)

Elizabeth Devine, a senior criminalist at the Los Angeles County Sheriff's Department, testified that she was one of the few criminalists in her department with expertise in the identification of blood spatter patterns. (RT 2336-2341.) Because she could not go to all crime scenes, Devine would evaluate bloodstain pattern evidence on the basis of photographs and other relevant evidence from the crime scene. (RT 2341.)

Devine was asked to investigate this case several years before trial and viewed many crime scene photographs and reports prepared by the investigators and Swobodzinski, the crime scene investigator from the

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71 According to Swobodzinski, there is no set number of points of comparison [characteristics] that must be found between a sample fingerprint/palm print before an examiner can say with certainty whether the prints were made by the same person. Instead, every identification is based on its individual merits and supporting factors. (RT 2003-2005.)

Gardena Police Department. (RT 2346-2347.) After viewing those materials and talking with Swobodzinski, Devine concluded that she would have photographed/handled the crime completely different, if she had been called to the scene. (RT 2369, 2381.)

In this regard, she would have taken many more photographs because there were many areas that should have been photographed in much greater detail. (RT 2370, 2396-2397.) [72] For example, the interior of the bathroom should have been photographed from top to bottom; the entire bathroom door [interior and exterior] should have been photographed; there should have been more photographs of the hallway, including photographs of the floor from a 90 degree angle; the footprints reported to have been made by the paramedics should have photographed to allow for later comparison; and random blood samples should have been collected to determine if some of the blood came from injuries to the attacker. (RT 2369-2374.) [73]

Based on her discussions and review of the inadequate but available materials, Devine concluded that Ms. Lao was stabbed in the employee bathroom and began bleeding there. (RT 2348-2350, 2376-2378, 2381, 2815.) The blood trail in the hallway leading from the employee bathroom

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[72] According to Devine, she talked at length with Swobodzinski who assured her that she did not photograph other areas because they did not contain blood, but Devine still would have photographed the scene more extensively. (RT 2381.)

[73] Devine believed from experience that the attacker in a stabbing crime often cuts himself/herself and that some of the blood in the parallel blood trail leading from the employee bathroom to where Ms. Lao collapsed could have come from an injured attacker. (RT 2373-2374.) As a competent professional in her field, Devine assumes very little about a crime scene and though it appeared that the blood only came from Ms. Lao, she would not and could not say that with 100% certainty, absent serology testing. (RT 2175, 2351, 2373-2376, 2382, 2396, 2398, 2808.)

to where she collapsed near the area by the cash register indicated that Ms. Lao was actively bleeding from her many wounds as she traversed that route. (RT 2351.) Devine was unsure if the employee's bathroom door was open or closed when Ms. Lao was stabbed, and could only say that it was closed at some point during the events in the bathroom [Ms. Lao must have touched the door when she got up from the floor and that action could have left the blood smears on the interior part of the door]. (RT 2353-2356, 2378-2380, 2813.) Devine noted that most of the drops in the bathroom were gravitational in nature with multiple drops landing on top of each other and concluded that Ms. Lao must have been bleeding in the bathroom for some time before leaving. (RT 2355.)

Devine also believed that the attacker left the employee bathroom before Ms. Lao – there was a great deal of blood in the darkened hallway leading from the employee bathroom to where Ms. Lao collapsed and it would have been very difficult for someone to walk that path without disturbing the many blood droplets there. (RT 2362.) [74] Further, Devine believed that Ms. Lao would have transferred some blood to the attacker, though not a substantial amount because she saw no evidence of arterial bleeding/spurting in the bathroom and Ms. Lao's clothing would have limited the amount of blood transferred. (RT 2356-2357, 2363-2364, 2386.) Finally, Devine concluded that without scientific testing, it is difficult to see blood on dark clothing [like that worn by the attacker in this case]. (RT 2365, 2384, 2386, 2389-2391.) [75]

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[74] Devine also explained that the police likely would not have disturbed the blood in the hallway because officers are trained to be very careful and avoid stepping in such evidence. (RT 2369.)

[75] Devine believed that a layperson might see blood on an attacker, including his hands and face, but only if they were looking for it and the person did not go past too quickly. (RT 2384-2386.)

DEFENSE CASE – GUILT PHASE

The Defense called no witnesses and did not introduce any evidence during the guilt phase.

PROSECUTION CASE – PENALTY PHASE

A. FINGERPRINT EVIDENCE CONCERNING MR. VIRGIL'S PRIOR CONVICTIONS

Kim Swobodzinski, the Gardena Police Department evidence technician who collected evidence at the homicide scene and found Mr. Virgil's reported palm print on one of the tables in the dining area, was the prosecution's first witness at the penalty phase. (RT 3537.) Swobodzinski compared Mr. Virgil's fingerprints from a fingerprint card she obtained from him in court on June 29, 1994 [People's Exhibit No. 59], to fingerprints contained in People's Exhibit Nos. 101 [a 4-page document from the California Department of Justice related to Mr. Virgil's alleged October 1983 conviction for burglary in California], 102 [booking information related to Mr. Virgil's alleged October 1983 burglary conviction], and 104 [a 10-page prison packet from the State of Louisiana relating to Mr. Virgil's alleged conviction for commercial burglary]. (RT 3538-3540.) Swobodzinski was unable to compare Mr. Virgil's fingerprints to People's Exhibit No. 102 because the fingerprints were not clear, but testified that the same person who made the fingerprints in People's Exhibit No. 59 also made the fingerprints in People's Exhibit Nos. 101 and 104. (RT 3540-3542.)

B. OTHER VIOLENT CRIMINAL ACTIVITY – REPORTED INCIDENT WITH BENITA RODRIGUEZ

In October 1992 Julio Montulfar and his girlfriend/wife, Benita Rodriguez, worked together as caretakers at the Hilltop Motel in Los Angeles. Both spoke very little English. (RT 3543-3545, 3562-3623,

3635-3636, 3678.) They worked the night shift [8 PM – 8 AM] and their duties consisted of cleaning the premises and rooms, registering people at the motel, and collecting guests, money. (RT 3545, 3563, 3636.) There were many signs posted at the motel proclaiming that drug use and prostitution were prohibited there. (RT 3560.) Even though Montulfar and Rodriguez rented many rooms by the hour for cash [often to single men in the early morning hours], they denied knowing anything about such illegal activities being conducted at the motel. (RT 3560-3562, 3623, 3672.) People who rented rooms filled out a card after providing a name [identification was not always requested] and were given a room key after paying for the room. (RT 3561, 3620.)

Montulfar met Mr. Virgil sometime in mid-October 1992 when Mr. Virgil rented a room at the motel. (RT 3546-3547, 3549, 3624.) According to Montulfar and Rodriguez, they saw Mr. Virgil a total of about 10 times and concluded that he was normal, very calm and a tranquil person who spoke very softly and communicated well with them, despite their limited English. (RT 3551-3552, 3621, 3637, 3671, 3678.) Montulfar and Mr. Virgil were on friendly terms and Montulfar often shared coffee or food with Mr. Virgil, though he denied ever engaging in cocaine-related transactions with him. (RT 3563.) Once, Mr. Virgil asked Montulfar to order a pizza for him and offered to buy one for Montulfar and Rodriguez. (RT 3554-3555, 3624, 3637-3638.) [76] Rodriguez resented Montulfar's friendship with Mr. Virgil because she believed it interfered with his job responsibilities at the motel. (RT 3553, 3673.)

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[76] According to Montulfar, Mr. Virgil wrote a note [People's Exhibit No. 106] with instructions about the pizza and how he wanted it prepared [Montulfar gave the note to Sgt. Lobo]. (RT 3630-3631.)

Mr. Virgil occasionally asked to borrow money from Montulfar and once borrowed $10. (RT 3548, 3564.) This was about eight days after Montulfar first saw Mr. Virgil. (RT 3548-3549, 3622, 3673.) Mr. Virgil insisted on leaving his Nevada driver's license [People's Exhibit No. 105] as collateral for the loan, but he never repaid the loan and never retrieved his driver's license. (RT 3548-3550, 3625, 3632-3633, 3673.) During some of their talks, Mr. Virgil mentioned that he had lived in Las Vegas. (RT 3564.)

Rodriguez was cleaning one of the motel rooms on October 29, 1992, when Mr. Virgil appeared in the doorway and helped her finish making one of the beds. (RT 3639-3640.) Mr. Virgil then asked about Montulfar and Rodriguez replied that he was shopping and had not yet come to work. (RT 3640.) Mr. Virgil acted normal during this encounter and Rodriguez returned to her cleaning duties after he left. (RT 3640.)

About 10-30 minutes later, Rodriguez reportedly was cleaning another room when she looked up to see Mr. Virgil standing in the room, near the foot of the bed. (RT 3639-3642, 3673-3675.) Mr. Virgil was acting completely different than he was minutes before as he pointed a knife at her, closed the door to the room, gestured for her to be quiet, and told her to remove the rings from her fingers and the watch from her wrist. (RT 3642-3645, 3674, 3690.) Mr. Virgil also asked about money in the office and for the office key. (RT 3643-3644.) Rodriguez knelt down in front of Mr. Virgil and pleaded for him not to kill her. As she was doing this, Mr. Virgil quickly and snugly tied a shoelace around her left wrist, secured it with more than one knot and directed her to put her hands behind

her back so he could tie her up. (RT 3647, 3648, 3690.) [77]

After. Rodriguez refused to put her hands behind her back, Mr. Virgil said in English that she should remove her pants. (RT 3645, 3647.) Because Rodriguez did not seem to understand his commands, Mr. Virgil gestured for her to remove her pants by pulling on his shorts and then got on the bed on all fours to signify the position that he wanted her to assume. (RT 3645.) After Rodriguez refused to remove her pants and get on the bed, Mr. Virgil reportedly stabbed her once in the chest [punctured her lung] and then kicked her. (RT 3646.) The kick caused Rodriguez to fall onto the floor and she concluded from Mr. Virgil's facial expression that he was trying to kill her and that he seemed to enjoy what he was doing to her. (RT 3649, 3653, 3688, 3690-3691.)

Rodriguez screamed and Mr. Virgil attempted to stifle her screams by covering her mouth with his hand as he continued attacking her. (RT 3653.) Because she was afraid for her life, Rodriguez managed to grab the blade of the knife and break it [her fingers were badly cut in the process]. (RT 3653-3654.) Rodriguez only remembered that the knife was small [5-6 inches long] and testified that Mr. Virgil left the room, just after she broke the blade. (RT 3655.) According to Rodriguez, she suffered significant injuries during the attack [approximately 20 stab wounds to her body and had many surgeries and medical complications during her lengthy hospital stay]. (RT 3649, 3657-3663, 3669-3670, 3676, 3687-3688.)

Montulfar was inside the office's bathroom when Rodriguez came into the office bleeding from her face and through her shirt. She had a

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77 Rodriguez could not tell if Mr. Virgil was under the influence at the time and could only say that his actions seemed deliberate, he had an ugly expression on his face as he looked at her, and he could have been under the influence because people at the motel sometimes acted crazy. (RT 3671-3672.)

string/rope tied around her left arm. (RT 3553-3554, 3559, 3656.) Rodriguez was having trouble breathing, felt like she was dying, and had blurry vision from the loss of blood. Montulfar directed her to sit down so he could question her about what happened and who attacked her. (RT 3568, 3624, 3656-3657, 3669.) Rodriguez responded that it was the man who ordered the pizza for them about eight days before [reportedly Mr. Virgil]. (RT 3554-3556, 3568, 3656, 3673.) Montulfar asked if that man was still there and Rodriguez said that he left. (RT 3556, 3656.) According to Montulfar, Mr. Virgil was not seen at the motel in the days before or after the stabbing. (RT 3568-3569.)

Montulfar called the police and paramedics who arrived very quickly in response to his call. (RT 3656.) After the paramedics took Rodriguez to Martin Luther King Hospital, Montulfar gave the officers Mr. Virgil's driver's license and watched them go into the room where Rodriguez was reportedly stabbed. (RT 3556-3558, 3626-3627, 3648.) Montulfar never went to the room, but testified that the dayshift cleaning crew gave him a yellow envelope from the room that contained paperwork for Mr. Virgil's application for General Relief [welfare]. (RT 3566-3567, 3622.) [78] Montulfar gave the papers to Detective Lozano of the Los Angeles Police Department, but was unsure if the papers shown to him in court [Defense Exhibit No. T] were the same papers. (RT 3565-3567.)

Sgt. Lobo interviewed Rodriguez several times in 1994 about the incident and showed her a sixpack photographic lineup. According to Lobo, she identified Mr. Virgil as the person who stabbed her. (RT 3663-

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[78] If that evidence was in the room as Montulfar claimed, it defies reason to believe that the responding officers would not have collected evidence that reasonably could have led to the identity of the man who attacked Rodriguez.

3664.) [79] During her testimony, Rodriguez refused to look at Mr. Virgil because he tried to take her life. (RT 3691.)

C. VICTIM IMPACT TESTIMONY FROM MS. LAO'S SISTER – LYNNE NGOV

Soy Sung Lao was 22 years old when she died and was the youngest of three brothers and two sisters. (RT 3693.) Ms. Ngov and Ms. Lao were very close [they were the two youngest siblings], but Ms. Lao was even closer to Ms. Ngov's children, five-year old Brian and three-year old Ariel whom Ms. Lao had named. (RT 3694, 3701.) Ms. Lao was closer to the children than Ms. Ngov and taught them how to sing and write, and the difference between right and wrong. (RT 3694.) Ms. Lao's death affected Ms. Ngov and her children greatly and even though Ms. Lao was killed years ago, Ms. Ngov thinks about her every day and every night. (RT 3694, 3702.)

Ms. Ngov, Ms. Lao, their three older brothers and grandmother fled from Cambodia in 1975 or 1980 after the Communists took over, because they wanted a better life and freedom. (RT 3694-3695, 3700-3701.) Their eldest brother, who now lives in Michigan, led them and their grandmother in a harrowing journey from Cambodia to a refugee camp in Thailand where they lived for almost a year before arriving in the United States in November 1980. (RT 3694-3695.) They were sponsored for admission

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[79] Consistent with his pattern of conducting last minute interviews, the prosecutor interviewed Montulfar and Rodriguez on March 9, 1995, and questioned her about the "shoelace" used to bind her wrist. (RT 3570-3595, 3678, 3691.) Though Rodriguez testified that she would never forget the incident with Mr. Virgil, she also seemed to concede that her testimony about the incident could have been affected by the timing of the last minute interview. (RT 3678-3679.) According to Lobo, he had to track down Rodriguez because she moved and did not recall the District Attorney's Office telling her to remain in contact. (RT 3667-3669.)

into the United States by a church group who also arranged for them to be granted permanent resident status. (RT 3701.) Ms. Ngov was 12 years old when they arrived in San Diego, Ms. Lao was 10, and the brother who led them there was 16 or 17. (RT 3695-3696.) Because their parents died years before, the siblings were very close, took care of each other, and lived together in San Diego until Ms. Ngov married Ty Ngov in 1987. (RT 3696.)

When Ms. Ngov and her husband bought the Donut King in Gardena, they moved to the Los Angeles area, close to their business. Ms. Lao remained in San Diego until she graduated from high school. (RT 3697.) Ms. Lao then moved to Los Angeles to be closer to Ms. Ngov and to attend the University of Southern California, after taking out a loan to finance her education. (RT 3697, 3702.) Ms. Lao was scheduled to graduate in May 1993 with a major in international relations and had many friends at school and at the home she shared with a friend from Taiwan. (RT 3697-3698, 3702.)

Ms. Ngov and her husband were home when a man called and said that Ms. Lao had been stabbed. (RT 3698.) After learning more details about what happened, they drove to the donut shop, but Ms. Lao had already been transported to the hospital. (RT 3698.) Ms. Ngov saw the blood near the front counter and remained at the shop [she called her brother and sister to report the attack] and Mr. Ngov went to the hospital to monitor's Ms. Lao's condition. (RT 3698-3699.) Ms. Ngov was sitting with her husband when the doctor said Ms. Lao had died from her injuries and they could see her if they wanted, or, they could just remember how she was in life. (RT 3699-3700.)

Ms. Ngov had not sought therapy as a result of Ms. Lao's death, but worked hard and kept busy to avoid thinking very much about Ms. Lao. (RT 3702.) Ms. Ngov and her husband felt guilty and responsible for Ms.

Lao's death because they believed she would still be alive if they had not opened the Donut King. (RT 3702-3703.) After Ms. Lao's death, they moved to Orange County and now operate a Mexican fast food restaurant. (RT 3702-3703.)

DEFENSE CASE – PENALTY PHASE

A. MR. VIRGIL'S CHILDHOOD AND FAMILY HISTORY

The defense case in mitigation consisted of testimony by two witnesses, Mr. Virgil's sister, Debra Virgil, and his former fiancée, Annie Antoine.

Debra Virgil, Mr. Virgil's older sister, testified that she was born in Tallulah, Louisiana in 1963. (RT 3705-3706.) Their mother, Lillie Virgil, was born on April 14, 1946, and their father is Willie Hardy. (RT 3706.) Lillie and Willie were classmates in high school and together moved to Los Angeles when Debra was about one year old. (RT 3706-3707.) While Lillie was pregnant with Mr. Virgil, Willie left and returned to Louisiana. (RT 3705-3708, 3711.) Mr. Virgil was born in Los Angeles on December 28, 1964. Lillie's third child, Debra and Mr. Virgil's younger, half-brother, Dexter, was born on December 11, 1974. (RT 3705, 3727.)

Lillie supported her young family by working as a waitress at Swan's Café in Compton. (RT 3708-3709.) Debra and Mr. Virgil often accompanied Lillie to work and Debra testified that Mr. Virgil liked pretending that he was playing the guitar and he got pretty good at "the Blues." (RT 3727.)

Debra and Mr. Virgil were close while growing up and the family moved often, though Debra did not know why. (RT 3709.) Lillie partied and drank a great deal, but Debra thought that Lillie did her best raising and providing for her children. (RT 3710.) Lillie always disciplined her children and sometimes, when she was drinking, hit them so hard with her

hand and other objects [belt or extension cord] that she caused cuts and welts. (RT 3710-3711.) The children always got a "whooping" when they did something wrong and the severity of the beating depended on what they had done. (RT 3711.) Lillie sometimes relied on AFDC funds if she was not working or working just occasionally. (RT 3711, 3714.)

Lillie had other men in her life after Willie left and returned to Louisiana. (RT 3711-3712.) Cosmas Ford, Dexter's father, was one of these men. (RT 3712, 3727.) At some point during their childhood and consistent with her volatile and violent temper, Lillie killed someone, was convicted of manslaughter, and sent to the Sybil Brand jail facility in Los Angeles. (RT 3712-3713.) While Lillie was in jail, Debra and Mr. Virgil lived with Lillie's sister, Nora Jackson, her husband, and two children. (RT 3713.) Mr. Virgil and Debra were thrown out of the Jackson's home one day after Mr. Virgil accidentally broke a lamp. (RT 3714.)

The frequent moving around and Lillie's constant drinking and great temper caused a great deal of instability in Debra and Mr. Virgil's young lives and resulted in significant violence in their home. (RT 3715-3716, 3720-3721, 3729.) Debra and Mr. Virgil sometimes had to sleep in the same bed or even the same room when finances were tight, though they never had to sleep on the floor, they usually had decent clothes to wear, and there was food on the table. (RT 3718-3720, 3751.) Despite her interest in the children attending school, Lillie did not show her children any love and was not involved in their schooling, though she did monitor their grades and enrollment in school. (RT 3730.) Debra tried for years to get help for Lillie [her drinking problem], but Lillie always refused help by saying that she did not drink that much. (RT 3765.)

As Mr. Virgil got older, he became more and more the focus of Lillie's anger and discipline, something that seemed to increase in intensity because she was a severe disciplinarian. Debra recalled pleading with

Lillie many times not to beat and punish Mr. Virgil so severely. According to Debra, they grew up in a "terrorism[-like]" environment because of the great and almost unpredictable violence that Lillie inflicted on her children. (RT 3716-3717, 3765-3766.)

Lillie beat Mr. Virgil for just about anything and Debra believed that caused Mr. Virgil a lot of anger and resentment, especially in the late 1960s and early 1970s. (RT 3716-3717.) According to Debra, Lillie began calling Mr. Virgil "a little jughead bastard" and telling him that he "would turn out just like his father, no good, worthless" and "wouldn't amount to a hill of beans" from the time he was a young child and until he started running away to escape from the violence against him. (RT 3766-3767, 3768.) [80] Lillie sometimes beat Mr. Virgil so badly that he bled from his injuries and Debra suspected that Lillie did not seek medical treatment for him because she was afraid of being arrested for child abuse. (RT 3767.)

Mr. Virgil began working at his Uncle's gas station when he was 11 or 12 years old and always worked after that. (RT 3725, 3761, 3762.) After that job, Mr. Virgil began working at different fast food places. He ran away from home when he was 14 or 15 [1978-1979] because Lillie had either "whoop[ed] him" or was about to beat him again. (RT 3724-3725.) According to Debra, Mr. Virgil had gotten angry by that time over Lillie's treatment of him. (RT 3725, 3753.)

In 1970-1971, Mr. Virgil attended the 97th Street School in Los Angeles. (RT 3721-3722.) In 1972, Debra accidentally pushed Mr. Virgil out of a tree and he broke his leg. (RT 3722.) Debra felt very badly about Mr. Virgil's injury because she and Mr. Virgil were very close. (RT 3722.) In 1973, Mr. Virgil attended Parmalee School in East Los Angeles and was

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[80] Mr. Virgil's father, Willie Hardy, is a pastor in Louisiana. (RT 3767-3768.)

involved in an incident at K-Mart where he put on a pair of shoes and was stopped by a security guard when he tried to walk outside. (RT 3723.) The incident got resolved, but Lillie punished Mr. Virgil "pretty badly." (RT 3723.)

In 1977, Mr. Virgil and Debra attended Brett Hart Junior High School in Los Angeles, but they spent most of their time with relatives and did not have outside friends. (RT 3727, 3728.) Mr. Virgil's grades began getting "shaky" and slipping and he seemed to be keeping secrets from Debra, including his use of drugs. (RT 3728-3729.) Despite declining grades in his core subjects, Mr. Virgil enjoyed music and got a B in band. (RT 3729.)

When Mr. Virgil was 14, he had a friend named Arthur Stewart who lived in Baldwin Hills. (RT 3731, 3754.) Once in 1979, Lillie beat Mr. Virgil so badly with a belt buckle that he ran away to Arthur's home. (RT 3731, 3754.) Debra later joined Mr. Virgil there because she refused "to take another whooping" from Lillie. (RT 3731, 3754-3755.) After that incident, Mr. Virgil and Debra were placed in a foster home for about six months, but eventually were reunited with Lillie. (RT 3731-3732.)

In 1981 and 1982, Mr. Virgil attended Washington High School in Los Angeles. (RT 3732.) Debra knew that Mr. Virgil's grades were dropping and even his grade in Band had dropped to a D. (RT 3732.) She asked him what was going on in his life, but Mr. Virgil replied "[n]othing." (RT 3732-3733.) Because he was working many hours, not getting enough sleep, and had trouble getting up to attend school, Mr. Virgil decided to drop out of high school in the 11th [or possibly the 12th grade] when he was 16 or 17 years old. (RT 3725-3726.) Mr. Virgil lied to Lillie by saying that he was still enrolled in school. (RT 3726.) Lillie got really angry when she learned that Mr. Virgil had dropped out of school. Though

Lillie stopped beating Mr. Virgil sometime between 1980 and 1982, she continued her verbal abuse of him. (RT 3726, 3768.)

Mr. Virgil once sang a duet and his Aunt Nora came to see him perform and Mr. Virgil was very pleased that an adult relative had shown some interest in him. (RT 3733.) Mr. Virgil was living in Nora's household at the time, but was arrested for stealing tools out of a garage and was sent to county jail. (RT 3733.) Shortly after his release from county jail, Mr. Virgil moved to Louisiana and Debra followed him there in 1982 or 1983. (RT 3734.) Debra, who wanted to get out of the Los Angeles area, moved to their parents' hometown of Tallulah, Louisiana, and began living with Mr. Virgil and tried to help him straighten out his life, in part by getting him a job. (RT 3734-3735.) Mr. Virgil was smoking marijuana then, but Debra knew nothing about him using cocaine. (RT 3735.)

In 1985, Debra moved back to California, got a job, and began living with Lillie again. (RT 3735-3736.) Mr. Virgil was living in Shreveport, Louisiana, and got involved with his cousin, Chester, who was a big time cocaine user. (RT 3738.) At some point, Debra learned that Mr. Virgil had been arrested and sentenced to prison in Louisiana for a commercial burglary at a Budweiser beer warehouse in Shreveport. (RT 3737-3738.) Debra often returned to Louisiana and visited Mr. Virgil in prison. (RT 3739.) Mr. Virgil was very glad to see her because they were friends, still very close, and he did not have many other visitors. (RT 3739-3740.)

Debra was living in Hawthorne with Annie Antoine in May 1991 when Mr. Virgil was released on parole from the Louisiana State Prison system. (RT 3740, 3750.) Eventually, Ms. Antoine became Mr. Virgil's fiancée and they had a child [Nigel] together. (RT 3740-3741.) Debra got Mr. Virgil a job at a parking lot, but Mr. Virgil did not keep that job very long. (RT 3742.) Instead, Mr. Virgil got a better job in June or July 1991

with Closets by Design, a company that installed portable closets in homes. (RT 3743, 3749-3750.)

Toward the end of 1991, the company relocated Mr. Virgil to Las Vegas and, about a month later, Ms. Antoine joined him there. (RT 3745-3746, 3760.) Before Mr. Virgil moved to Las Vegas, Ms. Antoine told Debra that Mr. Virgil was abusing cocaine and Debra offered to take him for treatment. (RT 3760-3761, 3765.) Mr. Virgil refused and said that he did not need any help. (RT 3761.) Sometime after Mr. Virgil moved to Las Vegas, Debra and their half-brother, Dexter, went to visit Mr. Virgil, but could not find him and they soon returned to California. (RT 3746-3747.) [81]

By October 1992, Debra had completely lost contact with Mr. Virgil and had no idea where he was living. In the early part of that month, however, Mr. Virgil called Debra at work and said he was at Lillie's house in Los Angeles, and they arranged to meet there later that day. (RT 3745-3747, 3749-3750, 3762.) They visited for about 30-45 minutes and Debra noted that although Mr. Virgil was articulate and dressed well, he had lost a great deal of weight. (RT 3748-3749.) Debra knew that something was wrong and suspected that he was quite possibly using cocaine. (RT 3748-3749, 3763, 3769.)

Mr. Virgil was driving a BMW and said it was his when Debra asked about the car. (RT 3763.) Debra pressed Mr. Virgil for details, but he refused to say more. (RT 3764.) Because Mr. Virgil respected Debra, he would always go out of his way to hide things from her when he was doing something wrong. (RT 3765.) Mr. Virgil did not seem like he

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[81] Debra was shown a copy of Mr. Virgil's Nevada driver's license and testified that he looked much skinnier in that photo than he did in his California driver's license that was taken on June 4, 1991. (RT 3741-3742.)

needed help so Debra did not offer him any. (RT 3764.) Debra did not see Mr. Virgil in the remainder of October or November 1992. She had no idea of his whereabouts or that he had been arrested for car burglary in November 1992. He was in jail when she saw him the next time. (RT 3749-3750.)

On cross-examination, Debra testified that Lillie's brother-in-law and sister, Mr. and Mrs. [Mike and Annie] Sheppard, lived in the Los Angeles area while Debra and Mr. Virgil were growing up. (RT 3755-3756.) They were role models for the children, loved them very much, and gave them the love that Lillie did not give them. (RT 3755-3756.) Mr. Sheppard was Mr. Virgil's favorite relative and Debra was Mrs. Sheppard's favorite. (RT 3755.) The Sheppard's gave the children a great deal of attention and taught them a great deal about life [there are no free rides in life]. (RT 3755-3756.)

In addition, Dexter's father, Mr. Ford, helped out a lot with the children. (RT 3756-3757.) Mr. Ford never married Lillie, but stayed around from the time Lillie was pregnant with Mr. Virgil until Dexter was born. (RT 3757.) Debra thought of Mr. Ford as her father because he was such a good role model and he had a good relationship with Mr. Virgil as well. (RT 3757-3759.) According to Debra, Mr. Ford was a loving and affectionate person and though he did not live with them, he was a close family friend who was often at their home. (RT 3758.)

Debra stated that she and her husband [a truck driver] both work and have no children. Debra had never been convicted of any serious crimes. (RT 3754.) Dexter, also raised alone by Lillie, worked as a school bus driver and before that worked at a hotel. (RT 3769-3770.) Debra considered herself a strong, independent woman and she, like Dexter, never got involved with smoking rock cocaine because she did not want to look or behave like the people who are so obviously addicted. (RT 3770-3771.)

Debra conceded that Mr. Virgil began using cocaine on his own, neither she nor her mother ever provided him with drugs, and she never saw him use cocaine. (RT 3759, 3765.) Debra felt that Lillie was not a bad mother, did her best under the circumstances, and disciplined the children when they did something wrong. (RT 3751-3752.)

B. MR. VIRGIL'S RELATIONSHIP WITH ANNIE ANTOINE AND HIS SON, NIGEL

Annie Antoine testified that she met Mr. Virgil in 1986 at the Gutrey Job Corps, a one-year program they attended to learn different job skills. (RT 3780, 3810.) Ms. Antoine was learning to become a security officer and Mr. Virgil was learning to become a respiratory therapist. (RT 3780.) Attendees at the Job Corps program lived in separate rooms at the program's facility in Torrance, sometimes four to a room. (RT 3780.)

Ms. Antoine was from Eunice, Louisiana, a small town about a four-hour drive from Tallulah, Louisiana [Lillie's hometown]. (RT 3781.) Ms. Antoine was of Creole-Cajun descent and was excited to learn that Mr. Virgil's family was from the same part of Louisiana. (RT 3781.) During their enrollment at the highly structured Job Corps, Mr. Virgil was and had to be drug-free because that was a program requirement and enforced through initial and ongoing, random drug-testing. (RT 3782, 3784.)

Ms. Antoine and Mr. Virgil developed a romantic relationship while at the Job Corps. (RT 3783.) Mr. Virgil seemed to be good husband material and just who Ms. Antoine was looking for because of their common background and the fact that he treated her well. (RT 3783-3784.) Because they had a good relationship and Mr. Virgil showed so many good traits, they decided to have a child together. (RT 3784, 3786.)

At some point in 1986, the Job Corps sent Mr. Virgil to work at a meat packing plant in Sioux City, Iowa. (RT 3785.) While the Job Corps trained people for a particular career, there was no guarantee that the person

would actually find employment in that field. (RT 3785.) Ms. Antoine, who considered herself a fairly intelligent woman, remained at the Job Corps because she was attending college and wanted to become a probation officer. (RT 3786.)

In early 1987, Mr. Virgil moved from Sioux City to Shreveport, Louisiana (RT 3787.) Ms. Antoine left the Job Corps in March 1987 and moved to Shreveport and began living with Mr. Virgil in his apartment. (RT 3786-3787.) At first, Mr. Virgil seemed normal, like he was at the Job Corps, but Ms. Antoine soon noticed changes in his behavior. (RT 3787.) Mr. Virgil was working as an asbestos remover, but was spending too much time with his cousin, Chester, a cocaine user who Ms. Antoine felt was a bad influence on Mr. Virgil. (RT 3788, 3814.) Ms. Antoine expressed her feelings about Chester to Mr. Virgil, but he defended his cousin and said he would continue to see him because he was family. (RT 3788, 3814.) Ms. Antoine questioned Mr. Virgil about what he doing with Chester, but Mr. Virgil would only say that they were shooting pool and drinking beer. (RT 3814-3815.)

When Ms. Antoine's father became ill in December 1987, she left Shreveport and returned to Eunice to care for him until his death in 1988. (RT 3789, 3790.) By then, Mr. Virgil was a different person – he was covering things up and staying out until late at night, though he continued working. He would become short with Ms. Antoine when she questioned him about his comings and goings. (RT 3789.) Ms. Antoine never saw Mr. Virgil use cocaine and never even suspected that he was using that drug. (RT 3790.) According to Ms. Antoine, Shreveport is a large city with many of the same problems that plague Los Angeles. (RT 3791.)

Ms. Antoine maintained contact with Mr. Virgil by mail and telephone while she cared for her father. (RT 3791.) Mr. Virgil said he still cared for Ms. Antoine, but she noticed great changes in him and he told

her that he did not want her to return. (RT 3791.) Ms. Antoine believed that Mr. Virgil was truthful when he said that he still cared for her, but she suspected that Chester continued to have a negative influence on him and that was why Mr. Virgil did not want her to return to Shreveport. (RT 3791-3792.)

Ms. Antoine was still living in Eunice when she learned that Mr. Virgil had been arrested for burglary in Shreveport and committed to Louisiana State Prison. (RT 3792.) Ms. Antoine moved to McKinney, Texas, after her father died and she enrolled in the Job Corps program there with the goal of becoming a nurse. (RT 3792.) Ms. Antoine left McKinney in 1989 and transferred to another Job Corps program. (RT 3792-3793.) Ms. Antoine maintained regular and frequent contact with Mr. Virgil while he was in prison and despite his criminal transgression and drug use, she felt that he had enough redeeming qualities for them to marry. (RT 3783-3784, 3793.) By the time Mr. Virgil was released on parole in May 1991, Ms. Antoine had moved to Los Angeles and was living with Mr. Virgil's sister, Debra. (RT 3794.)

In May 1991, Mr. Virgil returned to Los Angeles, moved into the apartment with Ms. Antoine and Debra, and began working as a parking lot attendant [Debra had gotten him the job]. (RT 3794-3795.) Soon after his arrival in Los Angeles, Mr. Virgil got another job with a company called Closets by Design and worked both jobs while living with Debra and Ms. Antoine. (RT 3795-3796.) Mr. Virgil looked healthy and seemed happy and normal. (RT 3796.)

In July 1991, Ms. Antoine and Mr. Virgil moved into their own apartment in the Los Angeles area. Ms. Antoine saw no evidence that Mr. Virgil was a different person or using drugs. (RT 3796.) Mr. Virgil maintained regular contact with his parole officer. (RT 3823.) But, by October 1991, Ms. Antoine noticed changes in Mr. Virgil that very much

concerned her. (RT 3797-3798, 3801-3802.) Ms. Antoine had no idea whether Mr. Virgil was using drugs in Los Angeles, but she knew that he had lost a significant amount of weight and was having mood and personality changes. (RT 3816.)

At some point in November 1991, Ms. Antoine had a miscarriage [her second] and was hospitalized for five days. On the day she was released from the hospital, she called Mr. Virgil for a ride home, but he never showed up. (RT 3798, 3801, 3824, 3825.) Ms. Antoine waited at the hospital for several hours and finally took a cab. She was angry when she arrived home and found Mr. Virgil there, asleep on the couch. (RT 3798-3799, 3824.) Ms. Antoine began yelling at Mr. Virgil and demanded to know why he had not given her a ride. (RT 3799, 3824.) Mr. Virgil claimed to have fallen asleep, but Ms. Antoine noticed that he looked and talked differently. Ms. Antoine had no idea whether or not he was under the influence of drugs. (RT 3799, 3824-3825.) Ms. Antoine became so angry at Mr. Virgil because of his behavior and what he said to her that she pulled out a box cutter that she carried for self-protection and cut Mr. Virgil's shoulder. (RT 3800, 3824-3825.) Mr. Virgil was seriously injured and required stitches, but he just stood there and never attempted to harm Ms. Antoine in response to her attack (RT 3800-3801.) Ms. Antoine was a woman of great patience and she forgave Mr. Virgil. (RT 3801.)

Around December 1991, Mr. Virgil was transferred to Las Vegas by his employer, Closets by Design, and, about two weeks later, Ms. Antoine joined him there. (RT 3801.) Ms. Antoine was shocked when she arrived because Mr. Virgil was really thin and seemed like different person because he was having frequent and dramatic mood swings. (RT 3802.) Mr. Virgil refused to talk about what was happening with him, and Ms. Antoine, who had little or no experience with drugs and their effects, naively believed that his weight loss and different behavior was because she had not been

there to cook and care for him. (RT 3802.) Mr. Virgil worked for Closets by Design for a period of time and then began working at different jobs. (RT 3803.) Mr. Virgil's sister and brother, Debra and Dexter, visited them in Las Vegas, but they eventually lost contact with Mr. Virgil. (RT 3812.)

Ms. Antoine's relationship with Mr. Virgil continued to deteriorate, but Ms. Antoine remained hopeful that his goodness and responsibility would resurface and they would return to the trusting, stable and loving relationship that they had together. (RT 3803-3804, 3818.) Mr. Virgil often assured Ms. Antoine that he still loved her, but he began staying out all night and disappearing for days at a time. (RT 3804.) Ms. Antoine was concerned that Mr. Virgil was having an affair and confronted him with her suspicions. RT 3804.) Mr. Virgil replied that he was having an affair and "her name is cocaine." (RT 3804.)

After Mr. Virgil disclosed his addiction to cocaine, Ms. Antoine offered to help him, if he wanted help to beat his addiction. (RT 3804, 3815.) Mr. Virgil replied that he needed help, but Ms. Antoine never told him to stop using drugs and she had no idea if he ever sought or obtained help. (RT 3815.) As Mr. Virgil's drug addiction took greater hold of him, he became more unwilling to talk with Ms. Antoine, despite her continued efforts to have him get help for his drug problem. (RT 3805.) One evening in January 1992, Ms. Antoine came home and found that all of their property, except for the kitchen table, was missing from their apartment. (RT 3798, 3805.) Ms. Antoine believed that Mr. Virgil's problem with drugs was responsible for the missing property. (RT 3805.)

Nevertheless, Ms. Antoine continued to stand by Mr. Virgil for the first few months of 1992. (RT 3805-3806.) In May 1992, Ms. Antoine had become so upset and despondent about her relationship with Mr. Virgil that she decided to leave him and moved to Salt Lake City, Utah to live with her sister who had become ill. (RT 3806, 3813, 3826-3827.) Ms. Antoine did

not fear that Mr. Virgil would harm her. Instead, she concluded that she had to leave him because she could no longer compete with cocaine for his affections and she could no longer tolerate living with someone whose life had been taken over by drugs. Ms. Antoine lost contact with Mr. Virgil after she left Las Vegas, partly because she no longer had his address. (RT 3826-3828.)

In June 1992, Ms. Antoine was living in Salt Lake City when she learned that she was pregnant with Mr. Virgil's child. (RT 3806-3807, 3811.) Their son, Nigel Antoine, was born in Salt Lake City in February 1993 and Ms. Antoine remained there until November 1994 when she returned to Los Angeles. (RT 3806-3807, 3809, 3826.) After her return to Los Angeles, Ms. Antoine contacted Mr. Virgil's sister, Debra, told her about Nigel's birth, and asked about Mr. Virgil's whereabouts. (RT 3806-3807, 3811.) Ms. Antoine gave Debra a photograph of Nigel and said "yes" when Debra asked if she could tell Mr. Virgil about his son. Thereafter, Ms. Antoine began corresponding with Mr. Virgil around April 1993 while he was in jail. (RT 3807, 3812, 3826-3827.)

Someone other than Ms. Antoine told Mr. Virgil that he was Nigel's father and Ms. Antoine testified that Nigel resembled his father. (RT 3807-3808.) According to Ms. Antoine, she could not tell Mr. Virgil about her pregnancy earlier because she did not know his whereabouts, though she tried to locate him and maintained contact with his family. (RT 3811, 3813, 3814.) According to Ms. Antoine, Mr. Virgil learned on a Friday about having a son and wrote her a letter almost immediately. (RT 3812-3813.)

Ms. Antoine sent Mr. Virgil pictures of Nigel as he was growing up and Mr. Virgil responded by offering his family's assistance if Ms. Antoine needed help with the baby. (RT 3808.) Mr. Virgil was very proud that he was the father of such a cute baby. He was interested in Nigel's welfare,

and arranged for his family to help Ms. Antoine care for his infant son. (RT 3808.) Ms. Antoine maintained contact with Mr. Virgil, through letters and visits, while he was in jail. (RT 3809.)

Ms. Antoine loved Mr. Virgil when they lived together and still loved him at the time she testified on his behalf at the penalty phase. (RT 3810.) Despite his drug addiction and legal travails, Ms. Antoine believed that Mr. Virgil would be a good and loving father to Nigel and would have been a good provider because he was able-bodied and worked hard by holding down multiple jobs. (RT 3813, 3819, 3821, 3828.) Ms. Antoine was not familiar with how people looked when they were under the influence of drugs, but testified that Mr. Virgil never hit her or threatened her with violence, even at the worst times of their relationship. (RT 3819.)

During cross-examination, Ms. Antoine testified that she had no idea what Mr. Virgil was doing when he lived on the streets and she was shocked to learn the facts of the case that led to his conviction for murder. (RT 3820.) Ms. Antoine was also greatly surprised to learn about Mr. Virgil's conduct with Benita Rodriguez, whom he reportedly stabbed approximately 20 times after killing Ms. Lao. (RT 3820.) Ms. Antoine also conceded that she never saw anyone force Mr. Virgil to use drugs and that he did so on his own. (RT 3821-3822.)

GUILT PHASE

ARGUMENTS OF LAW

I.

THE MANY PROCEEDINGS CONDUCTED OUT OF MR. VIRGIL'S PRESENCE DURING HIS TRIAL VIOLATED HIS RIGHTS TO BE PRESENT AND ASSIST IN HIS DEFENSE AND AFFECTED THE RELIABILITY OF THE PROCEEDINGS AND REQUIRE THE REVERSAL OF THE ENTIRE JUDGMENT

A. INTRODUCTION

In the present case, the trial court conducted many hearings out of Mr. Virgil's presence that violated his rights, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the analogous provision of the California Constitution. and the relevant California statutory provisions to be present at all critical stages of his trial. These proceedings involved jury voir dire, the court's later inquiry into the ability of several jurors to remain fair and impartial during trial, the disclosure that one juror had out-of-court contact with the prosecutor and investigating officer, and a series of rulings that involved questions about defense counsel's performance and the prosecutor's conduct during trial. Under the circumstances, the many proceedings conducted outside of Mr. Virgil's presence violated his federal and state constitutional and statutory rights to be present at all critical stages of his trial and require the reversal of the entire judgment.

B. Mr. Virgil's Absence At Critical Portions Of His Trial

1. The Trial Court Denied Defense Counsel's Request That All Challenges For Cause Be Made In Open Court And Adopted A Procedure Where Only The Court, Counsel, And The Court Reporter Wearing A Headset Could Hear The Discussion

When the court and parties discussed jury selection procedures, defense counsel asked that challenges for cause be made in open court. (RT 22.) The trial court refused counsel's request and ruled that all challenges for cause be handled at the sidebar. (RT 22.) [82] Consistent with its ruling, the court conducted the proceedings on challenges for cause out of the "presence" of everyone in the courtroom other than the court, counsel, and the court reporter, who was given a headset so she could hear the proceedings. (RT 22.) Utilizing that procedure, the court heard and ruled on eight challenges for cause. [83] (RT 372-373, 383-386, 473, 485-486. 527-530, 542-547, 566-567, 567-571, 582-585) Mr. Virgil never waived his right to be present at these proceedings. (RT 22-23.) [84]

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82 Despite that ruling, the court identified 10 jurors that it wanted to examine in open court, but out of the presence of other prospective jurors. (RT 116-117.) During that examination, the prosecution made five challenges for cause, four of which were sustained, and the defense made four challenges for cause, all of which were sustained. (RT 118-121, 122-130, 130-134, 134-138, 138-141, 141-145, 145-148, 149-156, 157-162, 163-175.)

83 Out of Mr. Virgil's "presence," the trial court granted all of the prosecution's challenges for cause (RT 372-373, 566-567, 571), granted three defense challenges (RT 472, 485. 527-529, 542-547), and denied three defense challenges. (RT 383-386, 567-571, 582-585.)

84 In contrast, Mr. Virgil was advised of and waived his right to be present at the hardship screening of prospective jurors, but his waiver was limited to that part of his trial. (RT 18-19.)

Finally, the record reflects that defense counsel did not have an opportunity to consult with Mr. Virgil about the challenges for cause before they were made and discussed, except for the one involving prospective alternate juror Tracey Saunders. Because Mr. Virgil recognized Saunders from her work as a nurse at the Main Jail where he was housed during trial, he was able to advise defense counsel of that important information that led to the challenge for cause against her. (RT 22, 370-373, 382-386, 473, 485, 527-529, 542-547, 563-571, 585-585.) [85]

2. Jury Voir Dire That Was Conducted Outside Of Mr. Virgil's Presence

During the trial court's questioning of prospective juror Feliberta Jauregui, the trial court asked her to come to the sidebar to be questioned about her juror questionnaire and whether she would always vote for the death penalty. (RT 273.) According to Jauregui, she made a "mistake" in her questionnaire by saying that she would always vote for the death penalty. Instead, she would base her decision on the evidence introduced in the case. (RT 274.) The prosecutor and defense counsel questioned the juror more about her "mistake" and views on the death penalty and she was eventually seated as a regular juror. (RT 275-277.)

After prospective juror Nina Muns was questioned about her views regarding the death penalty, the trial court called counsel to the sidebar and asked if both counsel were willing to stipulate to her being excused because of her views regarding the death penalty [she did not think she could decide whether someone should live or die]. (RT 369.) The juror was excused after both counsel stipulated. (RT 370.)

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[85] The trial court's denial of that challenge is raised below in Argument II.

During the questioning of prospective juror William Mosby [the foreperson during the guilt and penalty phases], the court asked him to approach the sidebar so he could be questioned about his prior conviction for driving under the influence. (RT 425.) During the sidebar conference, Mosby disclosed that he was a "drunk, obnoxious college student," he was treated as such by "everyone involved," and he harbored no resentment because of the incident. (RT 425-426.)

After the court and counsel questioned prospective juror Sandra Morrison, defense counsel indicated in open court that he wanted to challenge the juror for cause. (RT 473.) The court replied that this needed to be discussed at the sidebar. (RT 473.) Before it ruled on the defense challenge for cause at the sidebar, the trial court ruled that both counsel were "officially out of time" and could no longer question jurors directly. (RT 485.)

While questioning prospective alternate juror John Bruins, the court asked him to come to the side bar. (RT 507.) There, the court discussed Bruins' disclosure in his questionnaire that he was abused as a child and Bruins added that he told his parents about the abuse, but they did nothing to help him. (RT 507-508.) According to Bruins, he was unhappy about how things were handled, the perpetrator [his Uncle] was now deceased, and he did not believe that an abusive childhood would extenuate the circumstances of a crime. (RT 508-509.)

Bruins also discussed his juror questionnaire where he said that a person who kills during a robbery forfeits his right to live. Despite that statement, Bruins also said he would not choose death automatically and would weigh the circumstances. Bruins conceded that his responses to these important and critical questions were contradictory. Bruins attempted to clarify these contradictions by saying he would consider life without possibility of parole as a punishment, but would lean very strongly towards

death if the killing was vicious. Finally, Bruins took offense at defense counsel's questioning because he felt counsel was trying to lead him "down the garden path" [by suggesting that he would automatically choose death]. (RT 508-514.) [86]

During the questioning of prospective alternate juror Richard Sena, the trial court asked him to approach the side bar. (RT 522.) In his questionnaire, the juror had said that he doubted whether he could be fair and impartial in Mr. Virgil's case because he believed his brother was "railroaded" by his Deputy Public Defender and Mr. Virgil was being represented by the Public Defender's Office. (RT 523-524.) Eventually, the juror indicated that he would not feel comfortable serving as a juror in a death penalty case and he was excused upon the agreement of counsel. (RT 525-526.)

After the 12-person jury had been sworn and during the selection of alternate jurors, Roberto Staben [Juror No. 2 (RT 176)], asked permission to address the court and was directed to come to the sidebar. (RT 530.) According to Staben, he learned the day before [February 7, 1995] that he was "very familiar with the location of the donut shop and the bowling alley. Due to a fact from my employment, I have been visiting that location several times." (RT 530.)

In this regard, Staben told the court that he had been to the donut shop twice, the bowling alley once, and his nephew got carjacked at the corner of Van Ness Ave. and El Segundo Blvd. [where the Donut King was located] about a year and a half before the trial. (RT 531.) When asked why he did not provide that important information earlier, Staben explained that he was "talking about it [the case] yesterday – last night" and learned

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[86] Defense counsel later used a peremptory challenge to excuse Mr. Bruins. (RT 572.)

from relatives, including some who owned businesses in the area, that the Donut King was in a high crime area where robberies were common. (RT 531-532.) The court directed Staben to return to his seat in the jury box and addressed counsel about Staben's belated disclosures. (RT 532.)

The prosecutor spoke first and said that Staben withheld information during voir dire because the addresses of the Donut King and Southwest Bowl were disclosed in the juror questionnaire [Question 42(b) and (c)] and both locations had been mentioned during general voir dire. (RT 532-533.) Defense counsel added that both counsel were not only quite upset over Staben's revelations, but were also prepared to excused him by stipulation. According to defense counsel, the only question was how to replace him because the jury had been sworn. (RT 487, 533.)

Defense counsel asked how the court wanted to proceed and whether the court would replace Staben by "call[ing] the next alternate." (RT 533.) According to the court, the next alternate would be Ms. Ehiemua, defense counsel agreed to accept that juror, but the prosecutor indicated that he would exercise a peremptory challenge against her. (RT 533.) Defense counsel asked if the court would consider substituting Ms. Ehiemua and then giving each side a peremptory challenge. (RT 533.) The court ruled that Staben was not very candid during voir dire, it would remove him from the jury, and it would give each party one additional peremptory challenge to select his replacement. (RT 533-534.) Defense counsel concluded by saying that if the court called the next juror in sequence, Harriet Perkins, the defense would not exercise its one additional peremptory challenge against her. (RT 534.) [87] All of the proceedings involving the discharge

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[87] The 12-person jury was sworn after the prosecutor exercised his one allotted peremptory challenge against Ms. Ehiemua and defense counsel accepted the jury without exercising his allotted peremptory challenge against Ms. Perkins. (RT 534-535.)

of Juror Staben, the procedure for replacing him, and the ultimate selection of Juror Perkins as a regular juror were done at the sidebar and out of Mr. Virgil's presence. (RT 530-534.)

When the selection of alternate jurors resumed, the court called prospective alternate juror Gladys Flair to the sidebar. (RT 535-536.) The court asked about her pending vacation and the juror replied that she and her husband were planning a trip to New Orleans to care for her husband's 90-year old mother. (RT 536.) Both counsel stipulated to excuse the juror. (RT 536-538.)

During the questioning of prospective alternate juror Duvall Green, the court asked him to approach the sidebar. There, Green disclosed and discussed the abuse committed against him by his alcoholic father. (RT 551-552.) In addition, Green discussed his criminal history and prior convictions for driving under the influence and joyriding. (RT 553.) Defense counsel asked to question Green further after he indicated he could be fair to both sides, but the court refused by saying that both counsel were out of time. (RT 553.) [88]

While still at the sidebar, the prosecutor exercised a challenge for cause against prospective alternate juror Janice Smith because of her views about the death penalty. (RT 566-567.) Defense counsel asked for an opportunity to question Smith and rehabilitate her, but the court refused and granted the prosecution's challenge. (RT 567-571.)

During the trial court's questioning of prospective alternate juror Tracey Saunders, defense counsel asked to approach the sidebar. (RT 582.) Defense counsel explained that Mr. Virgil knew Saunders because she was a nurse at the Main Jail where he was housed during trial and she treated

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[88] Green was seated as an alternate juror and later became one of the 12 jurors during the guilt phase. (RT 572, 593-594, 3410.)

him several times, once when he was sick and once when he was stabbed by another inmate while handcuffed. (RT 583.) Defense counsel believed that Saunders might not recognize Mr. Virgil because she treats many prisoners, but it would be uncomfortable for Mr. Virgil to have her serve as a juror, especially because of her close association with deputies at the jail. (RT 583.) Defense counsel added that Saunders, service as a juror might be very problematic because "we're trying to pretend he's not in custody" and she might see him in custody at the jail. (RT 583.) Accordingly, defense counsel challenged Saunders for cause "out of an abundance of caution." (RT 583.)

The prosecutor opposed the challenge and the trial court agreed to question her in open court about whether she recognized anyone sitting at the defense table. (RT 583-584.) After the juror replied she did not, the court had counsel approach the sidebar again and ruled that it would be "awfully difficult for me to say that she couldn't be an objective juror based on the concerns you [defense counsel] have." (RT 584.) On that basis and because the court expected that Saunders would not work during her jury service and that negated defense counsel's stated concerns, the court denied the defense challenge for cause against Saunders. (RT 584-585.)

Prospective alternate juror Marguerite Wiener was called to the sidebar where she discussed the disclosure in her juror questionnaire that she had been abused during her childhood and her mother was an alcoholic. (RT 589-590.) After she was questioned further about her past, her feelings about the death penalty, and defense counsel's concern about the fact that she had been robbed by a black man, the proceedings resumed in open court. (RT 590-593.) [89] There were no more challenges and the four

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[89] Defense counsel had exhausted his peremptory challenges so he could not exercise them against Jurors Green, Saunders, or Wiener.

alternate jurors were sworn. (RT 594.)

3. IMPORTANT BENCH CONFERENCES DURING TRIAL THAT WERE CONDUCTED OUTSIDE OF MR. VIRGIL'S PRESENCE

After learning that Juror Duarte had her car stolen from the court parking lot the day before, the court questioned her about whether she could remain a fair and impartial juror in the case. (RT 1251-1253.) Before she responded, defense counsel asked to come to the sidebar because he had "a concern." (RT 1253.) [90] At the sidebar, defense counsel argued that he was concerned about the juror's continued service because she was "very, very agitated" about the theft of her car and there will be evidence that Mr. Virgil was arrested for car burglary/attempted car theft on November 3 [1992] and that arrest will be a prominent part of the prosecution's case, given that one of the booking photographs used to identify him was taken after that arrest. (RT 1253, 1254.) The prosecutor replied that many jurors said they had their cars burglarized and the court should merely inquire whether Duarte could remain fair and impartial. (RT 1254.) After proceedings resumed in open court, the court questioned Duarte who agreed that she could remain fair and impartial and that she would not be affected by the theft of her car. (RT 1255-1256.) [91]

While cross-examining Kim Swobodzinski, an Identification Technician for the Gardena Police Department [RT 1995], defense counsel commented that the prosecution had elicited much testimony about efforts to eliminate others as the source of palm prints found at the Donut King.

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[90] Consistent with the sidebar conferences involving challenges for cause and general voir dire, there is no indication that the court used a different procedure for these conferences.

[91] Duarte was later excused from the jury at her request because of a death in her family. (RT 1892.)

(RT 2155.) Then, defense counsel asked whether it was defense counsel, not the prosecutor, who asked that the Ngovs [Ms. Lao's sister and brother-in-law] be fingerprinted to determine if they were the sources of the palm prints. (RT 2155.) The prosecutor objected as "irrelevant," the court sustained the objection, and defense counsel asked to approach the sidebar. (RT 2155.)

Defense counsel argued at the sidebar that Mr. Virgil was not charged until September [1993] and the employees at the Donut King were long gone by then so they could not be fingerprinted to eliminate them as sources of the fingerprints. (RT 2155.) According to defense counsel, this was relevant evidence because the otherwise unidentified fingerprints found at the scene could have been left by the person who really killed Ms. Lao and the failure to check the employees' fingerprints undermined Mr. Virgil's defense. (RT 2155-2156.) The court agreed that defense counsel's questioning was reasonable, but believed it was improper for defense counsel to suggest that he requested this be done. (RT 2156.) [92]

Linda Schuetze, an Identification Technician for the Hawthorne Police Department, testified for the prosecution about her examination of palm prints submitted to her for examination by her former colleague, Kim Swobodzinski. (RT 1994-1995, 2050, 2238.) On June 1, 1994, Schuetze compared People's Exhibit No. 63 [Mr. Virgil's palm print obtained after his arrest on November 3, 1992 (RT 2047-2049)] with People's Exhibit No. 58 [the partial palm print found on the table in the Donut King where the reported suspect was seen seated (RT 939, 987, 1205., 2023-2024, 2861-2862)]. Schuetze testified that she was 100% certain that People's Exhibit

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[92] The prosecutor believed that both counsel requested that the employees be checked and defense counsel did not dispute that representation. (RT 2156.)

No. 58 [partial palm from the table] was "identified to the right palm print on People's 63" [Mr. Virgil's right palm print]. (RT 2238) Further, on February 21, 1995, Schuetze compared People's Exhibit No. 59 [Mr. Virgil's palm print obtained in court on June 2, 1994 (RT 2027)] with People's Exhibit No. 58 [partial palm print from the table] and testified that the partial palm print represented Mr. Virgil's palm print. (RT 2238-2239.) In other words, Schuetze was a very important prosecution witness.

The court interrupted defense counsel's cross-examination of Schuetze by asking both counsel to approach the sidebar. (RT 2245-2246.) During that discussion, the court asked why counsel was wasting the court's time by going over these comparisons in court. (RT 2246.) Defense counsel explained that he was questioning Schuetze about those fingerprints because he did not know that other comparisons and eliminations of fingerprints had been done. (RT 2246-2247.) The prosecutor agreed and said that he too did not know until today that Schuetze and Donald Keir looked at and compared other palm prints and fingerprints. (RT 2247.) After the proceedings resumed in open court, Schuetze testified that Mr. Virgil and Ms. Lao were eliminated as the sources of all of the prints found on the interior bathroom door. (RT 2247-2248.)

During the prosecutor's direct examination of Los Angeles County Sheriff's Detective Richard Cohen [the detective who interviewed Mr. Virgil after his arrest at St. Francis Cabrini Church and who called the Gardena Police Department to report his belief that Mr. Virgil was the suspect in Ms. Lao's homicide], defense counsel objected and argued that the detective's belief that Mr. Virgil resembled the composite of the suspect in Ms. Lao's homicide was irrelevant. (RT 2711.) The court sustained the objection absent an offer of proof and the prosecutor asked to approach the sidebar. (RT 2711.) At the sidebar, defense counsel argued that the

detective's beliefs about whether Mr. Virgil resembled the composite drawing and that the M.O. [modus operandi] of his crimes was similar to the crimes at the Donut King were improper and usurped the jury's province. (RT 2711-2713.) The court ruled that the prosecutor's questioning about the similarity was probative and relevant, but that the detective's opinion about the sketch as a good or bad likeness of Mr. Virgil was irrelevant. (RT 2713-2714.)

After defense counsel concluded his cross-examination of Gardena Police Detective Otake, the prosecutor asked to approach the sidebar. (RT 2794.) During that discussion, the prosecutor disclosed that he had not expected Detective Otake to testify that he had contacted Mr. Virgil's parole agent after Mr. Virgil's arrest for car burglary on November 3, 1992. (RT 2784-2785, 2788, 2794-2795.) The prosecutor was unsure if defense counsel would object to Otake's disclosure of Mr. Virgil's parole status. (RT 2795.) [93]

During the prosecutor's direct examination of Dr. John Stroh who was called to render an opinion about how long Ms. Lao might have remained conscious after her injuries/blood loss [RT 2826-2827], defense counsel objected that the doctor was not qualified to render such an opinion (overruled) [RT 2828-2829] and latter objected that the doctor misstated the evidence when he rendered an opinion by citing the report of the paramedics who treated Ms. Lao. (RT 2832-2833.) When the prosecutor disagreed that the doctor had misstated the evidence, the trial court called counsel to the sidebar. (RT 2833.) The court agreed with the prosecutor

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[93] Defense counsel elected not to object and not to request an admonition because he did not want to draw attention to Mr. Virgil's parole status. (RT 2796-2797, 2820.)

[Paramedic Roberts testified about Ms. Lao's blood loss] and the proceedings resumed before the jury. (RT 2834.)

During the prosecutor's direct examination of Lavette Gilmore [the hairdresser who reportedly saw the suspect in the donut shop before Ms. Lao was killed and later lied about her identification], the prosecutor sought to rehabilitate her by asking whether she saw the man in the donut shop in the courtroom. (RT 2872-2873.) After Gilmore nodded her head in an affirmative manner and explained that she lied earlier because she was "scared," defense counsel objected because Gilmore never made a prior identification at the lineup and it was improper and prejudicial for her to do so at trial. (RT 2873.) The prosecutor denied that he intended for her to make such an identification and the court called both counsel to the sidebar. (RT 2873.)

At the sidebar, the prosecutor argued that he planned only to show Gilmore a photograph of the lineup and ask whether it represented the lineup she attended, but thought it also would be a good idea to ask whether she recognized anyone in the lineup. (RT 2874.) Before the prosecutor could complete his statement, defense counsel interjected by saying that the prosecutor essentially wanted to rehabilitate Gilmore by having her make an identification in court when she failed to make one earlier and that was improper, regardless of her motivation for not making an earlier identification. (RT 2874.) The court concluded that the prosecutor had laid a proper foundation when Gilmore reluctantly said that she recognized the man's face from the donut shop at the lineup and the defense could question her identification on cross-examination. (RT 2874.)

During defense counsel's cross-examination of Gilmore, the trial court asked whether defense counsel's examination would go "a bit longer." (RT 2915.) After Defense counsel answered that it would, the prosecutor interrupted by asking for a sidebar conference. During that

conference, the prosecutor asked defense counsel to limit his cross-examination because Gilmore had to leave and pick up her children. (RT 2915-2916.) Defense counsel agreed and the proceedings resumed in open court. (RT 2916.)

After the court agreed to review Ms. Lao's medical records and decide whether to grant the prosecutor's request to admit them over defense counsel's objection, the prosecutor asked to approach the sidebar. (RT 3151-3153.) During that conference, the prosecutor asked that the trial court admonish the jurors not to have contact with the parties and witnesses, especially given Juror Bandy's attempt to speak with the prosecutor and the investigating officer the day before. (RT 3022-3023, 3153-3154, 3155-3156.)

After the hearing regarding Mr. Virgil's reported possession of a large staple and the court's decision to have him wear a reactor stun belt, the prosecutor asked that Mr. Virgil be removed from court so witnesses Julio Montulfar, the former clerk at the Hilltop Motel, and Benita Rodriguez, Montulfar's girlfriend who reportedly was assaulted by Mr. Virgil at the motel, could be brought into court and ordered to return the next day for their testimony during the penalty phase. (RT 3443-3506.) The court agreed and Mr. Virgil was removed so the court could address these witnesses out of his presence. (RT 3505-3506.)

After the prosecutor gave his Opening Statement at the penalty phase, defense counsel asked to approach the sidebar. (RT 3521.) Defense counsel conceded that he knew Rodriguez would be called as a witness at the penalty phase, but he had no information that she was in therapy and asked that such evidence not be introduced before the jury. (RT 3521-3522.) The prosecutor replied that he complied with the discovery rules on this topic, but defense counsel disagreed that he received sufficient and specific notice about the medical and mental health effects of the incident

on Rodriguez. (RT 3522-3524.) The court agreed with the prosecution that it satisfied its obligations regarding notice after disclosing its intent to have Rodriguez testify. (RT 3525-3526.)

During defense counsel's cross-examination of Julio Montulfar, defense counsel asked when he was interviewed last by the prosecutor and investigating officer. (RT 3569.) Defense counsel also asked whether the prosecution's representatives took notes, Montulfar said they did not, and defense counsel asked the prosecutor in open court if he had notes of that interview. (RT 3569.) The prosecutor agreed to review his files and defense counsel asked for copies of all notes of the prosecution's interviews with Montulfar. (RT 3569.) After the prosecutor produced the notes, the court called counsel to the sidebar. (RT 3570.)

During the ensuring discussion, defense counsel complained about the prosecutor's conduct and pattern of providing discovery at the possible last minute. Defense counsel further complained that he was not given notice that Montulfar would testify and prosecutors are the first to complain when the defense interviews witnesses without taking notes. (RT 3570.) Finally, defense counsel reminded the court of its ongoing discovery order and demanded copies of the prosecution's notes regarding Montulfar. (RT 3570.)

Commendably, the prosecutor confessed that he interviewed Montulfar the night before he was to testify, he had not bothered to interview him before the eve of his testimony, and he had notes of the interview with Montulfar. (RT 3571.) The prosecutor reminded defense counsel that Montulfar was listed on his witness list, but claimed that Montulfar provided no new information and all of his statements were in police reports about the incident with Rodriguez. (RT 3571-3572.)

Given the prosecutor's urging that Montulfar's information was not significant, defense counsel asked why the prosecution bothered to

interview him at all and why the police did not prepare a report and provide it to counsel after the interview was conducted. (RT 3572.) Defense counsel complained that this was just one more example of the prosecution's improper gamesmanship of providing discovery at the last possible moment [and then only after being confronted by its failure to do so]. (RT 3572-3573.)

The trial court was unsure if the prosecutor's notes were discoverable because they appeared to be attorney work product. (RT 3573.) Defense counsel disagreed because the prosecutor, like all prosecutors, would have been the first to complain [and seek sanctions] if the defense had violated the rules of discovery in the same manner. (RT 3573.) Because he was fed up with the prosecutor's perceived misconduct, defense counsel moved to strike Montulfar's testimony, based on the prosecution's "bad faith" conduct regarding discovery during the penalty phase. (RT 3574-3575.) The trial court then excused the jury and went on the record in open court to discuss this matter further. (RT 3576-3595.) [94]

During defense counsel's cross-examination of Montulfar, the prosecutor objected to defense counsel's line of questioning as improper impeachment and asked to approach the sidebar. (RT 3626-3627.) Defense counsel indicated that the problem was caused by the nature of the reports prepared by the Los Angeles Police Department about the incident with Rodriguez and conceded that the prosecutor was correct. (RT 3627.)

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[94] The trial court denied the motion to strike Montulfar's testimony, but admonished the prosecutor to provide any information to the defense that was not previously disclosed. (RT 3595.) Given the pointed nature of the trial court's comments, the prosecutor volunteered that he just learned Ms. Lao had named one of her sister's children and the children were very close to Ms. Lao. (RT 3595.)

During the prosecution's cross-examination of Ms. Antoine, Mr. Virgil's former girlfriend and the mother of his son, defense counsel asked to approach the sidebar. (RT 3816.) Defense counsel argued that he had not asked Ms. Antoine whether Mr. Virgil should live or die or questioned her about the events associated with Ms. Lao's homicide so the prosecutor should not be allowed to question her about such matters. (RT 3816-3817.) The prosecutor countered that Ms. Antoine was present throughout the trial and he planned to ask her what kind of person would do these things to another person. (RT 3817.) The prosecutor decided not to pursue this topic with Ms. Antoine, but said he would only question her about Mr. Virgil's secretive nature and the two sides of his personality. (RT 3817.)

During discussion about the admission of Exhibits, the prosecutor asked to approach the sidebar. (RT 3828-3829.) Once at the sidebar, defense counsel added that he just learned his mother-in-law died and he wanted to know whether they could expedite the proceedings so he could leave and join his wife. (RT 3829.) The court asked if defense counsel wanted to recess, but counsel replied that was not necessary and hoped they could finish the proceedings in the next 30 minutes. (RT 3829.)

Finally, out of Mr. Virgil's presence, the court identified the jurors who spoke at the hearing on June 15, 1995, regarding the defense motion to unseal their information. (RT 3981.) The court commented that it decided not to identify the jurors who spoke in open court by name at the time "to make them feel better," but identified them for the record as Denise McGee, Dolores Padilla, and Marguerite Wiener. (RT 3981.) Further, the court said that it would contact the four jurors who were not present at the hearing to advise them of their right not to discuss the case. (RT 3982.)

C. MR. VIRGIL WAS PREJUDICED BY THE MANY PROCEEDINGS OUT OF HIS PRESENCE AND THIS REQUIRES THE REVERSAL OF THE ENTIRE JUDGMENT

A criminal defendant has a right under the Sixth and Fourteenth Amendments to the United States Constitution, under section 15, article I of the California Constitution and California Penal Code sections 977 and 1043 to be personally present during his trial. (*People v. Cole* (2004) 33 Cal.3d 1158, 1230; *People v. Waidla* (2002) 22 Cal.4th 690, 741; *People v. Weaver* (2001) 26 Cal.4th 876, 976; *Clark v. Stinson* (2d Cir. 2000) 214 F.3d 315 [the right to be present is grounded in the due process and confrontation clauses of the United States Constitution].) The United States Supreme Court and this Court have recognized that the right to be present is violated when the accused is absent from proceedings that are substantially related to the fairness of the procedure or the fullness of the opportunity to defend against the charges.. (*Faretta v. California* (1975) 422 U.S. 806, 819, fn. 15; *People v. Ochoa, supra,* 26 Cal.4th 398, 433-435; *People v. Cole, supra,* 33 Cal.4th at pp. 1231-1232.) According to this Court, it applies an independent or de novo review to a trial court's exclusion in whole or in part of a criminal defendant from pretrial and trial proceedings. (*People v. Cole, supra,* 33 Cal.4th at p. 1230; *People v. Waidla, supra,* 22 Cal.4th at p. 741.)

Individually and collectively, the many proceedings described above were proceedings substantially related to the fairness of Mr. Virgil's trial and his opportunity to defend against the serious charges against him. The procedure used by the court violated Mr. Virgil's rights under the Fifth, Sixth, and Fourteenth Amendments to be personally present at his trial and his right to consult with and receive the effective assistance of counsel in his defense. Further, the procedure used by the trial court affected the reliability of the proceedings in violation of Mr. Virgil's rights under the

Eighth Amendment, as applied to the states by the Fourteenth Amendment, by conducting proceedings effectively in secret and out of his hearing. (See *Woodson v. North Carolina* (1976) 428 U.S. 280; *Tuilaepa v. California* (1994) 512 U.S. 967; *Gardner v. Florida* (1977) 430 U.S. 349; *Caldwell v. Mississippi* (1985) 472 U.S. 320.)

Jury voir dire is a critical stage concerning the right to be present, like any other stage of the trial where the accused's absence might frustrate the fairness of the trial. (*Faretta v. California, supra,* 422 U.S. 806, 819, fn. 15; *People v. Ervin* (2000) 22 Cal.4th 48, 73, citing *Gomez v. United States* (1989) 490 U.S. 858, 873, quoting *Lewis v. United States* (1892) 146 U.S. 370, 374, and authorities cited therein, establishing the critical necessity and importance of voir dire to the overall fairness of a trial and the defendant's right to a fair and impartial jury). For that reason, the many sidebar conferences held outside Mr. Virgil's hearing [presence] violated his right to be present during voir dire, especially when challenges for cause were made at the sidebar out of his presence and information was elicited concerning the overall suitability of prospective jurors to serve on his jury where the punishment sought was death.

In this regard, the record reflects that Mr. Virgil was able to provide input to defense counsel regarding the fairness of potential jurors in only one instance and then only because he had out-of-court contact with Ms. Saunders in her capacity as a nurse at the Main Jail where he was housed during trial. In other words, Mr. Virgil was able to assist counsel as to this juror only because he had personal knowledge of the juror's status, something that cannot be said for the many other jurors questioned secretly out of his hearing.

In the remaining voir dire proceedings conducted outside of his presence, the record reflects that Mr. Virgil had no opportunity to provide similar input to counsel, especially because so much of the information

about the jurors' respective abilities to be fair and impartial was disclosed and discussed only at the sidebar and where the court announced its rulings. For example, Mr. Virgil had no opportunity to provide input to counsel regarding his assessment of prospective jurors when they disclosed their feelings about the childhood abuse inflicted on them by alcoholic parents and other close relatives, their feelings about the abuse and the abuser, and the effects of that abuse on them as adults. Given the nature of Mr. Virgil's penalty defense that focused in large part on the abuse he suffered at the hand of his hard-drinking, violent mother, it was necessary that Mr. Virgil be allowed to discuss his impressions of the jurors at issue [Juror Green and Alternate Juror Wiener] with defense counsel Further, Mr. Virgil had no opportunity to discuss with counsel the planned procedure for replacing Juror Staben that touched upon his rights to a unanimous jury. (See *United States v. Lopez* (9th Cir. 1978) 581 F.2d 1338, discussing the interplay between the dynamics of the jury process and the requirement of juror unanimity.)

Because Mr. Virgil was unable to communicate with counsel regarding his observations, impressions and concerns about jurors in light of the information that they disclosed only to the court, counsel and the headset-wearing court reporter at the sidebar, the procedure employed by the court violated Mr. Virgil's right to be present. (See *Cohen v. Senkowski* (2d Cir. 2002.) 290 F.3d 485, 490 [defendant's right to be present was violated when voir dire proceedings occurred out of his hearing, the defendant had no opportunity to confer with counsel, and the court's ruling was not stated in open court]; *United States v. Fontenot* (9th Cir. 1994) 14 F.3d 1364, 1370 [a defendant's right to be present is violated by voir dire proceedings out of his presence if the defendant had no opportunity to talk with counsel during and immediately following voir dire].)

In addition, the procedure used violated Mr. Virgil's right to be present at many evidentiary arguments and rulings that dealt with his opportunity to defend against the charges, to be present at proceedings where the prosecution's seemingly endless stream of alleged discovery violations was discussed and at other times where questions about his counsel's performance were raised. For example, Mr. Virgil could have insisted that defense counsel seek some formal relief from the pattern of discovery violations or lodge a complaint about defense counsel and seek relief if he knew of the court's frustration with counsel, belief that counsel was wasting valuable court time, and counsel's erroneous views of the evidence and willingness to curtail his examination of witnesses for scheduling reasons caused by the death of his mother-in-law. Instead, the procedure employed by the court kept Mr. Virgil in the dark and unable to assist counsel and ensure that he was receiving the effective assistance of counsel.

Under the circumstances, Mr. Virgil's absence from so many proceedings and conference raises many questions about the fairness of the proceedings and Mr. Virgil's opportunity to defend against the serious charges he faced. Though the present federal and state guarantees about the right to be present have departed from the common law's strict rule requiring an accused's personal presence at all stages of the trial (see *People v. Ochoa, supra* 26 Cal.4th 398, 434; *United States v. Nektalov* (S.D.N.Y. 2004) __ F.Supp.__ [2004 WL 1672466, p. 1]), several recent decisions from the United States Supreme Court cast doubt on the continued vitality of this departure. Instead, the recent trend from the United States Supreme Court involves a return to strict compliance with the requirements of the common law when that is most consistent with the intent of the Framers of the United States Constitution.

In this regard, the United States Supreme Court held in two very recent cases [*Crawford v. Washington* (2004) 541 U.S. 36, and *Blakely v. Washington* (2004) 542 U.S. 296] that courts in the United States must consider the Framers, intent in the context of the common law when considering the effect of the modern rules of evidence and those governing sentencing. Because a return to the requirements of the common law underlies this recent trend in our high court, Mr. Virgil respectfully submits that decisions like *People v. Ochoa, supra,* 26 Cal.4th at pp. 433-435, must be reexamined because they so dramatically depart from the common law's strict requirement of the accused's personal presence at all stages of his trial. Given Mr. Virgil's absence from so many proceedings that were important to the fairness of his trial and his opportunity to defend against the charges, it cannot be said that the errors in excluding him were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) This is especially so because of the heightened need for fairness and reliability in deciding whether death is the appropriate punishment. (See *Woodson v. North Carolina, supra,* 428 U.S. at p. 305 (lead opn. of Powell, J.).) Similarly, it cannot be said that the errors were harmless under the California Constitution because Mr. Virgil's many absences permeated all aspects of his trial and thereby frustrated the goal of having him present so he could assist in defending against the charges. (*People v. Cole, supra,* 33 Cal.4th at pp. 1231-1232; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Accordingly, the entire judgment against Mr. Virgil must be reversed.

II.

THE TRIAL COURT'S ERRORS DENYING THE DEFENSE CHALLENGES FOR CAUSE AGAINST PROSPECTIVE JURORS JOHN BRUINS AND TRACEY SAUNDERS, GRANTING THE PROSECUTION'S CHALLENGE FOR CAUSE AGAINST PROSPECTIVE JUROR JANICE SMITH, AND LIMITING THE QUESTIONING OF PROSPECTIVE JUROR DUVALL GREEN REQUIRE THE REVERSAL OF MR. VIRGIL'S JUDGMENT OF DEATH

A. APPLICABLE LAW AND STANDARD OF REVIEW

A defendant is entitled to have his attorney question jurors during voir dire about facts or circumstances "likely to be of great significance to prospective jurors" in deciding whether or not to vote for or against the death penalty. (*People v. Cash* (2002) 28 Cal.4th 703, 718-723.)

A prospective juror may be challenged for cause based upon his or her views regarding capital punishment, if those views would "'prevent or substantially impair'" "the performance of the juror's duties as defined by the court's instructions and the juror's oath. (Citations.)" (*People v. Heard* (2003) 31 Cal.4th 946, 958, quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424.) Under this standard, a prospective juror is properly excluded if he or she cannot "'conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate,'" and the trial court's ruling will be upheld on appeal "'if it is fairly supported by the record.'" (*People v. Heard, supra,* 31 Cal.4th at p. 958, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 975.) According to this Court, "'"[t]he real question is 'whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror.*'"'"(Citations.)" (*People v. Heard, supra,* 31 Cal.4th at p. 958.) The trial court has broad discretion in assessing the qualifications of jurors challenged for cause and determining whether the juror will be

"'unable to faithfully and impartially apply the law in the case.'(Citation.)" (*People v. Weaver* (2001) 26 Cal.4th 876, 970.)

A defendant claiming that the trial court wrongly denied a challenge for cause must show that the right to a fair and impartial jury was affected. (*People v. Crittenden* (1994) 9 Cal.4th 83, 121.) In this regard, the defendant must establish that he or she exercised a peremptory challenge to remove the juror in question, exhausted the defendant's peremptory challenges, and advised the trial court of defendant's dissatisfaction with the jury. (*Id.,* at p. 121.) If a defendant can show that his right to an impartial jury was affected because he was deprived of a peremptory challenge that would have been used to excuse a juror who sat on his jury, he is entitled to a reversal, without having to show that the outcome of the case would have been different. (*Id.,* at pp. 121-122.)

B. THE TRIAL COURT'S RULINGS REGARDING THE CHALLENGES FOR CAUSE AGAINST PROSPECTIVE ALTERNATE JURORS BRUINS, SAUNDERS, AND SMITH

Penal Code section 1089 provides that if a judge decides to select alternate jurors, the prosecutor and the defense [if only one defendant] are to have as many peremptory challenges as there are alternate jurors to be selected. In this case, the trial court decided to select four alternate jurors, thereby giving each side four peremptory challenges. (RT 21, 487.) Mr. Virgil exhausted his four peremptory challenges during the selection of prospective alternate jurors by exercising them against John Bruins (RT 572), Martin Briones (RT 572), Paul Blasman (RT 573), and Ola Saylor. (RT 588.) Accordingly, Mr. Virgil has preserved for appellate review the denial of his challenges for cause against prospective alternate jurors Bruins and Saunders. Further, the selection of alternate jurors was critically important because two alternate jurors, Tracey Saunders and Duvall Green, became regular jurors during the guilt phase of Mr. Virgil's trial. (RT

1893, 3390.)

1. THE DENIAL OF MR. VIRGIL'S CHALLENGE FOR CAUSE AGAINST PROSPECTIVE ALTERNATE JUROR BRUINS

Prospective alternate juror John Bruins, a software systems analyst for Hughes Aircraft, was questioned first during the selection of alternate jurors. (RT 504; CT Supp. I 1840.) He had served on a jury before, but was frustrated by that experience because a mistrial was declared after two jurors refused to believe the testimony of police officers in that case. (RT 504-505; CT Supp. I 1844.) About 25 years before Mr. Virgil's trial, Mr. Bruins was robbed [no weapon was used] while working as an employee at a McDonald's restaurant in Long Beach. (RT 505-506; CT Supp. I 1851.) The juror denied that experience would affect his ability to be fair to both sides and he was generally satisfied with how the prior incident was handled. (RT 506.)

Mr. Bruins described himself as a "strong proponent" of the death penalty, though he believed he could fairly and reasonably consider life without possibility of parole as a penalty and agreed to follow the court's instruction concerning the evidence to consider, including sympathy for the defendant and his background in deciding penalty. (RT 506-507; CT Supp. I 1838, 1840.) The juror also said he understood that life without possibility of parole meant life in prison, he understood that whatever punishment was selected would be carried out, he could consider all penalty options, and he had no problem with making a penalty decision. (RT 507.)

At the sidebar with counsel, the court questioned the juror about having been abused as a child [attempted sexual abuse by his Uncle]. (RT 507-508; CT Supp. I 1842.) The juror was not pleased with how the matter was handled, but recognized that was partly because it occurred in the early 1960's when such matters were handled very differently than today. (RT 508.) The court asked whether his experiences as a child would affect his

ability to weigh evidence of child abuse that might be elicited in the present case and Mr. Bruins answered it would not affect his ability to objectively weigh evidence of abuse. (RT 508-509.) Mr. Bruins, however, also believed that people "can be in bad circumstances, and make the right decisions and turn out positively." (RT 509.) He added that he "could be objective" and consider such evidence as an "extenuating circumstance," "in the right circumstances." (RT 509.)

Because defense counsel seemed to have significant concerns about the prospective juror's ability to be fair and impartial when considering the death penalty, he directed Mr. Bruins to page 26 [of his juror questionnaire] and asked "'Do you feel that a person who has committed cold-blooded, premeditated murder in the commission of a robbery has forfeited his right to live and should automatically get the death penalty regardless of circumstances?'" (RT 510.) [95]

Mr. Bruins replied that he "would not say automatically [for death]," but felt that such a person "has forfeited a certain amount [of his right to live], Yes." (RT 510.) Bruins continued that his vote for death would not

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[95] Mr. Bruins's juror questionnaire is located at CT Supp. I 1837-1872. The questions on that page concerned a juror's general feelings about the death penalty [Question No. 46 – Mr. Bruins said he was for the death penalty "under circumstances of premeditated murder, or circumstances where murder is strictly for viciousness, that is where it is performed when the victim has cooperated and does not threaten the robber (in a robbery)"]; if the juror has always felt that way or what changed their beliefs [Question No. 47 – Mr. Bruins replied "Yes")], if the juror had any moral or philosophical beliefs that would prevent him/her from imposing the death penalty, whether the juror could set those views aside [Question No. 48 – Mr. Bruin wrote "If the death penalty is appropriate under the law, I would impose it.")], and what the juror believed was the purpose of the death penalty [Question No. 49 – Mr. Bruins said "Remove from society those who have proven themselves unable to let others be, and thus to act as a preventative to others who would murder." (CT Supp. I 1862.)

be automatic, but "[t]here would be circumstances." (RT 510.) Defense counsel asked "[w]hat circumstances?" and the juror replied that he had been "wrestling" with those circumstances since filling out his questionnaire. (RT 510.) According to the juror, he was referring to a robbery where the victim was attempting to cooperate and stay out of the way, but was murdered anyway. In that situation, the juror believed that the perpetrator "forfeit[ed] their right [to live]." (RT 510-511.)

Defense counsel immediately added that this was "precisely what the People are going to try to prove, would that cause you to vote for the death penalty?" (RT 511.) The juror answered that he "would lean very strongly in that direction [death], I'm afraid. I'm being honest. Forgive me, but that's –" (RT 511.) The court interrupted the juror in mid-sentence by saying they were present to hear the juror's honest responses and then cut-off defense counsel's questioning by asking the prosecutor if he wanted to question Mr. Bruins. (RT 511.)

The prosecutor began by asking if Mr. Bruins would automatically choose death in every felony murder case where the victim was intentionally killed during the course of a felony or whether he could weigh the aggravating and mitigating factors and possibly choose life without possibility of parole? (RT 511.) The juror replied that his response might be inconsistent with what he just said, but

> "in a situation where an innocent is approached by somebody, an active person who wants to start out by robbing the person in the process – if a murder is committed, basically when the person has not done, as one of the other jurors have done, and tried to wrestle with them, and what have you, if they try to cooperate, I would lean towards the death penalty very strongly in that situation." (RT 511-512.)

The court attempted to clarify the juror's seemingly contradictory response by asking if he could consider life without possibility of parole "under those circumstances." (RT 512.) The juror replied that he "would

be weighing the circumstances. I could consider it, but I would tend to lean in the direction of the death penalty." (RT 512.) The prosecutor then directed the juror to the penalty phase where a great deal of evidence is elicited, including much evidence that would be offered to extenuate the circumstances of the crime, and asked whether he "actually [could] come back with [a verdict of] life without parole? [¶] Or are you going to say automatically every time that --" (RT 512.) The juror replied "No" and added that he was "hedging" because of the "term 'automatic,'" but agreed he would consider the circumstances, though he was "a little bit vamping here." (RT 512.) [96] According to the juror, he has "seen the circumstances where people who are trying their best and get out of the way have been – have their lives taken from then, or whatever, and for no activity of their own." (RT 513.) Though the juror continued that he would not "automatically" vote for death, he remained "really bother[ed] . . . And in a situation like that, if somebody is being that vicious [by killing a cooperative and unresisting victim], that's where I would consider – I hesitate to say automatic, but I probably would consider it [death] much more strongly." (RT 513.)

Because he believed the prosecution would attempt to prove that Mr. Virgil killed an unresisting and cooperative victim, defense counsel asked "[b]ut if a person goes out of his way to take a robbery victim who is not

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[96] Vamping may be defined as "To put together; fabricate or improvise:" The American Heritage® Dictionary of the English Language, Fourth Edition. Copyright © 2000 by Houghton Mifflin Company. Published by Houghton Mifflin Company.)

Though counsel did not ask Mr. Bruins what he meant by "vamping," it reasonably appears the juror was doing his best to improvise or craft a coherent response to questions about under what circumstances he would select the death penalty.

resisting, and then take them to another area and murder them by repeatedly stabbing them –" (RT 513.) Before defense counsel could complete his question, the prosecutor objected, and the trial court sustained his general objection. (RT 513.) Defense counsel pressed on by returning to the juror's questionnaire where he said that a defendant has "forfeited the right [to live]" if there is an "intentional, premeditated, deliberated murder." (RT 513-514.) 97 The juror denied that meant he would automatically vote for death, though he also said he "would lean much more heavily towards it. But I mean, there are circumstances that would have to be weighed all the way around. [¶] It sounds like, in the scenario you are describing, that it's pretty much cut-and-dry. It almost sounds, that way, you could probably lead me down the garden path." (RT 514.) 98

After questioning the next group of prospective alternate jurors, the prosecutor challenged prospective alternate juror Janice Smith for cause because of her views regarding the death penalty. (RT 566-567.) Defense counsel objected because only the trial court questioned Ms. Smith and he had no opportunity to question and attempt to rehabilitate her before the

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97 Question No. 63 asked prospective jurors whether a person "who intentionally kills another person should always get the death penalty." (CT Supp. I 1865) Mr. Bruins "Strongly agree[d]" they should and wrote "Intentional to me means the murderer has forfeited any [right to] leniency (unless in self defense in some manner). (Original Emphasis.)" (CT Supp. I 1865.)

98 Admittedly, the juror's final response to the scenario identified by counsel [and sought to be proved by the prosecutor in Mr. Virgil's case] was somewhat confusing. Given the totality of his responses, especially his belief that the death penalty was used "[t]oo seldom, (CT Supp. I 1863)," the only reasonable conclusion is that the juror would vote for death whenever the circumstances were "pretty much cut-and-dry" [unresisting victim and vicious and senseless killing – the circumstances the prosecution sought to prove in the present case].

court ruled on the challenge. (RT 553, 567.) After the trial court overruled defense counsel's objection and granted the prosecutor's challenge against Ms. Smith, defense counsel challenged Mr. Bruins for cause because of his views about the death penalty. (RT 567-568.)

Defense counsel argued that there was no reasonable possibility that Mr. Bruins would select life without possibility of parole under the circumstances of the present case – a victim who did not resist, was stabbed repeatedly, and killed "for absolutely no reason other than the [sic] for purpose of robbery. [¶] And Mr. Blasman [sic] had made it clear that that is the type of homicide that he would impose the death penalty." (RT 568.) [99]

After retrieving Mr. Bruins, questionnaire, the prosecutor argued that when defense counsel questioned the juror, he was

> "attempting to get a prejudgment from Mr. Bruins based on the hypothetical facts of the case, and not the law that applies to this case. [¶] He didn't ask questions in an abstract felony murder case, but 'assume you have a victim who doesn't resist, who is killed in cold blood, viciously in a robbery/murder,' et cetera. [¶] I don't think that's the appropriate method to determine whether or not a juror could be fair and objective under *Wainwright vs. Witt.* [¶] In any event, even those questions that were asked of Mr. Bruins, his responses were yes, they were pro-death, but they were not automatic death. [¶] He was not auto-death even after given the scenarios of vicious cold-blooded killing where a victim doesn't resist. [¶] And I don't know if my facts may end up eliciting whether there was resistance from my victim or not. [¶] But given that, I think he asked a very pointed question, and he said, 'No. I would consider all the factors. I would be leaning towards death.' [¶] He did not say, 'I would automatically impose it.' [¶] In other words, -- direct the court's attention to No. 54 and

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[99] Later, the court and counsel agreed that defense counsel was referring to Mr. Bruins and not Mr. Blasman whom defense counsel later excused by exercising a peremptory challenge against him. (RT 568-569, 573.)

> 55 question in penalty phase determination, where he indicated that he was neither auto-death or auto-life. [¶] And he further indicated throughout the questionnaire that he would be able to consider the background and other circumstances of the situation before making a decision." (RT 569-571.)

The court added that it observed the juror's demeanor, he appeared to be very thoughtful and credible, he did not like the use of the word "'automatically,'" and he would not say that he would "automatically" put someone to death, though he would strongly lean in that direction." (RT 571.) ***100*** Because the juror would not say that he would "automatically" put someone to death, the court concluded there was an "insufficient [basis] to find that his ability to be a fair juror would be substantially impaired." (RT 571.) Though the juror was certainly a "strong pro-deather," the court believed he would look at the circumstances, though his feelings [pro-death stand] "are very strong." (RT 571.) The court sustained the prosecutor's challenge against Ms. Smith, but denied the defense challenge against Mr. Bruins. (RT 571.)

2. THE TRIAL COURT'S ERROR DENYING THE DEFENSE CHALLENGE FOR CAUSE AGAINST PROSPECTIVE ALTERNATE JUROR BRUINS REQUIRES THE REVERSAL OF MR. VIRGIL'S PENALTY JUDGMENT

After defense counsel's challenge for cause against Mr. Bruins was denied, counsel exercised a peremptory challenge against him and eventually exhausted all four peremptory challenges allowed during the selection of alternate jurors. (RT 567-568, 572, 573, 588.) Counsel, however, did not express his overall dissatisfaction with the jury. As discussed below, this Court has not consistently applied the requirement

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100 Mr. Bruins, credibility and sincerity is not at issue because his overall responses, including those in his questionnaire, establish beyond a doubt that he would always vote for death under the reported circumstances of Ms. Lao's homicide.

that counsel express overall dissatisfaction with the jury before the erroneous denial of a challenge for cause may be considered on appeal. Accordingly, the application of this requirement to Mr. Virgil and barring appellate review on that basis would violate his right to due process under the Fifth and Fourteenth Amendments because of the inconsistent application of state law. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

In a footnote, the Court in *People v. Crittenden, supra,* 9 Cal.4th at p. 121, fn. 9, recognized that the defendant had exercised peremptory challenges against the jurors at issue and exhausted his peremptory challenges, but failed to express any dissatisfaction with the jury as sworn. Though the Court recognized that defendant's failure to express dissatisfaction with the jury prevented him from complaining about the jury's composition on appeal, the Court indicated that it would reach the merits because of "the consequent difficulty in identifying this issue as ineffective assistance of counsel." (*Ibid.*)

In *People v. Boyette* (2002) 29 Cal.4th 381, 415-416, the People argued that defendant failed to preserve a claim on appeal concerning the wrongful discharge of Juror K.C. for cause because counsel did not express dissatisfaction with the composition of the jury as seated. This Court reached the merits in *Boyette* because it found that the law on this point was unsettled at the time of the defendant's trial in 1993.

Similarly, in *People v. Weaver, supra,* 26 Cal.4th at pp. 910-911, the Court reached the merits of defendant's claim because "language in past cases suggested that counsel's expression of dissatisfaction with the jury was not always a necessary prerequisite to challenging on appeal a trial

court's decision denying a challenge for cause (Citation.)." [101]

In July 1995, some five to six months after the jury was selected in Mr. Virgil's case, this Court still was not applying the statement of dissatisfaction requirement consistently. In *People v. Hawkins* (1995) 10 Cal.4th 920, 939, disapproved on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 110, the Court cited *Crittenden* and recognized that defendant did not communicate to the trial court any dissatisfaction with the jury selected. Nevertheless, the Court reached the merits by finding that "defendant's right to an impartial jury was not violated, and any error by the trial court in denying defendant's motion to excuse [the jurors at issue] . . . was not prejudicial." (*Ibid.*) Accordingly, Mr. Virgil's federal right to due process would be violated by applying a procedural rule against him to bar appellate review when that rule was not being applied consistently at the time of his trial. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

As demonstrated below, the trial court's error in denying the defense challenge for cause against Mr. Bruins deprived Mr. Virgil of his federal and state constitutional rights to due process, an impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts and requires the reversal of the penalty judgment. (*Wainwright v. Witt, supra,* 469 U.S. at p. 424; *People v. Crittenden, supra,* 9 Cal.4th at pp. 121-122.)

In *People v. Cash, supra,* 28 Cal.4th at p. 721, this Court considered whether the trial court erred by prohibiting defense counsel from asking during voir dire whether prospective jurors would automatically vote for the death penalty, if the defendant had previously committed another

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[101] The trial in *Weaver* was conducted well before Mr. Virgil's trial and the decision in *Crittenden.* (*People v. Weaver, supra,* 26 Cal.4th at p. 898.)

murder. Citing its earlier decision in *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005, the *Cash* court held that

> "'[a] prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is therefore subject to challenge for cause, whether or not the circumstance that would be determinative for that juror has been alleged in the charging document.' (Citations.)"

According to the court in *Cash*, the decision in *Kirkpatrick*

> "affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence. (Citation.)"

(*People v. Cash, supra* 28 Cal.4th at pp. 720-721.)

Because the defendant's guilt of a prior murder[s]

> "was a general fact or circumstance that was present in the case and that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances, the defense should have been permitted to probe the prospective jurors' attitudes as to that fact or circumstance. In prohibiting voir dire on prior murder, a fact likely to be of great significance to prospective jurors, the trial court erred."

(*Id.*, at p. 721.)

Mr. Bruins was a strong proponent of the death penalty and stated clearly in his questionnaire and during voir dire that a person who committed a cold-blooded, premeditated murder during a robbery where there was evidence that the victim did not resist "forfeited any [right to] leniency [right to live]." (RT 510; CT Supp. I 1865.) [102] Though the juror

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[102] Mr. Bruins also believed that the "death penalty" was more severe punishment than life without possibility of parole and the "[c]ircumstances [of the crime] should be what determines the penalty." (CT Supp. I 1865.)

adamantly maintained that he would not "automatic[ally]" vote for the death penalty, it appears that the juror was troubled only by the mere use of that word. Instead, his responses indicate that he would always choose the death penalty under the facts in Mr. Virgil's case that likely would be of great significance to him. (*People v. Cash, supra,* 28 Cal.4th at p. 721.)

For that reason, the trial court erred by preventing defense counsel from questioning Mr. Bruins fully and in a way that would have confirmed his clear auto-death response to the "fact[s] or circumstance[s] [anticipated to be] shown by the trial evidence." (RT 511, 513, 626-627, 646, 656-657.) (*People v. Cash, supra,* 28 Cal.4th at pp. 720-721; see also *United States v. Blount* (6th Cir. 1973) 479 F.2d 650, 651, the trial court's ruling prevented counsel from establishing what "folk wisdom teaches that where there is smoke there must be fire.") Because there is not substantial evidence to support the trial court's ruling denying the defense challenge for cause against Mr. Bruins, especially given the trial court's unreasonable limitation on defense counsel's questioning, the inquiry must extend to prejudice.

The trial court's denial of the challenge for cause and the restriction on voir dire were prejudicial because defense counsel had to exercise a peremptory challenge against Mr. Bruins and thereafter exhausted all of the peremptory challenges available to the defense during the selection of alternate jurors [Mr. Briones, RT 572; Mr. Bruins, RT 572; Mr. Blasman, RT 573; and Ms. Saylor, RT 588]. (See *People v. Yeoman, supra,* 31 Cal.4th at p. 114.) Also, the effect of forcing defense counsel to exercise a peremptory challenge against Mr. Bruins also meant that he could not exercise a peremptory challenge against Tracey Saunders, whom he unsuccessfully challenged for cause because of her prior [and, as it turned out, future] contacts with Mr. Virgil at the Main Jail. (RT 577-585, 3205.)

[103] Further, defense counsel could not exercise peremptory challenges against prospective jurors Green and Wiener, both of whom became alternate jurors [Green was later seated as a regular juror] and had backgrounds strongly suggesting they would not be good jurors for the defense. (RT 551-553, 589-593.) [104] Accordingly, the limitation on voir dire and the denial of the challenge for cause against Mr. Bruins were prejudicial and require the reversal of Mr. Virgil's penalty judgment because the court's rulings deprived him of his rights to a fair trial, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *Davis v. Georgia* (1976) 429 U.S. 122, 123; *Gray v. Mississippi* (1987) 481 U.S. 648, 659-667 (opn. of the court); *id.*, at pp. 667-668 (plur. opn.); *id.*, at p. 672 (conc. opn. of Powell, J.); *People v. Stewart* (2004) 33 Cal.4th 425, 432; *People v. Crittenden, supra,* 9 Cal.4th at pp. 121-122.)

3. THE DENIAL OF MR. VIRGIL'S CHALLENGE FOR CAUSE AGAINST TRACEY SAUNDERS

Juror Tracey Saunders worked as a registered nurse for the Sheriff's Department at the Los Angeles County Men's Central Jail and treated inmates in custody. (RT 577-578; CT Supp. I 2234, 2235, 2236.) She said during the court's voir dire that she had no problem with serving on a jury, she had no close friends who worked at the jail, and she could fairly and objectively evaluate the credibility of police officers. (RT 578-579; CT

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[103] Mr. Virgil's claim regarding the denial of his challenge for cause against Juror Saunders is presented below.

[104] As argued above in Argument I, both of these jurors were questioned at the sidebar and out of Mr. Virgil's presence.

Supp. I 2267.) *__105__*

Saunders had been a victim of two crimes [purse snatching and carjacking at gunpoint], she was not injured in either incident, no arrests were made in either case, and she denied those incidents would affect her ability to serve as a juror in Mr. Virgil's case. (RT 579-580.) She had relatives who attended services at St. Francis Cabrini Church years before, but she had never been to the church and could avoid the areas identified as crime scenes in the juror questionnaire. (RT 580-581; CT Supp. I 2252.) She favored the death penalty, believed it was used "too seldom," and she agreed to consider all of the evidence for and against the death penalty and the court's instructions in deciding penalty. (RT 581-582; CT Supp. I 2258, 2259, 2260.) In her questionnaire, Saunders provided that the defendant's background and character, and any sympathy for him should <u>not</u> be a factor in deciding penalty (CT Supp. I 2265-2266.) During voir dire, however, Saunders explained that she did not know sympathy could be considered and she would follow the court's instruction regarding the evidence to be considered in deciding penalty. (RT 582.)

After the trial court completed its voir dire of Saunders, the court returned to peremptory challenges and said the next one was with the defense. (RT 582.) At the sidebar, defense counsel expressed his concerns about Saunders serving on the jury because she treated Mr. Virgil at the Jail, once by giving him medication and once after he was stabbed by another inmate while handcuffed and shackled. (RT 583.) Mr. Virgil had also seen Saunders talking [flirting] with deputies and believed that she

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__105__ In her questionnaire, Saunders disclosed that her "best friend" at work was "Caucasian." (CT Supp. I 2243.)

"date[d]" deputies during her time off. (RT 583.) [106] Because of the juror's past contacts with Mr. Virgil, her ongoing employment and potential future contacts with Mr. Virgil, and her likely personal relationship with deputies, defense counsel challenged Saunders for cause. (RT 583.)

The prosecutor responded that the juror should be questioned generally about whether she recognized Mr. Virgil and he felt that a potential juror's prior, "minor" "contact with a client" was not sufficient to support a challenge for cause. (RT 583-584.) The court agreed to question Saunders about whether she recognized Mr. Virgil and discounted defense counsel's concerns about her future contact with Mr. Virgil during trial by concluding "she wouldn't have any contact with him now because she obviously wouldn't be going to work; she would be coming here." (Emphasis added.) (RT 584.) After the juror failed to recognize anyone [Mr. Virgil] at counsel table, the court ruled at the sidebar that "it's awfully difficult for me to say that she couldn't be an objective juror based on the concerns you have. [¶] So I will deny the challenge." (RT 584-585.) The proceedings resumed in open court and defense counsel "[a]ccept[ed] the alternates." (RT 585.) [107]

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[106] Though Saunders, questionnaire reflects that she had a four-year old daughter, was single, and lived with her "significant other," the nature of her conduct and association with deputies at work was a great source of concern for Mr. Virgil and defense counsel. (CT Supp. I 2235, 2236.)

[107] Though defense counsel "accept[ed]" the alternate jurors then, he exercised a peremptory challenge against the next prospective alternate juror to be questioned. (RT 585-588.) Accordingly, he did not waive the issue by passing consecutively. (See Code Civ. Proc., §231, subd. (e).)

4. THE TRIAL COURT'S ERROR IN DENYING THE DEFENSE CHALLENGE FOR CAUSE AGAINST JUROR SAUNDERS REQUIRES THE REVERSAL OF MR. VIRGIL'S PENALTY JUDGMENT

Saunders became one of the 12 regular jurors during the guilt phase, after Juror Olivia Duarte was discharged from the jury at her request. (RT 1892-1893.) Contrary to the court's expectation that Saunders could serve as a juror because she would not have contact with Mr. Virgil at work during trial, she advised the court on Monday, March 6, 1995, near the conclusion of the guilt phase, that she went to work on Friday [March 3, 1995] and saw Mr. Virgil at the jail. (RT 3205.) According to Saunders, she made eye contact with Mr. Virgil as she walked past him, but no words were exchanged. (RT 3205-3206.) During defense counsel's questioning, Saunders said she knew Mr. Virgil was in custody and the nature of his charges; she did not recall ever talking with or treating him; she denied ever asking deputies to obtain information about him; and she denied that her contact with Mr. Virgil would have any effect on her ability to serve as a juror. (RT 3206-3207.) The court concluded the inquiry by asking Saunders not to share her knowledge about Mr. Virgil with her fellow jurors. (RT 3208.)

In *People v. Compton* (1971) 6 Cal.3d 55, 60, this Court held that "the trial court has at most a limited discretion to determine that the facts show an inability to perform the functions of a juror, and that inability must appear in the record as a demonstrable reality." (*Id.* at p. 60.) In *Compton* an alternate juror told his barber in casual conversation that "it would be hard to keep an open mind on a case such as this . . . ." (*Id.* at p. 59.) The trial court never questioned the alternate juror to clarify his comments, but felt it had to grant a mistrial because there were no other alternates. (*Id.* at pp. 60-61.) This Court reversed because the court was not required to declare a mistrial and the record was so ambiguous that it did not establish

the juror was "unable to perform his duty" within the meaning of Penal Code section 1089.

In *People v. Hacker* (1990) 219 Cal.App.3d 1238, 1242-1245, a juror advised the court during the prosecution's case-in-chief that she saw the defendant at her church the previous weekend and said she was troubled by serving as a juror because of the defendant's association with her church. The Court of Appeal found that the trial court correctly removed the juror for cause because she could not assure the court that she could decide the case without reference to her out-of-court experience with the defendant.

In this case, the court believed that defense counsel's concerns about ongoing contact between Saunders and Mr. Virgil were unfounded, in significant part because she would not see him at work during the pendency of the trial. Obviously, the court was wrong because Saunders not only saw Mr. Virgil at the jail, but noted then that he was an inmate with special handling and custody status, knowledge that would be taboo for any and all jurors under the circumstances. (RT 3205.)

Given Saunders, knowledge of Mr. Virgil's elevated, special custody status, the trial court forced Mr. Virgil "to run the risk of a tainted decision where there is any reasonable probability that the decision-maker will be less-than-impartial." (*People v. Hacker, supra,* 219 Cal.App.3d at p. 1245.) Under the circumstances, the trial court erred by denying the challenge for cause against Saunders because of the unacceptable risk that one of the jurors who actually served on Mr. Virgil's was less-than-impartial, based on her exposure to information suggesting that Mr. Virgil

was dangerous at the time of trial and, inferentially, in the future. [108] Accordingly, the inquiry must turn to prejudice.

Defense counsel questioned Sanders about whether she thought her out-of-court observation of Mr. Virgil would influence her jury service. (RT 3207.) The juror denied it would. (RT 3207-3208.) Her denial, however, does not resolve the matter. In *People v. LeDoux* (1909) 155 Cal. 535, 543, this Court recognized that when a juror learns facts though his/her investigation, the juror is absolutely disqualified from serving as a juror, regardless of his/her protestations to the contrary that he/she can serve as a fair and impartial juror. Though the juror denied that she affirmatively investigated Mr. Virgil's background (RT 3207), the juror learned of Mr. Virgil's elevated special custody status by going to work, something contrary to the court's expectations and rationale for denying Mr. Virgil's challenge for cause. Under the circumstances, it must be concluded that Saunders, conduct of going to work and learning about Mr. Virgil's

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[108] Based on her observation of Mr. Virgil at the jail, the juror learned that he was in the "escort module," a status that she associated with special handling requirements. (RT 3205.) The juror was correct because Mr. Virgil was a "K-10" inmate at the Men's Jail, a status that identified him as an inmate subject to "special handling" for various reasons, including the possibility that he was a danger to others. (RT 3446.) Because the juror knew Mr. Virgil had special status and likely all the reasons why an inmate would have such status, Ms. Saunders was exposed to out-of-court information that was akin to evidence of future dangerousness. Under the circumstances, the inference of future dangerousness negatively affected Mr. Virgil's rights to a fair trial, the assistance of counsel, and a reliable penalty determination because he had no had no viable opportunity to challenge the highly prejudicial information received out-of-court. (See *Simmons v. South Carolina* (1994) 512 U.S. 154, 164; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4, 5, fn. 1; *People v. Boyette, supra,* 29 Cal.4th at p. 446; *People v. Ervin* (2000) 22 Cal.4th 48, 99.) Further, Saunders would not have known that Mr. Virgil was in special handling after he was stabbed by another inmate while handcuffed and thus unable to protect himself. (RT 583.)

elevated custody status and inferentially that he was potentially dangerous to others is akin to learning prohibited facts through investigation. Because Saunders, conduct and knowledge rendered her disqualification to serve as a juror absolute and her statement that she could serve fairly and impartially utterly without effect, the trial court's denial of the challenge for cause against this juror violated Mr. Virgil's right to a fair trial, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts and requires the reversal of Mr. Virgil's penalty judgment. (*Simmons v. South Carolina, supra*, 512 U.S. at p. 164; *People v. LeDoux, supra*, 155 Cal. at p. 543; *People v. Yeoman, supra,* 31 Cal.4th at p. 114; *People v. Crittenden, supra,* 9 Cal.4th at pp. 121-122..)

5. THE GRANTING OF THE PROSECUTOR'S CHALLENGE FOR CAUSE AGAINST PROSPECTIVE ALTERNATE JUROR JANICE SMITH

After the 12 jurors were selected and sworn a second time, Janice Smith was examined by the court. (RT 535, 554; CT Supp. I 2090, 2092.) One of Smith's family member used crack cocaine, her sister worked with an organization that helped people beat their drug addictions, and two of her brothers and a cousin had been shot [her cousin was killed]. (RT 554-555; CT Supp. I 2093, 2103.) ***109*** Smith believed that the person who killed her cousin got off too lightly by being treated as a juvenile, but she was satisfied with how the police handled the case. (RT 555-556; CT Supp. I 2103.) Like her sister who worked to better the community, Smith

109 One of her brothers was falsely accused of committing a crime and had a bad experience with a police officer, but that would not affect her ability to serve as a juror in Mr. Virgil's case. (CT Supp. I 2105.)

attended a women's group at her church to develop ways to help others in need. (CT Supp. I 2093, 2098.)

Smith did not believe that drug addicts should be held strictly accountable for their conduct because of drugs, effects [she thought cocaine might destroy brain cells], but believed generally that people should be held accountable for their actions. (CT Supp. I 2094.) She believed that she must know all the circumstances before deciding whether she could give a drug user a fair trial. (CT Supp. I 2094.) One of her cousins was sexually abused when young and the perpetrator [her cousin's stepfather] went to jail. (RT 2094.) One of her female cousins killed her husband and was convicted of manslaughter and sent to jail. (CT Supp. I 2104.) Smith believed that her cousin's "jail" commitment was proper because "if you did the crime you have to pay the price." (CT Supp. I 2105.)

She served as a juror twice before [burglary and a kidnapping/assault cases], each time the jury reached a verdict, and she could follow the law and the court's instructions. (CT Supp. I 2096, 2113.) She believed that "sympathy" for the defendant should not play a role in determining guilt because otherwise jurors could not be fair. (CT Supp. I 2107.) Crime was a not a serious problem in her neighborhood; she believed that crime has increased over the past 10 years; and though she did not believe any one group was responsible for the increase in crime, she felt that the use of illegal drugs and the "[l]ack of education about God" played a major role in the crime problem. (CT Supp. I 2099, 2100, 2101.)

When she was younger, she felt that the person who killed her cousin should die, but her beliefs changed over time and she no longer "believe[s]" in the death penalty. (RT 556; CT Supp. I 2114.) Now, she felt that no one had the right to say that another person should die, she felt that the death penalty was a bad idea, and "[i]n general . . . [she] could not make that decision [sentencing someone to death]." (RT 556-557.)

According to Smith, she could not think of a set of circumstances where she could actually vote to put someone to death, even if they were convicted of first degree murder and the murder was committed during the course of a robbery. (RT 557.)

Smith wrote in her questionnaire that while she felt "God is the Judge & jury of all, but if I had to put my beliefs aside I think I could impose the death penalty if I thought it was appropriate." (Emphasis added.) (CT Supp. I 2114.) According to Smith, she did write that in her questionnaire, but she reflected on her response since then and believed during voir dire that she could not sentence a person to death. (RT 557.) Notably, however, Smith wrote in her questionnaire that she would not vote automatically one way or the other on guilt or the truth of the special circumstance to make or avoid having to make a guilt determination and she would not automatically vote one way or the other on penalty. (CT Supp. I 2115-2116.)

Smith believed that the death penalty was the more severe punishment, strongly disagreed that cost should be a factor in deciding penalty, strongly agreed that the circumstances of the crime should decide punishment, disagreed somewhat that a person who kills intentionally should always get the death penalty, and the death penalty should not be automatic for a repeat violent offender. (CT Supp. I 2117-2118.) Smith could personally participate in the decision that resulted in the imposition of the death penalty and felt the death penalty should be reserved for the worst offenders, like multiple murderers. (CT Supp. I 2118.) She did not think a member of the victim's family should serve on the jury and she did not see herself as representing the victim's family on the jury. (CT Supp. I 2119.) She also believed that in an appropriate case, she had the moral right to decide whether someone should live or die by following the law. (CT Supp. I 2120.)

Smith strongly agreed that the decision about penalty should be based on the defendant's "total criminal history" and she did not have "an answer" to what factors would cause her to sentence a person to life without possibility of parole instead of death. (CT Supp. I 2121.) She would follow the court's instructions about sympathy for the defendant in deciding penalty, but she did not feel that a defendant's character, background or physical or emotional absences should be a factor in deciding penalty. (CT Supp. I 2122.) Smith would, however, consider all evidence and factors that the court instructed her to consider in deciding the appropriate penalty. (CT Supp. I 2122-2123.) Smith swore under penalty of perjury that she knew of no reason why she could not serve as a fair and impartial juror, including making a decision about a person's right to live. (CT Supp. I 2123-2124.)

After two other prospective alternate jurors were examined, the prosecutor challenged Smith for cause because "she clearly indicated that no matter what the circumstances, no matter how heinous the murder, she would be unable to impose the death penalty," thereby rendering her "substantially impaired" under "*Wainwright v. Witt.*" (RT 566-567.) Defense counsel replied that only the court questioned the juror, the defense was not allowed to attempt rehabilitation, and the court should allow defense counsel to question Smith before ruling on the prosecution's challenge. (RT 567.) In the alternative, defense counsel objected to her exclusion on the basis of her responses. (RT 567.)

The court replied that its "questioning was fairly pointed and fairly clear" and so much so that the juror said in court "'I know what I put on my questionnaire. And I know at the time, I said "yes, I could impose the death penalty." But now that I've had time to think about it, I just couldn't.' [¶] And I think her responses were very clear." (RT 567.)

6. THE TRIAL COURT'S ERROR IN EXCUSING PROSPECTIVE ALTERNATE JUROR JANICE SMITH FOR CAUSE REQUIRES REVERSAL OF MR. VIRGIL'S PENALTY JUDGMENT

In *People v. Mincey* (1992) 2 Cal.4th 408, 456-457, this Court held that if a juror gives equivocal or conflicting answers, the trial court's determination of whether the juror is excusable under *Witt* because of his/her views regarding the death penalty is binding on the reviewing court. In *Morgan v. Illinois* (1992) 504 U.S. 719, 721, the court considered the question of "whether, during voir dire for a capital offense, a state trial court may, consistent with the Due Process Clause of the Fourteenth Amendment, refuse inquiry into whether a potential juror would automatically impose the death penalty upon conviction of the defendant."

The *Morgan* court recognized that the adequacy of voir dire is not easily determined on appeal, but the high court has not hesitated in capital cases to ensure that the questioning during voir dire was adequate "to effectuate constitutional protections" associated with deciding whether death is the appropriate punishment. (*Id.,* at p. 730.) Pursuant to that purpose, the Supreme Court recognized that it violated the requirements of a fair and impartial jury to "exclud[e] veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected. (Citations.)" (*Id.,* at p. 732.) Instead, the State may only challenge those "'veniremen whose views would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths.' (Citations.)" (*Id.,* at pp. 732-733.) Because defense counsel was not allowed to question Smith, the inquiry must turn to whether the trial court's voir dire was constitutionally adequate under *Morgan.*

Despite the trial court's belief in the adequacy of its questioning, the

record indicates that the court did not ask the question that mattered the most and the one deemed most determinative in the court's ruling denying the defense challenge for cause against Mr. Bruins [110] -- that is, whether or not Smith could set aside her personal views about capital punishment and decide the issue of penalty, solely on the basis of the court's instructions and the evidence presented at trial. (See *People v. Heard, supra.* 31 Cal.4th at p. 958, citing *Wainwright v. Witt, supra,* 469 U.S. at p. 424; see also *Morgan v. Illinois, supra,* 504 U.S. at p. 735, the inquiry should be focused on whether or not the juror can follow the law; *Lockhart v. McCree* (1986) 476 U.S. 162, 176,

> "[i]t is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.")

Because the court failed to conduct a sufficient inquiry about whether the juror could set aside her personal views and decide the case on the basis of the law and evidence, the trial court's ruling sustaining the

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110 In considering the defense challenge for cause against Mr. Bruins, the court expressed its belief that Mr. Bruins was able to serve as a fair and impartial juror because he was asked and satisfactorily answered questions that established he could set aside his strong views favoring the death penalty by following the law and deciding the case on the basis of the evidence. (See RT 511-514, 569-571)

prosecution's challenge for cause is not supported by substantial evidence. _111_

Further, the trial court's rigid and erroneous enforcement of time limitations for voir dire (see *People v. Hernandez* (1979) 94 Cal.App.3d 715, 719, citing *People v. Tyren* (1919) 179 Cal. 575, 577) and its refusal to allow defense counsel to question Smith on that basis was an abuse of discretion because her "'disqualification [for cause was not] unmistakably clear.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 355, citing *People v. Bittaker* (1989) 48 Cal.3d 1046, 1085, citing *People v. Nye* (1969) 71 Cal.2d 356, 364). That is because Smith's questionnaire provided a substantial basis to believe that despite her significant objection to the death penalty and reluctance to impose it, she unmistakably declared under penalty of perjury that she would follow the law and decide the case on the basis of the law and evidence and could impose a sentence of death if she had to put aside her religious beliefs. (CT Supp. I 2114-2124.) Because it cannot be said on the basis of the total record that defense counsel's questioning would have been an exercise in futility or had no likelihood of success in rehabilitating Smith (see *United States v. Flores* (5th Cir. 1995) 63 F.3d 1342, 1354; *Nichols v. Scott* (5th Cir. 1995) 69 F.3d 1255, 1287, fn. 67.), the court's errors preventing defense counsel from questioning Smith and then granting the prosecution's challenge for cause against her are

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_111_ The present case is unlike *People v. Cunningham* (2001) 25 Cal.4th 926, 981, where this Court held that prospective juror Lori D. was properly excused for cause after she indicated that she would not vote for death [thereby following the law as prescribed by Pen. Code § 190.3] even if she found that the aggravating circumstances outweighed the mitigating circumstances. Instead, the trial court here merely questioned Ms. Smith generally about her views and though she did say that she doubted whether she could sentence someone to death, she never said that her strongly held views would prevent her from deciding the case on the basis of the evidence and the applicable law. (RT 556-557.)

manifest. Accordingly, Mr. Virgil's penalty judgment must be reversed because of the violations of his rights to a fair trial, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts. (*People v. Heard, supra,* 31 Cal.4th at p. 966, *People v. Ashmus* (1991) 54 Cal.3d 932, 962, *Gray v. Mississippi* (1987) 481 U.S. 648, 666-668, (opn. of the court); *id.* at pp. 669-672, (conc. opn. by Powell, J.), and *Davis v. Georgia* (1976) 429 U.S. 122, 123.)

7. THE TRIAL COURT'S VOIR DIRE OF PROSPECTIVE ALTERNATE JUROR DUVALL GREEN AND ITS REFUSAL TO ALLOW DEFENSE COUNSEL TO QUESTION HIM

This Court recently held that trial courts have substantial discretion under Code of Civil Procedure section 223 concerning how to conduct voir dire and jury selection. (See *People v. San Nicolas* (2004) 34 Cal.4th 614, 633.) A trial court abuses its discretion concerning the conduct of jury voir dire when its rulings have the effect of limiting a capital defendant's opportunity to establish that jurors had hostility or partiality against him. (See *Mu'Min v. Virginia* (1991) 500 U.S. 415, 425-426; *Murphy v. Florida* (1975) 421 U.S. 794, 800-803.) This is especially so when the trial court's limitation is based on the setting of arbitrary time limits. (*People v. Hernandez,* 94 Cal.App.3d at p. 719, the fixing of arbitrary time limits is dangerous and can lead to reversal on appeal.) As will be discussed below, the trial court abused its discretion by preventing defense counsel from having an opportunity to question prospective alternate juror Duvall Green and thereby establish the likelihood that he would not be a fair and

impartial juror. [112]

In his questionnaire, Green wrote that he believed the most important lesson he could teach his children was "[r]esponsibility." (CT Supp. I 2018-2020.) Green was raised by a single mother and never had anyone close to him suffer from a problem with alcohol or drug abuse. (CT Supp. I 2020, 2021.) [113] He wrote that people use drugs to avoid facing their problems and the more a person uses drugs, the more he wants and the more problems he causes. (CT Supp. I 2021.) Green believed that drug users, unless the drugs are prescribed by a physician, should be held strictly accountable for their actions. (CT Supp. I 2022.) Green also believed that drugs do not always cause people to do "bad things" and he could give Mr. Virgil a fair trial, even if he concluded that Mr. Virgil was a drug user. (CT Supp. I 2022.)

Green wrote that he once served as the jury foreperson in a civil case and the jury reached a verdict. (CT Supp. I 2024.) He believed that illegal drugs were responsible for most crime [60 percent responsible], though he did not see any one group being responsible for the crime rate. (CT Supp. I 2027, 2028.) Green also believed that crimes were caused by the lack of jobs, the use of illegal drugs, and people being simply lazy. (CT Supp. I 2029.) He did not believe that murder was committed for a particular reason, though he also felt it was because of "Inorence [sic]." (CT Supp. I 2030.) He was a victim of two felonies, burglary and robbery [at knifepoint], but never called the police ["just another day in the

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[112] Mr. Green became a regular juror during the jury's guilt phase deliberations when he was selected at random to replace Juror Elvin Clay who was excused upon his request. (RT 3390.)

[113] During voir dire, Green said that his mother abandoned him in his youth and he lived with his abusive alcoholic father for about three years. (RT 551.)

neighborhood"] and he once witnessed the theft of a "handbag." (RT 548, 549-550; CT Supp. I 2031.) Green said that he could be a fair juror even though Mr. Virgil was alleged to have used a knife during the commission of the charged offenses. (RT 548-549.)

Green did not believe that all eyewitness, identifications were accurate and he would require more "evendence [sic]" before he could find an identification was accurate beyond a reasonable doubt. (CT Supp. I 2032.) He had been arrested for "joyriding" and DUI [driving under the influence] when he was 12-14 years old, was fined and sent for rehabilitation. (RT 552-553; CT Supp. I 2032.) He believed he was treated fairly for those offenses and received "just punishment," especially because he could have hurt someone while driving under the influence. (RT 553; CT Supp. I 2033.) Though he had a negative experience with a police officer, Green did not feel that would impact his ability to be a fair and impartial juror. (CT Supp. I 2033.)

Green believed that jurors "must always follow the Judge's instruction" and race should not play a part in the criminal justice system because "Right is right – Wrong is wrong." (CT Supp. I 2035.) He believed that he could weigh the charges separately and decide guilt on the basis of the evidence. (CT Supp. I 2041.)

Green believed in the death penalty "to deter people from killing each other," "but it doesn't seem to work. So, I think we need it," and that the purpose of the death penalty was "justest [sic] for the crime committed," though he did not believe in an "eye for an eye" as justification for the penalty. (RT 550; CT Supp. I 2042, 2044.) He did not have enough information about the death penalty to say if was used "too seldom" or "too often" and he would not always vote way or the other to make or avoid making a penalty decision. (CT Supp. I 2043-2044.) Despite those feelings, Green felt that life without possibility of parole was

a more severe punishment than the death penalty. (CT Supp. I 2045, 2049.)

Green wrote that cost should not be a fact in deciding penalty, he strongly agreed that punishment should fit the crime, and agreed somewhat that an intentional killer should always get the death penalty [the only exception should be homicides committed in self-defense]. (CT Supp. I 2045.) He believed that a person convicted of murder who was previously convicted of a violent felony should always get the penalty because "How many chances should he get?" (CT Supp. I 2046.) He believed the death penalty can be imposed for just one murder; the death penalty should be given to the "'worst of the worst'" offenders because some people cannot be helped; and he could sentence a person to death "if the edvidence [sic] is clear." (CT Supp. I 2046.)

Green wrote that he would decide the case on the basis of the evidence, he strongly disagreed that race should be a factor in deciding penalty, and he disagreed somewhat that a person should be swiftly executed because the "sercumstanes [sic] may not call for the death penalty." (CT Supp. I 2047-2048.) He agreed somewhat that he should know as much as possible about the defendant's background and circumstances before deciding punishment because "their [sic] might be something mental wrong" and he indicated that a jury of "12 people, not 1" person had the right to make a moral decision about whether a person should live or die. (RT 550; CT Supp. I 2048.) [114]

Green agreed somewhat that a defendant's criminal history should be a factor in deciding whether to impose the death penalty "if their [sic] is a patter [sic] of violent crimes." (CT Supp. I 2049.) According to Green,

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[114] After clarification, Mr. Green said he understood that each juror was required to make his/her own penalty decision. (RT 550.)

childhood experiences affect people as adults because bad habits "stay with you, but he did not believe that sympathy for a defendant should be sufficient to warrant a sentence of life without possibility of parole ["you can feel bad for someone a [sic] still serve justice"]. (CT Supp. I 2049.) Despite that belief, he wrote that he could consider sympathy for the defendant if instructed to do so, but not his character or background in deciding penalty [though he also said such evidence should be considered]. (CT Supp. I 2050.)

Green believed that "only the evidents [sic]" should be considered, he agreed to consider all factors he was instructed to consider in deciding penalty, and he could reasonably consider and impose either penalty option. (RT 550-551; CT Supp. I 2050-2051.) Finally, Green agreed under penalty of perjury that he knew of no reason why he could not be a fair juror, he could sit in judgment of another person, and he would have no difficulty making a decision about whether someone should live or die. (CT Supp. I 2051-2052.)

The trial court conducted the entire voir dire with Juror Green because counsel were out of time. (RT 548-553.) Green asked to approach the sidebar during voir dire and disclosed that he was abused by his father who beat his mother; his mother abandoned him and his father; and he lived with his father for about three years [his father would leave him with other people because he was an alcoholic]. (RT 551.) Later in life, Mr. Green's father said he did the best he could and Mr. Green felt

> "it's no big deal. I'm here. I work every day. So it's no big deal. [¶] But I don't know if it came over. I never had any psychological counseling. So I guess I'm just a regular kind of guy, you know." (RT 551.)

The trial court responded by asking if evidence of abuse was introduced during the trial, could Green weigh that evidence "objectively?" (RT 551-552.) Green replied "I think so, because I never think about it. It

doesn't bother me." (RT 552.) The court asked if Green felt that someone could overcome such abuse and "still make the right choices in life." (RT 552.) Mr. Green replied "of course, they can." (RT 552.) Continuing, the court asked if he could consider evidence of abuse, even if he believed that the person made wrong choices in life? (RT 552.) Green answered

> "But it would be their choice. It's not like they're still being abused. To me, it's not that deeply rooted, seeded. That's just my personal opinion." (RT 552.)

Defense counsel asked to question Green, but the court refused by saying "[y]ou are both out of time. I'm going to cut it off." (RT 553.) [115] Before he returned to his seat in the jury box, Green added "[t]oo late. I'm gone." (RT 553.)

After directing Mr. Green to resume his seat among the prospective alternate jurors, the court resumed the process of selecting the alternate jurors. After the prosecutor and counsel exercised challenges for cause against Ms. Smith [prosecution - granted], Mr. Bruins [defense –denied] and Saunders [defense - denied] and peremptory challenges against Mr. Briones [defense], Mr. Bruins [defense], Mr. Blasman [defense], Ms. Crawford [prosecution], Mr. Gilstrap [prosecution], Mr. Havis [prosecution], and Ms. Saylor [defense], the four alternates were sworn. (RT 553-594.)

8. THE TRIAL COURT'S REFUSAL TO ALLOW DEFENSE COUNSEL TO QUESTION JUROR GREEN WAS AN ABUSE OF DISCRETION AND REQUIRES THE REVERSAL OF MR. VIRGIL PENALTY JUDGMENT

Juror Green disclosed a significant amount of information in his

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[115] Despite enforcing time limitations as to the questioning of Juror Green, the court allowed defense counsel to question prospective alternate juror Marguerite Wiener about whether the man who robbed her was "black." (RT 593.)

questionnaire and during voir dire, an important part of which was out of Mr. Virgil's presence, that was highly relevant to whether he could be a sufficiently fair and impartial juror. In this regard, he discussed the importance of personal responsibility (CT Supp. I 2019); he was raised by a single mother who abandoned him and he experienced violence in his home at the hand of his alcoholic father; he believed that people who used drugs were attempting to avoid responsibility in their lives; a person's abusive background could be considered in deciding penalty, but a person should be held strictly accountable for his actions; he was victim of robbery at knifepoint when he lived in a high crime area; he believed his punishment for committing crimes was just and he could have hurt someone while driving under the influence; the State needed the death penalty to deter crime and render justice; the punishment should fit the crime and an intentional killer should always get the death penalty unless the killing was in self-defense; a person who commits a prior violent crime and kills should always get the death penalty because he had enough chances in life; some people cannot be helped and deserve the death penalty; and a person's childhood experiences stay with and affect a person as an adult, but sympathy should not stand in the way of justice. Though Juror Green did indicate in many regards that he could consider all the evidence and be a fair juror, it remains that his responses during voir dire and in his questionnaire raised significant questions about his ability to be serve as a fair and impartial juror.

The trial court arbitrarily and capriciously enforced time limits on counsel's voir dire and that deprived the defense of an opportunity to establish that Green could not serve as a fair and impartial juror, something that was reasonably suggested by his responses during voir dire and in his questionnaire. By prohibiting defense counsel from questioning Green about his background and opinions in light of the facts expected to be

elicited during the penalty phase, the trial court prohibited voir dire on "fact[s] likely to be of great significance to" the juror. (*People v. Cash, supra,* 28 Cal.4th at p. 721.) In other words, the trial court committed the same kind of error found to be reversible in *Cash.* Because Green actually served as a regular juror, after defense counsel was unable to excuse him because he exhausted all of his peremptory challenges, the trial court's limitation on voir dire rendered Mr. Virgil's trial fundamentally unfair and Mr. Virgil's penalty judgment must be reversed. (*Mu'Min v. Virginia, supra,* 500 U.S. at pp. 425-426; *Murphy v. Florida, supra,* 421 U.S. at pp. 800-803; *Aldridge v. United States* (1931) 283 U.S. 308, *Wainwright v. Witt, supra,* 469 U.S. at p. 424.)

III.

THE INTRODUCTION OF PEOPLE'S EXHIBIT NO. 14, FOUR PHOTOGRAPHS OF MS. LAO IN LIFE AND DEATH, AT THE GUILT PHASE VIOLATED MR. VIRGIL'S RIGHTS TO DUE PROCESS, AN IMPARTIAL JURY, AND A RELIABLE PENALTY DETERMINATION AND REQUIRES THE REVERSAL OF THE ENTIRE JUDGMENT FOR THE CRIMES AGAINST MS. LAO

A. STANDARD OF REVIEW AND APPLICABLE LAW

Trial courts have much greater discretion at the guilt phase to exclude photographic evidence as inflammatory or lacking in probative value because of the risk that the evidence might "produce a visceral response that unfairly tempts jurors to find the defendant guilty of the charged crimes." (*People v. Box* (2000) 23 Cal.4th 1153, 1200-1201.) Though trial courts have much greater discretion to exclude evidence at the guilt phase, the courts nevertheless retain their traditional discretion at both phases of a capital trial to exclude evidence "that is misleading, cumulative, or unduly inflammatory." (*Id.* at p. 1201; see also *People v. Staten* (2000)

24 Cal.4th 434, 462-464; *People v. Anderson* (2001) 25 Cal.4th 543, 591-592.)

> "Evidence is prejudicial when it uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citations.] (Citation.) [T]rial courts should be alert to how photographs may play on a jury's emotions, especially in a capital case, [and] we rely on our trial courts to exercise their discretion wisely, both to allow the state fairly to present its case as well as to ensure that an accused is provided with a fair trial by an impartial jury. (Citation.)" (*People v. Benavides* (2005) 35 Cal.4th 69, 96, italics omitted.)

A trial court's exercise of discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. (*People v. Heard, supra,* 31 Cal.4th at p. 976.)

B. PROSECUTION'S DISPLAY AND USE OF PEOPLE'S EXHIBIT NO. 14 AT THE GUILT PHASE

During the guilt phase of Mr. Virgil's trial, the prosecution marked for identification People's Exhibit No. 14, a series of photographs of Ms. Lao in life [two photographs on the left] and in death [two photographs on the right], and repeatedly questioned witnesses in the case about that exhibit. (RT 928-929, 938, 1047-1048, 1500, 1706-1709, 1863-1864, 2076, 2263, 2278, 2331, 2877.) When the prosecutor first displayed the exhibit, he covered two and a half of the four photographs in the exhibit.

(RT 928) *116*

The prosecutor first questioned Sgt. Tiller about whether he knew the employees at the Donut King and if he knew Ms. Lao. (RT 927-928.) Tiller replied that he did and the prosecutor asked whether he could identify the "young lady" depicted in People's Exhibit No. 14. (RT 928.) After Tiller identified Ms. Lao as the person wearing the a USC sweatshirt in the two photographs on the right side of exhibit, the prosecutor directed him to the partially covered photograph on the right side and Tiller replied that she looked "quite different" there and the prosecutor agreed by saying "[y]es." (RT 928-929.)

The prosecutor next turned to this exhibit while questioning Ms. Tomiyasu about the woman she saw at the Donut King who appeared and collapsed just after Tomiyasu saw the man at the cash register. (RT 1047.) The prosecutor asked if Ms. Tomiyasu saw the woman who collapsed in People's Exhibit No. 14 and she replied that she did and pointed to the partially covered photograph of Ms. Lao on the right side of the exhibit,

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116 The two photographs on the left side of People's Exhibit No. 14 depicted Ms. Lao in life smiling and wearing a University of Southern California ["USC"] sweatshirt; the photograph on the upper right side depicted a left, frontal view of the upper one-third portion of Ms. Lao's naked body on an autopsy table with an intubation tube in her mouth, a number of the [cleaned] wounds inflicted on her during the homicide, and a surgical incision in the middle of her chest; and, the photograph on the lower right side was a rear view of the upper one-third portion of Ms. Lao's naked body depicting a number of the [cleaned] wounds that had been circled and numbered by the pathologist during his in-court testimony. (RT 928, 3133-3134.) Because the lower right side photograph was of Ms. Lao's back and the upper right side photograph depicted her face and the front of her body, the prosecutor's reference to the exhibit when first introduced as showing two and a half photographs meant that the prosecutor had covered the lower right side photograph completely and had covered the upper right side photograph, just below Ms. Lao's face so her face could still be identified. (RT 928.)

again establishing that the prosecutor's purpose in showing the partially covered photograph was to focus the jury's attention on Ms. Lao in death. (RT 1047.) Ms. Tomiyasu then added that Ms. Lao was the person in the other photograph[s] wearing the USC sweatshirt. (RT 1048.)

During the prosecutor's examination of Gardena Police Officer Schmidt [the first officer on the scene], the prosecutor established that after the paramedics showed the officer Ms. Lao's injuries, he concluded that she would likely die from her injuries and advised his Sergeant of his belief. (RT 1498-1499.) Then, the prosecutor showed the officer People's Exhibit No. 14 and asked if he could identify the person in the partially concealed photograph on the right, once again focusing the jury's attention on Ms. Lao in death. (RT 1500.) The officer could and identified Ms. Lao's photograph in death as the victim in this case. (RT 1500.)

The exhibit remained partially covered until the prosecutor began questioning Ty Ngov, Ms. Lao's brother-in-law, about Ms. Lao's age. (RT 1706.) Anticipating that the prosecutor would show Mr. Ngov the exhibit depicting the partially covered photograph of Ms. Lao in death, defense counsel offered to stipulate to Mr. Ngov's identification of Ms. Lao. (RT 1706.) According to defense counsel, the exhibit did not have to be shown at that point and the trial court seemed to agree by asking the prosecutor if it was relevant for any other purpose. (RT 1706.) The prosecutor replied that there was some relevance to Mr. Ngov's identification and he refused to stipulate to her identification. (RT 1707.)

Defense counsel then asked for a bench conference where he objected to showing Mr. Ngov the photograph of Ms. Lao with a tube in her throat and said he had no objection to showing him only the photograph[s] of Ms. Lao in life. (RT 1707.) After the prosecutor said he only wanted to show Mr. Ngov the photograph[s] of Ms. Lao wearing the sweatshirt, defense counsel replied he did not object, but only if the partially covered

photograph of Ms. Lao in death was completely covered. (RT 1707.) The court agreed, declared a recess, and the prosecutor prepared the exhibit for Mr. Ngov's testimony. (RT 1707.)

The exhibit remained in that condition [no pictures of Ms. Lao in death] when the prosecutor showed Ms. Ngov, Ms. Lao's sister, People's Exhibit No. 14. (RT 1863-1864.) Ms. Ngov identified Ms. Lao in the two uncovered photographs as the person wearing the USC sweatshirt. (RT 1864.) Similarly, the exhibit remained in that same condition when the prosecutor showed it to Ms. Swobodzinski, the Gardena Police Department Evidence technician assigned to the case, who agreed that the color of the hair found in one of the knotted aprons at the donut shop was consistent with the hair color of the person depicted in People's Exhibit No. 14. (RT 2075-2076.)

During his direct examination of Dr. Chinwah, the pathologist who performed the autopsy on Ms. Lao, the prosecutor completely uncovered the exhibit and questioned the doctor extensively about the wounds on Ms. Lao's body. (RT 2263-2306.) During this questioning, the pathologist circled and numbered some of the wounds on the bottom right side photograph of Ms. Lao in death (RT 2277-2279) and testified about the surgical incision on Ms. Lao's chest depicted in the upper right side photograph (RT 2331-2332), but testified much more extensively about all 30 wounds on Ms. Lao's body and his identification/marking of those wounds on People's Exhibit No. 76, a diagram of a female human body. (RT 2263-2306.)

After the doctor's testimony, the prosecutor apparently re-covered the photographs of Ms. Lao in death. In this regard, the prosecutor directed Lavette Gilmore [an owner of the Girls Will Be Girls hair salon] to People's Exhibit No. 14 and commented for the record that the two photographs on the right had been covered. (RT 2877.) The prosecutor

then asked if she recognized the "lady" from the donut shop and Gilmore replied that she was the person wearing the USC sweatshirt. (RT 2877.)

When the prosecutor sought to admit the exhibit, defense counsel objected to the prosecutor's photographic display of Ms. Lao in life next to her naked body in death on a coroner's gurney with a tube in her throat. (RT 3133-3134.) According to defense counsel, the Los Angeles County District Attorney's Office had a history of using such exhibits to inflame juries against defendants so he objected to the admission of this exhibit as proffered. (RT 3133-3134.) Further, defense counsel argued that Dr. Chinwah spent over an hour detailing the wounds on Ms. Lao's body and marking People's Exhibit No. 76 and while exhibit No. 14 suggested the brutal nature of the crime, it was irrelevant to the matter at issue in the guilt phase – the identity of the person who killed Ms. Lao. (RT 3133-3134.) Specifically, defense counsel argued that the exhibit was unduly prejudicial, cumulative and intended "to play to the sympathy of the jury" and should not be admitted at the guilt phase. (RT 3134.) [117]

The prosecutor countered that the prosecution had a right to show the brutality of the crime and was allowed to introduce a photograph of the victim in life. (RT 3135.) The prosecutor also argued that the photographs of Ms. Lao in life tended to disclose something about her height and weight – one photograph showed her standing and the photographs established that she was mildly obese and that was relevant to whether aprons were tied around her body. (RT 3135.)

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[117] In other words, counsel argued that the trial court ought to exercise its discretion under Evidence Code section 352 and exclude the exhibit as more prejudicial than probative because it was being offered "to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]" (*People v. Benavides, supra,* 35 Cal.4th at p. 96 citing *People v. Hart* (1999) 20 Cal.4th 546, 616.)

The prosecutor's argument concerning the relevancy of the photographs of Ms. Lao in life was specious at best or intended to misled the court to the point of constituting misconduct. There were no reference points on the exhibit indicating Ms. Lao's height and there was no testimony about whether a 28-inch circumference correlated to any degree of obesity on her or any woman. (RT 3135.) Also, the prosecutor established that Ms. Lao was obese through testimony from Dr. Chinwah who established that she was 5'6" tall, weighed 176 pounds, and mildly obese. (RT 2301.) Further, the prosecutor's relevancy argument seriously misled the court because he later argued that the apron was used to bind Ms. Lao's hands or arms, not her body. (RT 3247.)

Continuing, the prosecutor argued that the photographs of Ms. Lao in death were relevant to premeditation and the brutality of the crime, they were relevant to show the wounds on Ms. Lao's arms were consistent with defensive wounds, [118] and the wounds on her back showed some wounds in detail [blunt edge and sharp edge of the knife wounds] and how she was stabbed in relation to other wounds (RT 3136.) Also, the prosecutor argued that the photographs showed that a laparotomy was performed and the coroner testified about that procedure. (RT 3136.) Further, the prosecutor defended the exhibit by arguing that he kept the coroner's

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118 The prosecutor elicited testimony that wounds 23 and 24 were defensive wounds, but People's Exhibit No. 14 did not depict Ms. Lao's hands, whereas People's Exhibit No. 76 adequately depicted her hand and those injuries. (RT 2283.) Though Dr. Chinwah did say that any injury on a person's hand or arms could be construed as a defensive wound, he added that wound 29 by Ms. Lao's left breast could be a defensive wound. (RT 2289.) That may have been an overstatement or a misstatement, however because his other testimony essentially limited defensive wounds to a person's hands and arms and Ms. Lao's arms and her hands were not adequately or fully depicted in People's Exhibit No. 14. (RT 2177, 2283, 2385-2386.)

photographs covered except during Dr. Chinwah's testimony; the nature of the wounds and their location could best be shown on a human body and not just a "stick figure;" the photographs showed the location of the wounds, how they would have bled and caused the blood trail, the nature and direction of the stabbing; and the prosecutor exercised discretion by only using the coroner's photographs that he felt were most relevant. (RT 3136.)

Finally, the prosecutor argued that he kept the photographs covered during most of the civilian testimony and they were only uncovered when the coroner testified. (RT 3136.) As referenced above, only the right lower photograph was completely covered during such testimony and the right upper photograph was only partly covered some of the time. Despite the prosecutor's claims, a reasonable examination of the photographs of Ms. Lao in death belies the prosecutor's argument because only a few of the wounds are shown. Instead, People's Exhibit No. 76 provided far more information about the matters the prosecutor claimed were shown by People's Exhibit No. 14.

Defense counsel replied that the prosecutor's argument was beside the point because the real issue is the Los Angeles County District Attorney's Office's longstanding and calculated practice [presumably with a significant measure of success] of preparing exhibits in this manner to prejudice the defense. (RT 3136-3137.) Further, the photographs of Ms. Lao in life were not relevant because there was no issue as to her identity and they were irrelevant to the primary issue in the guilt phase, the identity of the person who killed Ms. Lao. (RT 3134, 3137.) Further, the photographs were irrelevant because the pathologist could not even tell from the wounds whether the attacker was left or right handed. (RT 2320-2321.)

Defense counsel concluded that if the trial court found the probative value of the coroner's photographs outweighed their prejudicial effect, the court should admit those photographs, but not the ones of Ms. Lao in life. (RT 3137.) According to defense counsel, his proposed modification of the exhibit would avoid the risk of having the jury decide guilt on the basis of sympathy for Ms. Lao, something not permissible in the guilt phase of a capital trial. (RT 3137.)

The trial court agreed that defense counsel's argument had merit and would control in some cases, but not in Mr. Virgil's case. (RT 3137-3138.) According to the court, there was certain physical evidence found at the scene that could be correlated to the victim, there was some dispute about the blood trail, and the coroner's photographs were "quite antiseptic given the nature of this particular attack." (RT 3137.) The trial court overruled defense counsel's objection by finding the exhibit as proffered was more probative than prejudicial, especially because the photographs were so "antiseptic[]"and it saw nothing prejudicial about photographs of Ms. Lao in life and in death appearing in the same exhibit. (RT 3138.)

C. THE ADMISSION OF PEOPLE'S EXHIBIT NO. 14 WAS AN ABUSE OF DISCRETION AND VIOLATED MR. VIRGIL'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A trial court's discretion to admit photographic evidence is not unlimited at the guilt phase because of the risk that the jury will decide the question of guilt or innocence on the basis of prejudicial and inflammatory evidence. (*People v. Box, supra,* 23 Cal.4th at p. 1200-1201; *People v. Anderson, supra,* 24 Cal.4th at pp. 591-592.) As the circumstances of the present case establish, the trial court abused its discretion by admitting People's Exhibit No. 14 as proffered by the prosecution because it was more prejudicial than probative under Evidence Code section 352 given the prosecution's intended use of the exhibit (*People v. Scheid* (1997) 16

Cal.4th 1, 18); it was irrelevant and cumulative because there was no question about Ms. Lao's identity and did not reveal anything about her attacker (*id.,* at p. 14); and the exhibit encouraged the jury to decide guilt or innocence on the basis of prejudicial and inflammatory evidence. (*People v. Cavanaugh* (1955) 44 Cal.2d 252, 268- 269; *People v. Box, supra.* 23 Cal.4th at p. 1201.)

Based on testimony from Officer Schmidt and Paramedics Audet and Roberts, there was no doubt that Ms. Lao was seriously and mortally injured by many stab wounds and likely to die from her injuries and the paramedics made efforts to assist her respirations and ability to breath. (RT 1497, 1498, 1499, 1501, 1615-1617, 1622, 1637, 1638, 1645.) Dr. Chinwah testified about the laparotomy that was performed in the Emergency Room in an attempt to save Ms. Lao's life and about her many wounds in painstaking detail. (RT 2263-2306, 2331-2332.) But no witnesses saw the attack against Ms. Lao, the man in the donut shop was not seen in possession of a knife, no knives were ever recovered at the donut shop that were suspected to have been used Ms. Lao, and Dr. Chinwah could not discern whether the attacker was left or right handed. [119]

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[119] The fact that a knife was used against Ms. Lao does not make that fact relevant and cross-admissible to the other charged crimes. In this regard, it cannot be said a knife was used against Ms. Addo [only that a sharp object was used] and though Mr. Draper claimed a knife was used against him, he did not actually see it, though he did claim his fingers were cut when he attempted to remove the knife from being pressed against his neck. (RT 2461, 2474-2475, 2527-2528.) Even if Mr. Draper was correct in believing that the knife was serrated, Dr. Chinwah could not determine if the weapon used against Ms. Lao was serrated. (RT 2300-2301, 2461.) Instead, all that could be said was that the knife/knives used against Mr. Draper and Ms. Lao were single-edged, something reasonably true of most knives.

The photographs of Ms. Lao's wounds were irrelevant to any contested issue in the guilt phase and were also cumulative and prejudicial given the circumstances of their use. Accordingly, the trial court abused its discretion by allowing the admission of the exhibit as proffered by the prosecution. Though this Court has many times rejected claims that photographs should have been excluded as irrelevant, cumulative or unduly prejudicial (see *People v. Box, supra,* 23 Cal.4th at pp. 1199-1201), the prosecution in this case sought not just to prove the circumstances of the crime. Instead, the prosecution sought to prejudice the jury by its comparative method of showing photographs of Ms. Lao in life next to her naked body in death with the markings of efforts to save her life. Because the prosecution's strategy of offering this exhibit was intended to elicit a "visceral response that unfairly tempt[ed] jurors to find the defendant guilty of the charged crimes" (*id.,* at p. 1201), the trial court's abuse of discretion in admitting the exhibit as proffered was prejudicial and violated Mr. Virgil's federal and state constitutional rights.

Questions regarding the application of state evidence law do not always involve federal constitutional questions. (See *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919.) Nevertheless, "[d]ue process draws a boundary beyond which state rules cannot stray" and state evidentiary rulings violate the United States Constitution if they rendered the trial fundamentally unfair and especially if they affected the reliability of whether death was the appropriate punishment. (*Id.,* at pp. 19-20; see also *Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *Gardner v. Florida, supra,* 430 U.S. at p. 358; *McLain v. Calderon* (C.D. Cal. 1995) __ F.Supp. __ [1995 WL 769176, at p. 49], citing *Barclay v. Florida* (1983) 463 U.S. 939, and *Wainwright v. Goode* (1983) 464 U.S. 78.) Because the prosecution's use of the exhibit in question was intended to and did render Mr. Virgil's trial fundamentally unfair and affected the

reliability of his judgment of death, the trial court's error violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts and requires the reversal of the entire judgment for the crimes against Ms. Lao.

IV.

THE TRIAL COURT ABUSED ITS DISCRETION IN A SERIES OF RULINGS DURING LAVETTE GILMORE'S TESTIMONY ABOUT HER IDENTIFICATION OF MR. VIRGIL AND THOSE ERRORS REQUIRE THE REVERSAL OF THE JUDGMENT FOR THE CRIMES COMMITTED AGAINST MS. LAO AND MR. VIRGIL'S JUDGMENT OF DEATH

A. INTRODUCTION

Lavette Gilmore was an important witness for the prosecution because she reportedly saw the man suspected of robbing and killing Ms. Lao seated at a table in the donut shop minutes before these crimes were committed and she positively identified Mr. Virgil as that man. Her testimony about the events inside the donut shop shortly before Ms. Lao's was attacked, however, differed greatly from the testimony of three other key prosecution witnesses, all of whom testified that Gilmore was not in the donut shop with them as she testified she was. Further, Gilmore's identification of Mr. Virgil as the man in the donut shop was highly suspect, both because of the nature of the identification process and her claim that her failure to identify Mr. Virgil during the live lineup was a lie. Given the nature of the identification process, Gilmore's conduct during that process, and her expressed certainty that Mr. Virgil was the man in the donut shop, it was critical that Gilmore's testimony on key points be properly admitted and that she be subject to a fair and adequate cross-examination. The trial court, however, abused its discretion in a series of rulings that not only allowed improper testimony to remain on the record,

but also unduly restricted defense counsel's cross-examination of this very critical prosecution witness. For the reasons discussed below, Mr. Virgil was prejudiced by the trial court's erroneous ruling and the entire judgment involving the crimes against Ms. Lao must be reversed.

B. Standard Of Review And Applicable Law

In *Davis v. Alaska* (1974) 415 U.S. 308, 310-311, the United States Supreme Court considered whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a witness by cross-examination directed at possible bias. In ruling on defendant's claim, the Court held "'exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination (Citation.). (*Id.,* at pp. 316-317, fn. omitted.) Ultimately, the high court held that defendant had been "denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' (Citations.)" (*Id.,* at p. 318, italics omitted.) According to the Court, without evidence of the witness's probationary status [the limitation at issue in *Davis*], the defense did not have an adequate record from which to argue that the witness's status may have led to the faulty identification of the defendant. (*Id.,* at pp. 317-318.)

Later, in *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679, the Supreme Court recognized that the Sixth Amendment's Confrontation Clause does not prevent "a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness" and "trial judges retain wide latitude" "to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness, safety, or interrogation that is repetitive or only marginally relevant." Further, the court reiterated that

“,the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish., *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam).” (*Delaware v. Van Arsdall, supra,* 475 U.S. at p. 679.) Accordingly, “[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby ‘to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.’ *Davis v. Alaska, supra*, at 318.” (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 680.)

Trial court rulings are tested for abuse of discretion because they retain considerable discretion to exclude testimony that is repetitive, prejudicial, confusing to the jury, or of marginal relevance. (*People v. Frye* (1998) 18 Cal.4th 894, 945-946.) Notwithstanding the Confrontation Clause, a trial court may restrict the cross-examination of an adverse witness pursuant to Evidence Code section 352, including cross-examination pertaining to the credibility of a witness, “unless a reasonable jury might have received a significantly different impression of the witness’s credibility had the excluded cross-examination been permitted.” (*People v. Quartermain* (1997) 16 Cal.4th 600, 623- 624, citing *Delaware v. Van Arsdall, supra*, 475 U.S. at p. 680; *People v. Belmontes* (1988) 45 Cal.3d 744, 781.)

C. MS. GILMORE’S TESTIMONY ABOUT HER OBSERVATIONS INSIDE THE DONUT SHOP AND HER IDENTIFICATION OF MR. VIRGIL AS THE MAN SHE SAW SEATED AT THE TABLE INSIDE THE SHOP

According to Lavette Gilmore, she took a break from her work at Girls Will Be Girls Hair Salon during the afternoon of October 24, 1992, and walked to the Donut King to buy donuts. (RT 2859-2860, 2863.)

Before entering the donut shop, she looked through the front window and saw a man seated at one of the customer service tables. (RT 2860, 2864.) Gilmore admitted that she did not get a good look at the man or look at him clearly (RT 2860, 2919), but noted that he was wearing a Malcolm X hat and a black jacket with a black shirt with the color red (RT 2861, 2863, 2902) and there was a gym bag and a small, Styrofoam cup on the table where he was seated. (RT 2861-2862, 2902.) Gilmore testified she was very suspicious of the man because he looked out of place, unkempt and possibly under the influence of some substance. (RT 2864-2865, 2907, 2918.)

Ms. Gilmore first did not recall how she described the man to the police that day, but then recalled describing him as a "black adult, six foot two, 150, black hair, brown [eyes], clean shaven, sweaty looking, wearing a black shirt, unknown colors, and black jeans." (RT 2906.) At trial, she testified that the man was dirty and "wasn't no clean-shaved person." (RT 2906, 2918.) Out-of-court, Gilmore identified photographs of Mr. Virgil and said she was 100 percent certain he was the man in the donut shop. (RT 2889-2890, 2906-2908.) Though she testified that Mr. Virgil's profile was similar [RT 2871-2872], she could not say in court that he was the man in the donut shop. (RT 2865-2866.) ***120***

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120 During his direct examination, the prosecutor walked up behind Mr. Virgil and asked Ms. Gilmore if the person he was standing behind was in the donut shop on October 24, 1992. (RT 2866.) Ms. Gilmore replied "he doesn't look rugged as he looked in the donut shop," "[h]e looks so clean and nice now and healthy," but "I can't say [if Mr. Virgil was the person in the donut shop]." (RT 2866.) When the prosecutor later asked about her photographic identification from profile views, Ms. Gilmore confirmed her identification [of Mr. Virgil] and added that her identification was based on seeing his eyes, nose, and facial hair in the donut shop that day as he tried to hide his face. (RT 2871.)

Ms. Gilmore's testimony about the events inside the donut shop that day was not without serious question. In this regard, she testified that she was in the donut shop for 25-25 minutes using her "big mouth" to talk with Ms. Lao and the many customers who came and went during that time and she talked inside and then outside the shop with a "park policeman" to whom she related her suspicions about the man seated at one of the customer tables. (RT 2861, 2864, 2879, 2880-2881, 2887, 2896-2897, 2900-2901.) Park Police Sgt. Tiller testified differently that he and his partner were at the donut shop minutes before Ms. Lao was stabbed and he saw no one else in the donut shop other than Ms. Lao and the man seated at the table. (RT 934-935, 948, 3090.) *121* Further, Ms. Gilmore testified that she was in the shop with Mr. Harrison, but Ms. Tomiyasu testified that there was no one in the shop when she entered and Harrison testified similarly that they were the only customers inside the shop. (RT 1033-1034, 1118, 1261-1263, 1276-1277, 2916-2917, 2923.) Finally, Ms. Gilmore said for the first time at trial, years after the events in question, she was certain about being in the shop with a bald man [Mr. Harrison] and another lady and that a white policeman at the live lineup told her to make an identification against her wishes. (RT 2891-2892, 3088-3089, 3091.) *122* The investigating officer in the case, Gardena Police Sgt. Lobo, testified that it is not uncommon or unheard of for people's memories to

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121 Ms. Gilmore testified that a "white" policeman attended the live lineup and sat in the front row. (RT 2890-2891, 2894.) Park Police Sgt. Tiller attended that lineup along with Ms. Gilmore and other witnesses. (RT 967-968.)

122 Sgt. Lobo testified that witnesses at the live lineup were separated by an empty chair between them and witnesses were far enough apart they could not talk with one another. (RT 2973.)

fade over time and for events to blend together when the person gives a statement/testifies years after the fact. (RT 3089-3090.)

Similarly, the testimony about Ms. Gilmore's out-of-court identification was not without serious question. On August 18, 1993, Sgt. Lobo reinterviewed Ms. Gilmore about her description of the man in the donut shop. (RT 2963.) According to Sgt. Lobo, Ms. Gilmore said the man seated at the table was a male black, in his late 20s, early 30s that she estimated was 5'9" to 6' tall; he weighed between 150-160 pounds, with dark brown hair and eyes; he had a mustache and a scraggly beard around his mouth and chin; and he was skinny, dirty looking and wearing dark jeans and a black T-shirt. (RT 2963-2964, 3089.) Lobo showed Ms. Gilmore People's Exhibit No. 6 and she eliminated the men depicted in Position Nos. 3, 4, 5, and 6 of that Exhibit [RT 2867, 2965], but could not distinguish between the people depicted in Position Nos. 1 and 2. (RT 2868-2869, 2965.) [123]

Sgt. Lobo then asked Ms. Gilmore if she could make a better identification by looking at a sixpack lineup containing profile views. (RT 2967.) Ms. Gilmore said she could so Lobo showed her People's Exhibit No. 22-B]. (RT 2869, 2967.) [124] According to Lobo, Gilmore looked at the photographs and said the person in Position No. 2 "based on front & side profile," is the closest to my memory of the man I saw in the donut shop." (RT 2871-2872, 2968; CT Supp II 654.) Lobo testified that

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123 Mr. Virgil's November 3, 1992, booking photograph was in Position No. 2 of that Exhibit. (CT Supp. II, 379.)

124 Mr. Virgil's photograph was in Position 2 in People's Exhibit No. 22–B. (CT Supp. II, 395.) Mr. Virgil's photographs in People's Exhibit Nos. 6 and 22-B were in the top center position and his were the only photographs with a prominent, bright yellow background. (CT Supp. II, 379, 395.)

Gilmore then returned to People's Exhibit No. 6 and said that the man in Position No. 2 [Mr. Virgil] looked "'closest'" to the man in the donut shop. (RT 2968.)

Sgt. Lobo sought to solidify and buttress Ms. Gilmore's identification of Mr. Virgil as the man in the donut shop by reinterviewing her on January 20, 1995, almost two years after his first interview and just before trial, and showed her the same sixpack that led to her identification of Mr. Virgil in August 1993 [People's Exhibit No. 22-B]. (RT 2969-2970, 2888-2889.) According to Lobo, he did this because he was worried about Gilmore's ability to correctly identify the prosecution's suspect in Ms. Lao's homicide [she identified Mr. Virgil in photographic lineups, but not at the live lineup]. (RT 2969.) After confronting Ms. Gilmore with her inconsistent identification, she replied somewhat defensively that she got it right earlier ["I made the proper identification the first time"] and asked to see the photographic lineup where she "made the proper identification."(RT

2969.) [125] Unsurprisingly, Ms. Gilmore selected the same photograph [Mr. Virgil, the person in Position No. 2] and claimed then she was 100 percent certain of her identification. (RT 2969, 2889-2890.)

The night before her testimony, Sgt. Lobo [and the prosecutor] interviewed Ms. Gilmore again. (RT 2923-2924.) After stressing the importance of Mr. Virgil's case and how important it was for her to tell the "truth," Lobo asked again about her failure to identify the same person at the live lineup that she identified in the photographic lineup. (RT 2970-2971.) Lobo explained it was understandable if Ms. Gilmore deliberately made a wrong identification at the live lineup to avoid getting involved and

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[125] Sgt. Lobo's testimony suggests undue influence in the identification process. In this regard, Lobo testified that he talked with Gilmore about "a discrepancy on her ID, and I questioned her as to why did we have such a discrepancy in the photo line-up. And her response was, Well, I identified him the first time around, you know, I made the proper identification the first time. I want to see that again. And I showed her again, and that's when she said, See, No. 2." (RT 2969.) If Lobo had not confirmed that she identified the prosecution's suspect in the photographic lineup[s], how could Ms. Gilmore say she made "the proper identification" the first time around? It certainly was not from her identification alone because she could not decide between two of the men in People's Exhibit No. 6 [those in Position Nos. 1 and 2]; she looked at People's Exhibit No. 22-B and said the person in Position No. 2, based on her "memory," looked "closest" to the person she saw in the donut shop]; and then she returned to People's Exhibit No. 6 and selected No. 2 in the Exhibit. (RT 2964-2965, 2967-2968.) As provided above, Mr. Virgil was in the same position in both Exhibits and his was the only photograph with a prominent, bright yellow background. (CT Supp. II, 379, 395.) Accordingly, Ms. Gilmore was far from certain regarding her identification of the man in the donut shop and was therefore a witness who should have been subjected to a vigorous and complete cross-examination ["the "greatest legal engine ever invented for the discovery of truth.""]. (*Green v. California* (1970) 399 U.S. 149, 158, fn 11, citing 5 Wigmore §1367.) This is especially so because she was obviously a critical prosecution witness, given the series of last minute interviews on the eve of trial and the night before her testimony. (RT 2924-2925, 2968, 2970.)

asked if that was the case. (RT 2971.) According to Lobo, Ms. Gilmore responded by crying and walking away, but he managed to soothe her emotions by talking with her. (RT 2971.) Then, Ms. Gilmore reportedly answered that she saw the man from the donut shop at the live lineup, but she lied and identified the wrong man [she lied at her husband's suggestion to avoid any further involvement in the case]. (RT 2872-2873, 2971-2972, 3092-3093.)

D. The Trial Court's Erroneous Rulings During Ms. Gilmore's Testimony Were Prejudicial And Require The Reversal Of Judgment

1. The Trial Court Erred By Failing To Strike Gilmore's Nonresponsive Testimony Concerning Her Fear That The Man In The Donut Shop Might Rob Her

There were two main issues regarding the crimes against Ms. Lao. The first involved the identity of the person who stabbed and killed Ms. Lao and the second involved whether the taking of money out of the cash register constituted robbery [intent to commit theft before or during the application of force] or a mere "petty theft" [the intent to commit theft was formed after the application of force]. (RT 3157-3158, 3159-3170, 3201-3202, 3290-3291, 3295-3298, 3366-3368.) [126] On direct examination, the prosecutor asked Gilmore a series of questions about whether Mr. Virgil looked like the man she saw in the donut shop shortly before Ms. Lao was fatally stabbed and then about the circumstances of her out-of-court identification of him as that man. (RT 2866-2871.) During the latter

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[126] During the penalty phase, defense counsel urged the jury to spare Mr. Virgil's life under a theory of lingering doubt [the taking of money from the cash register was an afterthought and not "in the furtherance or continuation of a robbery"]. (RT 3884.)

questioning, the prosecutor directed Gilmore to People's Exhibit Nos. 93 and 92 [copies of the sixpack photographic lineup with Mr. Virgil in Position No. 2 and the related admonition form, respectively] and asked if she drew something on Exhibit No. 93. (RT 2871.) Gilmore answered that she remembered many details about the man's face and that he was "trying to hide his face." (RT 2871.) According to Gilmore, she "took the time to look at him" because she had been "working" as a hairdresser all day and was carrying "a lot of money" in her pocket. (RT 2871.) Defense counsel immediately objected to Gilmore's testimony about carrying "a lot of money" and her related "inchoate fear[]" of being robbed by the man. (RT 2871.) The trial court in effect sustained the objection by directing the prosecutor to ask his next question, but the court failed sua sponte to strike the objectionable testimony as irrelevant for any purpose other than to suggest Mr. Virgil's predisposition to commit robbery. (See *People v. Dad* (1921) 51 Cal.App. 182, 185-186.)

Evidence Code section 766 requires that a witness give only responsive answers to questions and nonresponsive answers shall be stricken upon the motion of any party. The prosecutor asked Gilmore if she drew something on Exhibit No. 93, but Gilmore never answered that question. Instead, she attempted to explain why her identification of Mr. Virgil as the man in the donut shop was correct: she looked at him because she thought he appeared to be up to no good and was trying to conceal his identity and she feared he might rob her of the money she was carrying. (RT 2871.) Gilmore's testimony was nonresponsive to the question asked and the trial court erred by failing sua sponte to strike her inadmissible, nonresponsive testimony that went to the heart of the two main issues involving the crimes against Ms. Lao and Mr. Virgil's eligibility for the death penalty. Though defense counsel did not move to strike Gilmore's testimony, the trial court's response to his objection directing the

prosecutor to ask his next question evidences that any such request would have been futile. (See *People v. Hill* (1998) 17 Cal.4th 800, 820-821, no waiver if objection/request would have been futile.) Instead, the court should have stricken Gilmore's inadmissible, nonresponsive testimony.

Under ordinary circumstances, a trial court can correct an error in admitting improper evidence by striking it from the record and admonishing the jury to disregard it, and the jury is presumed to obey the instruction. (*People v. Hardy* (1948) 33 Cal.2d 52, 61.) However, as the Court of Appeal recognized in *People v. McKelvey* (1927) 85 Cal.App. 769, 771, there are some occasions where striking testimony and admonishing the jury to disregard it cannot remedy the harm caused by the jury's exposure to inadmissible testimony. This result is necessary and appropriate when the inadmissible testimony goes to the main issues in the case and where the proof of defendant's guilt is not clear and convincing. (*Ibid.*)

Gilmore's inadmissible testimony regarding her fear of being robbed by the man as the reason why she looked at him more carefully and inferentially why her identification of Mr. Virgil as the man in the donut shop should be considered correct could not have been remedied by striking her testimony because the harm had been done. Gilmore's overall identification testimony was inconsistent and inherently suspect and the question of whether a robbery later occurred was an issue of major importance. Because failing to strike Gilmore's nonresponsive and inadmissible testimony had the effect of buttressing the strength of her otherwise suspect identification and Gilmore was not a witness to the actual commission of the crimes against Ms. Lao, it was error to allow her testimony about "inchoate fears" to remain before the jury.

When Gilmore was asked if Mr. Virgil's appearance in court was consistent with the man in the donut shop, she replied that he looked "so

clean and nice now and healthy." (RT 2866.) When Gilmore was shown People's Exhibit No. 6 on August 18, 1993 [a photographic lineup containing Mr. Virgil's booking photograph from November 3, 1992, in Position No. 2 – front facial view, goatee only], she circled the photographs in Position Nos. 1 and 2 [both of men had neatly trimmed goatees] and wrote that she could not distinguish between the men in the two photographs. (RT 2868; CT Supp. II, 649-652.) In court, however, she testified with Mr. Virgil sitting in front of her [he had a goatee at trial] that both men had big noses and Mr. Virgil looked most like the man in the donut shop. (RT 697, 2869.)

On October 19, 1993, two months after her inability to identify Mr. Virgil with certainty, Gilmore was shown People's Exhibit No. 22-B [a photographic lineup containing Mr. Virgil's booking photograph from November 3, 1992, also in Position No. 2 – left side profile view, goatee only]. (RT 2869-2870; CT Supp. II, 653-655.) Then, Gilmore wrote that the man in Position No. 2 looked closest to the man she recalled seeing in the donut shop. (RT 2870-2871; CT Supp. II, 654.) Gilmore was shown the same photographic lineups in January 1994 [People's Exhibit Nos. 6, 22-B, 91, and 93] and went from saying that Mr. Virgil looked closest to the man in the donut shop to being more than "100%" certain in her identification.

Her identification and certain conclusion are very curious and suspect. At trial, Mr. Virgil looked like he did on November 3 [ten days after the events inside the donut shop he looked clean and had a neatly trimmed goatee], but on October 26 [two days after the events in the donut shop he had a full beard and thus could not have had just a goatee less than two days before]. (RT 697, 2866-2872, 2889-2890; CT Supp. II, 379, 395, 651-652.) Accordingly, the trial court's error in allowing Gilmore's nonresponsive testimony to remain was prejudicial because it buttressed her

otherwise suspect testimony about the certainty of her identification of Mr. Virgil as the man in the donut shop. As such, the error violated Mr. Virgil's right to a fair trial, to fairly confront the witnesses against him, and to a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts.

Further, the trial court's error in failing to strike Gilmore's testimony affected the second main issue involving the crimes against Ms. Lao. The prosecution's theory was that Mr. Virgil was guilty of first degree felony murder based on the commission of robbery and also alleged the related robbery special circumstance. (RT 3224.) The defense countered that the circumstances were inconsistent with robbery because the nature of the attack against Ms. Lao suggested that it was a rage killing or a sexual assault gone awry. (RT 3160-3161.) Gilmore was not present at the time the alleged robbery occurred and her nonresponsive answer suggested to the jury that Mr. Virgil, the man she identified in the donut shop, was planning a robbery all along.

In *People v. Melton* (1988) 44 Cal.3d 713, 744, this Court cited with approval the Court of Appeal's decision in *People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40, where the lower court recognized that a lay witness may not "express an ultimate opinion based on his perception" unless that opinion is "'helpful to a clear understanding of his testimony' (citation) [and] . . . where the concrete observations on which the opinion is based cannot otherwise be conveyed. (Citations.)" As a lay witness, Gilmore was not entitled to express the ultimate opinion about whether the man in the donut shop intended to commit robbery because that was not helpful to a clear understanding of her testimony and she was otherwise able to convey her concrete observations of the man sitting quietly at the table in the donut shop. In other words, Gilmore was not entitled to testify about whether the

man planned to commit robbery [his state of mind] because there was no evidence within her actual knowledge concerning his motivations and her "inchoate fears" were based on mere speculation and not actual knowledge. (See *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1470-1471, citing *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 582.) As such, the trial court abused its discretion by failing to strike her testimony and the error violated Mr. Virgil's rights to a fair trial, to fairly confront the witnesses against him, and to a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts.

2. THE TRIAL COURT ERRED BY ALLOWING GILMORE TO TESTIFY ABOUT HER BELATED IDENTIFICATION OF MR. VIRGIL FROM A PHOTOGRAPH OF THE LIVE LINEUP

Gilmore was an important eyewitness because she reportedly saw the man in donut shop just before the crimes against Ms. Lao were committed and she was the only person to identify Mr. Virgil as that man under non-traumatic conditions. [127] Part way through Mr. Virgil's trial, the prosecutor surprised the defense by calling Gilmore as a witness, after previously advising counsel that she would not testify. (RT 2873.) Because Gilmore was such an important witness and her identification of Mr. Virgil was suspect under the circumstances detailed above, the

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[127] Other than Sgt. Tiller who was uncertain that Mr. Virgil was the man in the donut shop, Debra Tomiyasu, DeAndre Harrison, and Ella Ford identified Mr. Virgil as that man, but made their observations under extremely stressful conditions – they saw the man around the time that Ms. Lao suddenly appeared covered in blood and collapsed in front of them or seeing the man suddenly appear and almost run over her as he ran through the parking lot at about the time people began chaotically dashing about and screaming that someone had been stabbed. (RT 956-957, 1040, 1048, 1057, 1209, 1267, 1359-1360, 1362-1363, 1364, 1401-1402, 1403, 1407, 1408, 1409-1410, 1411, 1412, 1439-1440, 1680-1681, 1725, 1729-1730.)

prosecutor attempted to buttress her identification testimony by asking whether she attended the live lineup on October 19, 1993, and whether she identified someone there other than Mr. Virgil. (RT 2872.) Gilmore answered that she attended the live lineup, recognized Mr. Virgil at the lineup, but lied deliberately by identifying another man. (RT 2872.) Gilmore explained that she was "scared" at the lineup and deliberately identified the wrong man to avoid further involvement in the case. (RT 2872-2873.)

Anticipating that the prosecution would have Gilmore identify Mr. Virgil from a reconstruction of the live lineup [People's Exhibit No. 8], defense counsel objected that this would be improper because Gilmore did not identify Mr. Virgil at the live lineup and her identification from photographs would be tainted because the exhibit was unduly and impermissibly suggestive – the exhibit contained three photographs, one of the six men facing forward, one of the six facing to their right and displaying their left profiles, and one a close-up of Mr. Virgil by himself with a numbered placard [No. 4] around his neck. (RT 2873-2875.) The trial court ruled that Gilmore could view the photographic exhibit and testify about whether she identified Mr. Virgil at the live lineup and defense counsel could question her on cross-examination about her identification. (RT 2873-2874.) After Gilmore identified Mr. Virgil as the man in Position No. 4 at the live lineup, defense counsel noted for the record that Mr. Virgil's solo photograph in that exhibit "was bigger than life" and the court agreed by saying the "[e]xhibit speaks for itself." (RT 2875.) The trial court's error in allowing Gilmore to identify Mr. Virgil from photographs of the live lineup violated Mr. Virgil's right to counsel, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts.

In *People v. Fowler* (1969) 1 Cal.3d 335, the defendant surrendered himself to the police and was asked if he was represented by counsel. Defendant replied that he was not and the police never advised him of his right to counsel at the lineup. At the lineup that soon followed, two witnesses identified the defendant as the robber in question and he was arrested for robbery. After concluding that the preindictment lineup was a critical stage of the proceedings where the right to counsel had attached, this Court addressed the Attorney General's argument that the violation of the right to counsel was harmless because the live lineup could be adequately reconstructed by taking testimony from persons involved in the lineup, including the police officers who conducted the lineup and the witnesses who attended, and viewing still photographs of the lineup. (*Id.,* at p. 348.) This Court held that such a procedure could not adequately reconstruct the lineup and remedy the violation of the defendant's Sixth Amendment right to counsel under the United States Supreme Court's decisions in *United States v. Wade* (1967) 388 U.S. 218, and *Gilbert v. California* (1967) 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178. (*Id.,* at pp. 348-348; accord, *People v. Lawrence* (1971) 4 Cal.3d 273, 279, fn. 2; compare with *United States v. Barker* (9th Cir. 1993) 988 F.2d 77, 78, and *United States v. Amrine* (8th Cir. 1983) 724 F.2d 84, finding the defendant's Sixth Amendment rights were not violated by showing a videotape of the lineup to witnesses because the defense could effectively reconstruct the lineup and the videotape was akin to a photographic lineup where there is no right to counsel because the defendant is not present.) [128]

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[128] In any event, the photographic exhibit at issue here was inadequate because it only included a limited portion of the lineup [only the men standing there] and violated due process because it was unduly suggestive [blown-up photograph of Mr. Virgil by himself with an identifying placard around his neck].

Gilmore was present at the live lineup, but did not identify Mr. Virgil then. Instead, the trial court allowed her to claim at trial that she in fact identified Mr. Virgil at the live lineup, something that is akin to granting the prosecution an opportunity to show that her testimony had an independent source. In *Moore v. Illinois* (1977) 434 U.S. 220, 231, the Supreme Court cited *Gilbert v. California, supra,* 388 U.S. at p. 272, and held that a pretrial corporeal identification obtained in violation of a defendant's Sixth Amendment right to counsel cannot be used by the prosecution to buttress its case-in-chief, even given the possibility that the identification had an "independent source" from the violation. Under the rationale from *Moore* and *Gilbert,* Gilmore's belated identification of Mr. Virgil from a photographic exhibit of the live lineup is no different than saying even if Mr. Virgil's rights were violated at the live lineup, Gilmore could testify about her identification under the "independent source" doctrine. Because that is constitutionally impermissible, the trial court's ruling allowing the prosecution the same opportunity to buttress its case-in-chief with her revisionist testimony not only violated Mr. Virgil's Sixth Amendment right to counsel, but also his rights to a fair trial and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts.

3. THE TRIAL COURT ERRED BY RESTRICTING CROSS-EXAMINATION THAT WAS INTENDED TO EXPLORE GILMORE'S BIAS AND OBTAIN EVIDENCE FROM WHICH TO ARGUE THAT HER BIAS AFFECTED HER CREDIBILITY

Defense counsel began his cross-examination by establishing that when Gilmore attended the live lineup, she knew that the charges against Mr. Virgil involved extremely serious allegations of murder and robbery. Further, Gilmore conceded that she was not thinking about the

consequences of making a deliberate misidentification or whether that might result in the falsely identified man going to "the gas chamber." (RT 2890.) According to Gilmore, she was crying and did not want to make an identification at the lineup and she told a white policemen there about her desire not to identify anyone. (RT 2891.) [129] Despite her desire not to identify anyone, she eventually decided to identify the man in Position No. 1. (RT 2891.) Defense counsel attempted to explore Gilmore's willingness to lie in a death penalty case by asking why she deliberately "put down something that wasn't true in something as crucial as a capital murder case . . . ?" (RT 2891.) Before Gilmore could answer, the prosecutor objected that Ms. Gilmore did not know it was a capital case and the court sustained the objection. (RT 2891-2892.)

Defense counsel's question was akin to matters of common knowledge or illustrations drawn from common experience, history or literature (see generally *People v. Hill* (1998) 17 Cal.4th 800, 819 [no misconduct to comment on matters not in evidence if the matters involve well-known or information commonly known]). Because Ms. Gilmore obviously knew that this was a murder case and the death penalty could be an option, the trial court abused its discretion by sustaining the prosecutor's

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[129] Presumably, Ms. Gilmore was talking about Sgt. Tiller who also attended the live lineup. As noted above, Sgt. Lobo testified that jurors were separated and not close enough to talk with each another during the lineup. (RT 2973.) Gilmore's testimony about the policeman pressuring her to make an identification represents one more example of Gilmore's fanciful recollection and doubtful credibility. Further, it establishes why the trial court's restriction on cross-examination was error and highly prejudicial.

objection. [130]

Defense counsel moved on to explore when Gilmore told the police about her alleged, deliberate misidentification at the live lineup. Gilmore admitted she did not remember telling the police about her lie when she was interviewed on the eve of trial in January 1995. (RT 2892.) Defense counsel then asked how Gilmore could so easily forget "deliberately intentionally misidentif[ying] a person" "in a murder case involving allegedly a robbery . . . ?" (RT 2892.) Gilmore replied by repeating her story about being pressured to make an identification by the "white" "policeman" and testified that she decided to identify the wrong person "to get this away from me." (RT 2892.) Gilmore explained further that she decided not to disclose her lie soon after the lineup because she was still upset by thoughts of Ms. Lao lying on the floor in the donut shop and she thought she had succeeded in lying her way out of further involvement in the case. (RT 2893.)

Defense counsel continued by asking why the jury should believe her identification testimony at trial and Gilmore replied that the white policeman pressed her to calm down and identify someone. (RT 2893-2894.) Given Gilmore's knowledge about the seriousness of the charges, her willingness to lie in order to avoid further responsibility in the case, and her incredible testimony about being pressured to identify someone, defense counsel sought to explore Gilmore's state of mind by asking how she would feel if someone had deliberately misidentified her in a robbery-murder case. (RT 2894.) The prosecutor objected that the question was

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[130] It is not certain that defense counsel's question necessarily referred to Ms. Gilmore's knowledge about the nature of the penalty being sought at the time of the live lineup. Because the question could just as readily referred to her knowledge at the time of trial, the trial court's ruling without seeking clarification was a manifest abuse of discretion.

"[a]rgumentative"] and the trial court sustained the objection and directed Ms. Gilmore not to answer. (RT 2894.)

Defense counsel's question was not intended to engage the witness in an argument, but rather to elicit information within her knowledge (see generally *People v. Mayfield* (1997) 14 Cal.4th 668, 755, citing *People v. Smith* (1954) 43 Cal.2d 740, 747) so it was certainly not argumentative.

Further, defense counsel's questioning was directed towards Gilmore's bias against Mr. Virgil because she was an important prosecution eyewitness, someone who knew Ms. Lao well, and someone whose credibility was very much at issue. (See Evid. Code § 780.) Contrary to the court's ruling, the defense was entitled to explore Gilmore's willingness to lie and her apparent lack of concern about the consequences of deliberately lying in an admittedly extremely serious case. As such, defense counsel's question was proper because it went to Gilmore's demeanor while testifying, the character of her testimony, her character for honesty, the existence or nonexistence of her bias or other motive for her statements, her attitude toward the action where she testified or towards giving testimony, and her admission of untruthfulness. (See Evid. Code §780, subds. (a), (b), (e), (f), (h), (j), and (k).) For these reasons, the trial court abused its discretion by wrongly limiting defense counsel's cross-examination and ability to challenge the overall validity and accuracy of Gilmore's identification of Mr. Virgil as the man in the donut shop.

After discussing the pie tin found in the donut shop, defense counsel returned to Gilmore's description/identification of the man she reportedly saw there. (RT 2896-2905.) After Ms. Gilmore testified that she did not recall her description of the man when she was interviewed by a police officer at the scene, defense counsel recited the description that she gave to Gardena police officer Pepper. (RT 2905-2906.) Gilmore remembered providing that description, including that the man in the donut shop was

"clean shaven." (RT 2906.) When defense counsel asked if she recalled saying "clean shaven," Gilmore denied that the man was "clean-shaved," but then claimed not to remember ever telling Officer Pepper what his report reflects she said – the man was "clean-shaved." (RT 2906.) Defense counsel was about to question Gilmore further about the man's appearance and facial hair and the nature of the identification process by prefacing his next question with the fact that she had only been shown photographs of men with facial hair. (RT 2906.) The prosecutor interrupted by objecting that defense counsel was being "[a]rgumentative" and the trial court sustained the objection. (RT 2906.) ***131***

As provided above, there were two main issues involving the crimes against Ms. Lao, the identity of the perpetrator and whether a robbery was committed. Gardena police officers Schmidt and Schnabl were the first officers to arrive in response to the 911 calls about the events at the Donut King. (RT 1477-1480, 1496.) Schmidt was the senior officer and assumed responsibility for interviewing witnesses and obtaining a composite description of the suspect from different witnesses. (RT 1478, 1496.) According to Officer Schmidt he asked witnesses Tomiyasu and Harrison if the man they saw in the donut shop had a beard and they both said "no" he did not. (RT 1586.) But, Schmidt's radio broadcast at the scene and his police report about his interviews reflected that the suspect had a beard. (RT 1527, 1585-1586,1592-1593.) During his testimony, Schmidt admitted

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131 Because the prosecutor interrupted defense counsel by objecting and the trial court immediately sustained the objection, defense counsel never got to complete his statement. A fair reading of the record, however, establishes that defense counsel was going to say that she had only been shown photographs of men with facial hair and his purpose in doing so was to challenge the identification process as unduly suggestive – she was only shown photographs consistent with Mr. Virgil's appearance, the prosecution's only suspect after his arrest in June 1993.

that he freely edits his police reports by omitting information that might be used later to challenge the reliability of an eyewitness's identification. (RT 1582.)

Gardena police officer Pepper also interviewed witnesses at the crime scene. (RT 956, 1607, 1830, 2905, 2918-2919.) The statements about facial hair given to Pepper ranged from full beard [Tomiyasu and Harrison], to unkempt goatee [Sgt. Tiller], and to "clean shaven [Gilmore]" (RT 1000, 1592, 2906.) Under the circumstances, defense counsel had a legitimate basis to question Gilmore about being shown only photographs of men with facial hair.

Very recently in *United States v. Schoneberg* (9th Cir. 2005) 396 F.3d 1036, the Court of Appeals applied *Davis v. Alaska, supra,* 415 U.S. 308, to the question of whether the trial court's limitation on cross-examination violated the defendant's Sixth Amendment rights to confrontation. The defendant in *Schoneberg* and his co-conspirator [Woodbury] were charged by indictment, but Woodbury pleaded guilty after negotiating a plea agreement that offered him the possibility of a reduced sentence in exchange for his testimony against the defendant. Under the terms of his agreement, Woodbury had to persuade the "government" that his testimony was truthful before he could earn the right to ask for a sentence reduction.

During cross-examination, the defense sought to explore Woodbury's motivation for testifying and establish that he had to persuade the "government" that his testimony was truthful before he could ask for a sentence reduction. The trial court repeatedly ruled that the jury was the "'sole determiner of credibility," and refused to allow defense counsel "to explore Woodbury's incentive to please the government." (*Id.,* at p. 1041.) The jury got to see the relevant provision of Woodbury's presentence agreement and trial counsel was allowed to elicit on cross-examination that

Woodbury's motive in testifying was to earn the right to request a sentence reduction. The Court of Appeals concluded, however, that the trial court erred by not allowing cross-examination intended to prove that the witness had a motive to testify in a certain way that was pleasing to the government and that motive provided a reason for the jury to question his credibility. (*Id.,* at p. 1043.) Though trial courts have discretion concerning the scope of cross-examination, the Court of Appeals held that the trial court's limitation went too far: it not only prevented the defense from asking if the witness was biased, but it also prevented the defense from making a record from which to argue that the witness was so biased that his testimony was not credible. (*Id.,* at p. 1042, citing *Davis v. Alaska, supra,* 415 U.S. at pp. 316-318.)

In this case, the trial court's limitation on cross-examination also went too far. It prevented the defense from exploring Gilmore's bias and willingness to lie in a capital trial, from exploring her state of mind regarding her feelings about lying in such a serious case, and from exploring the suggestive nature of the identification process. Thus, the trial court impermissibly limited the defense from exploring a critical witness's bias and developing evidence from which to argue that her bias provided a reason not to believe her testimony identifying Mr. Virgil as the man in the donut shop. As such, the trial court violated Mr. Virgil's rights to due process, confrontation, counsel, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts. (*Ibid.*)

4. THE TRIAL COURT'S RULINGS DURING MS. GILMORE'S TESTIMONY ON DIRECT EXAMINATION WERE PREJUDICIAL AND REQUIRE THE REVERSAL OF MR. VIRGIL'S CONVICTIONS FOR THE CRIMES AGAINST MS. LAO AND HIS JUDGMENT OF DEATH

Ms. Gilmore was a critical identification witness whose testimony about the circumstances inside the donut shop and her identification of Mr. Virgil were far from certain and highly suspect. For example, two days after Ms. Lao's homicide Mr. Virgil had a full beard, but nine days later he had a neatly trimmed goatee, like the one he had at trial. (RT 697; People's Exhibit No. 4.) Gilmore testified, however, that Mr. Virgil's appearance in the donut shop was consistent with how he looked 10 days after the homicide, but inconsistent with how he would have looked at the time of the homicide. (RT 2906-2908.) Also, Gilmore identified Mr. Virgil from photographs of the live lineup where he was depicted "bigger than life" with a goatee [like the one he had at trial] and wearing a placard hanging from his neck that identified him as the man in Position No. 4 at the lineup. Thus, the question of Mr. Virgil's identity was not a foregone conclusion, especially because the other eyewitnesses who identified Mr. Virgil did so under circumstances of great stress and Gilmore's identification was the only one under nontraumatic conditions.

Also, Gilmore improperly expressed her lay opinion about the ultimate and highly contested issue of whether the man she identified as Mr. Virgil planned to commit a robbery in the donut shop. This was highly prejudicial because the question of whether the taking of money from the cash register by what appeared to be a strung out, wild-eyed looking man was pursuant to a planned robbery or a mere theft based on an after-formed intent was not a foregone conclusion. The man did not try to harm Tomiyasu or Harrison who saw him at the cash register, nor did he attempt to retrieve his property which could have been easily accomplished before

he left the donut shop. Because the man in the donut shop did not do either of these things, something that would be expected from a robber who planned his crime, intended to eliminate witnesses, or remove evidence that might be used to identify him, the question was close about whether a robbery was intended.

Further, the nature of the acts against Ms. Lao and where they were committed in the employee restroom similarly establishes that the question was close about whether a robbery was intended. It was alleged by the prosecution that the man in the donut shop bound Ms. Lao and repeatedly stabbed her, but the many stab wounds, almost all of which were not fatal, reasonably suggests that the perpetrator's motive was something other than robbery. Thus, Gilmore's testimony that she was afraid of being robbed by the man should have been stricken and the trial court's failure to do was extremely prejudicial because it affected the main issues involved in the crimes against Ms. Lao – whether Mr. Virgil was the man in the donut shop and whether he intended to commit robbery.

Finally, Gilmore's testimony was crucial to the prosecution's case

that was based primarily on eyewitness identification. [132] Thus, the trial court's failure to strike Gilmore's testimony about her fear of being robbed by the man and allowing her to identify Mr. Virgil from a photographic exhibit of the live lineup that was not associated with the protections afforded by the Sixth Amendment right to counsel at a live lineup are not harmless under the federal and state standards of review. Accordingly, Mr. Virgil's convictions for the offenses against Ms. Lao and his judgment of death must be reversed under the United States and California Constitutions. (*United States v. Wade, supra,* 388 U.S. 218; *Gilbert v. California, supra,* 388 U.S. 263; *Moore v. Illinois, supra,* 434 U.S. 220; *People v. Sergill, supra,* 138 Cal.App.3d 34; *People v. Fowler, supra,* 1 Cal.3d 335; *Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

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[132] Mr. Virgil's palm print was reportedly found on the outer edge/corner of a dining room table in the donut shop. (People's Exhibit No. 60.) Assuming arguendo that the print belonged to Mr. Virgil, its location near the outer edge/corner of the table meant that it was not located in an area where reason dictates would be wiped down every time the table was cleaned to remove coffee stains and debris. Further, the police and prosecution waited years before attempting to learn about the cleaning practices at the Donut King and then could only elicit testimony that was equivocal at best – Ms. Ngov claimed not to remember whether she cleaned that table on the day in question and then testified that she did clean that table, but would have done so about six hours before the crimes against Ms. Lao were committed. Further, the police found no other fingerprints connecting Mr. Virgil to the offenses against Ms. Lao and they failed to collect serological evidence that could have established with certainty the identity of the person who attacked Ms. Lao. Under the circumstances, it cannot be said that the evidence of Mr. Virgil's presence in the donut shop just before Ms. Lao was attacked was supported by competent, scientific evidence. Instead, it was based mainly on suspect, eyewitness identification testimony.

5. SIMILARLY, THE RESTRICTION ON DEFENSE COUNSEL'S CROSS-EXAMINATION OF GILMORE IS PREJUDICIAL AND REQUIRES THE REVERSAL OF THE JUDGMENT FOR THE CRIMES AGAINST MS. LAO AND MR. VIRGIL'S SENTENCE OF DEATH.

In *United States v. Schoneberg, supra,* 396 F.3d at p. 1044, the Court of Appeals recognized that the United States Supreme Court held in *Delaware v. Van Arsdall, supra,* 475 U.S. 673, that a violation of the right to confrontation under the Sixth and Fourteenth Amendments does not compel an automatic reversal. Instead, it is subject to the "'harmless-error analysis'" from *Chapman v. California, supra,* 386 U.S. at p. 24. Because the trial court's errors restricting defense counsel's cross-examination prevented the defense from eliciting information that would have been used to challenge Gilmore's credibility based on her bias and motivation and she was a critically important prosecution witness, it cannot be said that the errors were harmless under either the federal or state standards of review regarding the crimes against Ms. Lao and the special circumstance finding.

Defense counsel's attempts to challenge Gilmore's credibility on cross-examination by asking her pointedly why she would willingly lie in a crucial case involving capital murder charges (RT 2891) and her feelings about having someone deliberately lie against her in a robbery-murder case (RT 2894) were consistently thwarted by the trial court's rulings sustaining the prosecutor's objections. When defense counsel attempted to question Gilmore about the suggestive nature of the identification process and her inconsistent statements about the man she saw in the donut shop (RT 2906), the trial court again refused to allow defense counsel to question Gilmore about a topic that went to identity, the primary issue involved in the offenses against Ms. Lao and that which led to Mr. Virgil's sentence of death. Under the circumstances where the prosecution's evidence that Mr. Virgil's was the man in the donut shop and intended to commit robbery was

far from overwhelming, the trial court's errors restricting cross-examination intended to challenge Gilmore's credibility cannot be harmless under the federal and state standards of review. Accordingly, Mr. Virgil's convictions for the offenses against Ms. Lao and his judgment of death must be reversed under the United States and California Constitutions. (*United States v. Schoneberg, supra,* 396 F.3d 1036; *Davis v. Alaska, supra,* 415 U.S. at pp. 317-318; *Delaware v. Van Arsdall, supra,* 475 U.S. at pp. 679-680; *Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

V.

THE TRIAL COURT VIOLATED MR. VIRGIL'S RIGHTS TO DUE PROCESS, TRIAL BY AN IMPARTIAL JURY, AND A RELIABLE PENALTY DETERMINATION BY ALLOWING DETECTIVE COHEN TO TESTIFY ABOUT WHY HE BELIEVED MR. VIRGIL WAS THE SUSPECT IN MS. LAO'S HOMICIDE

A. APPLICABLE LAW AND STANDARD OF REVIEW

It is well-settled that "[a] lay witness may testify to an opinion if it is rationally based on the witness's perception and if it is helpful to a clear understanding of his testimony. (Evid. Code, § 800.)" (*People v. Farnam* (2002) 28 Cal.4th 107, 153.) It has also been held that

> "opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt."

(*People v. Torres* (1995) 33 Cal.App.4th 37, 47.)

Further,

> "A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only . . . where the concrete observations on which the opinion is based cannot otherwise be conveyed. (Citations.)"

(*People v. Melton* (1988) 44 Cal.3d 713, 744.)
According to this Court, one of the primary reasons for the rule limiting lay opinion testimony is "the factfinder, not the witnesses, must draw the ultimate inferences from the evidence." (*Ibid.*) Further, lay opinion testimony that invades the province of the jury's factfinder function is not permitted because it does not bear on the witness's credibility and has no "'tendency in reason, to disprove the veracity of the statements.'" (*Ibid.*, citing Evid. Code §§ 210, 350, 780; see also *United States v. Schoenberg, supra,* 396 F.3d at p. 1043.)

A trial court's ruling concerning the erroneous admission of lay opinion testimony is reviewed for an abuse of discretion. (*People v. Medina* (1990) 51 Cal.3d 870, 887; *People v. Farmer* (1989) 47 Cal.3d 888, 908, overruled on another point in *People v. Waidla, supra,* 22 Cal.4th at p. 724, fn. 6.)

B. DETECTIVE COHEN'S TESTIMONY REGARDING HIS BELIEF THAT MR. VIRGIL WAS A SUSPECT IN MS. LAO'S HOMICIDE

Detective Richard Cohen of the Los Angeles County Sheriff's Department was the police officer who caused the homicide investigation to focus on Mr. Virgil. Accordingly, his testimony was central to the prosecution's case and constituted critical evidence on the issue of Mr. Virgil's guilt for Ms. Lao's homicide, as well as his guilt for all the charged crimes. The trial court, however, erred by allowing the detective to testify about why he thought Mr. Virgil was the suspect in Ms. Lao's homicide because that evidence could otherwise have been conveyed and the jury was as competent as the detective to weigh the evidence and draw their own conclusion about Mr. Virgil's guilt. Further, the detective's testimony invaded the province of the jury in deciding the facts presented.

Detective Cohen interviewed Mr. Virgil on October 27, 1992, the day after his arrest for burglary/trespass on October 26 at St. Francis

Cabrini Church and three days after Ms. Lao's homicide at the Donut King. (RT 883-886.) On October 26, after Mr. Virgil's arrest, a booking photograph of him had been taken at the Lennox Sheriff's station [People's Exhibit No. 4(a)]. (RT 885, 896.)

After interviewing Mr. Virgil and advising him of his constitutional rights, Detective Cohen allowed Mr. Virgil to write a narrative statement regarding the incident at the church [People's Exhibit No. 13]. (RT 888-890.) According to Cohen, Mr. Virgil did not seem to be under the influence of drugs at the time of the interview; he wore the same clothes that he was wearing at the time of his arrest – green shirt, gray shorts, and a white jacket; he was not disheveled, though he was somewhat unshaven, but not with a full beard; and he looked "quite skinny" for his build [much thinner than at trial], like a transient who lived from place to place. (RT 893-894.)

Sheriff's Detective LaBerge, the investigating officer in the case arising from the robbery and assault against Samuel Draper at the Southwest Bowl on October 31, 1992, learned from Mr. Jackson, the owner of the daycare center at the rear of the bowling alley's parking lot, that the suspect in the crimes against Mr. Draper had lived in Jackson's van and that person had been involved in a recent crime at a church [St. Francis Cabrini Church]. (RT 2723-2725.) After LaBerge spoke with his fellow detectives and learned that Detective Cohen was investigating the church incident, he obtained Mr. Virgil's October 26 booking photograph from Detective Cohen for use in his investigation regarding the crimes against Mr. Draper. (RT 2729-2731, 2757.)

The investigation into Ms. Lao's homicide was stalled until June 1993 when Gardena Police Sgt. Lobo assigned himself as the lead investigator in that case. (RT 3081.) Sgt Lobo believed that the suspect in Ms. Lao's homicide was a transient and learned through his investigation

that the tickets found in the gym bag left on the table at the donut shop were stolen from the Southwest Bowl. (RT 2402-2406, 2926, 2929.) Thereafter, Sgt. Lobo had a fellow Gardena police officer prepare a crime bulletin about the homicide and had it sent to nearby law enforcement agencies, including the Sheriff's Department, Lennox Division, because the bowling alley was within its jurisdiction. (RT 2929-2932, 2935.) [133]

Detective Cohen saw the bulletin and called the Gardena Police Department the next day to report his belief that Mr. Virgil should be considered a suspect in Ms. Lao's homicide. (RT 2709-2710, 2715-2720, 2737, 2763-2764, 2789-2790, 2936.)

At Mr. Virgil's trial, the prosecutor established, during his direct examination of Detective Cohen, that Cohen had talked with and met Sgt. Lobo after looking at the flier. The prosecutor then asked the detective if he "reach[ed] any sort of suspicions" that Mr. Virgil was the suspect in the homicide. (RT 2711.) Cohen answered in the affirmative and the prosecutor asked "what were those suspicions?" (RT 2711.) Before Detective Cohen answered, defense counsel objected that Cohen's response and state of mind were irrelevant and inadmissible. (RT 2711.) The trial court sustained defense counsel's objection, unless the prosecution could make an offer of proof to the contrary. (RT 2711.)

The prosecutor then requested a bench conference where defense counsel spoke first by saying he did not object to the prosecution introducing evidence that sixpack photographic lineups containing Mr. Virgil's booking photograph were prepared as a result of the meeting

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[133] The four-page bulletin/flier contained descriptions of the suspect from the various witnesses and a composite sketch of the suspect [People's Exhibit No. 11] drawn at Ms. Tomiyasu's direction, and detailed the contents of the gym bag. (RT 847, 1068-1069, 1134-1137, 1930-1931, 1961, 2931-2934; Supp. CT II 400.)

between Detective Cohen, Sgt. Lobo and other officers. (RT 2711.) Defense counsel, however, vigorously objected to Cohen testifying that the composite [People's Exhibit No. 11] looked like Mr. Virgil or that it was representative of how Mr. Virgil looked at time of his interview with Cohen, three days after Ms. Lao's homicide. (RT 2711.) According to defense counsel, this was because Cohen's opinion about how Mr. Virgil looked was irrelevant [because jurors should make their own determination about those matters]. (RT 2712.)

The trial court asked what the prosecution was trying to elicit from Detective Cohen. The prosecutor replied that he wanted to show how the investigation ultimately focused on Mr. Virgil: the composite resembled Mr. Virgil and "the circumstances of the crime at the bowling alley were consistent with the same kind of MO; that as a result then they took a sixpack and put it together." (RT 2712.) Defense counsel objected again that whether the circumstances of the crimes were similar should be left to the jury. (RT 2713.) Further, defense counsel argued that while Cohen could testify about his conversation with Sgt. Lobo, he should not be allowed to testify that the composite looked like Mr. Virgil or that the "MO" in the Draper robbery was similar to the circumstances at the Donut King. (RT 2713.) According to defense counsel, Cohen's anticipated testimony that the composite resembled Mr. Virgil and that there were similarities between the two incidents would impermissibly "usurp[]" the jury's "province." (RT 2713.)

The trial court concluded that the evidence about why the investigation focused on Mr. Virgil had probative value and the prejudice was almost negligible. (RT 2713.) Defense counsel, however, argued in response that Cohen's testimony would be a surprise because he had not been provided with discovery documenting Cohen's belief that Mr. Virgil resembled the composite. (RT 2713.) Instead, he was only provided with

discovery that the flier "jogged" Cohen's recollection of how Mr. Virgil looked during his interview with him. (RT 2714.) Ultimately, the trial court ruled that Cohen's testimony about the composite looking like Mr. Virgil was irrelevant, but the court would allow the detective to testify concerning his belief that "the MO in one case [] triggered his memory of this particular circumstance. I don't think that's unduly prejudicial. They [the jury] have already heard that." (RT 2714.)

When the proceedings resumed before the jury, the prosecutor asked Cohen if he was familiar with the circumstances of the Draper robbery at the time he met with Sgt. Lobo [Cohen was not]. (RT 2715.) Then, the prosecutor asked if there was anything about the St. Francis Cabrini Church burglary or about Mr. Virgil that he concluded made him a suspect in Ms. Lao's homicide. (RT 2715.) Cohen replied that Mr. Virgil "resembled" the composite and he knew Mr. Virgil had been "hanging around the Southwest Bowl and possibly committing crimes there." [134] Based on his conclusions, Cohen called Sgt. Lobo, told him that Mr. Virgil was the likely suspect in Ms. Lao's homicide, provided the reasons for his belief, and eventually provided Lobo with Mr. Virgil's booking photograph from October 26. (RT 2715-2716.) [135] Finally, Detective Cohen was present when Detective LaBerge talked with Sgt. Lobo and he heard LaBerge tell Lobo why he thought that Mr. Virgil was the likely suspect in Ms. Lao's homicide. (RT 2716.)

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[134] In his narrative statement about the incident at St. Francis Cabrini Church on October 18th, Mr. Virgil wrote that he returned to the "bowling alley" after he left the church. (RT 2715; CT Supp. II, 387.)

[135] As argued below, the trial court erred by instructing the jury with CALJIC No. 2.50 and its companion instructions and Detective Cohen's testimony compounded the harm from those instructions.

C. DETECTIVE COHEN'S OPINION TESTIMONY THAT MR. VIRGIL WAS THE LIKELY SUSPECT IN MS. LAO'S HOMICIDE WAS INADMISSIBLE AND REQUIRES THE REVERSAL OF THE JUDGMENT FOR THE CRIMES AGAINST MS. LAO

In *People v. Sergill* (1982) 138 Cal.App.3d 34, the defendant called two police officers to testify about discrepancies between what the eight-year-old complaining witness told them and her testimony at trial. During the prosecution's cross-examination and over defense objection, both officers were allowed to testify that the complaining witness told them the truth and then were allowed to explain the reasons for their conclusions. The Court of Appeal held that the trial court abused its discretion by allowing the officers' testimony and reversed the judgment because the prejudicial effect from the officers' opinion testimony and the trial court's comment that one officer was well suited to render such an opinion usurped the jury's function as fact finder.

According to the *Sergill* court, the officers' opinion testimony was inadmissible because it did not involve the complaining witness's character for honesty or veracity under Evidence Code section 780; their testimony was inadmissible as expert opinion testimony under Evidence Code section 801 because the matters at issue did not go beyond jurors' common experience and the officers were not qualified to render such an opinion; their testimony was inadmissible as lay opinion testimony under Evidence Code section 800 because the officers could testify about their respective interviews with the complaining witness in detail and their opinions about her truthfulness were not helpful to a clear understanding of their testimony; and their testimony was irrelevant under Evidence Code sections 210, 351, and 403 because it had no tendency in reason to affect the credibility of a witness and assessing the probative value of the witness's testimony. (*Id.,* at pp. 39-41.)

In *United States v. Butcher* (9th Cir. 1977) 557 F.2d 666, 667, 669, the Court of Appeals considered whether the trial court erred by admitting the lay opinion testimony of three law enforcement officials who testified the defendant was the person depicted in certain surveillance photographs. In analyzing defendant's claim, the Court of Appeals recognized there are two problems that arise with such testimony. [136]

> "First, there arises a question of whether the testimony improperly invaded the province of the jury . . . . [because] the determination of whether the defendant was the person in the photographs could perhaps have been made by the jury without the officers' testimony . . . . Second, the identifications by the police officers, while constitutionally permissible, did increase the possibility of prejudice to the defendant in that he was presented as a person subject to a certain degree of police scrutiny." (*Id.,* at p. 669.)

Ultimately, the court held that the trial judge did not clearly abuse his discretion and there was ample evidence to support the defendant's conviction. The Court of Appeals held, however,

> "that use of lay opinion identification by policemen or parole officers is not to be encouraged, and should be used only if no other adequate identification testimony is available to the prosecution." (*Id.,* at p. 670.)

In reaching its holding, the *Butcher* court found two cases instructive. The first was *People v. Van Perry* (1976) 60 Cal.App.3d 608, 613, where the California Court of Appeal permitted testimony from a police officer and a parole agent who had prior contact with the defendant because there was evidence that defendant had altered his appearance before trial and their testimony was the only way to establish that fact before the jury. The second was *United States v. Calhoun* (6th Cir. 1976)

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[136] Rule 701 of the Federal Rules of Evidence that was at issue in *Butcher* is identical to Evidence Code section 800 in all important regards. (See *United States v. Butcher, supra,* 557 F.2d at p. 669, fn. 6, and *People v. Mixon* (1982) 129 Cal.App.3d 118, 127.)

544 F.2d 291, where the Court of Appeals held that the trial court abused its discretion by admitting the lay opinion testimony of defendant's parole officer who identified defendant as the robber shown in surveillance photographs, absent a showing that no other witness could have made that identification.

The lessons from the above cases appear to be twofold: (1) police officers may not vouch for the credibility of other witnesses and that includes vouching for the accuracy of other witnesses' identifications and (2) such opinion testimony is more prejudicial than probative unless the matter at issue cannot be established by any other means. (See also *People v. Mixon* (1982) 129 Cal.App.3d 118, 128-129, "[e]xclusion is thus warranted if the prejudicial effect of such testimony outweighs its probative value.") Because the effect of Detective Cohen's testimony was vouching for the credibility of the eyewitnesses who testified that Mr. Virgil was the man in the donut shop and the accuracy of their identifications, the trial court's ruling allowing his opinion testimony was an abuse of discretion and the inquiry must extend to prejudice.

The only scientific evidence connecting Mr. Virgil to Ms. Lao's homicide was an undated palm print found in a public area in the Donut King. As such, the eyewitness' identifications of Mr. Virgil as the man in the donut shop were critically important evidence in the present case.

As detailed above, the eyewitness' identifications of Mr. Virgil were not without serious question because of the nature of the identification process. Also, there was much testimony about what the man in the donut shop looked like and the jury had an opportunity to view Mr. Virgil's booking photographs from October and November 1992 and compare them to the composite sketch and the identification testimony. Further, Mr. Virgil's association with the bowling alley was established through many witnesses. Thus, jurors could fully and adequately decide for themselves,

from the competent evidence before them, the matters that the prosecutor sought to elicit from Detective Cohen Because Detective Cohen's opinion testimony had the effect of vouching for the credibility of the eyewitnesses and the accuracy of their identifications of Mr. Virgil and his testimony was not admissible under any of the theories detailed in *Sergill,* the trial court abused its discretion by admitting his testimony that affected the main issue in the crimes against Ms. Lao – the identity of the perpetrator. Further, the combination of that error and the nature of the trial court's ruling admitting that testimony usurped the jury's function as fact finder.

In this regard, when the prosecutor first sought to elicit Detective Cohen's testimony about whether he reached any conclusions about the suspect in Ms. Lao's homicide, the trial court ruled in the jury's presence that the prosecutor could not elicit that testimony unless he provided a satisfactory offer of proof that the testimony was relevant. (RT 2711.) Then, after an extended sidebar conference, the court ruled that the prosecution's sustained its burden and the detective could testify about his opinion that Mr. Virgil was the suspect in Ms. Lao's homicide and the reasons for his conclusion. (RT 2711-2715.)

After the detective testified about his opinion and that he communicated his conclusions to Sgt. Lobo, the prosecutor also elicited testimony that Detective LaBerge similarly conveyed his "conclusions" to Lobo. (RT 2715-2716.) Under the circumstances, the combination of the trial court's ruling that the detective's opinion testimony was properly before the jury because it was deemed relevant by the court and the nature of the opinion testimony itself "may well have caused the jury to place undue emphasis" on the inadmissible testimony, thereby usurping the jury's function as fact finder. (See *People v. Sergill, supra,* 138 Cal.App.3d at p. 41.) Because this likely caused the jury to believe that the detective's opinion was entitled to greater weight on the main issue involved in the

crimes against Ms. Lao – the identity of the perpetrator – and the eyewitness testimony on this point was not without serious question, the trial court's ruling allowing the testimony at issue was prejudicial. Because the error deprived Mr. Virgil of his rights to due process, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts, Mr. Virgil's convictions for the crimes against Ms. Lao and his penalty judgment must be reversed. *Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Sergill, supra,* 138 Cal.App.3d 34)

VI.

THE TRIAL COURT VIOLATED MR. VIRGIL'S RIGHTS TO DUE PROCESS, COUNSEL, AND A RELIABLE PENALTY DETERMINATION BY FAILING TO SUPPRESS ELLA FORD'S LAST MINUTE OUT-OF-COURT PHOTOGRAPHIC AND IN-COURT IDENTIFICATIONS. THE ERROR REQUIRES THE REVERSAL OF THE JUDGMENT FOR THE CRIMES AGAINST MS. LAO AND THE PENALTY OF DEATH

A. INTRODUCTION

Ella Ford was an important prosecution witness regarding the events immediately after Ms. Lao was stabbed at the Donut King. Ford's testimony about her reported observations outside the donut shop and her identification of Mr. Virgil as the man she saw running through the parking lot and away from the Donut King was highly unreliable under the circumstances and the trial court erred by denying the defense motion to suppress the evidence from Ford.

Ford was interviewed minutes after her reported observation at the scene by Gardena police officer Nick Pepper. According to Officer Pepper, he asked very detailed questions during his 15-20 minute interview with

Ford. Then, Ford described the man she saw running outside the Donut King and the circumstances of her observation – Ford indicated she was some distance from the suspect when she saw him running through the parking lot and looking back towards the Donut King and described him as a black male in his 20s, six feet two inches tall, weighing 150 pounds, with a full beard, lightly grown, and wearing a black T-shirt with the Africa Continent in red, green, and yellow, blue jeans and unknown color of shoes. At the time, Ford said she saw the man's face when he looked back towards the donut shop. Ford did not say that the man had a heavy or long beard or anything about seeing some type of object in the man's hands from her somewhat distant vantage point.

Several months before Mr. Virgil's scheduled preliminary examination in November 1993, a Municipal Court judge granted the parties' joint request that a live lineup be conducted to test the reliability of the eyewitnesses, out-of-court identifications of Mr. Virgil as the man seen inside the donut shop and later running through the parking lot. Because Ford gave a statement at the scene regarding her observations moments after Ms. Lao was stabbed, she was a known eyewitness and someone who was subject to the court's order mandating that eyewitnesses attend the live lineup. Consistent with that status, a police officer was sent to Ford's home to transport her to the live lineup. Ford refused, however, to accompany the officer and never attended a court-mandated live lineup.

Thereafter, Ford was not interviewed by the prosecution until the eve of Mr. Virgil's trial in January 1995. Then, the investigating officer and the prosecutor went to Ford's home, interviewed her about the events at issue, obtained her statement, and showed her a photographic lineup of Mr. Virgil, the prosecution's suspect in Ms. Lao's homicide. Ford identified Mr. Virgil as the man she saw on the day in question. According to Ford,

she would have cooperated sooner if the police and prosecutor had come to her house before they did on the eve of Mr. Virgil's trial.

Defense counsel moved to suppress Ford's anticipated trial testimony regarding her observations at the scene and identification of Mr. Virgil because she should have participated in the court-ordered live lineup before making an identification so many years after the crimes against Ms. Lao and outside of defense counsel's presence. As counsel noted, the prosecution was responsible for the delay in investigation, and the failure to notify defense counsel before the last minute interview with Ford prevented counsel from asking for a live lineup where Mr. Virgil's Sixth Amendment right to the assistance of counsel could have been assured. Further, defense counsel objected to the introduction of Ford's delayed identification of Mr. Virgil on due process grounds because a live lineup would have been more reliable in determining her credibility and the accuracy of her identification. As will be discussed below, the trial court's error in denying the defense motion to suppress Ford's testimony violated Mr. Virgil's federal and state constitutional rights to due process, the assistance of counsel, and a reliable penalty determination and requires the reversal of his convictions for the crimes against Ms. Lao and his judgment of death.

B. APPLICABLE LAW AND STANDARD OF REVIEW

Despite the well-settled rule mandating the right to counsel at a postindictment lineup, the United States Supreme Court has held that the Sixth Amendment does not require the presence of defense counsel at a postindictment photographic lineup. In *United States v. Ash* (1973) 413 U.S. 300, 310-317, the Court held that the right to counsel at a pretrial live lineup identified in *United States v. Wade* (1967) 388 U.S. 218, does not extend to pretrial photographic lineups because the defendant is not and has no right to be present and thus cannot be prejudiced by the absence of

counsel. (See also *People v. Lawrence, supra,* 4 Cal.3d at pp. 277-280.) According to the *Ash* majority, there is no basis for a special rule extending the right to counsel to photographic lineups because there are many other opportunities for prosecutors to act unethically regarding the collection of evidence against the accused and the "the ethical responsibility of the prosecutor" suffices as a "primary safeguard" to protect the defendant against such abuse by prosecutors and their police agents. (*Id.,* at p. 320, fn. 16.) [137] Even though a defendant does not have a right to counsel at a photographic lineup, the defendant is still entitled to due process protection against a tainted identification. (*Payne v. Smith* (E.D.Mich. 2002) 207 F.Supp.2d 627, 645, citing *United States v. Ash, supra*, 413 U.S. at p. 320.)

The three dissenting Justices in *Ash,* however, vigorously disagreed with the majority's conclusion that the Sixth Amendment's right to counsel does not extend to photographic lineups. According to the dissent, the dangers inherent at a live lineup are fully applicable to pretrial photographic lineups, there was no indication that the presence or absence of the defendant was at all a factor in the Court's decision in *Wade,* and while the ethical responsibility of prosecutors might prevent some intentional misconduct, the presence of counsel is necessary to prevent intentional <u>and</u> unintentional misconduct from tainting the accused's

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[137] The *Ash* court also found that there was no right to counsel at photographic lineups because defense counsel could show the prepared photographic lineups to the eyewitness and this safeguard does not exist with live lineups that cannot so easily be re-created. (*United States v. Ash, supra,* 413 U.S. at p. 318, fn. 10.) As evidenced by the trial court's ruling here allowing Lavette Gilmore to identify Mr. Virgil from photographs of the live lineup, the prosecution was wrongly allowed to skirt this safeguard. Further, the prosecutor's conduct during trial of keeping the defense off-balance through delayed investigation and last minute disclosures calls into question the wisdom of the *Ash* majority's belief in the "ethical responsibility" of prosecutors as a "primary safeguard."

identification. (*United States v. Ash, supra,* 413 U.S. at pp. 326-344, 334, fn. 12 (dis. opn. of Brennan, J.)

The defendant bears the burden of showing an unreliable identification procedure (see *People v. DeSantis* (1992) 2 Cal.4th 1198, 1222), and though the standard of review regarding this determination remains unsettled, fairness and reason dictate that the appropriate standard requires this Court's independent review of the record. (See *People v. Ochoa*, *supra*, 19 Cal.4th 353, 413.)

C. ELLA FORD'S STATEMENT TO THE POLICE AT THE HOMICIDE SCENE; HER FAILURE TO ATTEND THE COURT-ORDERED LINEUP; HER INTERVIEW WITH THE POLICE AND PROSECUTOR ON THE EVE OF MR. VIRGIL'S TRIAL; DEFENSE COUNSEL'S MOTION TO SUPPRESS FORD'S TESTIMONY AND IDENTIFICATION OF MR. VIRGIL; AND FORD'S TESTIMONY AT MR. VIRGIL'S TRIAL

1. FORD'S INITIAL STATEMENT TO THE POLICE

On October 24, 1992, Gardena Police Officer Nick Pepper interviewed Ford for 15-20 minutes, just moments after her observations at the scene of Ms. Lao's homicide. (RT 1830, 1832.) According to Pepper, Ford described the man she saw running/hurrying through the parking lot as a black male in his 20's, six feet two inches tall, weighing 150 pounds, with black hair; brown eyes, a full beard, lightly grown, and wearing a black T-shirt with the continent of Africa outlined in red, green, and yellow colors, blue jeans and unknown colored shoes. (RT 1830-1831.) Based on his training and experience as a police officer, Pepper would have been "as precise and accurate as possible" in his questioning and would have asked many "detailed questions" to "pin witnesses down as to time, descriptions, sequence of events" in "a serious offense" like the one against Ms. Lao. (RT 1835.) Though his report regarding the interview with Ford was not

very long, it contained the "crucial bits of information" that Pepper believed were important. (RT 1835.)

According to Pepper, he believed he asked Ford whether she could identify the man if she saw him again. (RT 1836.) Based on Ford's statement to him, Pepper also believed that Ford was some distance from the man when she saw him running through the parking lot and when she saw his face as he looked back towards the donut shop. (RT 1835-1837.) Finally, Ford never told Pepper that the man had a heavy or long beard and she made no mention of seeing anything in the man's hands as he ran though the parking lot. (RT 1837.)

2. FORD'S REFUSAL TO ATTEND THE LIVE LINEUP

After her statement to Officer Pepper on the day in question, Ford was known as an important eyewitness and the police and prosecution treated her as such by sending a police officer to her home with directions to transport her to the Sheriff's Department so she could attend the court-ordered live lineup. (RT 1387, 1388.) Ford refused to attend the live lineup because she feared possible retaliation, if the man she saw had gang affiliations. (RT 1384, 1401.) Ford conceded, however, that she was never threatened and had no information that the events at the Donut King were gang-related. (RT 1384, 1385,1429-1430.)

3. FORD'S INTERVIEW WITH THE INVESTIGATING OFFICER AND THE PROSECUTOR ON THE EVE OF MR. VIRGIL'S TRIAL AND HER IDENTIFICATION OF MR. VIRGIL AS THE MAN SHE SAW RUNNING OUTSIDE THE DONUT KING

On January 6, 1995, almost two years after Ford's reported observations at the donut shop, the prosecutor and Sgt. Lobo went to Ford's home, to interview her and show her a photographic lineup. (RT 1376-1377.) In her rather lengthy statement to the investigating officer and the prosecutor, Ford indicated that her car was parked across the parking lot

from the Donut King, over 70 feet from the front door of the Donut King. (RT 1396-1399.) *138* Consistent with her statement to Officer Pepper, Ford told the investigating officer and the prosecutor that she left Conway Cleaners, the business next to and directly south of the Donut King, walked to her car carrying her laundry, opened her trunk and placed her laundry inside with her back turned to the Donut King. (RT 1399.) Then, she heard some yelling, turned back to look at the Donut King in response, and saw a black male walking fast through the parking lot. (RT 1399-1400.)

During her interview in January 1995, Ford said for the first time that she saw some type of object in the man's clenched left hand as he was running through the parking lot and looking back at the donut shop as if to see whether anyone was following him. (RT 1402.) *139* Consistent with her statement to Officer Pepper that she was some distance from the man when she first saw him, Ford told the investigating officer and the prosecutor that she was at her car and placing her laundry into the trunk when she heard shouting, turned, and saw a black male behind her, walking fast through the parking lot. (RT 1399-1400, 1433-1434, 1437-1439, 1835-1837.) Finally, Ford changed her description of the man's height during this interview by saying that the man was between 5'5" – 5'6" tall [she told Pepper just after seeing the man that he was 6'2" tall]. (RT 1416-1417, 1431.)

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138 At the time, Ford said she parked in the northernmost parking stall, facing east, and just west of the Donut King. (RT 1398-1399.)

139 As noted above, Tomiyasu and Harrison testified that the man never looked back after he left the donut shop. (RT 1056, 1144, 1193, 1275-1276, 1326-1328.)

4. THE DEFENSE MOTION TO SUPPRESS ELLA FORD'S IDENTIFICATION TESTIMONY OF MR. VIRGIL AND THE PROCEEDINGS ON THE MOTION

On February 8, 1995, defense counsel filed a motion concerning Ella Ford's out-of-court and anticipated in-court identifications of Mr. Virgil and her related testimony about seeing him outside the Donut King after Ms. Lao was stabbed. (CT 232-233.) At the motion hearing on February 8, 1995, defense counsel argued that in September 1993, a Municipal Court Judge [140] ordered that an in-person *Evans* lineup [141] be conducted before the preliminary examination and that known eyewitnesses, including Ms. Ford, were required to attend the lineup. (RT 603-606.) Ford refused to attend the lineup and the prosecution waited until "the last minute," more than two years after the events at the Donut King and on the eve of trial, to interview Ford and show her a photographic lineup. (RT 605.) According to defense counsel, the order for the *Evans* lineup imposed a continuing obligation on the prosecution to ensure that Mr. Virgil's right to counsel was protected by notifying defense counsel before Ford was asked to make an identification [of the prosecution's only suspect]. (RT 605-606.)

Defense counsel continued that the prosecution should be sanctioned for failing to notify him of the last minute interview with Ford by suppressing her out-of-court photographic identification of Mr. Virgil and the court should conduct an Evidence Code section 402 hearing to determine if Ford had an independent basis for her identification; the court should suppress any identifications of Mr. Virgil by Ms. Ford because "you

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[140] On August 29, 1993, South Bay Municipal Court Judge Deanne Myers ordered that a corporeal lineup be conducted before the preliminary examination. (RT 8-29-93, 4-5.)

[141] *Evans v. Superior Court* (1974) 11 Cal.3d 617.

can't unring the bell" after the tainted out-of-court identification was made; or, the jury should be instructed that the People had a responsibility to notify the defense about Ford's interview and planned identification and the failure to give such notice "should be taken into consideration as far as the accuracy of the identification. Some type of admonishment [regarding the failure to give notice.]" (CT 232-233; RT 606.)

Defense counsel explained that he filed his motion to challenge Ford's identification and related testimony because she was an important prosecution witness who was allowed to make a critical identification outside of counsel's presence. Defense counsel argued that two eyewitnesses, Debra Tomiyasu and DeAndre Harrison, testified at the preliminary examination that they saw Mr. Virgil inside the donut shop and then saw him leave through the front door. These eyewitnesses also testified that they followed Mr. Virgil out of the donut shop by running southbound with their backs turned to the donut shop's only exit. According to defense counsel, these eyewitnesses had their backs turned to the donut shop so they could not testify with any degree of certainty that someone else was in the donut shop and ran out after them. (RT 606-607.) When the prosecution team interviewed Ford years after the events at the Donut King and showed her a photographic lineup, her statement differed dramatically from the statement she gave to the police [Officer Pepper] years before. (RT 607.)

In her new statement, Ford claimed that she was placing laundry into the trunk of her car when she saw Mr. Virgil run out of the donut shop, he was the only person that ran out of the shop, and he was holding his [left] hand against his inner wrist as if he was concealing an object in his hand. (RT 607-608.) Based on Ford's revised statement, defense counsel anticipated that the prosecution would argue successfully that Mr. Virgil was the person who killed Ms. Lao because no one else left the shop after

him and no one saw a knife in his hand inside the shop because he was hiding it in his hand. (RT 608.) Accordingly, defense counsel concluded that Ford's identification of Mr. Virgil was "obviously very important for the People" and consequently he was very upset over the lack of notice and an opportunity to request another *Evans* lineup before her interview and identification of Mr. Virgil. (RT 608.) Finally, counsel emphasized the importance of an *Evans* lineup to the defense's ability to impeach the identifications in the case by reminding the court that Debra Tomiyasu failed to make an identification at the live lineup, but later changed her mind by calling the Gardena Police Department and saying that the person in the donut shop was in the lineup [Mr. Virgil]. (RT 608-609.)

The prosecutor countered that he doubted whether defense counsel's request for an *Evans* lineup specifically identified Ford as someone required to attend the lineup. (RT 609.) Further, the prosecutor argued that the prosecution was not required to have all witnesses attend a lineup, especially a witness like Ford who provided only limited information at the scene. (RT 609-610.) In this regard, the initial police report about Ford's observation was very brief [one-page long] and did not reflect details of her observation or whether she could identify the person if she saw him again. (RT 610.) Further, the prosecutor argued that Sgt. Lobo repeatedly tried to contact Ford at his request and he finally made contact with her in January 1995 when "it became incumbent upon us to show her the six-pack of photographs." (RT 610.)

The prosecutor continued by attempting to minimize Ford's usefulness as a witness by saying that she was not positive in her identification, though she did focus on Mr. Virgil in the photographic lineup and said he most looked like the person she saw leave the donut shop. (RT 611.) According to the prosecutor, the sanctions requested by the defense were too drastic because the circumstances of Ford's

identification could be explored adequately on cross-examination and there was no authority for defense counsel's request to be notified before a witness can be shown a photographic lineup. (RT 612.)

Defense counsel dismissed the merits of the prosecutor's argument. The prosecution knew that Ford witnessed the events outside the Donut King from the start of the case, there were good reasons for the *Evans* lineup and those reasons were ongoing because of the importance of Ford's identification and testimony, and defense counsel should have been notified before Ford's interview to ensure the reliability of her identification and hence to protect Mr. Virgil's rights to due process [avoid impermissibly suggestive identification] and counsel [ensure the reliability of the identification process]. (RT 613-614.)

The trial court ultimately held that Ford should have attended the lineup, but the prosecution had no duty to stop its investigation and notify defense counsel before interviewing Ford. (RT 614.) Instead, the trial court found guidance in the decision of *People v. Fernandez* (1990) 219 Cal.App.3d 1379, 1384-1386, a case where the defendant argued that the in-court identification of two eyewitnesses should have been excluded because they failed to attend a court-ordered lineup. (RT 614.) The *Fernandez* court believed that excluding the testimony of these witnesses was too harsh a sanction under the circumstances of that case and held the trial court there fashioned an appropriate remedy by modifying CALJIC No. 2.92 [the jury could consider the effect of failing to attend a lineup on the reliability of the identification]. Accordingly, the trial court in Mr. Virgil's case elected to follow the decision in *Fernandez* by agreeing to modify CALJIC No. 2.92 in a similar manner. (RT 615.)

During the discussion of jury instructions, defense counsel proposed modifying CALJIC No. 2.92 by instructing the jury to consider "[w]hether or not the People notified the defense attorney that a prior -- that a photo

line-up would be shown to a witness when there had been a prior court order for a physical line-up for all witnesses. This applies to witness Ella Ford." (RT 3184.) The trial court refused the proposed modification, but agreed to instruct the jury "by simply adding as a last factor 'the failure of a witness to attend a live line-up.'" (RT 3188.) Finally, the trial court ruled that defense counsel could adequately address Ford's failure to attend the live lineup by arguing to the jury that her failure to attend should cause the jury to distrust her identification testimony. (RT 3188.)

5. FORD'S TESTIMONY AT TRIAL

At Mr. Virgil's trial, Ford testified that she was at Conway's Cleaners, immediately adjacent to the Donut King, on October 24, 1992, picking up her laundry and talking with clerk about having alterations done when she heard several screams coming from the direction of the donut shop. (RT 1350-1351, 1353-1354, 1391.) Ford was uncertain when she arrived at the cleaners, but recalled that she missed a 3:00 PM meeting that day because of the events at the donut shop. (RT 1390.) [142]

After Ford and the clerk dismissed the sounds they heard as children playing in the alley nearby, Ford paid for her laundry and began walking to her car in the parking lot [the location of her car was circled in red on People's Exhibit No. 10-A and marked by an X on People's Exhibit No. 15]. (RT 1354, 1394-1395, 1397.) [143] Ford testified that when she was two-three feet outside of the cleaner's front door and walking towards her car, she saw a man running/hurrying out of the donut shop. (RT 1352-

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[142] Ford's recollection was incorrect because she was at the cleaner's well after 3:00 – the 911 calls made immediately after the man left the donut shop were made just after 4:00 PM. (RT 1673, 1677.)

[143] At trial, Ford revised her statement about where her car was parked by saying her car was in the second northernmost parking stall. (RT 1399.)

1354, 1401, 1406, 1407, 1437.) According to Ford, she came within a few feet of the man then and noted that he was about the same height and weight as one of her sons (5'5"-5'6" tall). (RT 1417-1418, 1432.) [144]

The donut shop was on Ford's left side as she was leaving Conway's and walking to her car and the man's right side would have been closest to Ford when she first saw him. (See People's Exhibit No. 15; RT 1354-1356]. Ford, however, expressed some confusion by testifying that the man's left side was closest to her when she saw him appearing to hold some type of object in his left, clenched fist. (RT 1357-1360, 1402.) Ford testified that she continued watching the man as he ran in a southeasterly direction and disappeared around the corner of the 8-Day Mini-Market. (RT 1359-1360, 1407-1408.)

Ford testified that the man was Afro-American, 5'5"-5'6" tall, weighed 155-160 pounds, with a thin to medium build, and wearing dark-colored jeans, white tennis shoes with no blood on them, and a black, short-sleeve T-shirt with African colors on the back [she did not recall seeing a design on the shirt, but only the colors red, green and orange], with a neat, heavy, non-shaggy, full beard that was more than just several days of growth. (RT 1373-1374, 1417-1422, 1429-1431, 1433.) [145] According to Ford, the man was not dirty and did not appear to be a transient/street-person. (RT 1419-1420.) In court, Ford identified Mr. Virgil as appearing consistent with the man she saw running from the donut shop [his face and the height] and testified that now he was heavier in

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[144] Ford told Officer Pepper that the man she saw running through the parking from some distance away was 6'2" tall. (RT 1830, 1836-1837.)

[145] During her interview with Officer Pepper, Ford had no idea what color the man's shoes were ["unknown color"] and never said the man had a heavy beard. (RT 1831, 1837.)

weight and his beard was different because he only had a goatee. (RT 1375-1376, 1432-1435.)

Ford identified People's Exhibit No. 6 as the photographic lineup she was shown in January 1995, just about a month before her testimony. (RT 1376.) Just after Ford identified Exhibit No. 6, the prosecutor quickly realized the error in Ford's testimony and his error in showing her the wrong photographic exhibit. (RT 1376-1377.) Instead, the prosecutor had shown her People's Exhibit No. 12 on January 6, 1995. (RT 1377.) [146]

During cross-examination, Ford was questioned about her statement just one month before. Then, Ford told the police and prosecutor that she was at her car and had placed her laundry into the trunk when she heard someone shouting and turned back to see a man running through the parking lot. (RT 1399-1400.) Ford claimed that the police report about her statement was wrong because she never meant to say that she only saw the man once that day. (RT 1400-1401, 1434.) According to Ford's testimony at trial, she saw the man twice that day – once as she was walking out of the cleaner's and he was leaving the donut shop and a second time after she had walked at a normal pace to her car, placed her laundry inside and saw him when she turned back to look at the donut shop in response to shouts about a woman having been stabbed. (RT 1401, 1402, 1406-1408, 1409, 1411,

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[146] People's Exhibit No. 6 represented Mr. Virgil's appearance after his arrest for auto burglary in Gardena on November 3, 1992. (Supplemental Clerk's Transcript II, 379.) People's Exhibit No. 12 represented Mr. Virgil's appearance after his arrest for trespassing at St. Francis Cabrini Church on October 26, 1992. (Supplemental Clerk's Transcript II, 385.) Mr. Virgil's appearance in these photographs was dramatically different.

1413-1415, 1437.) [147]

According to Ford, she did not tell the police and prosecutor just a month before her testimony at trial about seeing the man twice because she must have been confused about something or the investigating officer got her statement completely wrong. (RT 1400-1401, 1438.) Ford testified that she looked at the man carefully because it seemed strange for him to be hurrying through the parking lot and/or because she heard a female with curlers in her hair [Tomiyasu] yell repeatedly that "[h]e stabbed her." Ford thought the man might be responsible because he looked back at the donut shop after the shouts, as if to see whether someone was following him. (RT 1360-1362, 1403, 1407-1409, 1414-1415, 1436-1437.) Despite the ensuing pandemonium, Ford testified that she went to her to car, opened the trunk and put her laundry inside before walking to the nearby intersection to see where the man had gone. (RT 1411-1414.)

Ford claimed for the first time at trial that she saw the teenager [DeAndre Harrison] leave the donut shop after the woman with curlers in her hair [Debra Tomiyasu] left the shop. (RT 1403-1405.) Later, Ford changed her testimony to say that she did not see the teenager leave the donut shop. Instead, Harrison was already inside the cleaners when Ford turned back to look at the donut shop in response to screams and saw only Tomiyasu leave the shop. (RT 1439-1440.)

Ford correctly identified People's Exhibit No. 4-A [Mr. Virgil's October 26 booking photograph] as the photograph included in People's

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[147] Ford's testimony about seeing the man twice defies common sense and reason. If she encountered the man leaving the donut shop as he was running from the scene, he would have been long gone by the time Ford, a middle-aged woman carrying an armload of laundry on hangers, would have traversed more than 70 feet from the cleaners to her car while walking at a normal pace. (RT 1354, 1355, 1392, 1397-1398, 1432.)

Exhibit No. 12. According to Ford, Mr. Virgil's face in that photograph looked oval and she recalled the man in the parking lot had an oval head and a very short, neat haircut like Mr. Virgil had in that photographic exhibit. (RT 1423-1426. While looking at People's 4-A, Ford replied "Yes" to the prosecutor's question about whether that photograph "accurately depict[ed] the condition or state of his [Mr. Virgil's] facial hair at the time you [Ford] saw him on October 24th?" (RT 1380.)

Finally, Ford claimed she was in court and testifying voluntarily. She conceded, however, that she had been subpoenaed to testify and she knew that her failure to appear and testify would result in her arrest and commitment to jail. (RT 1387-1389.) Despite her fear, Ford was willing to cooperate with the government's investigation. (RT 1388.) According to Ford, she had always provided the prosecution with correct contact information; she responded to each subpoena by calling the prosecution's witness' coordinator to document her whereabouts and availability to be interviewed; and, she would have agreed to be interviewed and give a statement long before January 1995, if she had been asked to do so before that time. (RT 1387-1390, 1431.)

D. UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE TRIAL COURT VIOLATED MR. VIRGIL'S RIGHTS TO DUE PROCESS AND COUNSEL BY FAILING TO SUPPRESS MS. FORD'S TESTIMONY AND IDENTIFICATIONS OF MR. VIRGIL AND THAT ERROR REQUIRES THE REVERSAL OF THE ENTIRE JUDGMENT FOR THE CRIMES AGAINST MS. LAO

1. ELLA FORD WAS A CRITICAL PROSECUTION WITNESS

The prosecutor established the importance of Ford's testimony by telling the jury during his Opening Statement that Ford saw Mr. Virgil run past her, he was the only person that came out of the donut shop, and he was clutching something in his hand that was indicative or consistent with

holding a knife. (RT 640-641.) Further, Ford's testimony was critically important because it provided the jury with a basis to reject the anticipated defense theory that someone other than Mr. Virgil was present and killed Ms. Lao, given that Mr. Virgil had no blood on his person or clothing and no one saw him in possession of the knife used against Ms. Lao.

During his closing argument, the prosecutor buttressed the importance and reliability of Ford's testimony by arguing that Ford refused to attend the lineup because she and her family feared for her safety, but the jury should commend her and find her testimony credible because she was courageous enough to remain at the homicide scene and give a statement to the police (RT 3216-3217); Ford's erroneous [and revised] description of the man's height in the parking lot should not cast doubt on her identification of Mr. Virgil because she admitted that she was not good at estimating height (RT 3245); and, she was an important and accurate witness to the events at the donut shop because she heard Ms. Lao screaming. (RT 3260).

During his closing argument, defense counsel identified the critical nature of Ford's identifications by telling the jury that the court's Eyewitness Instructions were very important and the jury should consider the length of time between the event and when the identifications were made. (RT 3301.) Defense counsel also argued that the prosecutor called Ford as a witness to suggest that Mr. Virgil was concealing a knife as he ran and to explain that was why a knife was not seen in his possession or found at the scene. (RT 1362, 3306-3307.) Defense counsel concluded by arguing that someone other than Mr. Virgil was the killer because a knife was not seen in his possession and blood was not seen on his person or clothing. (RT 3318.)

During the second part of his closing argument, the prosecutor focused the jury on Ford's testimony by arguing that she was able to see

everything that took place until she turned her back to the Donut King and walked to the intersection to see where Mr. Virgil had gone. (RT 3322.) Finally, the prosecutor argued that Ford's observations provided the basis to reject the defense theory that someone else was present in the donut shop and that person killed Ms. Lao. (RT 3322-3323.)

2. FORD'S IDENTIFICATION WAS UNRELIABLE

As detailed above, Ford's description of the man in the parking lot changed significantly between the time of her interview with Officer Pepper within minutes after her observation and the time of her belated interview by the police and prosecutor on the eve of trial, more than two years later. Further, her testimony about her observations and the timing of the events in question differed significantly from other witnesses,, thereby casting doubt on the accuracy of her identification and detailed statement years after the events at the Donut King.

Ford's initial description was that the man was 6'2" tall [RT 1830-1831] which was consistent with Sgt. Tiller's description of the man as 6,1." Later, she changed her description to the man being about 5'5" -5'6 1/2" tall, consistent with the height of one of her sons. (RT 1417-1418.) Ford also exhibited confusion in her other testimony about her observations of the man.

Ford testified that she was two to three feet outside Conway's Cleaners when she turned to her left and saw a man, from a few feet away, leaving the donut shop. (RT 1352-1354, 1401, 1406, 1407, 1437.) A few months earlier, however, Ford told the police and prosecutor that she was already at her car and had placed her laundry inside the trunk when she turned in response to shouting about a stabbing and saw a black male hurrying through the parking lot. (RT 1399-1400, 1433-1434, 1437.) Not only did Ford testify for the first time at trial that she saw DeAndre

Harrison leave the donut shop, she changed her testimony afterwards to say that she did not see him leave the shop. (RT 1403-1405, 1439-1440.) Further, Ford sought to explain the differences between her testimony and her earlier statement about seeing the man while at her car by saying that was the second time she saw him that day. According to Ford, she never meant to tell the investigating officer and the prosecutor what she said to them [that she only the saw the man once while standing at the rear of her car]. (RT 1400-1401, 1404-1405, 1409, 1410, 1434, 1437-1439.)

According to Ford, the man's left side was closest to her when she saw him and she noted what appeared to be some object in his left hand. (RT 1358-1360, 1402.) As discussed above, however, Ford's testimony made little sense because the man was to her left and his right side was closest to her when she reportedly saw him leaving the donut shop and later she saw him turning to his right looking at the donut shop over his right shoulder as he was running through the parking lot. (RT 1354-1356, 1358-1360, 1402.) In other words, the man's body would have blocked Ford's view of his left hand both times she reportedly saw him outside the Donut King.

Unlike Gilmore (RT 2864-2865, 2907, 2918), Tiller (RT 951-954, 974, 989, 996), Tomiyasu (RT 1045-1046, 1052, 1053, 1123, 1125, 1127, 1128, 1131, 1152, 1197-1198, 1962, 1977), and Harrison (RT 1280, 1308, 1313), all of whom attended the live lineup (RT 1168-1169, 1294, 2976, 2872; CT Supp II 383) and said the man in the donut shop was a dirty-looking transient, Ford testified that the man she believed was Mr. Virgil was not dirty-looking, nor a transient. (RT 1419-1420.) Further, Ford testified that the man had a heavy beard, but she never told Officer Pepper about the man having such a beard, though he would have asked her detailed questions about the man's appearance because of the seriousness of

the offense and the need to gather accurate information about the suspect's description. (RT 1830-1831, 1834-1835, 1837, 1419.)

Ford's memory of the events was also different than that of Mr. Santoyo, who testified without challenge about the events he witnessed at the donut shop. Santoyo testified that Ford was inside the cleaners with her laundry and wearing a black and white dress when he ran past the cleaners en route to the donut shop. (RT 1233-1236.) According to Santoyo, an otherwise unimpeached witness, the woman matching Ford's description was inside the cleaners and commented, after talking with others nearby, that she saw someone running through the parking lot. (RT 1236-1241, 1244.) Santoyo did not know where the woman was located when she made her observation, but she was still carrying her laundry and had not placed it in her car when she spoke with him about seeing the man run through the parking lot. (RT 1235-1237, 1411-1414.) By the time Santoyo arrived and Ford was still in the cleaner's, there was no black male running through the parking lot wearing a Continent of Africa T-shirt. (RT 1236.) [148] Ford remembered Santoyo from that day, but did not remember being in the cleaner's when she encountered and spoke with him. (RT 1393.)

In addition to the significant discrepancies in Ford's story at trial from the her own statements and the statements of other witnesses, the photographic lineup shown to Ford several years after her reported observations unfairly highlighted Mr. Virgil's photograph. In this regard, People's Exhibit No. 12 [containing Mr. Virgil's booking photograph taken about two days after the events at the Donut King] depicted Mr. Virgil with a full beard that covered his cheeks and extended back to each ear. (RT

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[148] Ford never testified that she returned to the cleaner's after seeing the man in the parking lot and Santoyo's testimony challenges the details of Ford's testimony regarding her vantage point when she first saw the man outside the Donut King.

999; Supplemental Clerk's Transcript II, 385.) None of the men depicted in that Exhibit, however, looked similar and Mr. Virgil's photograph was highlighted because the size of his head was a fraction of the size of the other men's heads and the background color of his photograph differed from that of the other photographs. (RT 1423; Supplemental Clerk's Transcript II, 385.)

Moreover, the reliability of Ford's photographic and in-court identification of Mr. Virgil was further cast in doubt by her identification of the wrong photographic exhibit in court. At Mr. Virgil's trial, the prosecutor showed Ford People's Exhibit No. 6 [containing Mr. Virgil's booking photograph taken 10 days after the events at the Donut King depicting him with a very distinctive goatee and clean-shaven cheeks, just like he appeared at trial] and asked if this was the exhibit she was shown just a month before. (RT 697, 1376.) Ford immediately said "[y]es" and the prosecutor sought to buttress the strength of Ford's in-court (RT 1374-1376) and out-of-court identifications by showing her a second photographic exhibit, People's Exhibit No. 12 [containing Mr. Virgil's booking photograph taken three days after the events at the Donut King]. (RT 1376.) Ford corrected her previous testimony by identifying People's Exhibit No. 12 as the photographic exhibit that she was shown just a month before. (RT 1377.)

Under the circumstances, Ford's identification was unreliable because she told the investigating officer and the prosecutor that the man she saw outside the Donut King had a full beard, but yet she identified the wrong exhibit that depicted Mr. Virgil with a goatee like he had at trial. (RT 1429.) In other words, Ford's misidentification of the exhibit that showed Mr. Virgil as he appeared at trial and the nature of both photographic exhibits cast doubt on the accuracy and reliability of Ford's out-of-court and in-court identifications and supports Mr. Virgil's claim

that the trial court erred by failing to suppress her testimony and identification.

3. Ford Was Required To Attend The Lineup Because She Was A Percipient Witness And Known As Such By The Prosecution From The Time Of Officer Pepper's Interview With Her Just After The Events At The Donut King

Ford was known as a witness from the time she was interviewed by Officer Pepper, just hours after the incident. (RT 1830-1832.) Despite the lack of any evidence that the crime was gang-related or that any witnesses had been threatened, Ford refused to attend the lineup, even under police protection. (RT 1384.) Though law enforcement knew where she lived and worked at all times after the day of the homicide, the police and prosecution waited for more than two years and until the eve of trial before interviewing her. (RT 1430-1431.)

In *Evans v. Superior Court, supra*, 11 Cal.3d at p. 625, this Court held that "due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate." There is no dispute here that Mr. Virgil's request for a lineup was timely because it was requested soon after Mr. Virgil's arraignment and before the preliminary examination. (CT 1; RT 603-605.) (See *People v. Baines* (1981) 30 Cal.3d 143, 147-148, requests for a live lineup after arraignment and before the preliminary examination are considered timely.)

Regardless of the prosecutor's argument that he did not know the details of Ford's statement until he went to her home on the eve of trial (RT 610), Gardena Police Officer Pepper worked for the police agency investigating the homicide and acted as the prosecution's agent when he interviewed Ford at the scene and obtained detailed information about her observation of the man believed to be the perpetrator of Ms. Lao's

homicide. (RT 1830-1835.) Based on the court order for an *Evans* lineup and the information known to the police, Ford was a witness who was required to attend the lineup. [149] The prosecution recognized this even at the time, and an officer was sent to Ford's home and attempted to transport her to the lineup. (RT 1388.) Accordingly, the question remains whether the prosecutor's delay in showing Ford a photographic lineup years after the crime, without the presence of defense counsel, violated Mr. Virgil's rights to due process, counsel, and a reliable penalty determination.

4. UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE TRIAL COURT'S FAILURE TO SUPPRESS FORD'S TESTIMONY AND IDENTIFICATIONS VIOLATED MR. VIRGIL'S RIGHTS TO DUE PROCESS AND COUNSEL AND REQUIRES THE REVERSAL OF THE ENTIRE JUDGMENT FOR THE CRIMES AGAINST MS. LAO

As provided above, the United States Supreme Court and this Court have recognized the critical importance of the Sixth Amendment's right to counsel at live lineups and consequently mandated the presence of counsel at those lineups. Though a slim majority of the Supreme Court has held that the right to counsel does not extend to photographic lineups because the defendant is not present, the photographic lineup can be recreated, and the prosecutor's ethical responsibility provides a primary safeguard against the government's impropriety at a photographic lineup, it remains that the prosecutor here delayed his investigation for years and then decided without notice to the defense to interview Ford at the last moment before trial with knowledge that she was a witness who was subject to the court order for a live lineup.

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[149] In considering the defense motion to suppress Ford's testimony, the trial court found that Ford "arguably" was subject to the August 1993 order for a lineup. (RT 614-615.)

By the time the prosecution interviewed Ford on January 6, 1995, just three days before the trial was set to begin on January 9, 1995, Mr. Virgil was clearly the only focus of the investigation in Ms. Lao's homicide. Because Ford refused to attend the lineup and the prosecution delayed going to her home until the eve of trial, Ford was shown a photographic lineup and asked to make an identification for the first time in secret almost three years after her reported observations. Furthermore, because Ford was permitted to absent herself from the live lineup, the identification procedure was conducted without any of the safeguards associated with live lineups, including the fairness of the identification procedures and the right to the assistance of counsel. Under the circumstances, the trial court's denial of the defense motion to suppress Ford's testimony and identification allowed the prosecution, intentionally or otherwise, to conduct a critical identification procedure in violation of Mr. Virgil's rights to due process and counsel.

In denying the defense motion to suppress Ford's testimony and identification, the trial court relied on the decision in *People v. Fernandez, supra,* 219 Cal.App.3d at pp, 1384-1386, to craft a remedy for Ford's failure to attend the live lineup. (RT 614-615.) The trial court's reliance was misplaced because that decision was based on the absence of any suggestion that the prosecution had acted in bad faith.

In Mr. Virgil's case, the prosecution engaged in a consistent pattern of providing late discovery and keeping the defense scrambling to address its many last minute disclosures. Further, the prosecution here joined in the defense request for a live lineup and treated Ford as an important eyewitness by sending a police officer to bring her to the live lineup. Consistent with its conduct of keeping the defense off-balance and despite its knowledge that Ford was a witness who should have attended the live lineup, the prosecutor decided without notice and at the last minute to

interview Ford and have her make an identification outside of the presence of defense counsel. Though the prosecutor undoubtedly knew of Ford's importance as an eyewitness and that the defense would have insisted that Ford participate in a live lineup before being shown a photographic lineup containing Mr. Virgil's picture, he decided to avoid the constitutional protections associated with a live lineup by secretly interviewing Ford at the last minute. Accordingly, the prosecutor acted in bad faith and the exclusion of Ford's testimony and identification was required. (See *People v. Fernandez, supra,* 219 Cal.App.3d at pp. 1385-1386 [remedies should be tailored to discourage improper conduct by the police and prosecution].)

Ford's testimony was used by the prosecution to defeat the defense claim of another man being present in the donut shop and to explain why the knife used to kill Ms. Lao was never found. Because the identification process was suggestive and unreliable and Ford's version of the events in question was ever-changing and hence unreliable, the prosecution's conduct of secretly interviewing Ford outside of the presence of counsel and using her unreliable testimony and identification to convict Mr. Virgil of the crimes against Ms. Lao violated Mr. Virgil's rights to due process, the assistance counsel, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts. Finally, the importance of Ford's testimony to the prosecution's case was manifest because her testimony was used to defeat Mr. Virgil's defense that he was not the person who killed Ms. Lao and to explain why a knife was not seen in his possession or found at the scene. Accordingly, it cannot be said that the trial court's error in denying the defense motion to suppress Ford's testimony and identification was harmless beyond a reasonable doubt under the federal standard or harmless under the state standard. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Watson, supra*, 46 Cal.2d at

p. 836.) For these reasons, Mr. Virgil's convictions for the crimes against Ms. Lao and his judgment of death must be reversed.

VII.

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF UNCHARGED CRIMES AND INSTRUCTING THE JURY WITH CALJIC NOS. 2.50, 2.50.1, AND 2.50.2. THOSE ERRORS REQUIRE THE REVERSAL OF THE ENTIRE JUDGMENT

A. INTRODUCTION

The prosecution sought to prove Mr. Virgil's guilt for all of the charged crimes by introducing a series of minor, theft-related offenses committed before and after the charged crimes. According to the prosecution's theory, the relevance of the other crimes evidence was to show that Mr. Virgil was in the area during the period when the charged offenses occurred. As will be shown below, the trial court's error in giving CALJIC No. 2.50 and its related instructions over defense objection violated Mr. Virgil's rights to due process, trial by jury, and a reliable penalty determination under the federal and state constitutions and requires the reversal of the entire judgment.

B. APPLICABLE LAW AND STANDARD OF REVIEW

Under Evidence Code section 1101, subdivision (b), evidence that the defendant has committed uncharged crimes is not admissible to prove that the defendant is a person of bad character or has a criminal disposition, but such evidence is admissible to prove, inter alia, the identity of the perpetrator of the of the charged crimes. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) "Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent <u>only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent</u>. (Citation.)" (Emphasis added.) (*People v. Kipp,*

supra, 18 Cal.4th at p. 369.) "To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses. (Citation.)" (*Ibid.*)

> "Evidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a '"pattern and characteristics . . . so unusual and distinctive as to be like a signature."' (Citations.) 'The strength of the inference in any case depends upon two factors: (1) the degree of distinctiveness of individual shared marks, and (2) the number of minimally distinctive shared marks.' (Citations.)"

(*Ibid.*)

In *People v. Ewoldt* (1994) 7 Cal.4th 380, 393-394, this Court considered whether evidence of defendant's prior, uncharged misconduct was admissible under Evidence Code section 1101. Though the Court recognized that specific instances of misconduct were not admissible to prove the person's conduct on a specific occasion, the Court held that this rule does prohibit the admission of uncharged misconduct evidence to establish some fact other than a person's character or disposition under Evidence Code section 1101, subdivision (b). As part of its analysis, the *Ewoldt* court held that the nature and degree of similarity between uncharged misconduct and the charged offense in order to establish a common design or plan differs from the degree of similarity necessary to prove intent or identity. (*Id.,* at p. 402.) In this regard, "[t]he least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. (Citation.)" (*Ibid.*) Continuing, the *Ewoldt* court held that

> "[a] greater degree of similarity is required in order to prove the existence of a common design or plan" and "[t]he greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the

> inference that the same person committed both acts. (Citation.) 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' (Citation.)"

(*Id.*, at pp. 402-403.)

Finally, the *Ewoldt* court held that even if the evidence is relevant and not excludable under Evidence Code section 1101, the inquiry must extend to prejudice because

> "[e]vidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. (Citations.)' (Citations.) 'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have *substantial* probative value.' (Citation.)"

(*People v. Ewoldt, supra,* 7 Cal.4th at p. 404; (*People v. Hawkins* (1992) 98 Cal.App.4th 1428, 1445.)

In other words, the *Ewoldt* court held that the issue must be examined under Evidence Code section 352 to determine whether the

> "the probative value of the evidence of defendant's uncharged misconduct is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' (Citation.)"

(*Ibid.*)

Penal Code section 1044

> "makes it the duty of the trial court 'to control all proceedings during trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

(*People v. Armstead* (2002) 102 Cal.App.4th 784, 793.)

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 US 358, 364.) It requires the state to prove '"every ingredient of the offense beyond a reasonable doubt . . . .'" (*Sandstrom v. Montana* (1979) 442 US 510, 524,

quoting *Patterson v. New York* (1977) 432 US 197, 215.) Not only does this requirement apply to the evidence as a whole, but also to each fact from which the defendant's guilt is inferred. This Court explained this principle in *People v. Watson, supra,* 46 Cal.2d at p. 831: "properly interpreted, CJ 28 [now CJ 2.01 and CJ 2.02] applies the doctrine of reasonable doubt not to proof of miscellaneous collateral or incidental facts, but only to proof of 'each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt.'" Accordingly, the *Watson* court held that in any case which rests essentially on circumstantial evidence, it would be error to refuse to instruct the jury on this basic principle. Further, in any such case, it would be error for the trial court to in any way mislead the jury into thinking that it was not necessary that each fact essential to complete a chain of circumstances establishing guilt be proved beyond a reasonable doubt. (*People v. Carter* (1957) 48 Cal.2d 737, 758-759, 760-761.) A conviction violates due process if it is based upon an amalgamation of facts, none of which have been proven beyond a reasonable doubt. (See *People v. Deletto* (1983) 147 Cal.App.3d 458, 472; *People v. Hefner* (1981) 127 Cal.App.3d 88, 96-97.)

It is true, of course, that neither the defendant's guilt of the uncharged offense, nor the relevance of prior uncharged offenses need be proven beyond a reasonable doubt as a prerequisite to the admissibility of the uncharged offense. (See *People v. Simon* (1986) 184 Cal.App.3d 125, 134, fn. 6 [admissibility of other crimes evidence governed by preponderance standard]; see also *People v. Albertson* (1944) 23 Cal.2d 550, 557.) However, this rule does not permit the jury to utilize the evidence to convict the defendant without finding that the other crime has been proven beyond a reasonable doubt. Such a result would violate due process by allowing an "ingredient of the offense" to be proven under a lesser standard. "An essential element of any crime is, of course, that the

defendant is the person who committed the offense. Identity as the perpetrator must be proved beyond a reasonable doubt." (*People v. Hogue* (1991) 228 Cal.App.3d 1500, 1505.)

Hence, the jury is actually faced with a two-step process regarding other crimes evidence. First, before the evidence may even be considered, it must be proven under the preponderance standard. (See Evid. Code § 403.) Second, before the other crime may be utilized to convict, it must be proven beyond a reasonable doubt.

Accordingly, to avoid unconstitutional use of prior uncharged offenses, the standard CALJIC instruction regarding the standard of proof as to uncharged offenses should be modified to make it clear to the jury that: (1) the evidence may not even be considered unless its relevance and the defendant's commission of the uncharged offense is established by a preponderance of the evidence (Evid. Code § 403); and (2) the evidence may not be utilized to convict the defendant unless its relevance, and the defendant's commission of the offense is proven beyond a reasonable doubt. Without such an instruction, there is a danger that the defendant's constitutional rights to trial by jury and due process under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution will be undermined by allowing the jury to convict with facts which have not been proven beyond a reasonable doubt. [150]

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150 Mr. Virgil wishes to thank the publishers of FORECITE® Legal Publications for their very substantial contribution to his argument concerning the trial court's federal constitutional errors in instructing the jury with CALJIC Nos. 2.50, 2.50.1, and 2.50.2.

C. THE UNCHARGED MISCONDUCT EVIDENCE ALLEGING MR. VIRGIL'S COMMISSION OF CRIMES AT AND NEAR THE SOUTHWEST BOWL [AUTO BURGLARY/THEFT OF RAFFLE TICKETS AND MINOR, DRUG-RELATED OFFENSES], AT THE ST. FRANCIS CABRINI CHURCH [BURGLARY/THEFT/TRESPASS], AND BEHIND THE M&M SOUL FOOD RESTAURANT [AUTO BURGLARY]

The prosecution introduced evidence from Joe Vaouli and Samuel Draper about the theft of raffle tickets from Vaouli's car at the Southwest Bowl, shortly before the homicide at the Donut King on October 24, 1992. (RT 1914, 2408-2409, 2419-2422, 2424-2427, 2431, 2434, 2436-2437, 2445, 2501, 2507, 3094.) Those tickets were found inside the gym bag that was on the table where the suspect in Ms. Lao's homicide at the Donut King was last seen sitting. (RT 1512-1518, 2402-2406, 2926, 2929.)

The prosecution also introduced evidence that Mr. Virgil trespassed/stole a pie from St. Francis Cabrini Church about a week before the homicide at the Donut King, he was arrested at the church by Sheriff's deputies two days after the homicide when he reappeared there, and he was living in a van behind the bowling alley. (RT 784-796, 882-885, 888-891, 896-898.)

The prosecution further introduced evidence that in early October 1992, weeks before the homicide at the Donut King, a police officer had seen Mr. Virgil and another man named Irwin often in the area near the Southwest Bowl and found them in possession of drug paraphernalia and auto burglary tools and seen them under the influence of cocaine. (RT 2675-2681, 2686, 2688, 2693-2694.) Deputy Everett testified that Mr. Virgil was seen in possession of a gym bag similar to the one found at the scene of the homicide and wearing clothing similar to those worn by the suspect in Ms. Lao's homicide. (RT 2682-2685, 2699.)

Finally, the prosecution introduced evidence that Mr. Virgil was arrested for suspected auto burglary in Gardena on November 3, 1992, nine

days after Ms. Lao's homicide. (RT 2769-2785.) Mr. Virgil's booking photographs following his arrest for the alleged crimes at the Church and for the alleged crimes related to the auto burglary were introduced as People's Exhibit No. 4 [Photograph A was taken two days after Ms. Lao's homicide and Photographs B and C were taken ten days after Ms. Lao's homicide]. (RT 1933-1934, 278/5-2786, 2788, 2790.) *151*

D. Defense Counsel's Objection To The Prosecution's Proposed Instruction With CALJIC Nos. 2.50, And 2.50.1, And 2.50.2 And The Instructions To The Jury

During the discussion of jury instructions, defense counsel objected to the prosecution's request to instruct the jury with CALJIC No. 2.50, and inferentially with its companion instructions of CALJIC Nos. 2.50.1 and 2.50.2. (RT 3346-3347.) According to defense counsel, there was no basis for the prosecution's proposed instruction[s] based on Evidence Code section 1101, subdivision (b), because there was insufficient evidence "of a characteristic plan, method, or scheme." (RT 3171.) Defense counsel also argued that the instructions were unnecessary because the "jury is well aware that the Cabrini caper and the auto theft arrest and all the other contacts with Deputy Everett and Garrett all go to identification, all go to how six packs were put together, all go to basically how the case was put

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151 During the pretrial proceedings, defense counsel advised the court that that he planned not to object to the prosecution's uncharged crimes evidence for tactical reasons [Mr. Virgil's appearance at the time of those incidents was very relevant evidence and defense counsel wanted the jury to have "a complete picture of what Lester Virgil looked like at various times" in deciding whether he was guilty of the charged crimes]. (RT 619.) Defense counsel's failure to object to the evidence, however, does not waive Mr. Virgil's instant challenge to the trial court's instruction about the use of that evidence. That is because defense counsel objected to these instructions and they affected his substantial rights under Penal Code section 1259.

together so the jury would not be in a vacuum." (RT 3171.) Further, the requested instructions were based on a "similar MO" [common plan or scheme] and there had not been a hearing to determine whether there was sufficient evidence to warrant the prosecution's requested instructions. (RT 3172.)

Defense counsel concluded that the prosecution was "having their cake and eating it, too" by

> "stack[ing] a bunch of robberies on to a homicide, then try to give 2.50 and bootstrap it in by saying they're all similar MO when I am prevented from making a motion to sever because Prop[osition] 115 says I can't sever, and in effect overruled Williams versus Superior Court, which was, of course, a case where they [the prosecution] hooked together three weak homicides and filed special circumstances with the idea that if he commits one robbery or one murder he probably committed the other murders and therefore give him the death penalty. And Williams says that was an abuse of discretion not to try the three homicides separately.
>
> "So I'm in opposition to 2.50. I think it tells the jury that the Joe Draper 211 was similar MO and therefore you can use that to make a determination of the identity of what happened in the Donut King store. And I think the instruction is misleading, prejudicial, and has no application in the case." (RT 3172.-3173.)

The prosecutor replied that all the charged crimes were cross-admissible and properly joined because "there is a similar MO" and CALJIC No. 2.50 was necessary for several reasons. (RT 3173.) According to the prosecutor, this was because the incident at the church and the auto burglary were not admitted "to prove that the defendant is a criminal generally but that they are admissible for the purpose of proving that he was in the same area during the same period of time." (RT 3173.) After further discussion, the prosecutor asked that CALJIC No. 2.50 be modified to eliminate reference to "motive for the crime charged" and that the instruction be worded only to address identity. (RT 3174-3175.)

The court added that it was unsure how the incident at the church factored into the instruction, except that it would be relevant to the auto burglary at the bowling alley where the raffle tickets found at the homicide scene were stolen from and the "jury should be given some guidance as to how to look at that kind of evidence." (RT 3175-3176.) Given the court's indication that it would give CALJIC No. 2.50 because the jury should be instructed regarding the incident at the church and auto burglary, defense counsel sought to minimize the harm by asking that the instruction be modified to avoid reference to a "characteristic method, plan or scheme –" (RT 3175-3176.) The court agreed there was "no 1101b evidence to show common method or plan other than the evidence which has already been introduced with the relation to the charges that he is facing here." (RT 3176.) Defense counsel completed the court's statement that the only thing that should remain in the instruction was to instruct the jury regarding the use of the uncharged misconduct evidence to prove "[t]he identity of the person who committed the crime, if any, of which the defendant is accused." (RT 3176.) *152* When the court read the instruction, as modified, defense counsel did not lodge a further objection and the jury

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152 Under the circumstances, defense counsel did not invite the trial court's error of giving CALJIC No. 2.50 and related instructions. In this regard, the court indicated that it would give the instruction and any objection would have been futile. (See *People v. Cooper* (1991) 54 Cal.3d 771, 828-831, no tactical purpose for the failure to object; *People v. Hill* (1998) 17 Cal.4th 800, 820-821, no waiver if objection would have been futile.)

was instructed as detailed below. (RT 3176-3177.) [153]

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[153] The jury was instructed as follows:

CALJIC No. 2.50:

"Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial. Such evidence, if believed, was not received and may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show the identity of the person who committed the crime, if any, of which the defendant is accused. For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case. You are not permitted to consider such evidence for any other purpose."

CALJIC No. 2.50.1

"Within the meaning of the preceding instruction, such other crime or crimes purportedly committed by a defendant must be proved by a preponderance of the evidence. You must not consider such evidence for any purpose unless you are satisfied that the particular defendant committed such other crime or crimes. The prosecution has the burden of proving these facts by a preponderance of the evidence."

CALJIC No. 2.50.2

"Preponderance of the evidence means evidence that has more convincing force and the greater probability of truth than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. You should consider all the evidence bearing upon every issue regardless of who produced it." (RT 3346-3347.)

E. THE TRIAL COURT'S INSTRUCTION WITH CALJIC NOS. 2.50, 2.50.1, AND 2.50.2 VIOLATED MR. VIRGIL'S RIGHTS TO DUE PROCESS, TRIAL BY JURY, AND A RELIABLE PENALTY DETERMINATION AND REQUIRES THE REVERSAL OF THE ENTIRE JUDGMENT

In *People v. Medina* (1995) 11 Cal.4th 694, 762-764, this Court recognized it had long held that evidence of other crimes used to prove, inter alia, the identity of the perpetrator of the charged crimes need only be proved by a preponderance of the evidence. According to the Court,

> "Prior cases explain that the facts tending to prove the defendant's other crimes for purposes of establishing his criminal knowledge or intent are deemed mere 'evidentiary facts' that need not be proved beyond a reasonable doubt as long as the jury is convinced, beyond such doubt, of the truth of the 'ultimate fact' of the defendant's knowledge or intent. (Citation.)"

(*Id.,* at p. 763.)

Later, in *People v. Carpenter* (1997) 15 Cal.4th 312, 380-383, this Court held that the admission of other crimes evidence lies within a trial court's discretion and again that such evidence need be proved only by a preponderance of the evidence. Finally, the Court addressed defendant's argument that the evidence of his intent at the time of the charged crimes was circumstantial and the jury might have inferred from the other crimes evidence instructions that his intent need be proved only by a preponderance of the evidence. According to the Court,

> "Defendant argues the evidence of intent as to all crimes was circumstantial. Therefore, he claims, the jury might infer from these instructions that the prosecution need prove intent only by a preponderance of the evidence. However, the court also gave the standard instructions on reasonable doubt in general and on the sufficiency of circumstantial evidence to prove the necessary 'specific intent or mental state.' These instructions made clear the reasonable doubt standard applies to intent as well as identity. No error appears."

(*Id.,* at p. 383.)

Despite the court's holdings in *Medina* and *Carpenter,* this Court has not adequately addressed the conflict between the circumstantial evidence instruction [CALJIC No. 2.01] which requires each essential fact in the chain of circumstances leading to guilt be proven beyond a reasonable doubt [154] and the other crimes, evidence instruction [CALJIC No. 2.50] which permits consideration of other crimes evidence that need be proven only by a preponderance of the evidence.

Though a trial court does not have a sua sponte duty to instruct with CALJIC Nos. 2.50, 2.50.1, and 2.50.2, it must do so accurately when it elects to give such instruction. (*People v. Nottingham* (1985) 172 Cal.App.3d 484, 497; *People v. Hayes* (1990) 52 Cal.3d 577, 624-625;

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[154] Mr. Virgil's jury was instructed as follows with CALJIC No. 2.01:

"However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only, 1, consistent with the theory that the defendant is guilty of the crime, but, 2, cannot be reconciled with any other rational conclusion.

"Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt.

"In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

"Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence and reject that interpretation which points to his guilt.

"If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (RT 3342-3343.)

People v. Edelbacher (1989) 47 Cal.3d 983, 1010.) Because the trial court's instruction failed to convey the jury's need to find Mr. Virgil's guilt for the uncharged crimes beyond a reasonable doubt before those crimes could be used as an inference in establishing his identity as the perpetrator of the charged offenses, the trial court's instruction with CALJIC No. 2.50 and its companion instructions violated Mr. Virgil's rights to due process, trial by jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*In re Winship, supra,* 397 U.S. at p. 364; *Sandstrom v. Montana, supra,* 442 U.S. at p. 524.) *155* Accordingly, the inquiry must turn to prejudice.

Mr. Virgil submits that the effect of the trial court's instruction with CALJIC No. 2.50 to prove identity "'consist[ed] of a misdescription of the burden of proof, which vitiate[d] all the jury's findings'", thereby constituting structural error that requires the reversal of the entire judgment. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281, 282.) Assuming that this Court concludes that the trial court's misinstruction does not constitute "structural error," reversal is still required because "there is a reasonable likelihood" that the instruction "led the jury to misconstrue or misapply the law" requiring proof of every fact essential to establish the defendant's guilt beyond a reasonable doubt. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70-75; *Boyde v. California* (1990) 494 U.S. 370, 378-381; CALJIC Nos.

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155 Though defense counsel clearly expressed tactical reasons for not objecting to the admission of the other crimes evidence, he vigorously objected to the prosecution's intention to use that evidence to prove Mr. Virgil's identity for the charged crimes [proof he was in area at the time the charged crimes were being committed]. (RT 3171-3177.) Further, he objected earlier to Detective Cohen's testimony about his belief that Mr. Virgil was the suspect in the crimes against Ms. Lao [the detective interviewed Mr. Virgil after his arrest for one of the uncharged offenses]. Under the circumstances, it cannot be said that defense counsel waived this claim on appeal.

2.01, 2.50-2.50.2.) For that reason, it cannot be said that the error is harmless beyond a reasonable doubt under *Chapman v. California, supra,* 386 U.S. at p. 24.)

In *People v. Ewoldt, supra,* 7 Cal.4th at pp. 402-403, this Court held that before other crimes evidence may be introduced to prove identity, the other crimes evidence must have the highest degree of similarity to the charged offenses. Further, in *People v. Kipp, supra,* 18 Cal.4th at p. 369, this Court held that for purposes of proving identity, the uncharged and charged crimes must be so similar that they must establish a pattern that is like a signature. As explained in *Ewoldt*, great care must be taken before evidence of uncharged crimes may be admitted, and, more importantly, used against the defendant to prove identity, because such evidence is so inherently and greatly prejudicial.

The prosecutor argued that Mr. Virgil was out committing crimes to obtain money to support his cocaine addiction from the time of Ms. Addo's reported robbery on October 13, 1992, until his arrest for car burglary in Gardena about three weeks later [uncharged crime]. (RT 3227.) Under the circumstances, the prosecution's use of the uncharged crimes evidence to establish Mr. Virgil's identity absent valid grounds for this inference and the dilution of the due process standard by allowing the jury to use such evidence absent proof beyond a reasonable doubt cannot be harmless beyond a reasonable doubt and requires the reversal of the entire judgment. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

VIII.

THE TRIAL COURT'S INSTRUCTION WITH CALJIC NO. 2.51 HAD THE EFFECT OF WITHDRAWING CRUCIAL ELEMENTS FROM THE CRIME OF ROBBERY AND THE SPECIAL CIRCUMSTANCE ALLEGATION FROM THE JURY'S CONSIDERATION AND REQUIRES THE REVERSAL OF THE JUDGMENT INVOLVING THE CRIMES AGAINST MS. LAO

A. INTRODUCTION

Mr. Virgil's jury was instructed with CALJIC No. 2.51 that motive was not an element of the charged offenses. [156] Under the circumstances of Mr. Virgil's case, the giving of CALJIC No. 2.51, coupled with the prosecutor's argument, had the effect of withdrawing crucial elements of robbery and the special circumstance and requires the reversal of Mr. Virgil's convictions and penalty for the crimes against Ms. Lao.

B. STANDARD OF REVIEW

"The Fifth and Sixth [and Fourteenth] Amendments to the United States Constitution require that every criminal conviction rest upon a jury determination that the defendant is guilty beyond a reasonable doubt of every element of the charged crime. (*United States v. Gaudin* (1995) 515 U.S. 509, 509, 510.)" (*People v. McGee* (2003) 107 Cal.App.4th 188, 192; see also *People v. Sengpadychith* (2002) 26 Cal.4th 316, 324.) The Court went further in *Sengpadychith* by concluding that the United States

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[156] Mr. Virgil's jury was instructed as follows with CALJIC No. 2.51:

"Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence as the case may be the weight to which you find it to be entitled." (RT 3347.)

Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 474, 476, 482-484, 490-495 and fn. 19, which treated a sentence enhancement as the "'functional equivalent'" of a crime, requires a jury to find every element of an enhancement, except for those based on a prior conviction, beyond a reasonable doubt. (See also *Sandstrom v. Montana* (1979) 442 U.S. 510, conviction based on a jury instruction that does not require the prosecution to meet its burden of proof beyond a reasonable doubt as to any fact necessary to constitute the crime violates a defendant's right to due process.) Accordingly, the failure to instruct a jury on an element of a crime or sentence enhancement provision not based on a prior conviction is reversible under *Chapman v. California, supra,* 386 U.S. at p. 24., "unless it can be shown 'beyond a reasonable doubt' that the error did not contribute to the jury's verdict." (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 326.)

C. GIVING CALJIC NO. 2.51 IS ERROR WHEN IT OPERATES TO WITHDRAW AN ELEMENT OF THE CHARGED OFFENSES AND SPECIAL ALLEGATION

In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the Court of Appeal considered whether giving CALJIC No. 2.51 operated to withdraw

an element of the crime from the charged offense of Section 647.6. [157] In beginning its analysis, the Court of Appeal recognized that

> "It is generally true that motive is not an element of a criminal offense [Citations.] But the offense of section 647.6 is a strange beast. As noted in *People v. Pallares, supra*, 112 Cal.App.2d at page Supplemental. 901: 'Although no specific intent is prescribed as an element of this particular offense, a reading of the section as a whole [then section 647a] in light of the evident purpose of this and similar legislation enacted in this state indicates that the acts forbidden are those *motivated by* an unnatural or abnormal sexual interests or intent with respect to children.'"

(*Id.*, at pp. 1126-1127.)

Continuing, the *Maurer* court cited with approval the definition of "motive" from 1 Witkin and Epstein, California Criminal Law (2d Ed. 1988) § 100, page 118, which provided that "'[m]otive is the emotional urge which induces a particular act.'" (*Id.*, at p. 1127.) Finally, the court noted that the difference between "motive," "motivation," or "motivated" is a distinction without practical significance as to whether CALJIC No. 2.51 operated to remove an element of the crime from the layperson jury's

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[157] The jury herein was instructed substantially in conformance with the instruction in *Maurer* which told the jury in pertinent part that motive was not an element of the crime charged and need not be shown. (*People v. Maurer, supra,* 32 Cal.App.4th at 1126.) In this regard, Mr. Virgil's jury was instructed that

"Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence as the case may be the weight to which you find it to be entitled." (RT 3347.)

consideration of defendant's guilt. [158]

More recently in *People v. Hillhouse* (2002) 27 Cal.4th 469, 503-504, and *People v. Cash* (2002) 28 Cal.4th 703, 738-739, the Court considered, respectively, the propriety of giving CALJIC No 2.51 in the context of the charged offenses of murder, robbery, and the special circumstance of murder during the commission of robbery. [159] The Court recognized in both cases that "motive is the 'reason a person chooses to commit a crime,' but it is not equivalent to the 'mental state such as intent, required to commit the crime.' (Citation.)" (*People v. Cash, supra,* 28 Cal.4th at p. 738, citing *People v. Hillhouse, supra,* 27 Cal.4th at p. 504.) In rejecting the defendants' arguments in both cases, the Court considered it critical that the jury was never instructed in effect that the terms "'motive," and "'intent'" could be used "interchangeably."

In Mr. Virgil's case, however, the prosecutor's argument to the jury concerning the crime of robbery and the truth of the special circumstance was that "the compelling motive in this case was robbery, and that motive

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[158] The *Maurer* court dismissed the People's argument that defense counsel in that case invited the error by requesting CALJIC No. 2.51 because there was no basis on the record to conclude that he did so for a deliberate tactical purpose. (*People v. Maurer, supra*, 32 Cal.App.4th at pp. 1127-1128.) As in the present case, the doctrine of invited error is not applicable because the record does not show that defense counsel had a deliberate tactical purpose by agreeing that the jury be instructed with CALJIC No. 2.51. (RT 3177.)

[159] The *Hillhouse* court rejected the People's argument that defendant's failure to object to CALJIC No 2.51 barred his challenge on appeal to that instruction. Citing Penal Code section 1259, the Court held that "[i]nstructions regarding the elements of the crime affect the substantial rights of the defendant, thus requiring no objection for appellate review. (Citations.)" (*People v. Hillhouse, supra,* 27 Cal.4th at p. 503.)

must exist before the actual killing takes place." (RT 3223.) [160] Further, the prosecutor argued that the special circumstance should be found true because robbery was the motive in Ms. Addo's case, but she was fortunate because she did not resist. Further, the prosecutor argued that the

> "one compelling motive in this case is simple human greed. And that is why when you kill somebody because of simple human greed, you make yourself eligible for a special circumstance finding." (RT 3226.)

Immediately after this argument, the prosecutor urged the jury to find that Ms. Lao's homicide was not "a passionate murder," but "a murder committed during the course of a robbery" and that the only way for the jury to decide

> "what was going through somebody's mind at a certain time, to figure out what they are specific intent was – you don't have a crystal ball, obviously, to go back and say, Well gee, what was going through the brain of Lester Virgil at that time.
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> "What was really going through his head? You might find that that head was under the influence of cocaine. So I think most of the time we keep on finding that he looks strung out. He looked like he might be a cocaine addict. But there is nothing to suggest really and truly that he was under the influence at the time of the commission of these crimes. But even if he had been, so what? He goes in, slaughters a young woman, takes money to continue supporting his cocaine habit. Same thing. what we have here is you have to infer his intent by way of his actions and by way of looking at all of the crimes that we have, October 13th, October

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[160] In *People v. Edelbacher* (1989) 47 Cal.3d 983, 1027, the Court held a reasonable juror would have understood that CALJIC No. 2.51 was limited to "crime[s], i.e., the charged offense of murder, and did not extend to allegations like special circumstances. Given the more recent decisions from the Court and the United States Supreme Court mentioned above that sentencing enhancements are functionally equivalent to crimes, the rationale from *Edelbacher* concerning the limited scope of CALJIC No. 2.51 should no longer be considered valid. (See *Apprendi v. New Jersey, supra,* 530 U.S. at pp. 474, 476, 482-484, 490-495 and fn. 19.)

> 24th, and October 31st. And I think that you get a pretty good picture of what was going on with this defendant during that period of time. Several occasions he was found with a cocaine pipe but no cocaine. And on most other occasions, whether it was when he was caught for the burglary on November 3rd, '92 at 2222 Rosecrans where Alvin Duncan had to chase him or if you look at the other of the circumstances, such as the Cabrini Church, the man didn't have any money. He kept on taking money from people, and he kept on spending it. On what? Do you remember Deputy Everett testifying how the average intake of a cocaine user in that area could be at least $100 a day?" (RT 3226-3227.)

In other words, the effect of the prosecutor's argument was to persuade the jury that Mr. Virgil's "motive" was akin to his mental state [specific intent to steal] that the jury had to find existed before the special circumstance could be found true. Further, the jury was instructed in such a way to advise them that the terms "mental state" and "specific intent" were synonymous.

In *People v. Bolton* (1979) 23 Cal.3d 208, the Court considered the effect of the prosecutor's argument in a claim involving prosecutorial misconduct. The prosecutor in *Bolton* implied during his argument that there was more evidence against the defendant than he could present to the jury. In addressing defendant's claim of prosecutorial misconduct, the Court discussed a defendant's Sixth Amendment right of confrontation and the importance of a prosecutor's argument to the jury. In this regard, the Court recognized that juries hold prosecutors in special regard and that prosecutor's arguments, consequently, carry great weight with juries. (*Id.*, at p. 213.) Accordingly, the prosecutor's argument about motive and mental state are important in deciding whether it was error to give CALJIC No. 2.51 under the circumstances of this case.

In *Saffle v. Parks* (1990) 494 U.S. 484, 486, a 5-4 majority of the Supreme Court reversed the judgment of the Court of Appeals by finding that the Court of Appeals created a new rule in violation of the procedural

rules from *Teague v. Lane* (1989) 489 U.S. 288, and that the trial court's "antisympathy" instruction did not violate the high court's decisions in *Lockett v. Ohio* (1978) 438 U.S. 586, and *Eddings v. Oklahoma* (1982) 455 U.S. 104. In his dissent, Justice Brennan recognized the importance of a prosecutor's argument to the jury by noting

> "Although the prosecutor's comments do not have the force of law, they often are a useful aid in determining how a reasonable juror could have interpreted a particular instruction. See [*California v.*] *Boyde*, 494 U.S., at 385, 110 S.Ct., at 1200 ("[A]rguments of counsel, like the instructions of the court, must be judged in the context in which they are made"); see also [*California v.*] *Brown*, 479 U.S., at 553, 107 S.Ct., at 845 (BRENNAN, J., dissenting).)" (*Saffle v. Parks, supra,* 494 U.S. at p. 511, fn. 12 (dis. opn. of Brennan, J.).)

D. THE TRIAL COURT'S ERROR IN GIVING CALJIC NO. 2.51 HAD THE EFFECT OF ELIMINATING ELEMENTS OF THE CHARGED OFFENSES AND THE ASSOCIATED ALLEGATIONS

As recognized above, motive is not usually an element of a charged offense. Motive, however, can be deemed an element based on a reading of the section as a whole and the terms "intent" and "motive" can be found to be interchangeable in light of the evident purpose of the legislation and the argument of counsel. (See *People v. Maurer, supra,* 32 Cal.App.4th at p. 1127; *People v. Cash, supra* 28 Cal.4th at p. 739; *People v. Brown* (1988) 45 Cal.3d 1247, 1256-1257; *People v. Bolton, supra,* 23 Cal.3d at p. 213.).)

In *Starr v. Lindsey* (N.D.Cal. 1999) __ F.Supp. ___ [1999 WL 300661, at pp. 10-11] the federal district court considered defendant's argument that giving CALJIC No. 2.51 violated his Fourteenth Amendment right to due process and his Sixth Amendment right to a jury trial on all material issues. The District Court found that there could be one or more motives in defendant's case and that his conviction did not depend on the existence of motive. Because the defendant's motive in committing the crime of assault with intent to commit rape might have differed from the

specific intent required to commit that crime, the District Court held that the instructions as a whole did not make it reasonably likely that the jury misunderstood the motive instruction in a way that violated the constitution. The District Court, however, did not consider whether a prosecutor's argument made it reasonably likely that the jury misunderstood the motive instruction in a way that violated the Constitution.

In *People v. Brown, supra,* 45 Cal.3d at pp. 1256-1257, the Court considered whether the interplay of counsel's argument with individually proper instructions produced a distorted meaning of the instructions. (See also *People v. Montoya* (1994) 7 Cal.4th 1027, 1049-1050, the argument of counsel is properly considered when it is claimed that proper instructions together produce a distorted meaning.) The Court recognized that the instructions themselves were not expressly erroneous and concluded that while the prosecution may have attempted to exploit any ambiguity in the instructions, the prosecutor's argument was itself so manifestly ambiguous that it implicitly conceded the issue at hand and thus cured any possibility of error.

In *People v. Nguyen* (1988) 204 Cal.App.3d 181, 188, the Court of Appeal agreed with the defendant that while the instruction at issue did not misstate the law, it was incomplete and thus improper. After recognizing that instructions should not be considered in a vacuum, the *Nguyen* court looked to the prosecution's argument and concluded that the jury was adequately informed of the issue, notwithstanding the inadequacy of the instruction at issue. (See also *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1603-1604.)

In the present case, the jury was instructed with CALJIC No. 3.31 that there must be a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator and unless that specific intent

exists, the crimes or allegation to which it relates [felony murder, murder with special circumstances and robbery and personal use of a knife] are not committed. (RT 3354.) CALJIC Nos. 2.01 and 2.02 were also given, the latter instruction equating specific intent with the mental state with which an act is done. (RT 3342-3343, 3354-3355.) [161] The court also gave CALJIC No. 8.10 [defendant may be found guilty of murder if a person was killed, the killing was unlawful, and was done with malice aforethought or occurred during the commission of robbery] (RT 3356); CALJIC No. 8.21 [any unlawful killing that occurs during the commission of robbery is first-degree murder when the perpetrator had the specific intent to commit that crime] (RT 3358-3359); Defense Special Instruction Nos. 1 and 2 [defendant must have had the intent to steal at or before the application of lethal force] (RT 3359, 3365); CALJIC No. 8.81.17 [before the special circumstance can be found true, the jury had to find the murder was committed while defendant was engaged in the commission or attempted commission of robbery, or the murder was committed to carry out or advance the commission of robbery or to facilitate escape or to avoid detection] (RT 3361); CALJIC 8.83.1 [the specific intent and/or mental state with which an act is done may be shown by the circumstances surrounding its commission and the special circumstance cannot be found true unless the surrounding circumstances are consistent with the defendant having had the required specific intent] (RT 3363-3364); and CALJIC No. 9.40 [to prove robbery, the jury had to find that defendant with force or fear

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[161] The Use Notes to CALJIC Nos. 2.01 and 2.02 provide that these are alternate instructions and should never be given together. This Court, however, has not found error in giving both instructions, either of which could arguably have been given in this case. (See *People v. Nakahara* (2003) 30 Cal.4th 705, 713-714; *People v. Maury* (2003) 30 Cal.4th 342, 428.)

took property from the person in possession of the property with the specific intent to permanently deprive that person of the property] (RT 3364-3365).

The prosecutor here urged the jury to find Mr. Virgil guilty of murder and robbery against Ms. Lao on the basis of his state of mind that he suggested was synonymous with the mental state required to commit these crimes. (RT 3223, 32226-3227.) That is, the taking of property was the compelling reason for the crime and that mental state, like the specific intent to steal, must be found to exist in Mr. Virgil's mind "before the actual killing [the application of lethal force] takes place." (RT 3223, 3359, 3365.) Under the circumstances, the prosecutor's argument blurred the distinction between motive and specific intent and had the effect of withdrawing the crucial mens rea elements of robbery and special circumstance from the jury's considerations. (See *Saffle v. Parks, supra,* 494 U.S. at p. 511, fn. 12 (dis. opn. of Brennan, J.).) Accordingly, the omission of elements of the offense and special circumstance from the jury's consideration violated Mr. Virgil's rights to due process, trial by jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*Sandstrom v. Montana, supra,* 442 U.S. 510; *Starr v. Lindsey, supra*, 1999 WL 300661, at p. 10; *United States v. Gaudin, supra,* 515 U.S. at pp. 509-511; *Apprendi v. New Jersey, supra,* 530 U.S. at pp. 490-495 & fn. 19..)

E. THE ERROR IN GIVING CALJIC NO. 2.51 IS NOT HARMLESS BEYOND A REASONABLE DOUBT AND REQUIRES THAT THE JUDGMENT BE REVERSED

The failure to instruct the jury on every element of a crime and statutory enhancement violates the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution (*United States v. Gaudin, supra,* 515 U.S. at pp. 509-511; *Apprendi v. New Jersey, supra,* 530 U.S. at

pp. 490-495 & fn. 19) and requires the reversal of judgment, unless it can be shown beyond a reasonable doubt that the error did not contribute to the jury's verdict. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Beyond the perpetrator's identity, the crucial inquiry in the present concerning the crimes against Ms. Lao involved a determination whether Mr. Virgil committed first degree felony murder by killing her during the commission of robbery, the prosecution's theory of liability. [162] Accordingly, Mr. Virgil's mental state was very much at issue. This was especially so because the defense argued that even if the jury believed Mr. Virgil killed Ms. Lao, the evidence did not show that he committed robbery, since the decision to take money occurred after the homicide was committed. (RT 3277-3290.) Because there is a "reasonable likelihood" that CALJIC No. 2.51 had the effect of withdrawing the intent [mens rea] element that went to the heart of the prosecution's entire murder case, the error in giving that instruction was not harmless beyond a reasonable doubt and requires the reversal of the entire judgment for the crimes against Ms. Lao. (*Yates v. Evatt* (1991) 500 U.S. 391, overruled on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4; *Boyde v. California, supra*, 494 U.S., at p. 380; *Chapman v. California, supra,* 386 U.S. at p. 24.)

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[162] The prosecutor argued that "the People's theory in this case is not that the defendant, Lester Virgil, committed premeditated murder, though I think the facts show that, but that he committed a first degree felony murder, which, in fact, is a special circumstance murder. If you commit a murder in the course of a felony, you are up for a special circumstance." (RT 3224.)

IX.

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY WITH CALJIC NO. 2.22 REGARDING THE WEIGHING OF CONFLICTING TESTIMONY REQUIRES THE REVERSAL OF THE ENTIRE JUDGMENT

A. INTRODUCTION

Much of the prosecution's evidence against Mr. Virgil during the guilt phase of his trial consisted of conflicting testimony. Approximately 20 years before Mr. Virgil's trial in 1995, this Court held in *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884, that trial courts must instruct juries with CALJIC No. 2.22 in every case in which conflicting testimony has been presented. [163] According to the decision in *Rincon-Pineda*, juries should be given this instruction because it greatly aids triers of fact in arriving at proper verdicts by instructing jurors not simply to count the number of witnesses who testify for the prosecution and defense, but to decide the case based on the convincing force of the evidence. (*Ibid.*; CALJIC No. 2.22.)

Despite a trial court's well established duty to instruct juries with CALJIC No. 2.22 in cases like Mr. Virgil's, the trial court here failed to give this critical instruction. Because there was conflicting evidence

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[163] CALJIC No. 2.22 provides as follows:

"You are not required to decide any issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which you find more convincing. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses [who have testified on the opposing sides]. The final test is not in the [relative] number of witnesses, but in the convincing force of the evidence."

regarding each of the charged offenses and the defense presented no witnesses, there is a reasonable likelihood that Mr. Virgil's jury based its guilt verdicts and the truth of the alleged special circumstance on the mere fact that all the witnesses during the guilt phase testified for the prosecution and the defense called no witnesses. Accordingly, the entire judgment must be reversed.

B. APPLICABLE LAW AND STANDARD OF REVIEW

In *People v. Rincon-Pindea, supra,* 14 Cal.3d 864, the Court considered the former version of CALJIC No. 10.22 and whether that "cautionary instruction" should continue to be mandatory and given in all sex offense cases. [164] After holding that such cautionary instructions are disapproved and not to be given in future cases, the Court noted that cases based primarily on eyewitness testimony do present some difficulty for juries because the issue of guilt or innocence mainly involves the credibility of the respective witnesses. Accordingly, the Court reaffirmed its support for proper instruction on the credibility of witnesses contained in CALJIC Nos. 2.20 and 2.22. (*Id.,* at pp. 883-884.) Specifically, the Court held that CALJIC No. 2.20 must be given sua sponte in every case and CALJIC No. 2.22 is similarly required "in every criminal case in which no corroborating evidence is required" because it "greatly aid[s] triers of fact in arriving at proper verdicts." (*Id.,* at p. 884; see also *People v. Cleveland* (2004) 32 Cal.4th 704, 751 [CALJIC No. 2.22 must be given sua sponte in every

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[164] This "cautionary instruction" provided that

"'A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent. [¶] 'Therefore, the law requires that you examine the testimony of the female person named in the information with caution.'" (*People v. Rincon-Pineda, supra,* 14 Cal.3d at p. 871.)

criminal case in which conflicting testimony has been presented]; *People v. Crew* (2003) 31 Cal.4th 822, 848 [CALJIC No. 2.22 is a proper instruction because it addresses the jury's evaluation of the evidence]; *People v. Nakahara* (2003) 30 Cal.4th 705, 714 [CALJIC No. 2.22 is a proper instruction because it advises jurors to evaluate the evidence by looking at its "'convincing force'" rather than the "'relative number'" of testifying witnesses]; *People v. Dickey* (2005) 35 Cal.4th 884, 906-907 [instruction on weighing conflicting testimony is important to deciding the credibility of witnesses].)

Generally speaking, an error in failing to instruct sua sponte on the general principle of law contained in CALJIC No. 2.22 requires reversal if it is reasonably probable that it affected the verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Under certain circumstances, however, the violation of a defendant's state law rights may also violate a defendant's rights under the federal constitution.

In *Bonin v. Calderon* (9th Cir.1995) 59 F.3d 815, 841-842, the defendant argued in federal court that the trial court's refusal to allow his second counsel to make a closing argument at the penalty phase of his capital trial deprived him of the right to the effective assistance of counsel and due process. The Court of Appeals recognized that it was bound by the California Supreme Court's conclusion that the trial court violated the defendant's state law rights under Penal Code section 1095 to have both counsel argue his case. The Court rejected, however, his argument that the violation of his state law rights violated his federal constitutional rights. According to the Court of Appeals,

> "In order to create a liberty interest protected by due process, the state law must contain: (1) 'substantive predicates, governing official decisionmaking' and (2) 'explicitly mandatory language' specifying the outcome that must be reached if the substantive predicates have been met. (Citation.). In order to contain the

> requisite 'substantive predicates,' the state law at issue 'must provide more than merely procedure; it must protect some substantive end.' (Citation.). Indeed, we have drawn a careful distinction between procedural protections created by state law and the substantive liberty interests those procedures are meant to protect. (Citations.) The denial of state-created procedural rights is not cognizable on habeas corpus review unless there is a deprivation of a substantive right protected by the Constitution. (Citation.) 'The state may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.' (Citation.)"

(*Id.*, at p. 842.)

Because Penal Code section 1095 did not itself create a protected liberty interest, but merely constituted a procedural right

> "designed to facilitate the protection of more fundamental substantive rights such as the rights to effective assistance of counsel and a reliable verdict. It contains neither 'substantive predicates, protecting a substantive end nor 'explicitly mandatory language' requiring a particular result if the 'substantive predicates' are met. Bonin's contention that he was deprived of a state-created liberty interest in having two attorneys make closing arguments must therefore fail.

(*Id.*, at p. 842.)

Unlike the state law right created by Penal Code section 1095, the requirement that CALJIC No. 2.22 be given in every criminal case like Mr. Virgil's protects the more formal, substantive requirements of fairness in the proceedings and the reliability of the penalty determination in capital cases. Thus, by instructing the jury of the requirement that its decision must only be based on the convincing force of the evidence and not on the mere number of witnesses for one side or the other, the instruction protects substantive liberty interests that are intended to be protected by the United States Constitution. Accordingly, the appropriate standard of review for the failure to give this important instruction is the harmless-error test from *Chapman v. California, supra,* 386 U.S. at p. 24.)

C. The Trial Court's Failure To Instruct The Jury Sua Sponte With CALJIC No. 2.22 Is Not Harmless Beyond A Reasonable Doubt And Requires The Reversal Of The Entire Judgment

As will be discussed below, there was conflicting testimony regarding the crimes alleged to have been committed by Mr. Virgil against Ms. Addo, Ms. Rodriguez, and Mr. Draper. Further, there were 45 witnesses who testified for the prosecution during the guilt phase, but no witnesses for the defense. (RT Volume A, pp. vi-viii.) Based on the conflicting testimony that permeated the entire guilt phase and the overwhelming number of witnesses called by the prosecution, the trial court's error in failing sua sponte to instruct the jury with CALJIC No. 2.22 is not harmless beyond a reasonable doubt and requires the reversal of the entire judgment against Mr. Virgil.

1. The Reported Crime Against Beatriz Addo

Beatriz Addo reported that the man who robbed her was black with a medium complexion and about the same height as her husband, who was 5'9" tall; the robber weighed about 155-165 pounds and had a normal frame [slim] that was not muscular, and he was 20-35 years old with somewhat short hair. (RT 694, 696, 716-717, 720, 743, 744, 753, 773, 774, 826-827.) Ms. Addo testified that the man did not appear to be a transient [not too dirty and not too clean], but Mr. Addo testified that his wife told him that the man looked like a street-person. (RT 695-696, 723, 724, 774.) Though Ms. Addo testified that she heard the old style cash register open and that required the pushing of a button, Gardena Police Officer Golf could not find any fingerprints on the cash register. (RT 689-690, 746-747, 857, 862-865, 880.) Contrary to what Ms. Addo told her husband about the man having medium complexion, Ms. Addo told Officer Golf that the man had "'dark'" complexion. (RT 866.)

2. THE REPORTED CRIMES AGAINST MS. LAO

Lavette Gilmore, a hairstylist and part-owner of the nearby Girls Will Be Girls Hair Salon, took a break from work during the afternoon of October 24, 1992, and walked to the Donut King to buy donuts. (RT 2859-2860, 2863.) Before entering the donut shop, she looked through the front window and saw a man seated at one of the customer service tables. (RT 2860, 2864.) Gilmore admitted that she did not get a good look at the man or look at him clearly (RT 2860, 2919), but noted that he was wearing a Malcolm X hat and a black jacket with a black shirt with the color red (RT 2861, 2863, 2902) and there was a gym bag and a small, Styrofoam cup on the table where he was seated. (RT 2861-2862, 2902.) Gilmore testified she was very suspicious of the man because he looked out of place, unkempt and possibly under the influence of some substance. (RT 2864-2865, 2907, 2918.)

Gilmore also testified that she was in the donut shop for 25-25 minutes talking with Ms. Lao and the many customers who came and went during that time, including a "park policeman" whom she told about her suspicions of the man seated inside the shop. (RT 2861, 2864, 2879, 2880-2881, 2887, 2896-2897, 2900-2901.) Park Police Sgt. Tiller testified differently that he and his partner were at the donut shop minutes before Ms. Lao was stabbed and he saw no one else in the donut shop other than Ms. Lao and the man seated at the table. (RT 934-935, 948, 939, 948, 1988, 3090.) Further, Gilmore testified that she was in the shop with DeAndre. Harrison and Debra Tomiyasu, but they testified that they were the only customers inside the shop. (RT 1033-1034, 1118, 1261-1263, 1276-1277, 2916-2917, 2923.)

Gilmore did not recall how she described the man to the police that day, but then recalled describing him as a "black adult, six foot two, 150, black hair, brown [eyes], clean shaven, sweaty looking, wearing a black

shirt, unknown colors, and black jeans." (RT 2906.) At trial, she testified that the man was dirty and "wasn't no clean-shaved person." (RT 2906, 2918.) Out-of-court, Gilmore identified photographs of Mr. Virgil and said she was 100 percent certain he was the man in the donut shop. (RT 2889-2890, 2906-2908.) Though she testified that Mr. Virgil's profile was similar [RT 2871-2872], she could not say in court that he was the man in the donut shop. (RT 2865-2866.)

Gilmore did not identify Mr. Virgil at the live lineup, something that very much concerned the investigating officer [Lobo] and the prosecutor who went to her home on the eve of trial in an attempt to correct what they believed to be a deliberate misidentification. (RT 2923-2924, 2969.) During that meeting, Lobo asked Gilmore if she deliberately made a wrong identification at the live lineup to avoid getting involved. (RT 2971.) Reportedly, Gilmore answered that she saw the man from the donut shop at the live lineup [Mr. Virgil], but she lied then by identifying someone else to avoid getting involved. (RT 2872-2873, 2971-2972, 3092-3093.)

DeAndre Harrison was unsure about his testimony at trial regarding the cash register inside the Donut King. (RT 1305, 1318, 1321-1323, 1332.) Almost two years before his testimony at trial, Harrison was questioned extensively at the preliminary examination about the cash register. Then, he testified that the man he saw behind the service counter pushed the button to open the register. Harrison could not recall that testimony at trial, even though he reviewed his testimony from the preliminary examination just before Mr. Virgil's trial. (RT 1304-1307, 1317-1318, 1320.) Harrison attempted to be honest when he testified at the preliminary examination, but testified that his memory might have failed him then. Instead, Harrison testified that his memory improved over time after he reviewed some materials and was prepped for trial by the investigating officer and the prosecutor. (RT 1303, 1304, 1318, 1319.)

Though Harrison remembered at trial that the man's hand went into the register, he also admitted that his memory of the events might have been better at the preliminary examination. (RT 1318-1324.)

Harrison also testified that the man appeared startled by the events inside the Donut King, but that his eyes were kind of "medium mellowed-out eyes" and not wild-looking as Tomiyasu described. (RT 1045, 1312, 1521.) He initially described the man as being about 6'2" tall with a thin build, a rough ["scroungy looking"] beard that was not necessarily a full beard, and "dark complected" ["dark ruddy skin"]. (RT 1277, 1278, 1279, 1280, 1308-1310, 1312, 1342.) At trial, however, Harrison testified that Mr. Virgil had medium brown complexion [like his skin color]. According to Harrison, he was wrong by telling the police at the scene that Mr. Virgil was dark-complected and explained his very different testimony in Mr. Virgil's presence by testifying that Mr. Virgil looked dirty at the time of the incident. (RT 1277, 1279, 1308-1311, 1548.)

Further, Harrison changed his estimate of Mr. Virgil's height and build by the time of trial by testifying that Mr. Virgil was 5'9" – 5'10" [not 6'2"] tall with a build that was not too thin and not too big. (RT 1278, 1308.) Harrison explained that his initial description was wrong because he had never witnessed events like those in the donut shop and was "tripping out" at the time. (RT 1278.) Finally, Harrison testified that his testimony at trial was more accurate than his testimony at the preliminary examination, though he also conceded the opposite by testifying that his prior statements may have been more accurate. (RT 1278, 1318-1319.)

Debra Tomiyasu [the woman in the donut shop with Harrison] described the man she saw behind the counter as looking like a transient with a round face and head, dark complexion with dark, dirty-looking, shiny smudges on his face [both sides of his jaw and cheek], "average" size nose with a thin bridge at the top, rough, scraggly beard and mustache

[several days of growth – significantly more facial hair than Mr. Virgil had two days after the homicide, as depicted in People's Exhibit No. 4-A], kind of wavy, very close shaven hair [not quo vadis length (close shaven and wavy), but close], very thin build with a drawn-in face, 5'9" – 5'10" tall, late 20s to early 30s, and "wild" looking eyes. (RT 1045-1046, 1052, 1053-1054, 1109, 1123, 1125, 1127, 1128, 1131, 1152, 1197-1198, 1962-1963, 1977.) At trial and with Mr. Virgil sitting before her, Tomiyasu's description changed to be more consistent with Mr. Virgil's appearance – his complexion was darker than medium complected and he had a large, broad nose. (RT 1126, 1197-1198, 1200.)

During her two interviews with Gardena police officer Schmidt just moments after the attack against Ms. Lao, Tomiyasu described the suspect as a male black adult in his late 20s to early 30s, with a very short Afro, a full beard "wild-looking" dark eyes, "dark" skin with a rough, dark complexion, thin build and weighing about 150 pounds, and wearing a short-sleeve black shirt depicting the continent of Africa in red and black on the front, and blue jeans. (RT 1521-1522, 1526, 1577-1578, 1585.) According to Schmidt, Tomiyasu said the man had rough, dark complexion, but she could not tell if his skin was rough or he was unshaven, and she never said the suspect had a beard or a round head or he would have noted that information in his detailed report of the incident. (RT 1577-1579, 1584-1585, 1592-1593.)

Felipe Santoyo worked at the Bates Fish Market that was in the same strip mall as the Donut King. (RT 1211-1213.) After running to Donut King in response to shouts about a stabbing victim there and returning to the fish market to call Ms. Lao's relatives, Santoyo returned to the donut shop. As he was returning, he saw a 40-45 year old black woman [Ella Ford] who was wearing a black and white dress standing outside Conway Cleaners carrying many clean clothes on hangers. (RT 1228-1229, 1233-

1235, 1239, 1392, 1427, 1432, 1751.) According to Santoyo, the woman [Ford] was still inside the cleaners when she told him about seeing a man run/hurry through the parking lot. (RT 1236-1237, 1244.)

Ella Ford testified that she went to Conway's Cleaners at approximately 3:00 – 3:45 PM on October 24, 1992, to pick up her laundry. (RT 1350-1351, 1390, 1421.) Unlike the description given by Santoyo, Ford claimed that she was wearing pants that day because it was a Saturday. (RT 1392, 1427.) After paying for her cleaning, Ford testified that she left the cleaner's and was 2-3 feet outside the front door when she saw a man [to her left] run out of the donut shop and hurry across the parking lot. (RT 1354-1355, 1400-1401, 1406, 1411.)

But, just a month before, Ford gave a different version to the police and prosecutor. Then, Ford said she was putting laundry into the trunk of her car when she heard shouting that someone had been stabbed, turned back to look at where the shouting had come from, and saw a man walk past her. (RT 1399-1401.) Ford explained her different stories by saying that she must have been confused when talking with the police and prosecutor a month before trial. (RT 1401.)

To complicate matters further, Ford attempted to harmonize her different statements by saying for the first time at trial that she saw the man twice, once as she was coming out of the cleaner's and the man was coming out of the donut shop and a second time when she was at her car and looked back at the donut shop in response to shouts about a stabbing. (RT 1399-1401, 1437-1438.) Just after the events at the donut shop, however, Ford had indicated to Gardena police officer Pepper that she was some distance from the man when she first saw him in the parking lot. (RT 1830-1831, 1836-1837.)

Unlike Gilmore (RT 2864-2865, 2907, 2918), Tiller (RT 951-954, 974, 989, 996), Tomiyasu (RT 1045-1046, 1052, 1053, 1123, 1125, 1127,

1128, 1131, 1152, 1197-1198, 1962, 1977), and Harrison (RT 1280, 1308, 1313), all of whom attended the live lineup (RT 1168-1169, 1294, 2976, 2872; CT Supp II 383) and said the man in the donut shop was a dirty-looking transient, Ford testified that the man she believed was Mr. Virgil was not dirty-looking, nor a transient. (RT 1419-1420.) Further, Ford testified that the man had a heavy beard, but she never told Officer Pepper about the man having such a beard, though he would have asked her detailed questions about the man's appearance because of the seriousness of the offense and the need to gather accurate information about the suspect's description. (RT 1830-1831, 1834-1835, 1837, 1419.)

3. THE REPORTED CRIMES AGAINST MR. DRAPER

Draper was certain at trial that Mr. Virgil was the person who robbed him, though he also conceded it was possible that someone other than Mr. Virgil was the actual robber. (RT 2520-2521, 2535, 2549.) Draper explained that Mr. Virgil was the person who asked him for bus fare and gave him the plastic bag full of clothing to hold, but his identification of Mr. Virgil was based also on some degree of speculation [there was only a brief lapse of time between those events and when he was grabbed at knifepoint, forced to the ground, and his wallet was taken so he believed Mr. Virgil was the culprit]. (RT 2533-2535, 2551.)

4. GIVEN THE CONFLICTING TESTIMONY THAT PERMEATED THE ENTIRE CASE, THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY SUA SPONTE WITH CALJIC NO. 2.22 CANNOT BE HARMLESS BEYOND A REASONABLE DOUBT

As detailed above, there was much conflicting testimony in this case concerning Mr. Virgil's description as the perpetrator of the crimes alleged to have been committed against Ms. Addo, Ms. Lao, and Mr. Draper. Further, as detailed above, there was much conflicting testimony regarding the events inside the donut shop. Because Mr. Virgil's identity as the

perpetrator of the all the charged crimes and the nature of his conduct inside the Donut King [robbery versus after-formed intent] were absolutely critical to the fairness of the proceedings and the reliability of the judgment of death, it was necessary that the jury be properly instructed regarding the weighing of the conflicting evidence, especially because the defense called no witnesses and the prosecution called 45. As established below, the trial court's error in failing to give CALJIC No. 2.22 sua sponte violated Mr. Virgil's rights to due process, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts and requires reversal of the entire judgment.

"It is settled that, even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) This longstanding requirement includes giving CALJIC No. 2.22, which, inter alia, has been "held to be required in all criminal cases" (*People v. Carter* (2003) 30 Cal.4th 1166, 1219) and a critically important instruction in cases based primarily on eyewitness identification. (See *People v. Alcala* (1992) 4 Cal.4th 743, 803; *People v. Blair* (1979) 25 Cal.3d 640, 662-663.)

CALJIC No. 2.22 would have been a critical instruction in Mr. Virgil's case because it would have advised the jury to evaluate the evidence by looking at its "'convincing force'" rather than the "'relative number'" of testifying witnesses. (See *People v. Nakahara, supra,* 30 Cal.4th at p. 714.) In evaluating the effect of the trial court's omission of this mandatory and critical instruction, the Court considers whether there is a reasonable likelihood that the failure to give CALJIC No. 2.22 so infected the entire trial that Mr. Virgil's resulting convictions and judgment of death

violated his federal constitutional rights to due process, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments and their analogous California counterparts. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Boyde v. California* (1990) 494 U.S. 370, 380; *Cupp v. Naughten* (1973) 414 U.S. 141, 147; *People v. Castillo* (1997) 16 Cal.4th 1009, 1016; *People v. Price* (1991) 1 Cal.4th 324, 446; *People v. Garrison* (1989) 47 Cal.3d 746, 780.)

Given the close nature of the present case regarding the identity of the man who committed the crimes alleged against Ms. Addo, Ms. Lao, and Mr. Draper and whether robbery was committed against Ms. Lao, [165] the absence of other instructions that properly guided the jury's consideration of the conflicting testimony, and the overwhelming number of witnesses who testified for the prosecution, there is a reasonable likelihood that the trial court's failure to give CALJIC No. 2.22 so infected the entire trial that Mr. Virgil's resulting convictions and penalty of death violated his federal and state constitutional rights to due process, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts. (*Ibid.*) Accordingly, the entire judgment against Mr. Virgil must be reversed.

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[165] The suspect nature of the identification process and Mr. Virgil's challenge to the sufficiency of the evidence regarding the crimes against Ms. Lao are detailed elsewhere in his Opening Brief. (See Arguments IV, VI, and XI.) Given the detailed treatment of these matters in other portions of his brief, Mr. Virgil incorporates those arguments here to support his claim that the omission of CALJIC No. 2.22 was prejudicial under the circumstances of his case.

X.

THERE IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT MR. VIRGIL'S CONVICTIONS FOR THE CRIMES AGAINST MS. LAO AND THE ENTIRE JUDGMENT INVOLVING THOSE CRIMES MUST BE REVERSED

A. APPLICABLE LAW AND STANDARD OF REVIEW

In addressing claims on appeal that the evidence is insufficient to support the judgment below, appellate courts must review the whole record and determine

> ". . . 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. (Citation.)"

(*Jackson v. Virginia* (1979) 443 U.S. 307, 318.)

In *People v. Morris* (1988) 46 Cal.3d 1, disapproved on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5, the Court considered whether there was sufficient evidence as a matter of law to support the charged special circumstance of murder during the commission of robbery. In beginning its analysis, the Court noted that there are

> "two necessary prerequisites to the jury's [robbery-murder] special circumstance finding: 1) substantial evidence of the robbery, and 2) substantial evidence that the murder was committed during the commission or attempted commission of the robbery. (*People v. Green, supra*, 27 Cal.3d at pp. 52, 59, 164 Cal.Rptr. 1, 609 P.2d 468.) "

(*People v. Morris, supra,* 46 Cal.3d at p. 19.)

After noting that "'[r]obbery' is defined as 'the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear'" the *Morris* court concluded that

> "a conviction of robbery cannot be sustained in the absence of

> evidence that the defendant conceived his intent to steal either before committing the act of force against the victim, or during the commission of that act; if the intent arose only after the use of force against the victim, the taking will at most constitute a theft. (*People v. Green, supra*, 27 Cal.3d at pp. 52- 54, 164 Cal.Rptr. 1, 609 P.2d 468.)"

(*Ibid.*)

In analyzing the evidence of a "'taking,'" the *Morris* court noted that the evidence, though weak, was legally sufficient to support that element of robbery. (*Id.,* at p. 20, fn. 8.) The Court, however, concluded that the evidence of whether the intent to steal arose before or during the application of force was based improperly on mere "suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." (*Id.,* at p. 21.) Accordingly, the Court held there was not substantial evidence to support a conclusion that a robbery occurred and, hence, the evidence was insufficient as a matter of law to support the jury's special circumstance finding. (*Ibid.*) [166]

B. THERE IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT MR. VIRGIL'S CONVICTIONS FOR THE CRIMES AGAINST MS. LAO AND THE ENTIRE JUDGMENT INVOLVING THOSE CRIMES MUST BE REVERSED

Ms. Lao was killed by someone who stabbed her repeatedly and the only forensic evidence connecting Mr. Virgil to her death was a reported

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[166] The evidence in *Morris* established that the victim was shot twice from close range in the restroom of a public bathhouse and died almost instantly from his injuries; the police responded promptly to the reported shooting and found the victim entirely nude except for his shoes and socks and no personal possessions were found nearby; the only personal property believed to have been in the victim's possession was a credit card that was later used by someone resembling the defendant; and, defendant later made a statement to a boyhood friend that he was out making money by dating homosexuals and had to kill one. (*People v. Morris, supra,* 46 Cal.4th at pp. 19-20.)

partial palm print found on a table in the public dining room at the Donut King. (RT 2148-2152.) Because the print was found on the corner of a table in a public part of the shop, it could have been left there at any time in the past and Mr. Virgil's identity as the person sitting at the table in the donut shop just before the stabbing and taking is based on mere speculation and conjecture. (RT 2148-2150.) In addition, the evidence about the cleaning practices at the Donut King and whether the table where the partial print was found had been cleaned that day was unreliable because it was elicited years after the fact by the police who belatedly thought to investigate that important evidence. The testimony about whether the table was cleaned was similarly unreliable because it was based on custom and practice and otherwise inconsistent or inconclusive. (RT 1739, 1748, 1758, 1762-1763, 1767, 1772-1774, 1778-1779, 1785-1788, 1790-1791, 1795, 1796, 1804-1805, 1808, 1811, 1865-1869, 1955, 2026, 2150, 3028, 3031, 3091.) [167]

Many fingerprints were found in the employee bathroom where Ms. Lao was believed to have been stabbed, but Mr. Virgil was not identified as the source of any of those prints. (RT 2016-2023, 2030-2031, 2038-2047, 2051, 2054-2056, 2059-2060, 2099-2100, 2166, 2184-2193, 2201-2202, 2798-2799, 2803, 2807.) Further, Mr. Virgil' sprints were not found on the cash register or the drawer that would have been touched by the man in the donut shop when he opened the drawer to remove money. (RT 1144, 1149-

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[167] Mr. Ngov could not say whether the table in question was cleaned that day and Ms. Ngov testified either that she could not remember cleaning the table that day or if she did clean it, she would have done so about six hours before Ms. Lao was stabbed. (RT 1762-1763, 1865-1869.) Finally, the palm print was found in a corner and near the edge of the table and not in an area where reason dictates would be cleaned routinely every time the table was wiped down, i.e., it was not reasonably where customers would leave coffee stains or food debris. (See People's Exhibit No. 60.)

1150, 1273, 1304-1305, 2038-2039.) Further, no serological evidence connected Mr. Virgil to the crimes against Ms. Lao, despite recognition in the law enforcement community that the attacker in a stabbing crime commonly cuts himself during such an attack. (RT 2373-2374.) Finally, as detailed above, the eyewitness identifications of Mr. Virgil as the man in the donut shop were highly unreliable because of the many errors committed during the identification process and at trial.

The prosecution's theory was that Mr. Virgil killed Ms. Lao during the commission of robbery because he stabbed her in the employee's bathroom at the Donut King and was seen shortly thereafter taking money out of the cash register. (RT 624, 626-627.) The prosecution theorized that Ms. Lao was stabbed in such a brutal manner because she resisted Mr. Virgil's attempt to restrain and rob her. (RT 627, 3226, 3282.) As defense counsel correctly argued, if the jury found that Mr. Virgil was the man in the donut shop and stabbed Ms. Lao, it would make no sense for him to have attacked her in such a brutal manner for the purpose of committing a robbery. Instead, the nature of the attack established that the asportation to the bathroom and the repeated stabbing there were the result of either rage due to a perceived slight or a sexual assault gone awry. (RT 3295-3296, 3990-3991.) In other words, defense counsel argued that the evidence was insufficient as a matter of law to support Mr. Virgil's conviction for robbery and the related special circumstance because the prosecution's evidence of intent to steal before or at the time the stabbing was based on mere "suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." (*People v. Morris, supra,* 46 Cal.3d at p. 21.)

In *Morris* there was a witness to the shooting, but no witnesses to any of the events surrounding the shooting. Similarly, there were no witnesses to any of the events surrounding Ms. Lao's initial encounter with

the person who stabbed and killed her and no witnesses to the stabbing itself. Though there were two witnesses to the taking of money out of the cash register [Debra Tomiyasu and DeAndre Harrison], the evidence from those witnesses about the taking does not support a reasonable inference or constitute substantial evidence that the intent to steal was formed before or during the application of force against Ms. Lao. Instead, the prosecution's case regarding this element of robbery and the related special circumstance was based on mere speculation and conjecture. [168] As the Court recognized in *Morris*, a reviewing court can engage in much speculation or conjecture about the facts and conclude on that basis that a taking was contemplated before or at the time force was applied. But, such speculation and conjecture cannot as a matter of law rise to the level of a reasonable inference from the evidence and does not constitute substantial evidence to support Mr. Virgil's conviction for robbery and the related special circumstance finding. Accordingly, Mr. Virgil's conviction for robbery and the special circumstance finding must be reversed as a matter of law. (*People v. Morris, supra,* 46 Cal.3d at pp. 19-22.)

Also, the jury's finding that Mr. Virgil committed other robberies in the area is of no consequence. In this regard, if Mr. Virgil was the person who committed the crimes against Ms. Addo and Mr. Draper, the evidence does not suggest sufficient common characteristics to support the jury's finding of guilt based on intent to steal before or during the application of

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[168] As argued above, the trial court erred by failing to strike Ms. Gilmore's testimony about her fear that the man seated at the table would rob her. The failure to strike that inadmissible testimony was highly prejudicial because it allowed the jury to infer that the man in donut shop had an intent to steal while seated at the table and well before the attack against Ms. Lao.

force. [169] This is especially so because these crimes were committed in high crime areas where robberies were considered so common and routine that the police officers patrolling these areas spent little time bothering to conduct adequate crime scene investigations or prepare comprehensive police reports. [170] In other words, the mere occurrence of robberies/assaults with a deadly weapon in the areas where these crimes were committed presents nothing reasonable of significance that suggests Mr. Virgil was the perpetrator, or that he harbored an intent to steal before or at the time force was applied.

Further, the details of each crime reasonably suggest no common perpetrator. Ms. Addo was alone in her grocery store and easily could have been stabbed, but she was not. (RT 683-685, 729, 742, 774-775, 873.) And, she could only say that a sharp object was used against her, but not that it was a knife. (*Ibid.*) About five days later, Mr. Virgil reportedly stole a pie and was confronted by several people at the church who chased, searched, and screamed at him, but he left without incident. (RT 786-787, 896-898.) When Mr. Virgil returned to the church eight days later [and after Ms. Lao was killed], he was detained by the priest there and taken into custody without incident, something that was inconsistent with him being a person on the run from a robbery-murder just two days before at the Donut King. (RT 787-788, 792, 794.) Mr. Draper, who was alone in the isolated

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[169] As noted above in Argument VII, the jury was instructed with CALJIC Nos. 2.50-2.50.2, but only as to identity, and the trial court found there was no common method or plan. (RT 3175-3176.)

[170] Mr. Jackson did testify that his business behind the Southwest Bowl was not in a high crime area and he felt safe there. (RT 2635.) His testimony, however, is relevant to his own experience and is belied by the law enforcement officers who testified about the area and that 1992 seemed to be a bad year for homicides in Gardena. (RT 2689-2691, 2728, 2748-2750, 3079-3080, 3118-3119.)

mechanics' room at the rear of the bowling alley, actively and forcefully resisted the man who robbed him, but he was not stabbed even after he resisted and was restrained. (RT 2444-2445, 2459-2461, 2478-2480, 2482-2483, 2531, 2546-2547.) Finally, Mr. Virgil ran away when he was confronted by Messrs. Duncan and Akimsaya, though he had a screwdriver in his possession that could have been used as a stabbing weapon. (RT 2772-2773, 2775-2776.) Accordingly, the circumstances of the other crimes do not support a reasonable inference or constitute substantial evidence to support the jury's finding that Mr. Virgil was the person who killed Ms. Lao in the commission of robbery or that Ms. Lao was killed because she actively resisted a planned taking.

Finally, there is not sufficient evidence to support a reasonable inference that Ms. Lao would have resisted the efforts to take money from the donut shop. Ms. Lao was quiet and shy by nature and she was given express instructions from Ms. Ngov to hand over the shop's money upon request. (RT 942, 945, 1888-1889.) Though there were defensive wounds on her arms and hands, those were consistent with her putting up her hands to block the stabbing attack against her. (RT 2177, 2283.) Reason dictates that such a reaction is automatic and can hardly be characterized as supporting an inference that the wounds were inflicted because she resisted a robbery. (See *Stevens v. Horn* (W.D.Pa. 2004) 319 F.Supp.2d 592, 595.)

There were two "eyewitnesses" who identified Mr. Virgil as the man in the donut shop that appeared at the cash register, just before Ms. Lao appeared behind him and collapsed in a pool of her own blood. (RT 966-967, 1076, 1292, 2871-2872.) If Ms. Lao had been killed to facilitate the commission of robbery and/or to hide the robber's identity, the man likely would have attacked and attempted to kill Ms. Tomiyasu [and Mr. Harrison] who made eye contact with him as he took money out of the register for the same reasons. (RT 1040-1048, 1050, 1107, 1149-1150.)

Though the record reflects that Mr. Harrison was a large young man, he could have been stabbed and dispatched easily as the man walked past him as Harrison stood there fixed in shock and "tripping out." (RT 1280, 1285, 1312.)

As reported by Ms. Tomiyasu, however, the man had a crazy and wild-look in his eyes and he made no attempt to harm her or Mr. Harrison as he walked past them out the front door. (RT 1045, 1052, 1053.) Also, the man's behavior establishes a lack of reasoning behind his conduct and the fact he was disturbed and not thinking clearly is established by him not only leaving eyewitnesses behind, but also property that could have been used to identify him. (RT 1202.) Instead, as defense counsel correctly argued in his Motion for New Trial, the circumstances suggest that Ms. Lao was killed in rage and for some reason other than the charged offense of robbery. (RT 3989-3992.) Finally, as for the other eyewitnesses, the identification process was highly questionable [171] and there is not substantial evidence to identify Mr. Virgil as the man in the donut shop, let

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[171] For example, the people at the live lineup were similar in height, but Mr. Virgil stood out because he was the only one with a prominent goatee and the only one who had also appeared in the photographic lineups. (RT 1010-1011, 1014, 1016-1017, 1121-1122, 1176-1177.) Further, Mr. Virgil's photograph in several of the Exhibits was highlighted either because his head was noticeably smaller than the other men depicted or the background of his photograph was noticeably different. CT Supp. II, 379, 385, 395.)

alone the man in any of the other incidents. [172] Because there is not substantial evidence to support Mr. Virgil's convictions for the charged offenses against Ms. Lao, his convictions must be reversed for insufficiency of the evidence and retrial barred under principles of Double Jeopardy. (*Jackson v. Virginia, supra,* 443 U.S. at p. 318; *Burks v. United States* (1978) 437 U.S. 1, 18.)

XI.

THE TRIAL COURT'S CERTIFICATION OF THE RECORD ON APPEAL VIOLATED MR. VIRGIL'S RIGHTS TO DUE PROCESS, A FAIR AND IMPARTIAL JURY, COUNSEL, CONFRONTATION AND A RELIABLE PENALTY DETERMINATION

A. INTRODUCTION

On March 7, 2003, Mr. Virgil filed a petition for writ of mandate/prohibition to decertify the record and allow proper record correction/settlement to proceed [Supreme Court Case No. S114106.]. [173] After pending in this Court for more than two years, the Court denied the petition on June 15, 2003. As established below, the Superior Court's

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[172] The prosecution did introduce the testimony of Melvin Cavanaugh, a documents examiner from the Los Angeles County Sheriff's Department, who testified that the note left by the man during the incident with Ms. Addo [People's Exhibit No. 3] was probably written by the same person who wrote People's Exhibit No. 13 [the note reportedly written by Mr. Virgil following his arrest at St. Francis Cabrini Church]. (RT 904-922.) Though his testimony and conclusion were not seriously challenged by defense counsel, handwriting analysis, even nine years after Mr. Virgil's trial, can not be characterized as an exact or reliable science. (See *Gant v. Roe* (9th Cir. 2004) 389 F.3d 908, 915, fn. 9, citing *United States v. Hines* (D.Mass.1999) 55 F.Supp.2d 62, 68.)

[173] Pursuant to Evidence Code section 452, subdivision (d)(1), Mr. Virgil respectfully requests that this Court take judicial notice of its own records in Supreme Court Case No. S114106.

rulings denying reasonable efforts to settle the record and its conduct during record settlement violated Mr. Virgil's rights to due process, a fair and impartial jury, counsel, confrontation, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts.

B. APPLICABLE LAW AND STANDARD OF REVIEW

The Superior Court is empowered with the responsibility to prepare and provide an "entire record" on appeal (see Pen. Code §§ 190.6-190.9; Cal. Rules of Court, rules 34-35.3) and a criminal defendant has a federal constitutional right to have his conviction and sentence of death reviewed upon a record that has been prepared and settled in accordance with procedural due process. (See *Chessman v. Teets* (1957) 354 U.S. 156, 164.)

This Court recently emphasized the need for strict adherence to the mandated procedures for correcting the record on appeal in capital cases. (*Marks v. Superior Court (Alameda)* (2002) 27 Cal.4th 176 [remanding for trial court's failure to comply with the Rules of Court].) The process is now governed by Rules 7 and 32.3.

First, the applicant shall "serve and file an application for permission to prepare a settled statement," which shall "explain why the oral proceedings cannot be transcribed." (Rule 32.3(a).) Second, the judge "must rule on the application within five days after it is filed." (Rule 32.3.) Third, if the application is granted, the applicant "must serve and file in superior court a condensed narrative of the oral proceedings . . . within 30 days" after permission to prepare a settled statement is granted. (Rules 7(b)(1), 32.3 (b).) The rule further provides that "[s]ubject to the court's approval in settling the statement, the [applicant] may present some or all of the evidence by question and answer." (Rule 7 (b)(1).) Fourth, the superior court may "[w]ithin 20 days after the [applicant] serves the

condensed narrative, the superior court may serve and file proposed amendments." (Rule 7(b)(4).) Fifth, the superior court's clerk "must set a date for a settlement hearing by the trial judge that is no later than 10 days after the respondent files proposed amendments or the time to do so expires, whichever is earlier, and must give the parties at least five days, notice of the hearing date." (Rule 7(c)(1).) Sixth, "[a]t the hearing, the judge must settle the statement . . . ." (Rule 7(c)(2).) Seventh, after settling the statement, the judge must "fix the times within which the [applicant] must prepare, serve, and file it." (Rule 7(c)(2).) Eighth, if the respondent thereafter serves and files timely objections, the judge must resolve the differences and thereafter the clerk must present the settled statement to the judge for certification. (Rule 7(b)(4), 7(c)(3).) Finally, once the statement is determined to have been properly prepared, the judge either certifies it, or the parties can stipulate to its proper preparation as the equivalent to the judge's certification. (Rule 7(c)(3) and (4); *Marks v. Superior Court (Alameda), supra,* 27 Cal.4th at 193.)

C. THE TRIAL JUDGE'S REFUSAL TO ALLOW RECORD SETTLEMENT AS TO AN ITEM OF EVIDENCE PRESENTED TO THE JURY TO EXPLAIN THE PROSECUTION'S EXPERT'S TESTIMONY

The record correction process in this case failed to conform to the foregoing procedures. In this regard, the trial court herein first erred by falling to allow reasonable settlement efforts concerning the chalkboard diagram drawn by Criminalist Elizabeth Devine to explain her testimony to the jury. According to the trial judge, it would involve an impermissible amount of speculation to say that any diagram was representative of the one drawn by Ms. Devine in court. (RT 11/18/02, 2-4; RT 12/16/02, 8-9.) Because the trial judge's conclusion is contrary to the precedent from this Court and violates Mr. Virgil's federal constitutional rights to due process, confrontation, counsel, and a reliable penalty determination under the Fifth,

Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and their analogous California counterparts, this Court must reverse the entire judgment against Mr. Virgil.

The diagram drawn by Ms. Devine was "evidence" which is defined as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." (Evid. Code § 140; CALJIC No. 2.00.) In this regard, Ms. Devine defined "blood spatter" for the jury [many blood stains on a wall, the floor, or any other surface] and testified that blood travels in a predictable way based upon forces applied to the drops [gravity, blunt force, or gunshot]. (RT 2341: 14-28, 2342: 1-17.) When the prosecutor asked Ms. Devine if she could determine the direction of travel of a blood droplet, Ms. Devine said "I wish I had a blackboard. It would be easier to explain, but –" (RT 2342: 18-23.) The Superior Court replied "[t]here's one on the other side of this cork board, I believe." (RT 2342: 24-25.) Ms. Devine replied "I could just make a real quick demonstration, and it would be easier than a bunch of words." (RT 2342: 26-28.)

After drawing the diagram, Ms. Devine explained the differences in blood droplets caused by gravity and those caused by force being applied, the direction of travel of blood droplets, whether the victim struggled during the assault, the characteristic patterns in cases involving a stabbing, and the effects from different kinds of wounds and vessels injured. (RT 2343-2346.) As part of her testimony, Ms. Devine emphasized that the blood spatter found in Ms. Lao's direction of travel was "an example of what I was showing you in my demonstration over here" [regarding blood spatter patterns drawn on the chalkboard]. (RT 2352.) Ms. Devine also

testified that based on the blood trail, the assailant left the bathroom before the homicide victim. (RT 2362-2363.) [174]

Defense counsel questioned Ms. Devine about her expertise regarding blood stains and established that she was one of the few people in the United States qualified to render an expert opinion about such matters. (RT 2368.) Defense counsel also questioned Ms. Devine about her belief that the attacker likely would have stepped on the blood stains, if he left the bathroom area after the homicide victim. (RT 2368-2369.) [175]

Ms. Devine conceded that the crime scene photos taken by the Gardena Police Department were insufficient because many more photos should have been taken of the scene. (RT 2369-2371.) Also, Ms. Devine expressed a belief that the crime scene likely was disturbed by footprints from emergency personnel on the scene, though nothing was done to confirm that belief. (RT 2371-2372.) Further, Ms. Devine testified that the crime scene was not properly processed and critical evidence was not preserved because blood samples were not collected to determine the type and source of the blood found, especially because some of the blood could have been left by the actual killer. (RT 2373.)

Ms. Devine also testified about her belief that the blood spatter patterns appeared to have come from one source [the homicide victim], though she could not conclude that with any significant degree of certainty. (RT 2374-2376.) In discussing her belief, Ms. Devine referred to the size of some of the drops in the bathroom and her belief that they were not a

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[174] This testimony was relevant to the defense theory that another man was present and he, not Mr. Virgil, was the person who killed Ms. Lao. (RT 3308-3315.)

[175] No such footprints were found in the blood stains leading from the bathroom to the employee services area where the victim collapsed and was treated by paramedics. (RT 2195-2197.)

product of force, but from one person bleeding in the bathroom, i.e., gravity-related blood drops. (RT 2378-2379, 2382-2383.) According to Ms. Devine, the accuracy of her conclusions about what happened to the homicide victim and where those things happened depended on where the victim began bleeding. (RT 2380-2381.)

On redirect examination, Ms. Devine testified that the victim who was badly wounded on both sides of her body and moving in a certain direction would be expected to produce two, distinct blood trails. (RT 2390.) Ms. Devine also testified that the she did not see the victim's footsteps in the trail of blood, nor anyone else's for that matter in the walkway from the bathroom to the customer service area where the victim ultimately collapsed. (RT 2396.) Ms. Devine was never at the scene and her testimony was based on her view of crime scene photographs that she earlier said were insufficient in her expert opinion.

During his closing argument, the prosecutor discussed Ms. Devine's testimony about the blood drops and argued that the killer left before the victim because there were no footprints in the blood trail. (RT 3259-3260, 3328, 3335.) Further, he argued the defense theory that another man was present and killed Ms. Lao was bogus and Ms. Devine's testimony about blood spatter and transference of blood from the victim to the killer was correct, even though the eyewitnesses did not see blood on the person who walked out of the donut shop within a few feet of them. (RT 3322-3337.)

During his closing argument, defense counsel discussed Ms. Devine's testimony about the gravitational nature of the blood droplets and the prosecution's theory that the killer left the bathroom area first because there were no shoe prints in the drops that led down the hallway to where

the homicide victim collapsed. (RT 3302.) [176] Further, defense counsel discussed the nature of the "blood gravity drops" and Ms. Devine's opinion that she would expect to see blood on the killer that came from the victim's flailing arms. (RT 3305-3306, 3318.) According to defense counsel, even if the jury believed that Mr. Virgil was in the donut shop that day, he was not the killer because someone else was present and that person killed the Ms. Lao. (RT 3308-3317.) Defense counsel's argument was based in part on the fact that the eyewitnesses did not see any blood on the person who walked right past them as he left the scene.

Thus, the blood stain patterns were an integral part of Ms. Devine's testimony and the prosecution's theory that Mr. Virgil was the killer. Further, they were important to the defense theory that even if the jury found that Mr. Virgil was present, the homicide was committed by someone else under the circumstances. Finally, the nature of blood drops/stains produced by gravity and by force were key to the above testimony and evidence. Accordingly, the chalkboard diagram that Ms. Devine drew for the jury to demonstrate the effects of gravity and force on blood generally and to give meaning to her testimony about the blood spatter at the scene was critical evidence. Given the importance of that evidence, her diagram should have been preserved in evidence and thereafter included in the record on appeal to allow for meaningful appellate review, as required by Mr. Virgil's federal constitutional rights to due process, counsel, confrontation, and a reliable penalty determination

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[176] The prosecution's theory was that Mr. Virgil was the sole killer; he repeatedly stabbed Soy Song Lao in the bathroom of the donut shop; he left the bathroom first and walked through the hallway before the victim went through that area; and, he scooped the money out of the register and then walked past the eyewitnesses who identified him as the man they saw taking money out of the register. (RT 3224, 3228, 3231-3232, 3237, 3251-3252, 3256, 3259-3260, 3328, 3332-3333.)

under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Roberts v. Louisiana* (1976) 428 U.S. 325, 335, and fn. 11, (conc. opn. of Stewart, Powell and Stevens, JJ.); *Chessman v. Teets, supra,* 354 U.S. at p. 164.)

In his "Request to Correct, Complete, and Settle the Record on Appeal," Mr. Virgil asked the trial court to allow record settlement regarding the chalkboard diagram drawn by Ms. Devine. (Supplemental Clerk's Transcript IV, at 12.) At the trial court's request appellate counsel prepared a detailed letter dated July 31, 2002, identifying the matters that remained to be settled and which required input from defense counsel, Mr. Clark. (Supplemental Clerk's Transcript IV, at pp. 57-62.) The chalkboard diagram prepared by Ms. Devine was listed in that letter as Item No. 21 (Supplemental Clerk's Transcript IV, at 61) and the trial court indicated at the hearing on August 5, 2002, that it had read that letter. (RT 8/5/2002, 1.) Thereafter, appellate counsel advised the court of his request that record settlement proceed as to the items detailed in his July 31 letter (RT 8/5/2002, 2) and the court replied that counsel should send a copy of that letter to Mr. Clark so record settlement could proceed. (RT 8/5/2002, 4.) Thus, the trial court initially allowed settlement efforts to proceed as to <u>all</u> requested items. (RT 8/5/2002, 4-8.)

At the hearing on October 15, 2002, the trial court indicated that it reviewed appellate counsel's letter dated July 31 and it understood why counsel needed Mr. Clark's assistance and why counsel would not waive settlement as to any of the items included therein. (RT 10/15/2002, 2.) Deputy Attorney General Erika Jackson, the People's primary representative during record correction, then indicated her opposition to settling some of the items Mr. Virgil requested be settled, though she did not specify on the record what those items were. (RT 10/15/2002, 3.)

As to the chalkboard diagram, Deputy District Attorney Marc Chomel, the prosecutor at trial, recalled that Ms. Devine went to the blackboard and made

> "basic marks . . . to indicate blood spatter in a directional way that went from up to down. [¶] I can't say anything more than that. I don't have any recollection, although I think if counsel consults with her, it may be a standard demonstration that she does in these kinds of cases. For that reason, she might recall more specifically what it was that she drew." (RT 10/15/2002, 5.)

After the trial court indicated it planned to certify the record and let this Court deal with record settlement through a request for augmentation, appellate counsel asked the trial court for permission to speak with Mr. Chomel and Ms. Jackson informally about record settlement matters before the court actually made that ruling. (RT 10/15/2002, 6-7.) After his discussion with the People's representatives, appellate counsel advised the trial court that substantial progress had been made towards record settlement; the court agreed to allow record settlement to proceed; and, the court directed appellate counsel to prepare a Proposed Settled Statement and allowed him to contact Mr. Clark about record settlement when he returned from administrative leave. (RT 10/15/2002, 8.) Appellate counsel served the Proposed Settled Statement on November 2, 2002. (Supplemental Clerks, Transcript IV, at 65-75.)

Several days later, appellate counsel submitted a letter to the trial court about his communications with the Los Angeles County Sheriff's Department, Scientific Bureau, and the Sheriff's Department's requirement that counsel obtain a court order before Ms. Devine's case files could be inspected. (Supplemental Clerks, Transcript IV, at 76-77.) Appellate counsel attached two Proposed Orders to that letter, one granting him access to Ms. Devine's case files and the other to preserve all evidence in

the possession of relevant law enforcement agencies. (Supplemental Clerks, Transcript IV, at 108.) [177]

In her letter dated November 8, 2002, Deputy Attorney General Jackson, inter alia, opposed Mr. Virgil's settlement efforts regarding the chalkboard diagram. (Supplemental Clerks, Transcript IV, at 78-79.) On November 15, 2002, appellate counsel submitted Mr. Virgil's response to the Attorney General's efforts to limit record settlement. [178] At the hearing on November 18, 2002, the trial court denied Mr. Virgil the opportunity to settle the record as to the chalkboard diagram. (RT 11/18/2002, 3-4.) According to the court, it would be impossible for the parties to agree on what Ms. Devine drew for the jury to explain her testimony. (RT 11/18/2002, 3-4.) [179] Because both trial counsel recalled the diagram, but never suggested that they could not agree on its re-creation (Supplemental Clerks, Transcript IV, at 102; RT 10/15/2002, 5), the Superior Court abused its discretion by eliminating the role of the parties

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[177] The Proposed Order to allow inspection of Ms. Devine's files is included in the record on appeal. (Supplemental Clerk's Transcript VI, 37.) In a letter dated February 18, 2003, and submitted pursuant to former California Rules of Court, rules 35(e) and 39.51, appellate counsel advised the Los Angeles County Superior Court's Clerk's Office of that and other omissions from the record on appeal. (Supplemental Clerk's Transcript VI, 38-39.)

[178] Mr. Virgil's Response was not included in the record on appeal. Appellate counsel's February 18 letter to the Clerk's Office also mentioned that omission.

[179] Given the Superior Court's denial, appellate counsel did not request that the Sheriff's Department be ordered to provide Ms. Devine's contact information. Such a request would have been futile under the circumstances and counsel has no obligation to make futile requests to preserve an issue for review. (See *People v. Cash* (2002) 28 Cal.4th 703, 730, citing *People v. Arias* (1996) 13 Cal.4th 92, 159.)

and denying record settlement efforts as to this item. This is especially so under California Rules of Court, rule 7(c)(2) and (4), that required the trial judge either to settle the record or to allow the parties to stipulate that their settled statement is correct.

In *People v. Osband* (1996) 13 Cal.4th 622, 662-663, this Court discussed settling the record as to lost or missing exhibits, some of which were not even admitted into evidence. Because six of the exhibits could not be reconstructed, this Court held that such exhibits could properly be re-created through the record settlement process. (*Id.,* at 662.) Based on the rationale from *Osband,* Mr. Virgil should have been allowed to attempt record settlement with Ms. Devine's assistance. If the diagram could be reconstructed by Ms. Devine, appellate counsel could have proposed record settlement to the parties on that basis; the parties could have agreed or not agreed to the proposed diagram; and, the trial judge could have determined whether or not the parties were credible regarding their proposed settled statement and whether any modification to the diagram was required. [180] Unlike the trial judge's ruling, the above procedure would have satisfied the respective roles of counsel and the trial court in record settlement – counsel drafts and proposes record settlement and the court rules upon their credibility and whether any amendment is required. (*Marks v. Superior Court (Alameda), supra,* 27 Cal.4th at 194; see also *People v. Hardy, supra,* 2 Cal.4th at 183, fn. 30.)

Instead, the Superior Court initially allowed settlement to proceed as to this Item and then at the last minute refused to allow reasonable settlement efforts as to a critical item of evidence that it wrongly failed to

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180 Under California Rules of Court, rule 7(c)(4), the parties alternatively could have stipulated that the matter at issue was properly settled and that would be "equivalent to the judge's certification.

ensure was included in the record on appeal. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1229, to preserve the defendant's right to meaningful appellate review of the trial court's decision, the trial court is obligated to ensure that all items of evidence are included in the record on appeal.) Because the Superior Court acted arbitrarily and abused its discretion in the settlement process by withdrawing permission to settle an item that it previously held could be settled and thereafter eliminated the role of counsel, the trial court violated well-settled procedures for settling the record on appeal. (See *Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 376, fn. 1; *Marks v. Superior Court (Alameda), supra,* 27 Cal.4th at 195; Cal. Rules of Court, rule 7 and 32.3)

Given the importance and relevance of this evidentiary item to the prosecution's theory of a sole attacker and to the defense theory of a third party being responsible for the homicide, the Superior Court's refusal to allow record settlement to proceed deprived Mr. Virgil of his federal constitutional right to a record on appeal that permits meaningful review, the assistance of counsel, confrontation, and a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and their analogous California counterparts. Because the error cannot be harmless beyond a reasonable doubt under the circumstances of Mr. Virgil's case, the entire judgment against him for the crimes against Ms. Lao must be reversed.

D. THE SUPERIOR COURT EFFECTIVELY ELIMINATED THE ROLE OF THE PARTIES BY INCLUDING ITS OWN "STATEMENT" CONCERNING WHAT COUNSEL SAID AND DID REGARDING THE EXCUSAL OF THE 60 PROSPECTIVE JURORS AT ISSUE FOR HARDSHIP

In addition, Mr. Virgil objected to the Engrossed Settled Statement and sought to decertify the record on appeal because of the trial court's "statement" concerning the circumstances of excusing 60 prospective jurors

for hardship without a hearing and on the basis of their hardship questionnaires.

This Court has "repeatedly rejected claims that a trial court's liberal policy of excusing prospective jurors for financial hardship deprives a defendant of his right to a fair and impartial jury. (Citations.)" (*People v. Burgener* (2003) 29 Cal.4th 833, 862.) In *People v. Wheeler* (1978) 22 Cal.3d 258, 273, however, this Court also noted that excusing potential jurors for hardship is highly discretionary and reviewing courts must be alert to possible abuses that could negatively affect the creation of juries that reasonably reflect a fair cross-section of the community. Finally, in *People v. Visciotti* (1992) 2 Cal.4th 1, 44, fn. 15, this Court noted that counsel's agreement or stipulation to excuse jurors is important and relevant to post-conviction claims. Given the effect of the trial court's "statement" on any post-conviction challenge as to whether Mr. Virgil's jury reasonably reflected a fair cross-section of the community, Mr. Virgil objected to the record as certified and respectfully requested in his petition for writ of mandate/prohibition filed March 7, 2003, to decertify the record on appeal and remove the trial court's offending "statement."

Appellate counsel spoke with the trial prosecutor, Deputy District Attorney Chomel, and defense counsel, Deputy Public Defender Clark, about the circumstances of these 60 jurors being excused. Mr. Chomel reported that he had no recollection of this matter, while Mr. Clark reported that he recalled some of the circumstances associated with the excusal of these jurors. (Supplemental Clerks, Transcript IV, at 103-104.) Specifically, Mr. Clark believed that the trial court was "pretty liberal" in ruling on the hardship requests and the court's primary concerns were whether (1) the prospective juror would be compensated adequately for jury service, (2) whether anyone was ill in the juror's family, or (3) whether the juror was a primary caretaker for another person. Finally, Mr. Clark

believed that a hearing was conducted regarding the requests for hardship and that a court reporter was present. (Supplemental Clerks, Transcript IV, at 103-104.) Despite counsels' failure to discuss details about their respective roles and conduct in the proceedings involving these prospective jurors, the trial court added its own "statement" that

> "each counsel did, indeed, see the questionnaires and, for lack of a better term, stipulated or agreed that these jurors would be excused . . . ." (RT 12/16/2002, 6-7.)

In *People v. Hardy, supra, 2* Cal.4th at 183, fn. 30, this Court recognized that a capital defendant's failure to challenge a settled statement approved by the trial court meant that the statement was "properly part of the appellate record. (Citation.)." To avoid the trial judge's "statement" from becoming "properly part of the appellate record" and to preserve his post-conviction right to challenge the jury's composition as fair and representative, Mr. Virgil filed a petition for writ of mandate/prohibition asking to decertify the record on that basis. Because his petition was denied without comment on June 15, 2005, Mr. Virgil raises the instant claim on appeal to preserve his post-conviction right to challenge the fairness and composition of his jury.

As noted above, neither the prosecutor nor defense counsel reported viewing the hardship questionnaires for the jurors at issue and neither reported stipulating nor agreeing to excuse these jurors for hardship. By directing that the Engrossed Settled Statement reflect what both counsel said and did regarding these jurors, when that differed substantially from what both counsel reported, the trial court eliminated the role of the parties in the record settlement process in violation of the Rules of Court, the procedures set forth in *Marks,* and, more important, Mr. Virgil's fundamental rights to due process, counsel, confrontation, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth

Amendments to the United States Constitution and their analogous California counterparts. (See *Pollard v. Saxe & Yolles Dev. Co., supra*, 12 Cal.3d at 376, fn. 1; *Marks v. Superior Court (Alameda), supra,* 27 Cal.4th at 195; Cal. Rules of Court, rules 7 and 32.3.) Under the circumstances, the trial court's error cannot be harmless beyond a reasonable doubt and Mr. Virgil's entire judgment must be reversed.

E. THE SUPERIOR COURT ACTED ARBITRARILY BY DECIDING THAT ALL PROCEEDINGS REGARDING THE 60 PROSPECTIVE JURORS AT ISSUE HAVE BEEN REPORTED AND THAT ERROR REQUIRES THE REVERSAL OF THE ENTIRE JUDGMENT

Mr. Virgil's defense counsel, Mr. Clark, reported his belief that a hearing was conducted on January 30, 1995, concerning the Superior Court's excusal of the prospective jurors at issue for hardship. (Supplemental Clerk's Transcript IV, at 104; RT 57-58.) At the record correction hearing on December 16, 2002, the trial judge said that the court reporter [Andrea Gartner] had reported everything conducted before her on the record that day and those proceedings were in the transcripts on appeal. (RT 12/16/2002, 4.) [181] Later, appellate counsel reminded the trial court of his request that Ms. Gartner be contacted and asked to check her notes in order to reliably determine whether she reported all of the proceedings that day. (RT 12/16/2002, 7-8.) The trial judge replied that "[s]he has reported everything that was done before her" and it had no recollection of additional proceedings [events that occurred more than seven years before]. (RT 12/16/2002, 8.) Further, the trial judge proceeded immediately to record certification without waiting to learn whether counsels' recollections

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[181] Those proceedings reflect that the prospective jurors at issue were excused for hardship, but they include no detailed discussion of the ruling, nor the specific bases that led to the jurors' excusal. (RT 56-58.) Most important, they do not reflect the parties' role in the excusal of these jurors.

as to the circumstances of the jurors at issue being excused had been refreshed by their review of the hardship questionnaires sent to them for that purpose. (RT 12/15/2002, 8.)

Mr. Virgil is unaware of a verified statement from either the clerk or the reporter that all proceedings on January 30, 1995, have been transcribed and that a Reporter's Transcript cannot be produced for a hearing beyond what is already in the record. Accordingly, Mr. Virgil argued in his petition that the trial court either relied on an out-of-court statement from Los Angeles County Superior Court Death Penalty Appeals Coordinator Addie Lovelace that no such hearing occurred and could not be transcribed or it made an equally objectionable decision to certify the record without assuring itself through the review of competent evidence that no such reported proceeding existed. Under either scenario, the trial court acted arbitrarily by failing to follow the mandated procedure from the Rules of Court and/or *Marks* that it must be presented with competent evidence before it can conclude that a Reporter's Transcript cannot be obtained. (See *Marks v. Superior Court, supra*, 27 Cal.4th at 193.) For the above reasons, the trial court's inclusion of a statement in the record on appeal that counsel said and did what they did not aver they said or did violated Mr. Virgil's rights to an adequate record on appeal, a fair and impartial jury, confrontation, counsel and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts. Under the circumstances, the trial court's error cannot be harmless beyond a reasonable doubt and Mr. Virgil's entire judgment must be reversed.

F. THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS DURING RECORD CORRECTION VIOLATED MR. VIRGIL'S FEDERAL CONSTITUTIONAL RIGHTS AND THEIR ANALOGOUS CALIFORNIA COUNTERPARTS AND REQUIRES THE REVERSAL OF THE ENTIRE JUDGMENT

Mr. Virgil's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as the state constitutional analogs, to a complete and accurate record on appeal have not been fulfilled by the Superior Court's record certification process.

> "[T]he most basic and fundamental tool of his profession [an appellate advocate] is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. [Fn. omitted.] Anything short of a complete transcript is incompatible with effective appellate advocacy." (*Hardy v. United States* (1964) 375 U.S. 277, 288, conc. opn. of Goldberg, J., in which Warren, C.J., and Brennan and Stewart, JJ. joined.)

In *Parker v. Dugger* (1991) 498 U.S. 308, 321, the United States Supreme Court emphasized the "crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." And held that "meaningful appellate review requires that the appellate court consider" the "actual" accurate record of defendant's trial. This Court has also recognized the "critical role of a proper and complete record in facilitating meaningful appellate review." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 63.)

The Superior Court certified Mr. Virgil's record on appeal despite the fact that it knew, or reasonably should have known, that the procedures and methods used to settle the record for the missing evidentiary item, the improper "statement" from the court, the refusal to wait for counsels' response after it ordered that they be sent the juror hardship questionnaires at issue, and its conclusion that a transcript did not exist absent competent

evidence did not comply with the fundamental requirements of due process, the heightened requirements when death is selected as punishment and the standard procedures from the California Rules of Court. (See generally *Marks v. Superior Court (Alameda), supra,* 27 Cal.4th 176; Cal. Rules of Court, rules 7 and 32.3; *Parker v. Dugger, supra,* 498 U.S. at p. 321; *People v. Hawthorne, supra,* 4 Cal.4th at p. 63; *Hardy v. United States, supra,* 375 U.S. at p. 88; *Chessman v. Teets, supra,* 354 U.S. at p. 164) Instead, the Superior Court settled the record over appellate counsel's strenuous objection that certification was improper because of the failure to follow proper and established procedures in settling the record.

California Penal Code section 190.9, subdivision (a)(1), establishes the right of a capital defendant to a reporter's transcript of all proceedings. That section provides,

> "In any case which a death sentence may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present."

However, if a reporter's transcript of proceedings in the trial court cannot be prepared – for example, because a reporter was not present or failed to take down some part of the proceedings – counsel should move to settle the record to establish what transpired at the preceding. The applicable California Rules of Court, rules 4, 7, 32.3, and 34 – 36.3, set out several steps to ensure the accuracy and completeness of the appellate record. California Rules of Court, rules 7 and 32.3 provide the method for preparing settled statements where no transcription of trial proceedings is readily available. A settled statement conforming to rules 7 and 32.3 requires a number of steps, including: an adequate showing that the matter was not reported or a reporter's transcript cannot be obtained; and order from the trial court permitting, upon a sufficient showing, the preparation

of the settled statement; and the preparation of a settled statement. (Cal. Rules of Court, rules 7 and 32.3.)

Settled statements must be prepared not only in conformance with the California Penal Code and Rules of Court, but also with a defendant's federal and state constitutional rights to due process, counsel, confrontation, and the need for heightened reliability when death is the punishment sought. If this Court concludes that no one of the errors identified above individually requires the reversal of all or a portion of the judgment, Mr. Virgil's respectfully submits that the combined effect of those errors was so prejudicial that his entire judgment must be reversed.

PENALTY PHASE

XII.

THE ERROR IN GIVING CALJIC NO. 8.84.1 COUPLED WITH THE FAILURE TO GIVE OTHER RELEVANT INSTRUCTIONS REQUIRES THE REVERSAL OF MR. VIRGIL'S JUDGMENT OF DEATH

A. INTRODUCTION

During the penalty phase of Mr. Virgil's capital trial, the trial court instructed the jury to disregard all prior instructions from the guilt phase, including the presumption of innocence, the definition of beyond a reasonable doubt, and the prosecution's burden of proof and all appropriate evidentiary instructions. Then, contrary to guidance from this Court and the Committee on Standard Jury Instructions of the Superior Court of Los Angeles County incorporating that guidance into CALJIC No. 8.84.1 and the Use Note to that instruction, the trial court in Mr. Virgil's case failed to reread all guilt phase instructions, beginning with CALJIC No. 1.01, that were applicable to the penalty phase and its instructions. [182]

Specifically, Mr. Virgil's penalty jury should have been instructed with CALJIC Nos. 1.01 [instructions to be considered as a whole], 1.02 [statements of counsel are not evidence], 1.03 [jury's decision must be based on evidence and the jury may only consider the translation from the court-certified translator], 1.05 [use of juror's notes], 2.00 [definition of

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[182] Because of the media publicity regarding Mr. Virgil's case, the trial court instructed the jury at the start of the penalty phase not to consider such material, but to base their decision on the evidence heard inside the courtroom. (RT 3514.) Further, the court instructed the jury that what the attorneys said during their Opening Statements was not evidence. (RT 3515.) These were the only evidentiary instructions given at the penalty phase.

evidence], 2.01 [circumstantial evidence]; 2.20 [credibility of witnesses], 2.21.1 [discrepancies in testimony], 2.21.2 [witness willfully false]; 2.22 [weighing conflicting testimony], 2.60 [defendant not testifying], 2.61 [defendant may rely on state of evidence], 2.71 [admission], 2.72 [corpus delicti rule], 2.80 [expert testimony], and 2.90 [presumption of innocence, definition of beyond a reasonable doubt, and prosecution's burden of proof].

Instead, Mr. Virgil's penalty jury was instructed only with CALJIC Nos. 8.84 [duty to determine penalty]; 8.84.1 [consider only penalty phase instructions and disregard all other instructions], 8.85 [listing of factors to be considered in deciding penalty]; 8.86 [prior convictions for second degree burglary must proven beyond a reasonable doubt before they may be considered], 8.87 [other criminal activity against Benita Rodriguez must be proven beyond a reasonable doubt before it can be considered] and 8.88 [concluding instruction]. (RT 3905, 3910-3911.) [183]

As will be discussed below, the trial court's failure to instruct Mr. Virgil's penalty jury correctly establishes a reasonable likelihood that the jury misapplied the beyond a reasonable doubt standard and the jury's penalty decision in all other regards violated Mr. Virgil's rights to due process, trial by jury, and a reliable penalty determination under the federal

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[183] The court also gave a series of defense instructions that provided as follows: the jury was not to consider the cost or deterrence in deciding penalty; a jury can impose a sentence of life without possibility of parole even in the absence of mitigation; the parties are entitled to the individual opinion of each juror; the absence of mitigating evidence is not an aggravating factor and the jury may only consider factors that are applicable to the evidence; only the enumerated factors in aggravation may be considered in deciding penalty; no double counting of the circumstances of the offense and special circumstance is permitted; and jurors may consider lingering or residual doubt in deciding penalty. (RT 3905-3906, 3908-3910.)

and state constitutions. For those reasons, Mr. Virgil's penalty judgment must be reversed.

B. APPLICABLE LAW AND STANDARD OF REVIEW

In *People v. Babbitt* (1988) 45 Cal.3d. 660, 718, fn 26, this Court held that trial courts "should expressly inform the jury at the penalty phase which of the instructions previously given continue to apply." In 1989, six years before Mr. Virgil's trial in 1995, the Committee on Standard Jury Instructions [hereinafter "Committee"] responded to the decision in *Babbitt* by advising trial courts that CALJIC No. 8.84.1 "be followed by all appropriate instructions beginning with CALJIC 1.01, concluding with CALJIC 8.88." (See *People v. Steele* (2002) 27 Cal.4th 1230, 1255-1256, citing the "Use Note" to CALJIC No. 8.84.1.) According to the Committee, trial courts should reinstruct penalty juries with all appropriate instructions from the guilt phase because that "is less likely to result in confusion to the jury" than the procedure from *Babbitt* recommending that penalty juries merely be told which guilt instructions continue to apply. (*Ibid.*) In other words, since the decision in *Babbitt* and the 1989 revision of CALJIC No. 8.84.1, trial courts in California have been on notice that penalty juries should be instructed with all general principles of law that are closely and openly connected to the facts and are necessary for the jury's understanding of the case. (*People v. Carter* (2003) 30 Cal.4th 1166, 1222, "trial courts [are strongly cautioned] not to dispense with penalty phase evidentiary instructions.")

In the consolidated cases of *Victor v. Nebraska* and *Sandoval v. California* (1994) 511 U.S. 1, 5, the Supreme Court recognized that

> "The government must prove beyond a reasonable doubt every element of a charged offense. (Citation.). Although this standard is an ancient and honored aspect of our criminal justice system, it defies easy explication. . . . .

> "The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. (Citation.). Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, (citation.), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. (Citation.) Rather, 'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.' (Citation.)" [184]

Continuing, the high court held that it has

> "made clear that the proper inquiry is not whether the instruction [defining reasonable doubt] 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did so apply it.* (Citation.) The constitutional question in the present cases, therefore, is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard."

(*Id.,* at p. 6, original italics.)

If there is a reasonable likelihood the jury understood that Mr. Virgil's judgment of death could be based on proof insufficient to meet the *Winship* standard [*In re Winship* (1970) 397 U.S. 358], the error constitutes

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184 Because both trial courts in the consolidated cases of *Victor* and *Sandoval* defined reasonable doubt to their respective juries, the precise issue of whether the Constitution requires instruction with the definition of reasonable doubt was not before the Court. Justice Ginsburg noted as much in her concurring opinion, implying that any purported "holding" in that part of the majority's opinion was dictum. (See *United States v. Walton* (4th Cir. 2000) 207 F.3d 694, 696, fn. 2, citing *Victor v. Nebraska, supra,* 511 U.S. at 26, (conc. opn. of Ginsburg, J.).) Because only Supreme Court's holdings, as opposed to dicta, are binding on lower Federal and State courts and only holdings need be reasonably applied, the dictum in *Victor* is not determinative of whether due process requires trial courts to instruct juries with the definition of reasonable doubt. (See *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1069; see also *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 [it is axiomatic that cases are not authority for propositions not considered].)

"structural error" under *Arizona v. Fulminante, supra,* 499 U.S. at pp. 309-310, because it

> "'infect[ed] the entire trial process,'" (Citation.) and 'necessarily render[ed his] . . . trial fundamentally unfair,' (Citation.) Put another way, these errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.' (Citation.)"

(*Neder v. United States* (1999) 527 U.S. 1, 8-9, quoting *Rose v. Clark* (1986) 478 U.S. 570, 577-578.)

When a defendant claims that the failure to instruct a sentencing jury deprived him of his rights under the Fifth, Sixth, and Eighth and Fourteenth Amendments to the federal Constitution, the defendant must demonstrate that the instructions given in his case, to a reasonable likelihood, precluded the sentencing jury from considering any constitutionally relevant mitigating evidence and rendering a fair and reliable penalty determination. (*Buchanan v. Angelone* (1998) 522 U.S. 269, 276-278; *Boyde v. California* (1990) 494 U.S. 370, 380.)

C. THE FAILURE TO INSTRUCT MR. VIRGIL'S PENALTY JURY WITH THE PRESUMPTION OF INNOCENCE, THE DEFINITION OF REASONABLE DOUBT, AND THE PROSECUTION'S BURDEN REQUIRES THE REVERSAL OF MR. VIRGIL'S PENALTY JUDGMENT

1. APPRENDI, RING, AND BLAKELY APPLY TO CALIFORNIA'S DEATH PENALTY SCHEME AND IMPOSE NEW CONSTITUTIONAL REQUIREMENTS ON PENALTY PHASE PROCEEDINGS

In *Blakely Washington, supra,* 542 U.S. 296 [124 S.Ct. 28531], the defendant pled guilty to the crime of kidnapping that carried a maximum punishment of 53 months, but the trial court imposed an "'exceptional'" sentence of 90 months after making a judicial determination that defendant

acted with "'deliberate cruelty.'" (*Id.*, at p. 2534.) 185 The defendant objected to the proposed increase in his sentence and the state court conducted a three-day hearing and heard testimony from defendant, his wife [the kidnapping victim], a police officer and medical experts. After that hearing, the trial court made 32 findings of fact that it used to impose the 90-month sentence. The United States Supreme Court granted certiorari and held that

> "This case requires us to apply the rule we expressed in *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.E.2d 435 (2000): 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that 'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason,' 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872) (Fn. omitted.) These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing; . . . . " (Fn. omitted.)"

(*Blakely v. Washington, supra,* 124 S.Ct. at p. 2536; see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 110-111 ["[I]f the existence of any fact (other than a prior conviction) increases the maximum

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185 Recently, in *People v. Morrison* (2004) 34 Cal.4th 698, 731, this Court rejected the defendant's claim that the United States Supreme Court's decision in *Blakely v. Washington* "undermine[s]" this Court's conclusion about the constitutionality of California's death penalty scheme. Because *Morrison* does not address the exact claim raised here regarding the effects of giving CALJIC No. 8.84.1 and the failure to instruct correctly regarding the presumption of innocence, the definition of beyond a reasonable doubt, and the prosecution's burden at the penalty phase, Mr. Virgil respectfully submits that the decision is inapposite.

punishment that may be imposed on a defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt."].)

The *Blakely* court recognized that *Apprendi* involved a New Jersey hate-crime statute that authorized a 20-year sentence, despite the usual 10-year maximum, if the judge found that the crime was committed for specified purposes, and that in *Ring v. Arizona, supra,* 536 U.S. at pp. 592-593, the high court applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found at least one of ten aggravating factors. (*Ibid.*) "In each case, we concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. (Citations.)" (*Ibid.*)

The State responded in *Blakely* that there was no *Apprendi* violation because the defendant's 90-month sentence was below the maximum punishment of 10 years, the "statutory maximum" punishment for class B felonies. (*Id.,* at p. 2537.) The high court completely debunked that argument by holding

> "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* (Citations.) In other words, 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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' (citation), and the judge exceeds his proper authority."

(*Ibid.,* original italics.)

Undaunted, the State attempted to defend the sentence in *Blakely* by drawing an analogy to other Supreme Court decisions, but the high court easily rejected the analogy by recognizing that neither of the cited cases

"involved a sentence greater than what the state law authorized on the basis of the verdict alone. Finally, the State tries to distinguish *Apprendi* and *Ring* by pointing out that the enumerated grounds for departure in its regime are illustrative rather than exhaustive. This distinction is immaterial. Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. (Fn. omitted.)"

(*Ibid.,* original italics.)

Continuing, the *Blakely* court emphasized that its "commitment" to *Apprendi* was based not simply on respect for longstanding precedent, but the need to give intelligible content to the right of jury trial that is a "fundamental reservation of power in our constitutional structure." (*Id.,* at pp. 2538-2539.) According to the Court,

> "Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors – no matter how much they may increase the punishment – may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene. Not even *Apprendi's* critics would advocate this absurd result. (Citation.) The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish. [Fn. omitted.]"

> "The second alternative is that legislatures may establish legally essential sentencing factors *within limits* – limits crossed when perhaps, the sentencing factors is a 'tail which wags the dog of the substantive offense.' (Citation.) What this means in operation is that the law must not go *too far* – it must not exceed the judicial estimation of the proper role of the judge."

(*Id.,* at p. 2539, original italics.)

In conclusion, the majority in *Blakely* held

> "The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty [or his life], the State should suffer the modest inconvenience of submitting its accusation to the 'unanimous suffrage of twelve of his equals and neighbours," 4 Blackstone Commentaries, at 343, rather than a lone employee of the State."

(*Id.,* at p. 2543.)

As will be discussed below, *Blakely* applies to California's death penalty scheme and its application requires the reversal of Mr. Virgil's penalty judgment of death.

In *People v. Prieto* (2003) 30 Cal.4th 226, 262, the trial court instructed the jury that it could consider evidence of defendant's prior criminal activity, but only if the prosecution established that defendant committed the alleged criminal activity beyond a reasonable doubt. [186] The trial court, however, did not instruct the jury with the presumption of innocence and the definition of reasonable doubt [CALJIC No. 2.90], but gave CALJIC No. 8.84.1 which instructed the jury to disregard all instructions given in earlier portions of the case.

The defendant in *Prieto* argued on appeal that the failure to instruct the jury with the presumption of innocence and the definition of reasonable doubt was federal constitutional error and this Court's prior decisions holding that such instruction was not required had been undermined by the United States Supreme Court's decision in *Ring v. Arizona* (2002) 536 U.S

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[186] In contrast, Mr. Virgil's penalty jury was never instructed about the prosecution's burden of proof at the penalty phase, including the allegations about his prior convictions and other violent criminal activity. (RT 3910-3911.)

. 584. (*Id.,* at p. 262.) [187] Before it rejected the defendant's argument, the *Prieto* court retreated from its earlier decision in *People v. Ochoa, supra,* 26 Cal.4th 398, 453, where the Court held

> "'a finding of first degree murder with a [Penal Code] section 190.2 special circumstance' under our [California] death penalty scheme was 'the functional equivalent of a finding of first degree murder' under Arizona's death penalty scheme, as described in *Apprendi* [*v. New Jersey*], *supra,* 530 U.S. at p. 496, 120 S.Ct. 2348. Because the United States Supreme Court has acknowledged that 'the *Apprendi* majority's portrayal of Arizona's [capital sentencing law]' was incorrect (*Ring v. Arizona, supra*, 536 U.S. at p. 604 [122 S.Ct. at p. 2440]), we recognize that our observation in *Ochoa* was also incorrect."

(*People v. Prieto, supra,* 30 Cal.4th at p. 263, fn. 14.) [188]

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[187] Recently, the United States Supreme Court clarified in *Schriro v. Summerlin* (2004) __ U.S. ___ [124 S.Ct. 2519, 2526], that *Ring* and *Apprendi* [and now *Blakely v. Washington* (2004) __ U.S. ___, 124 S.Ct. 2531 [2004 WL 1402697] under the same rationale], apply to cases that are pending on direct review, i.e., the first "round of appeals." Accordingly, there is no procedural, retroactivity bar to Mr. Virgil's argument that those decisions apply to his case in his automatic appeal to this Court.

[188] In rejecting the conclusion at issue from *Ochoa.* the *Prieto* court found it significant that the United States Supreme Court "has acknowledged" that its view of Arizona's death penalty law was incorrect. (*People v. Prieto, supra*, 30 Cal.4th at p. 263, fn. 14.) Even if this Court is correct that the Supreme Court changed its view of Arizona law, the Supreme Court more recently held that "[e]ven if our understanding of [Arizona] state law changed, however, the actual content of state law did not. (Citations.)" (*Schriro v. Summerlin, supra*, 124 S.Ct. at p. 2524, fn.. 5.) Accordingly, this Court's reasoning in *Prieto* for why California law should not be considered analogous to Arizona law is flawed because "before *Ring and after*, Arizona's statutory aggravators restricted (as a matter of state law) the class of death-eligible defendants, those aggravators *effectively were* elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements. (Citation.)" (*Schriro v. Summerlin, supra*, 124 S.Ct. at p. 2524, original italics.)

Ultimately, the *Prieto* court concluded that *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Ring v. Arizona, supra,* 536 U.S. 584, do not apply to California's death penalty scheme

> "Because any finding of aggravating factors during the penalty phase does not 'increase[ ] the penalty for a crime beyond the prescribed statutory maximum' (*Apprendi, supra,* 530 U.S. at p. 490, 120 S.Ct. 2348), *Ring* imposes no new constitutional requirements on California penalty phase proceedings. Accordingly, our rulings rejecting the need to instruct on the presumption of innocence during the penalty phase still control. (Citation.)"

(*People v. Prieto, supra,* 30 Cal.4th at p. 263; see also *People v. Navarette* (2003) 30 Cal.4th 458, 520; *People v. Danks* (2004) 32 Cal.4th 269, 316.)

This Court correctly observed in *Prieto* that once a defendant in California is convicted of first degree murder and one [or more] special circumstance[s] is/are found true by a jury properly instructed regarding the reasonable doubt standard, the defendant may only be sentenced to "the prescribed statutory maximum for the offense" – either death or life without possibility of parole. (*People v. Prieto, supra,* 30 Cal.4th at p. 263.) That correct observation, however, does not support this Court's conclusion in *Prieto* that *Apprendi* and *Ring* do not apply to California's death penalty scheme and instruction with the presumption of innocence, the definition of reasonable doubt and the prosecution's burden at the penalty phase are not required. (*Ibid.*)

In this regard, it is settled in California as a matter of law that death is a greater and harsher punishment than life without possibility of parole. (See *People v. Ochoa, supra,* 19 Cal.4th 353, 478-479, citing *People v. Memro* (1995) 11 Cal.4th 786, 879-880, opn. mod. 12 Cal.4th 783d, and *People v. Hill* (1992) 3 Cal.4th 959, 1016, death "is the worse punishment as a matter of law.")

Before a trier of fact in California can select a sentence of death, the trier of fact must make two additional findings beyond the verdict of guilt for first degree murder and the truth of the special circumstance – the trier of fact must find (1) the existence of aggravating circumstance[s] and (2) the totality of those circumstance[s] outweigh the totality of the circumstance[s] in mitigation. Though it is true that no one factor in aggravation or mitigation determines which penalty is appropriate, it remains that a trier of fact in California cannot select a sentence of death unless it makes two additional findings beyond the verdicts of guilt for first degree murder and the truth of the special circumstance[s]. Thus, the crucial inquiry in deciding whether *Apprendi, Ring,* and *Blakely* apply to California's death penalty scheme is whether this Court's definition of "statutory maximum" is consistent with the definition and use of that term by the United States Supreme Court. (See *People v. Prieto, supra,* 30 Cal.4th at p. 263, finding that *Ring* imposes no new constitutional requirements on California's penalty phase proceedings because the finding of aggravating factors in California will not increase penalty beyond the prescribed statutory maximum of death or its alternative of life without possibility of parole.)

In *Blakely* the Supreme Court recognized it was important to the scope of its decision to define and use the term "statutory maximum" correctly. As made clear in *Blakely*, that term refers only to the maximum punishment a judge can select based on the guilt verdicts alone. (*Blakely v. Washington, supra,* 124 S.Ct. at p. 2537; *Sattazahn v. Pennsylvania, supra,* 537 U.S. at pp. 110-111.) Absent the two additional findings concerning the existence of factors in aggravation and that such factors outweigh factors in mitigation, the "statutory maximum" punishment for a defendant in California found guilty of first degree murder and one or more special circumstances have been found true is life without possibility of parole.

(Pen. Code § 190.3.) [189] For that reason, the definition of "statutory maximum" used by this Court in *Prieto* is contrary to the United States Supreme Court's binding definition of that term for federal constitutional purposes. (See *People v. Bradley* (1969) 1 Cal.3d 80, 86 [the California Supreme Court is " bound by decisions of the United States Supreme Court interpreting the federal Constitution."].) Because the decision in *Prieto* is contrary to binding precedent from the United States Supreme Court, it must be concluded that the findings necessarily to make a defendant death eligible in California are "elements" of the murder offense for purposes of the Fifth, Sixth, Eighth and Fourteenth Amendments' guarantee that they be found beyond a reasonable doubt by a unanimous jury. (*Blakely v. Washington, supra,* 124 S.Ct. at p. 2537; *Sattazahn v. Pennsylvania, supra,* 537 U.S. at pp. 110-111; see also *Schad v. Arizona* (1991) 501 U.S. 624, 634, fn. 5 [a capital defendant has the right to an unanimous jury verdict; *Davis v. Mitchell* (6th Cir.2003) 318 F.3d 682, 687-688

["The reason that aggravating factors must be found unanimously

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[189] The first paragraph of Penal Code section 190.3 provides that the punishment for a defendant in California found guilty of first degree murder with one or more special circumstance[s] charged and found true is either death or life without possibility of parole. The last paragraph of section 190.3, however, provides that in deciding punishment, the trier of fact shall consider and be guided by the aggravating and mitigating circumstances and "shall impose a sentence of death" if the trier of fact finds that the circumstances in aggravation outweigh those in mitigation or "shall impose a sentence of confinement in state prison for a term of life without the possibility of parole" if the mitigating circumstances outweigh those in aggravation. It follows, therefore, that if a jury were to find no circumstances in aggravation, they could not impose a sentence of death under California's 1978 death penalty scheme that is applicable to Mr. Virgil. In other words, under Penal Code section 190.3, circumstances in aggravation are "elements" for federal constitutional purposes because their presence or absence narrows the class of death-eligible defendants in California. (*Schriro v. Summerlin, supra*, 124 S.Ct. at p. 2524.)

> is that they are the elements of the murder offense that make the defendant death eligible. See *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 2443, 153 L.Ed.2d 556 (2002) (holding that because Arizona's enumerated aggravating factors operate as the functional equivalent of elements of the offense, the Sixth Amendment requires that they be found by a jury). All of the elements of a criminal offense must be found by a jury unanimously as a matter of constitutional criminal procedure, see *Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707, 1710, 143 L.Ed.2d 985 (1999), particularly all elements that make a defendant death eligible, see *Ring*, 536 U.S. 584, 122 S.Ct. at 2431."].)

It appears this Court's position that *Apprendi, Ring*, and *Blakely* do not apply to California's death penalty scheme is based also on its view that penalty juries in California merely weigh the circumstances in aggravation and mitigation and then decide if a defendant eligible for the death penalty should receive that penalty. (See *People v. Prieto, supra,* 30 Cal.4th at p. 263.) The problem with this view, however, is the failure to consider that such weighing can only occur if the jury first finds some circumstance[s] in aggravation. Because only the existence of such circumstances makes a defendant death eligible, aggravating circumstances in California are no different than aggravating factors in Arizona that narrow the class of defendants eligible for the death penalty. Accordingly, aggravating circumstances in California are "elements" of the offense of murder for federal constitutional purposes and are therefore "subject to the procedural requirements the Constitution attaches to trial of elements." (*Schriro v. Summerlin, supra*, 124 S.Ct. at p. 2524; *Blakely v. Washington, supra,* 124 S.Ct. at p. 2537; *Sattazahn v. Pennsylvania, supra,* 537 U.S. at pp. 110-111.)

Because a trier of fact in California cannot impose a sentence of death based only on the mere verdicts of guilt for murder and the truth of the special circumstance[s], the decisions in *Apprendi, Ring*, and *Blakely* add new constitutional requirements to California's penalty phase

proceedings. For the above reasons, the trial court violated Mr. Virgil's federal constitutional rights by instructing his penalty jury with CALJIC No. 8.84.1 to disregard all prior instructions and not reinstructing on the presumption of innocence, the definition of beyond a reasonable doubt, and the prosecution's burden at the penalty phase.

2. MR. VIRGIL'S SENTENCE OF DEATH MUST BE REVERSED BECAUSE THERE IS A REASONABLE LIKELIHOOD THAT HIS PENALTY JURY BASED ITS SENTENCING DETERMINATION ON PROOF INSUFFICIENT TO SATISFY THE WINSHIP STANDARD

In Mr. Virgil's case, the jury was instructed in the guilt phase with CALJIC No. 2.90 concerning the presumption of innocence, the definition of beyond a reasonable doubt, and the prosecution's burden, but were instructed in the penalty phase with CALJIC No. 8.84.1 to disregard all prior instructions. (RT 3351-3352, 3905.) Further, jurors were instructed that before they could "consider" Mr. Virgil's alleged prior convictions for second degree burglary and the alleged other criminal activity against Benita Rodriguez [CALJIC Nos. 8.86 and 8.87, respectively] as circumstances in aggravation, jurors had to "be satisfied beyond a reasonable doubt" that Mr. Virgil "was in fact convicted of such prior crimes" and "did in fact commit such criminal activity," though "[i]t is not necessary for all jurors to agree." (RT 3910-3911.)

The prosecutor argued the importance of Mr. Virgil's reported prior convictions as a basis to impose the death penalty [he failed to learn his lesson but continued with his criminality]. (RT 3859-3860) More important, he urged the jury to impose the death penalty based on Mr. Virgil's reported "attack" against Ms. Rodriguez [he had a good time attacking her and engaging in the "sickest exercise" a man can commit against a woman; he is "the monster in her nightmares"; and, though the circumstances of the crimes against Ms. Lao were predominant in terms of

aggravation, the circumstances of the attack against Ms. Rodriguez made all of the aggravation much worse because it was like dipping an open wound into a bucket of alcohol. (RT 3862-3863, 3871-3872.) Accordingly, the trial court's instructional error affected key portions of the evidence against Mr. Virgil that the prosecutor argued made him deserving of the death penalty.

The confusion and inconsistency spawned by instructing the jury with CALJIC No. 8.84.1 to disregard all prior instructions, including the presumption of innocence, the definition of beyond a reasonable doubt, and the prosecution's burden [(RT 3351-3352, 3360-3361)] while also instructing the jury of the need to make findings on key portions of the evidence during the penalty phase beyond a reasonable doubt, (RT 3910-3911) made it reasonably likely the jury in Mr. Virgil's was so hopelessly confused that they applied the beyond a reasonable doubt standard incorrectly and in a way insufficient to meet the *Winship* standard. (*Victor v. Nebraska, supra,* 511 U.S. at p. 6.) [190] This conclusions is further inescapable because Mr. Virgil's penalty jury, unlike in *People v. Prieto, supra,* 30 Cal.4th at p. 262, was not instructed about the prosecution's burden proof at the penalty phase. (RT 3904-3913.) Because the trial court erred by failing to instruct clearly and with certainty regarding the presumption of innocence, the prosecution's burden and define reasonable doubt under circumstances that failed to articulate the heavy burden intended by the beyond a reasonable doubt standard and that error permeated the entire penalty phase, the trial court committed a structural

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[190] Though the penalty jury did not specifically express confusion about the trial court's instruction about the need to make some findings beyond a reasonable doubt and/or about unanimity, the jury did suggest some degree of confusion/and uncertainty during the penalty phase by asking "what happens if the jury is unable to reach an unanimous decision." (RT 3917.)

error that requires the reversal of Mr. Virgil's penalty judgment. (*Arizona v. Fulminante, supra,* 499 U.S. at pp. 309-310.)

E. EVEN IF THE FAILURE TO INSTRUCT THE JURY WITH THE PRESUMPTION OF INNOCENCE, THE PROSECUTION'S BURDEN, AND THE DEFINITION OF REASONABLE DOUBT IS NOT STRUCTURAL ERROR, MR. VIRGIL'S JUDGMENT OF DEATH MUST BE REVERSED BECAUSE OF THE FAILURE TO INSTRUCT THE JURY WITH ALL GENERAL PRINCIPLES OF LAW THAT WERE CLOSELY AND OPENLY CONNECTED TO THE FACTS AND NECESSARY TO THE JURY'S UNDERSTANDING OF THE CASE

In *People v. Carter, supra,* 30 Cal.4th at pp. 1218-1219, the trial court instructed the jury with CALJIC No. 8.84.1 [determine the facts from the evidence received in the penalty phase of the trial, accept and follow the law as given, and disregard all other instructions], CALJIC Nos. 8.85 [factors to consider in deciding penalty], 8.86 [requirement of proof beyond a reasonable doubt regarding prior convictions offered in aggravation], 8.87 [requiring such proof of other criminal activity offered in aggravation], 2.90 [presumption of innocence and defining reasonable doubt]; 17.47 [advising the jury not to disclose balloting], 17.48 [concerning the juror's use of notes]; and 8.88 [concluding instructions for the penalty phase].

The *Carter* court generally agreed with the defendant that the trial court should have instructed the jury with the general principles of law that were closely and openly connected with the facts and that were necessary to the jury's understanding of the case. (*Id.,* at p. 1219.) The Court, however, rejected the defendant's claim that the absence of evidentiary instructions constituted structural error as defined in *Arizona v. Fulminante, supra,* 499 U.S. at pp. 309-310, because the absence of such instructions did not deprive the defendant of the """basic protections" [such as an unbiased judge, an impartial jury, or the assistance of counsel] without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence [or punishment] . . . and no criminal

punishment may be regarded as fundamentally fair."' (Citations.)" (*People v. Carter, supra,* 30 Cal.4th at p. 1221.) [191] Also, the Court concluded that the defendant failed under the California standard of review "to establish a reasonable possibility that the error [in failing to give the evidentiary instructions at issue] affected the verdict. (Citation.)" (*Id.,* at pp. 1221-1222.) Further, the Court found that the defendant failed to satisfy the federal standard of review regarding constitutional error because "it appears beyond a reasonable doubt that the assumed error did not contribute to the death verdict. (Citation.)" (*Id.,* at p. 1222.) Though the Court concluded that the defendant failed to establish prejudice, it left open the possibility that, in an appropriate case, prejudice could result from the failure to instruct the penalty phase jury with evidentiary instructions. (*Ibid.*) As shown below, Mr. Virgil's case is such an appropriate case.

Gardena Police ID technician Swobodzinski testified about her comparison of Mr. Virgil's known fingerprints [ones she collected personally from Mr. Virgil – People's Exhibit No. 59] to those in the People's Exhibits from California and Louisiana – People's Exhibit Nos. 101-104]. Swobodzinski's testimony was the only evidence offered to establish that Mr. Virgil was the person who suffered the prior convictions.

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[191] Because the jury in *Carter* was instructed with CALJIC No. 2.90, the decision is inapposite concerning Mr. Virgil's argument that the failure to instruct the jury with the presumption of innocence, the definition of beyond a reasonable doubt and the prosecution's burden at the penalty phase constituted structural error.

[192] Given the testimony of the prosecution's expert criminalist at the guilt phase, Elizabeth Devine, Swobodzinski's performance and conclusions in this case were not above reproach. (RT 2369-2374, 2381, 2396-2397.) Further, Swobodzinski's testimony that a requisite number of points of comparison between sets of fingerprints was not required to make a positive identification (RT 2003-2005) is a minority view. (See *United States v. Mitchell* (3d Cir. 2004) 365 F.3d 215, 222, most jurisdictions employ a minimum number of points of comparison, though Canada and the United Kingdom do not require any minimum number.) [193]

Because the comparison of fingerprint evidence is not "within the common experience of all men of common education in the ordinary walks of life, and therefore the court and jury were properly aided by witnesses of peculiar and special experience on this subject" (*People v. Jennings* (1911) 252 Ill. 534, 96 N.E. 1077, 1083), and Swobodzinski's performance was questioned during the guilt phase and thus not above reproach in the penalty phase, there was a reasonable likelihood that the failure to instruct the jury regarding evidentiary matters and the reasonable doubt standard allowed the jury to accord greater weight to her testimony, especially in

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[192] The prosecution introduced four sets of documents into evidence that reportedly documented Mr. Virgil's prior convictions from Louisiana and California. (People's Exhibits 101-104.) (RT 3538-3539.) The testimony from Swobodzinski, however, gave those documents significance because she testified that the fingerprints contained in these documents were made by Mr. Virgil. (RT 3539-3942.) Accordingly, her testimony was crucial to the jury's determination about the Factor (c) evidence.

[193] By this, Mr. Virgil is not arguing that Swobodzinski's testimony was per se inadmissible or suspect. Instead, the fact that she espoused a minority view and one that seems to defy common sense, coupled with Ms. Devine's opinions about the crime scene investigation, represent the very reason why the jury should have been instructed with the appropriate CALJIC instructions.

light of the prosecutor's argument that Swobodzinski's testimony established the truth of the prior convictions under Penal Code section 190.3(c). (RT 3859.) (See CALJIC Nos. 1.01, 1.03, 2.00, 2.01, 2.20, 2.21, 2.22, 2.60, 2.61, 2.80, and 2.90] Accordingly the error is not harmless beyond a reasonable doubt and requires that Mr. Virgil's judgment of death be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Boyde v. California, supra,* 494 U.S. at p. 380.) Further, the error is not harmless under the standard for state law error because a reasonable probability exists the defendant would have obtained a more favorable result absent the error. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

In addition, the jury heard testimony from Julio Montulfar and Benita Rodriguez regarding Mr. Virgil's reported "attack" against Rodriguez at the Hilltop Motel, five days after Ms. Lao was killed. This evidence was highly emotional and likely extremely damning given Rodriguez's description of Mr. Virgil's conduct against her and her stated refusal to look at him in court because she felt he tried to kill her.

Because of the seriousness and prejudicial nature of her testimony, it was necessary that the jury be instructed properly regarding the presumption of innocence, the definition of reasonable doubt, and other evidentiary matters related to this evidence. (See CALJIC Nos. 1.01, 1.02, 1.03, 1.05, 2.00, 2.01, 2.20, 2.21.1, 2.21.2, 2.22, 2.71, 2.72, and 2.90.) [194]

The prosecutor extensively argued that the very dramatic, serious and egregious nature of the incident with Rodriguez justified a judgment of death. To counteract this, the jury should have been instructed in the

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[194] Two of the jurors were of Hispanic descent, Dolores Padilla and Feliberta Jauregui, and presumably spoke Spanish. (Supplemental Clerk's Transcript I, 686, 1406.) Accordingly, it was important to give CALJIC No. 1.03 and instruct these jurors [and others if they spoke Spanish] not to translate for themselves what the witness told the translator.

penalty phase, as in the guilt phase, that what the attorneys say is not evidence, and that it must base its decision on the evidence ("Evidence consists of the testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact."). [195] The jury should also have been instructed regarding the factors they should consider in determining the credibility of witnesses [given, for example, the incredible testimony that Montulfar and Rodriguez had no idea that the Hilltop Motel was a hotbed of criminality – rampant prostitution and drug sales/use]. (See CALJIC Nos. 1.02, 1.03, 2.20, 2.21.2, and 2.22.) (RT 3852-3853, 3861, 3862-3863, 3866, 3867, 3869-3872.). [196]

In addition, the prosecution argued to the jury that the crimes against Ms. Lao and Ms. Rodriguez evidenced Mr. Virgil's lack of remorse. (RT 3854, 3857, 3874.) Under the circumstances, the jury should have been

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[195] CALJIC No. 2.00. As mentioned above, the trial court did instruct jurors at the start of the penalty phase that they were to get their evidence based on what was said in court and what the attorneys said during their Opening Statements was not evidence. These instructions were not only limited, but also conflicted with the trial court's latter instruction with CALJIC No. 8.84.1 to disregard all prior instructions.

[196] Los Angeles County Sheriff's Deputy Everett testified that the Hilltop Motel was well known for "a very high incidence of narcotic offenses occurring there on a daily basis." (RT 2680.) Montulfar and Rodriguez, however, ridiculously testified that they had no idea what was going on around them, despite the many posted signs at the motel declaring that drug use and prostitution were not allowed at the motel, their room rentals to men late at night and by the hour, and by the regular police presence at the motel because of the many narcotic offenses committed there. (RT 2680, 3560-3562, 3623, 3672.) Accordingly, the jury should have been instructed regarding the credibility of these critical penalty phase witnesses and related evidentiary matters on what was likely a major and determinative factor leading to the jury's decision that death was the appropriate punishment.

instructed with CALJIC Nos. 1.02, 1.03, 2.00, 2.01, 2.20, 2.21.1, 2.21.2, 2.22, 2.60, 2.61, 2.71, 2.72 to insure the jury based their decision on proper consideration of the evidence and not to conclude that Mr. Virgil lacked remorse or the circumstances with Ms. Rodriguez were true because he did not testify.

Finally, and perhaps most important, the jury was not instructed with CALJIC No. 2.90 concerning the presumption of innocence, the prosecution's burden, and the definition of a reasonable doubt. [RT 3911] before it could consider as aggravating factors the very damning evidence of the incident with Rodriguez and Mr. Virgil's prior convictions for burglary. [197] Accordingly, the failure to instruct the jury with all general principles of law necessary to the jury's understanding of the case deprived Mr. Virgil of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because there was a reasonable likelihood that the jury's penalty determination was based on a faulty consideration of the evidence and under a standard less than the *Winship* standard of proof beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Boyde v. California, supra,* 494 U.S. at p. 380; *Victor v. Nebraska, supra,* 511 U.S. at p. 6..) Finally, even if the Federal standard is found not to apply, the trial court's error in failing to give all of the instructions identified above is not harmless under state law because a reasonable probability exists that Mr. Virgil would have obtained

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[197] Mr. Virgil pled no contest as a result of the incident with Rodriguez (RT 3013), but the jury was not advised of this fact and still had to determine the nature and truth of the incident with Rodriguez. (See *North Carolina v. Alford* (1970) 400 U.S. 25, 35-36, fn. 8, plea of nolo contendere is not "an express admission of guilt but [operates] as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency.")

a more favorable result absent the error. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

XIII.

THE TRIAL COURT'S INSTRUCTION TO THE JURY IN RESPONSE TO THEIR QUESTIONS ABOUT THE CONSEQUENCES OF NOT REACHING A UNANIMOUS PENALTY DECISION RESULTED IN A COERCED PENALTY VERDICT AND REQUIRES THE REVERSAL OF MR. VIRGIL'S JUDGMENT OF DEATH

A. INTRODUCTION

A few hours after the jury began its penalty deliberations, the jury sent a note to the trial court asking about the consequences of failing to reach a unanimous penalty decision. If this occurred, the jury wanted to know if the court would make the decision on penalty or if the punishment would automatically become life without possibility of parole. [198]

After discussion with the parties, the court refused the defense request to instruct the jury consistent with Penal Code section 190.4, subdivision (b) – in the event of a deadlock, the court would not decide penalty but would impanel a new jury to decide punishment. Instead, the court indicated that it would instruct the jury in conformance with this Court's decision in *People v. Thomas* (1992) 2 Cal.4th 489 – the jury was not to consider or concern itself with the possibility of a deadlock and was to make every effort to reach a unanimous decision.

Defense counsel objected by arguing that the court's proposed instruction about making every effort to reach a unanimous verdict would be coercive under the circumstances, in violation of this Court's decision in

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[198] The note also asked if jurors could be polled by number instead of by name at the conclusion of the trial.

People v. Gainer (1977) 19 Cal.3d 835, prohibiting the coercion of a jury's verdict. Instead, defense counsel asked the court only to instruct the jury that they have received all of the law and evidence applicable to their penalty decision and they were not to concern themselves with the possibility of deadlock.

After the court repeated its intention to instruct the jury in the language from *Thomas*, defense counsel asked the court to give CALJIC No. 17.40, an instruction held to be important in preventing juries from being coerced into rendering a verdict. [199] The trial court refused defense counsel's additional request and instructed the jury in the language from *Thomas*. As will be discussed below, the trial court's instruction in response to the jury's questions at issue and rejection of defense counsel's proposed instructions resulted in a coerced penalty verdict in violation of Mr. Virgil's rights to due process, trial by a fair and impartial jury, equal protection, and a reliable penalty determination under the Fifth, Sixth,

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199 At the guilt phase, the jury was instructed with CALJIC No. 17.40 as follows:

"The People and the defendant are entitled to the individual opinion of each juror. Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself but should do so only after discussing the evidence and instructions with the other jurors.

"Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

"Do not decide any issue in this case by chance, such as by drawing of lots or by any other chance determination." (RT 3371-3372.)

Though the jury was given this instruction at the guilt phase, the penalty jury was instructed with CALJIC No. 8.84.1 to disregard all such instructions. (See Argument XII above.)

Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts.

B. APPLICABLE LAW AND STANDARD OF REVIEW

In *People v. Belmontes* (1988) 45 Cal.3d 744, 813-814, the Court considered whether the trial court erred by refusing to instruct the jury "'"forthrightly'" in response to jurors' concerns about the consequences of their failure unanimously to agree on penalty. According to the defendant, the only "'forthright' reply would have been an instruction in the full-blown language of [Penal Code] section 190.4, subdivision (b); i.e., informing the jury of the statutorily mandated procedures and possibility of subsequent retrials in the event of a deadlock." (*Id.,* at p. 814.) [200]

The Court rejected that argument by holding that "such instruction under the 1978 death penalty law [the law applicable to Mr. Virgil's case] would have the potential for unduly confusing and misguiding the jury in their proper role and function in determining penalty." (*Ibid.*) According to the Court, penalty phase juries are required to decide between death and a sentence of life without possibility of parole and defendant's suggested instruction could well serve to lessen or diminish the jurors' sense of obligation in making that decision. (*Ibid.*; accord *People v. Gurule* (2002) 28 Cal.4th 557, 648.)

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[200] Penal Code section 190.4, subdivision (b) provides in pertinent part:

"If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole."

The Court continued that the trial judge in *Belmontes* acted "in a commendably forthright fashion" initially by merely rereading the pertinent instruction [CALJIC No. 8.84.2] ***201*** and then "prudently avoided misinforming and misleading the jury" when in response to a juror's specific question about whether the court would automatically impose one or the other penalty, it told the jurors that they would be discharged if the jury could not decide between the two penalties. (*Ibid.*) In conclusion, the Court found that defendant could not have been prejudiced by the trial court's limited disclosure because

> "[i]t bore no resemblance to the often criticized '*Allen*-type instruction" designed to extract a verdict from a deadlocked jury by admonishing the minority jurors to rethink their positions in light of the majority's views (*Allen v. United States* (1896) 164 U.S. 492, 501, 17 S.Ct. 154, 157, 41 L.Ed. 528.)"

(*People v. Belmontes, supra,* 45 Cal.3d at p. 814.)

In *People v. Thomas, supra,* 2 Cal.4th 489, the jury sent a note to the trial court asking two questions. The first concerned the defendant's appellate rights if a sentence of death or a sentence of life without possibility of parole was imposed and the second was "'[w]hat would be the action taken by the court in the event that the jury is unable to reach a unanimous decision?'" (*Id.,* at p. 539.) The trial court answered the first

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201 Former CALJIC No. 8.84.2 provided as follows:

"'After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors or aggravating and mitigating circumstances upon which you have been instructed. [¶] If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose the sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.'" (*People v. Weaver* (2001) 26 Cal.4th 876, 984.)

question by instructing that it would violate the jurors' duty to consider defendant's appellate right in deciding sentence and the jury was not to concern itself with that topic. Similarly, the trial court answered the second question by instructing the jury "'[t]hat again is not for the jury to consider or to concern itself with. You must make every effort to reach a unanimous decision if at all possible.'" (*Ibid.*)

On appeal, the defendant in *Thomas* argued that the trial court erred by giving the latter instruction because it "should have explained to the jurors that their inability to reach a verdict could not result in a sentence less than life without possibility of parole, but would only result in a retrial of the penalty phase." (*Id.,* at p. 539.) Relying on its earlier decisions in *People v. Belmontes, supra,* 45 Cal.3d at p. 814, and *People v. Rich* (1988) 45 Cal.3d 1036, 1114-1115, the Court concluded that instructing a penalty jury [under the 1978 death penalty] as the defendant proposed would have diminished the jurors' sense of duty to deliberate and be open to the views of their fellow jurors. (*People v. Thomas, supra,* 2 Cal.4th at pp. 539-540, fn. 18.)

More than a year later, this Court decided *People v. Wader* (1993) 5 Cal.4th 610, 664, where it rejected the defendant's argument that the trial court erred by refusing his request to instruct his penalty jury that it was not required to make a penalty decision because "'[t]he possibility of a hung jury is an inevitable by-product of the requirement that a verdict must be unanimous.'" In analyzing the defendant's claim, the Court recognized first that it had "previously rejected the proposition that when a jury asks the trial court what will happen if it fails to reach a penalty verdict, the court must explain to the jury the consequences of its failure to agree. (Citation.)." (*Ibid.*) The *Wader* court also held, however, that "[i]t follows that there is no duty to instruct a jury regarding its possible failure to reach a verdict in the absence of a request by the jury for an explanation." (*Ibid.*)

In *People v. Gainer* (1977) 19 Cal.3d 835, this Court considered whether it was proper to instruct juries in California in conformance with the United States Supreme Court's decision in *Allen v. United States* (1896) 164 U.S. 492, that has been "a popular technique for extracting verdicts from deadlocked juries." (*People v. Gainer, supra,* 19 Cal.3d at p. 843.) After the *Gainer* court concluded that *Allen* has been "a [decision with a] controversial history since it was cursorily approved by the United States Supreme Court" and "a prolific generator of appellate controversy," it held that such instruction should be prohibited in California because the *Allen* "'"dynamite'" charge allows juries "to consider extraneous and improper factors, inaccurately states the law, carries a potentially coercive impact, and burdens rather than facilitates the administration of justice, ..." (*Id.,* at pp. 842, 843.)

In *Jones v. United States* (1999) 527 U.S. 373, the Supreme Court held that the Eighth Amendment does not require capital juries to be instructed routinely and in every case about the consequences of a deadlocked jury. (*Id.,* at pp. 379, 383, but see *State v. Williams* (La. 1980) 392 So.2d 619, where the Louisiana Supreme Court held that juries in Louisiana must be informed of the consequences of failing to reach a unanimous verdict; *Mak v. Blodgett* (9th Cir.1992) 970 F.2d 614; *Kubat v. Thieret* (7th Cir.1989) 867 F.2d 351 [a defendant's federal rights to due process, equal protection and a reliable penalty determination are violated

when a jury is misinstructed regarding unanimity as to penalty.) 202 Despite that holding, the *Jones* court also held that the failure to instruct a jury about the consequences of a deadlock would violate the Eighth Amendment if the trial court's other instruction[s] "affirmatively misled [the jury] regarding its role in the sentencing process. (Citation.)" (*Id.,* at pp. 381-382.) This is so because

> "The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing."

(*Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

C. THE JURY'S NOTE CONCERNING THE EFFECT OF FAILING TO REACH A PENALTY VERDICT; DEFENSE COUNSEL'S PROPOSED RESPONSE TO THE JURY'S INQUIRY; THE TRIAL COURT'S INSTRUCTION TO THE JURY; PROCEEDINGS DURING THE JURY'S DELIBERATIONS; AND THE JURY'S PENALTY VERDICT

During the morning session on March 15, 1995, the jury in Mr. Virgil's case heard counsels' closing argument and the trial court's instructions that were to guide its penalty deliberations. (RT 3851-3914.) The jury commenced its deliberations at 1:42 PM that day and deliberated

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202 In *People v. Memro* (1995) 11 Cal.4th 776, 882, this Court declined any reliance on *Mak* and *Thieret* because "Federal circuit court opinions" are not binding on California state courts and those cases lacked "persuasive authority." Mr. Virgil's respectfully requests that this Court reconsider the application of these cases to California law for the reasons contained in those cases and under the rationale that the Eighth Amendment's evolving standards of decency now command a different result. (See *Roper v. Simmons* (2005) __ U.S. __ [125 S.Ct. 1183, 1191-1194], citing the importance of evolving standards of decency as a basis for interpreting the scope of the Eighth Amendment's prohibition against cruel and unusual punishment when a judgment of death is involved.)

until 4:15 PM. (RT 3914-3915.) On March 16, the jury commenced its deliberations at 9:15 AM and sent a note to the trial court just before the noon recess that provided as follows:

> "'Number 1, what happens if the jury is unable to reach an unanimous decision?
>
> "'Number 2, will you decide, parenthetically, on the sentence?
>
> "'Number 3, will life without parole be given automatically?
>
> "'Number 4, if we are polled at the end of this procedure can it be done by number instead of by name?'" (RT 3917; Supplemental Clerk's Transcript II, 906.)

At 1:45 PM on March 16, the court conducted a hearing outside of the jury's presence to discuss the jury's note and counsels' proposals for how to respond. (RT 3917.) Defense counsel spoke first and urged the court to instruct the jury with the truth [the first sentence] from Penal Code section 190.4, subdivision (b), because that would advise the jury that the trial court would not determine penalty in the event of a deadlock, the sentence would not automatically become life without possibility of parole if a mistrial was declared, and the Penalty Phase would be retried before a different jury. (RT 3917-3918.) [203]

Defense counsel continued by citing this Court's decision in *People v. Wader, supra,* 5 Cal.4th at p. 664, where the defendant claimed the trial court erred by failing to instruct the jury that "'[t]he possibility of a hung jury is an inevitable by-product of the requirement that a verdict must be unanimous.'" The *Wader* court held that it had previously rejected a claim

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[203] Defense counsel asked the trial court to instruct the jury as follows:

"'If the trier of fact is a jury and has been unable to reach an unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be.'" (RT 3918.)

that the jury should be instructed about the consequences of its failure to reach a penalty verdict and "[i]t follows that there is no duty to instruct a jury regarding its possible failure to reach a verdict in the absence of a request by the jury for an explanation." (RT 3918-3919; *People v. Wader, supra,* 5 Cal.4th at p. 664.)

According to defense counsel, this passage in *Wader* required that the trial court instruct the jury as he proposed because the jury asked for an explanation. (RT 3919-3924.) [204] In the alternative, defense counsel urged the trial court only to instruct the jury that it has "received all of the law and the evidence" and jurors were "not to speculate as to the consequences of your failure to agree." (RT 3919.) When the trial court indicated that it would instruct the jury in the language from *Thomas* to make every effort to reach a unanimous verdict, defense counsel objected that such instruction would be coercive and violate this Court's decision in *People v. Gainer, supra,* 19 Cal.3d 835. (RT 3920, 3923-3924.) After the

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204 This Court has cited the page at issue in *Wader* twice, but then only as a basis either to reject the defendant's argument that the trial court was obligated to instruct the jury sua sponte about the consequences of a deadlock absent a request for explanation (*People v. Memro, supra,* 11 Cal.4th at p. 782), or, as authority to reject a defense instruction identical to the one rejected in *Wader* (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1160). Given the absence of clarification from this Court about the meaning of this passage from *Wader*, it is possible that defense counsel was correct by interpreting the passage as he did.

Irrespective of whether or not defense counsel's interpretation was correct, Mr. Virgil's penalty jury was instructed to make every effort to reach a unanimous verdict in response to their question about the consequences of not reaching such a verdict. Because the combination of the trial court's instruction and the failure to give CALJIC No. 17.40 had the effect of coercing the jury's penalty verdict under the circumstances of Mr. Virgil's case, Mr. Virgil's judgment of death must be reversed, regardless of whether defense counsel's interpretation of *Wader* was correct.

court made clear that it would instruct the jury in the language from *Thomas*, defense counsel asked in the "alternative" that the court only give CALJIC No. 17.40 to ensure that jurors were not misled, but fully understood the nature of their sentencing responsibilities. (RT 3925-3927.)

The trial court concluded that its best and safest course was to instruct the jury only in the language from *People v. Thomas, supra,* 2 Cal.4th at p. 539, because the question asked by Mr. Virgil's penalty jury was "almost verbatim" to the jury's question in *Thomas,* the court believed the decision in *Gainer* was not applicable, and following the passage at issue from *Wader* would render CALJIC No. 17.40 unconstitutional. (RT 3924-3927.) Accordingly, the court answered the jury's first three questions about the consequences of failing to reach a unanimous decision by instructing as follows:

> " . . . that subject [the jury's failure to reach a unanimous verdict] is not for the jury to consider or to concern itself with. You must make every effort to reach an unanimous decision if at all possible."

(RT 3928; Supplemental Clerk's Transcript, 907.) ***205***

After receiving this instruction, the jury resumed its deliberations at 2:12 PM and continued deliberating until the evening recess at 4:13 PM. (RT 3928.) The next day [Friday, March 17] the jury began its deliberations at 9:10 AM and at 10:55 AM the trial court agreed to conduct a hearing about the jury's deliberations at defense counsel's request. (RT 3929.) During that hearing, defense counsel complained that the trial court wrongly instructed the jury over his vigorous objection with the language

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205 The court answered the jury's fourth question about whether they could be polled by number rather than name by instructing " . . . that concern should have no concern on your deliberations and you are not to consider it." (RT 3928.)

from *People v. Thomas, supra,* 2 Cal.4th 489, that was coercive under the circumstances of Mr. Virgil's case. (RT 3929.)

Defense counsel added that he felt there was something amiss regarding the jury's penalty deliberations and he believed that the Jury Foreperson [Mr. Mosby] was the cause. According to defense counsel, he was very upset that the jury selected Mr. Mosby to be the foreperson for the penalty phase [as he was for the guilt phase] because he was a law student and the jury's note about the consequences of a deadlock suggested that it came from someone who researched the law. Further, defense counsel was concerned that Mr. Mosby might be attempting to coerce a verdict by preventing jurors from communicating with the court and expressing that they were deadlocked. According to defense counsel, the length of the jury's penalty deliberations, coupled with his belief that jurors were upset with one another and wanted to get this trial over with, required that the court question jurors directly and poll them to learn "whether or not they feel there is a reasonable probability that further deliberations could result in a verdict." (RT 3929-3931.)

The prosecutor replied that it would be inappropriate to poll jurors at this point in their deliberations because that would be "tantamount to a reverse *Allen* charge by encouraging a jury that it is deadlocked before it says it is. A jury knows when it is deadlocked, and when they are, they say they are hung." (RT 3932.) The prosecutor continued that this was only the jury's third day of penalty deliberations after a six-week trial, the jury likely had more things to discuss and the court had properly instructed the jury in the language from *Thomas,* and it would be highly inappropriate to suggest that the jury should conclude it was deadlocked under the

circumstances. (RT 3932.) [206] According to the prosecutor, it would be just as improper to poll the jury about whether they are deadlocked as it was to give them an *Allen* charge in an attempt to break a deadlock. (RT 3932.) Finally, the prosecutor argued that though he had not tried other capital cases, he felt it was natural for the jury to select the same foreperson; he believed that there was "no indication that this foreman had acted improperly in any way;" and there was no basis to believe that the foreman was coercing jurors to reach a verdict against their will. (RT 3932-3933.)

Defense counsel replied by citing *In re Chapman* (1976) 64 Cal.App.3d 806, and Penal Code section 1163 for the propositions that the court has discretion to question the jury about whether there is "a reasonable probability" they can reach a verdict and he believed under the circumstances that some jurors might feel that they do not have the right to communicate with the court, except through the foreperson. (RT 3933-3934.)

The trial court disagreed with defense counsel's representation about dissension between jurors. Instead, it found there was no basis for defense counsel's concern about jurors feeling intimidated by the foreperson and believed it was not unreasonable for the jury to be out two full days "in a case of this magnitude." (RT 3935.) According to the court, if there was any evidence that jurors were being coerced, intimidated, or prevented from communicating with the court, the trial court would surely do as defense counsel suggested by questioning jurors directly. (RT 3935-3936.)

The court did agree to conduct a hearing in response to defense counsel's concerns about Mr. Mosby's conduct of studying law books

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[206] Regardless of whether the prosecutor was correct about a "six-week trial," the penalty phase lasted barely more than two days.

during breaks in the proceedings. During that hearing, the court asked Mosby if he had "talked to the jurors about anything at all to do with criminal law?" (RT 3939-3940.)

After Mosby denied conducting any outside legal research (RT 3940), the court allowed the jury to resume its deliberations at 11:20 AM. The jury deliberated until the lunch recess at 12:00 PM, resumed its deliberations at 1:30 PM, and recessed for the evening at 4:20 PM and until Monday, March 20, 1995. (RT 3942, 3943.) On Monday, March 20 the jury began its deliberations at 9:13 AM and announced its penalty decision of death at 11:15 AM. (RT 3944-3945.) The jury was polled by seat number and name in open court and each juror said "Yes," that was their verdict. (RT 3945-3946.)

D. THE POSSIBILITY THAT THE TRIAL COURT'S INSTRUCTION TO REACH A UNANIMOUS VERDICT COUPLED WITH THE FAILURE TO GIVE CALJIC NO. 17.40 MISLED THE JURY REGARDING ITS SENTENCING RESPONSIBILITY IS GREAT ENOUGH TO REQUIRE THE REVERSAL OF MR. VIRGIL'S PENALTY JUDGMENT

As mentioned above, defense counsel argued that the passage at issue in *People v. Wader, supra,* 5 Cal.4th at p. 664, [no duty to instruct on the consequences of the failure to agree, absent a request for an explanation] supported his argument that the trial court should instruct the jury in the language from Penal Code section 190.4, subdivision (b) [the failure to reach an unanimous verdict will result in the discharge of the jury and the empanelment of a new jury to decide penalty]. (RT 3918-3919.) Under the plain language of this passage and the Court's failure to clarify that this passage means anything different than what defense counsel argued, Mr. Virgil submits that the trial court erred under *Wader* by not instructing the jury as defense counsel first requested.

After the trial court refused to instruct the jury with the first sentence from Penal Code section 190.4, subdivision (b), defense counsel proposed

an alternate instruction to avoid the coercive effects of the court's proposed instruction from *Thomas*. (RT 3919.) Because defense counsel's alternate instruction was consistent with the trial court's instruction found proper in *Belmontes*, the trial court erred by refusing it.

In *Belmontes* the Court held that the trial judge acted "in a commendably forthright fashion" by rereading CALJIC No. 8.84.2 that effectively instructed the jury that it had received all of the evidence and applicable law necessary to its decision and "prudently avoided misinforming and misleading the jury" by instructing that it would discharge the jury if they could not make a decision between death and life without possibility of parole. (*People v. Belmontes, supra.* 45 Cal.3d at p. 814.) This is, in effect, no different than what defense counsel asked the court in Mr. Virgil's case to do, after it refused his request to instruct the jury in the language of Penal Code section 190.4, subdivision (b). By asking the trial court to instruct the jury that "[y]ou have received all the law and the evidence. You may not speculate as to the consequences of your failure to agree" (RT 3919), defense counsel was asking the court to instruct consistent with what this Court held was "commendabl[e]" in *Belmontes*. Accordingly, the trial court erred by refusing to give the defense proposed alternative instruction that was in all important regards consistent with *Belmontes*.

Similarly, defense counsel's proposed instruction with the first sentence of Penal Code section 190.4, subdivision (b), was consistent with *Belmontes* where the Court held that the trial court "prudently avoided misinforming and misleading the jury" by instructing that the jury would be discharged if they could not reach an unanimous decision. (*People v. Belmontes, supra,* 5 Cal.4th at p. 814.) By denying defense counsel's request that Mr. Virgil's penalty jury be instructed that they would be dismissed and a new jury impaneled to determine penalty, the trial court

erred by refusing an instruction that was consistent in all important regards with the instruction approved in *Belmontes*.

After the trial court insisted on instructing the jury in the language from *Thomas*, defense counsel again sought to avoid the coercive effects of the court's proposed instruction by asking the court only to instruct the jury with the full version of CALJIC No. 17.40. (RT 3925-3927.) [207] The court refused because it felt that its safest course of conduct was to instruct the jury in the language from *Thomas* and instructing the jury as defense counsel proposed based on *Wader* would negate CALJIC No. 17.40, an instruction used for years in California. (RT 3924-3927.)

Contrary to the trial court's apparent belief, CALJIC instructions are not sacrosanct because they "are not themselves the law, and are not authority to establish legal propositions or precedent." (*People v. Morales* (2001) 25 Cal.4th 34, 48 fn. 7; see also *People v. Alvarez* (1996) 14 Cal.4th 155, 217.) Thus, the trial court's ruling elevating CALJIC No. 17.40 to sacrosanct, constitutional status is not only wrong, but strangely curious given the court's refusal to give that instruction at defense counsel's request in response to the note from the jury. (See *People v. Miller* (1990) 50

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[207] Before the start of deliberations, the jury was given a defense special instruction that reflected the first sentence of CALJIC No. 17.40 [the People and the Defendant are entitled to the individual opinion of each juror and each juror must decide each question involved in the penalty decision]. (RT 3908.) That instruction, however, was not adequate to resolve Mr. Virgil's present claim because it did not include the balance of CALJIC No. 17.40 that would have instructed jurors that they were not to surrender their views to the majority or to any juror[s]. The obvious purpose of this portion of CALJIC No. 17.40 is to ensure that jurors fully understand that their individualized decision-making responsibility is more important than surrendering their views to reach an unanimous decision. (See *United States v. Mason* (9th Cir.1981) 658 F.2d 1263, 1268 ["the integrity of individual conscience in the jury deliberation process must not be compromised."].)

Cal.3d 954, 993-994, fn. 17, holding that the giving of CALJIC No. 17.40 emphasizing each juror's duty to act individually and not to surrender their views to the mere will of the majority or any other juror[s] is important in rebutting a claim of jury coercion; *People v. Gainer, supra,* 19 Cal.3d at p. 856 [approving CALJIC No. 17.40 and recommending its continued use]; *People v. Harris* (1981) 28 Cal.3d 935, 964 [CALJIC No. 17.40 should be given at the penalty phase to avoid the possibility of jury coercion]; *United States v. Mason, supra,* 658 F.2d at p., 1268 ["It is essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party."].)

This Court has long held that trial courts in California should not give a supplemental instructions intended to "''dynamite''" the jury out of a deadlock or ones that "carr[y] a potentially coercive impact" (*People v. Gainer, supra,* 19 Cal.3d at pp. 842, 843), though such instructions have been long been permissible in the federal system. (See *Lowenfield v. Phelps* (1988) 484 U.S. 231, 237; *Jones v. United States, supra,* 527 U.S. at p. 382, fn 5.) Though the Eighth Amendment to the United States Constitution does not require that capital sentencing juries be instructed routinely about the consequences of failing to reach a penalty verdict, that general rule from *Jones* is conditioned on the trial court's other instructions not "'affirmatively misleading the jury] regarding its role in the sentencing process.'" (*Jones v. United States, supra,* 527 U.S. at pp. 381-382.)

In *Jenkins v. United States* (1965) 380 U.S. 445, 446, the high court considered whether the trial court's response to the jury's note suggesting that it could not reach a verdict was coercive. (*Lowenfield v. Phelps, supra,* 484 U.S. at p. 239.) In giving additional instructions, the trial court in *Jenkins* instructed the jury that it had "'to reach a decision in this case.'" (*Ibid,*, citing *Jenkins v. United States, supra,* 380 U.S. at p. 446.) The United States Supreme Court held that "'in its context and under all the

circumstances, the judge's statement had the coercive effect attributed to it.'" (*Ibid.*)

The trial court's instruction in Mr. Virgil's case, especially when considered in the absence of CALJIC No. 17.40, elevated the importance of unanimity beyond the individualized nature of jurors' sentencing decision as the conscience of the community. Under these circumstances, the trial court's instruction affirmatively misled jurors about their sentencing responsibility in violation of Mr. Virgil's rights to due process, trial by a fair and impartial jury, equal protection, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (See *Lowenfield v. Phelps, supra,* 484 U.S. at pp 237-238; *Jenkins v. United States, supra,* 38/0 U.S. at p. 446; *Jones v. United States, supra,* 527 U.S. at pp. 381-382; *Mills v. Maryland, supra,* 486 U.S. at pp. 383-384; *Mak v. Blodgett, supra,* 970 F.2d 614; *Kubat v. Thieret, supra,* 867 F.2d 351.)

Because trial court's error deprived Mr. Virgil's of his fundamental rights to a fair and reliable trial, the error is structural and requires the reversal of judgment. (*Arizona v. Fulminante, supra,* 499 U.S. at pp, 309-310.) Even if the error is not deemed structural, it was not harmless beyond a reasonable doubt because the error misled the jury about the paramount importance of each juror's individualized sentencing responsibility that was more important in a capital case than the Government's interest in reaching a unanimous verdict. (See *Lowenfield v. Phelps, supra,* 484 U.S. at pp 237-238; *Jenkins v. United States, supra,* 38/0 U.S. at p. 446; *Jones v. United States, supra,* 527 U.S. at pp. 381-382; *Mills v. Maryland, supra,* 486 U.S. at pp. 383-384; *Mak v. Blodgett, supra,* 970 F.2d 614; *Kubat v. Thieret, supra,* 867 F.2d 351.; *Chapman v. California, supra,* 386 U.S. at p. 24.) Accordingly, Mr. Virgil's penalty decision must be reversed.

XIV.

THE TRIAL COURT'S EXCLUSION AND MODIFICATION OF DEFENSE EXHIBITS DURING THE PENALTY PHASE REQUIRES THE REVERSAL OF MR. VIRGIL'S PENALTY JUDGMENT

A. INTRODUCTION

During the discussion about the admissibility of exhibits at the penalty phase, the prosecutor asked that the defense exhibits be limited in number and scope because they presented too much information about Mr. Virgil and his relationship with his former fiancée, the mother of his son, and Nigel, his infant son. Defense counsel believed that the exhibits were necessary to Mr. Virgil's defense because they documented the scope of the love and care expressed between Mr. Virgil, Ms. Antoine, and Nigel. The trial court ruled that only some of the proffered exhibits would be admitted and those had to be modified to eliminate Ms. Antoine's writings that evidenced her intention to maintain a close and loving bond between herself, Mr. Virgil and their son. As will be shown below, the trial court abused its discretion by excluding and modifying these important exhibits in violation of Mr. Virgil's right to present relevant evidence as a basis for a sentence less than death. Under the circumstances, the trial court's error violated Mr. Virgil's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts and requires the reversal of his penalty judgment.

B. APPLICABLE LAW AND STANDARD OF REVIEW

It is well-settled and beyond dispute that a capital sentencing jury is required to consider "the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (plurality opinion

of Stewart, Powell, and Stevens, JJ.).) That requirement "rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long" and imposes a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case. (Fn. omitted.)" (*Id.,* at p. 305.)

In *Lockett v. Ohio* (1978) 438 U.S. 586, the Supreme Court renewed its support for the plurality's holding in *Woodson* by holding that

> "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, [Fn. omitted] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [Fn. omitted.]"

(*Id.,* at p. 604.)

In reaching that conclusion, however, the Supreme Court cautioned that nothing in its opinion "limit[ed] the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." (*Id.,* at p. 604, fn. 12.)

The Supreme Court renewed its support for the holdings in *Woodson* and *Lockett* in *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112, by holding that

> "justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." (Citation.) By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency."

In *Skipper v. South Carolina* (1986) 476 U.S. 1, 5, fn. 1, the Court held that the Eighth Amendment, as recognized in *Woodson, Lockett,* and *Eddings*, and the requirements of "elemental due process" demand that a capital defendant be allowed to introduce mitigating evidence to rebut the

prosecutor's argument encouraging the jury to impose the death penalty. According to the Supreme Court, evidence that a defendant will be well-behaved and peacefully adjust to incarceration "is itself an aspect of his character that is by its nature relevant to the sentencing determination. (Fn. omitted.): (*Id.,* at p. 7.) Consistent with its decision in *Lockett,* the Supreme Court cautioned again that not "all facets of the defendant's ability to adjust to prison life must be treated as relevant and potentially mitigating." (*Id.*, at p. 7, fn. 2.)

In opposing the admissibility of the defendant's proffered evidence in *Skipper*, the State argued that it was cumulative of the testimony from the defendant and his ex-wife that his behavior pending trial was satisfactory and defendant would attempt to use his time in prison productively and would not cause trouble if he was not sentenced to death. The Supreme Court strongly disagreed with the State's argument because the evidence of defendant's likely good behavior in prison if sentenced to life without possibility of parole would have rebutted the prosecutor's closing argument that defendant would be a great danger to others in prison if he was not sentenced to death. Accordingly, the Supreme Court concluded that the omission of the relevant mitigating evidence interfered with the jury's "ability to carry out its task of considering all relevant facets of the character and record of the individual offender" and this required the reversal of the defendant's sentence of death. (*Id.,* at p. 8.)

C. THE PROCEEDINGS REGARDING THE PROFFERED DEFENSE EXHIBITS DURING THE PENALTY PHASE AND THE TRIAL COURT'S RULING

After the defense rested its case, the trial court and parties discussed the admissibility of the exhibits in the Penalty Phase at the sidebar. (RT 3828-2829.) The prosecutor commented first on the defense exhibits by complaining that the proffered pictures of Mr. Virgil's former girlfriend,

Annie Antoine, and their son, Nigel, had writing on the back and it was "almost like we are getting a videotape of the defendant's life." (RT 3829.) The prosecutor added that he did not "have a problem with some of these photographs, but [argued] they were cumulative and [of] questionable relevance." (RT 3829.) According to the prosecutor, "[w]e know he has a child. We've seen him in court. I don't have a problems with some of these photographs coming in, but I do have a problem with the writing on the back, and I think that perhaps [only] three of these instead of seven of them or eight of them" ought to be admitted. (RT 3829.)

Defense counsel replied that the defense offered the photographs with the writing on them to show that Mr. Virgil and Ms. Antoine communicated about Nigel and there were "concerns about love and care" expressed between them (RT 3830.) Further, defense counsel argued that the prosecution was allowed to admit photographs of Ms. Lao and Benita Rodriguez graphically depicting their wounds and humanizing them for the jury, but now complained unfairly that the defense efforts to humanize Mr. Virgil were "cumulative and inflammatory." (RT 3830.)

The trial court responded that it would not have allowed the prosecution unbridled discretion to admit a multitude of photographs [15] of Ms. Lao and Rodriguez in life. (RT 3830.) Though the trial court believed that nine defense exhibits were too many, its real concern with these exhibit was "with the messages on the back." (RT 3830.) The court noted that there was writing on the back of Defense Exhibit Z ["'I love you Daddy'" – the court did not think that such writing was appropriate and

questioned who wrote the message[s]]. (RT 3830.) _208_ Defense counsel added that since the photograph [Defense Z] also contained writing that provided "one-year-old," he had no problem if that part of the writing was whited out. (RT 3830.) _209_ Similarly, defense counsel indicated that he did not oppose whiting out the writing on Defense X and commented that on Defense Y Ms. Antoine had written "'The loves of your life'" on the back of the picture of her and Nigel. (RT 3830.) The prosecutor summarized his position by saying that he objected to any of the writing and wanted to minimize this evidence because he felt it was "cumulative," though he did not object to the photograph of Ms. Antoine and Nigel. (RT 3830-3831.) _210_

_208_ Despite the trial court's stated query, defense counsel advised the court of the obvious fact that Ms. Antoine, not Nigel or Mr. Virgil, was the source of the writings and that she wrote those missives to strengthen and reinforce her and Nigel's connection ["concerns of love and care"] to Mr. Virgil, Nigel's father. (RT 3830)

_209_ Because Defense Exhibits Z, AA, DD, and EE were excluded by the trial court and returned to Ms. Antoine, with the agreement of the court and the prosecutor, the only descriptions of them are in the Reporter's Transcript. (RT 3832.)

_210_ The prosecutor's stated concern was disingenuous and belies his real concern. In this regard, the prosecutor was concerned that the photographs and writings might humanize Mr. Virgil to the jury, thereby rendering it more difficult for them to select a sentence of death. (See *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 937, testimony from family members seeking to humanize the defendant may be presented to a jury in a capital case and is critically important evidence because the failure to produce it is likely prejudicial; *Siripongs v. Calderon* (9th Cir. 1994) 35 F.3d 1308, 1315-1316, defense counsel's failure to attempt to humanize the defendant warranted further proceedings because of the importance of such mitigating evidence; *Marshall v. Hendricks* (3d Cir.2002) 307 F.3d 36, 103, the defense goal at the Penalty Phase is to make a case for life by humanizing the defendant.)

The court commented that the photographs appeared to be of Nigel at various stages of his life and defense counsel agreed and added that he wanted the writing on Defense Y providing "The loves of your life" because that is what Ms. Antoine wrote and the other writings are Ms. Antoine's interpretation of what Nigel would say to Mr. Virgil, his father, if he could. (RT 3831.) Further, defense counsel added that he had no opposition to eliminating the other writings, given the trial court's stated intention not to admit all photographs as submitted. (RT 3831.) *211* Ultimately, the court agreed to admit five photographs [Defense BB, CC, FF, X, and Y], with only the portion of Defense Y remaining clearly uncovered ["The loves of your life,"]. (RT 3831-3832; Supplemental

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211 The copies of Defense Y, BB, FF contained in the record on appeal have Court Exhibit stickers covering a portion or most of the writing on the back of each photograph. (Supplemental Clerk's Transcript II, 729, 733, 738.) Appellate counsel attempted to settle the record and establish the condition of the Exhibits at issue as seen by the jury and to establish the exact nature of the Exhibits refused by the trial court by filing a Motion to Reopen Record Correction/Augment the Record on September 3, 2004. On October 13, 2004, the Court denied the motion, thereby violating Mr. Virgil's federal constitutional right to a record on appeal sufficient to raise his claims. (See *Griffin v. Illinois* (1956) 351 U.S. 12, 18-20; *Gardner v. California* (1969) 393 U.S. 367, 369 [due process and equal protection demand that a defendant have a record of prior proceedings adequate to prosecute his appeal and "present his case in the most favorable light."].)

Clerk's Transcript II, 729-734, 736-739.) [212]

D. THE TRIAL COURT'S EXCLUSION OF THE DEFENSE EXHIBITS AND FORCED MODIFICATION OF THOSE ADMITTED INTO EVIDENCE DEPRIVED MR. VIRGIL OF HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO HAVE THE JURY CONSIDER ALL RELEVANT MITIGATING EVIDENCE AND REQUIRES THE REVERSAL OF HIS PENALTY JUDGMENT

The trial court and the prosecutor were of the same mind that Mr. Virgil's penalty jury should not be allowed to consider all of the evidence proffered by the defense to establish the ongoing nature of Mr. Virgil's relationship with Ms. Antoine and their son, Nigel. Instead, the court on its own and at the prosecutor's urging wanted to limit the jury's consideration of this relevant mitigating evidence, despite defense counsel's argument that the photographs and writing established and documented the ongoing love and concerns between Mr. Virgil and Ms. Antoine about their son. Because the effect of the trial court's ruling excluding the writing and other photographs affected "the [jury's] profoundly moral evaluation of the defendant's character and crime" (*Satterwhite v. Texas* (1988) 486 U.S. 249, 261 (conc.& dis. opn. of Marshall, J.)), the trial court's error in Mr. Virgil's case was not harmless beyond a reasonable doubt. Accordingly, Mr. Virgil's penalty judgment must be reversed. (*Chapman v. California,*

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212 After the court and prosecutor expressed "concern[ ]" with the writing on the back of Defense X ["Check me out, I'm walking around."], defense counsel said he "would like that snowpaqued out." (RT 3831-3832.) Rather than being an affirmative request, the context of defense counsel's statement establishes that he wanted to put relevant evidence before the jury, but asked to remove the writing only to avoid the trial court's exclusion of that Exhibit as well. (RT 3831-3832.) Because this classic "Hobson's Choice" or "Catch-22" situation [see *Stuard v. Stewart* (9th Cir.2005) 401 F.3d 1064, 1067, fn. 8, & 1069, fn. 19] did not involve a choice between two advantages, defense counsel's request cannot be characterized as a waiver.

supra, 386 U.S. at p. 24; *Satterwhite v. Texas, supra,* 486 U.S. at p. 261 (conc.& dis. opn. of Marshall, J.).) This conclusion is manifest when considering the remaining evidence in the case and the prosecutor's argument seeking to minimize the effect Mr. Virgil's relationship with Ms. Antoine and Nigel and urging the jury to impose the death penalty.

During the Penalty Phase, the jury learned of Mr. Virgil's relationship with Ms. Antoine, how he positively affected her and caused her to hope for their future together (RT 3783-3786), and how he negatively affected her when he began his downward slide into becoming a street person embroiled in a love affair with the "woman" known as "cocaine." (RT 3789-3793, 3798-3801, 3804-3805, 3824-3825, 3827-3828.) Further, the jury heard evidence that Mr. Virgil did not know of Nigel's birth until many months after his incarceration for the present crimes and that he wrote to Ms. Antoine immediately after learning that he was a father. (RT 3811-3814.) The jury, however, was limited and not allowed to consider fully and adequately that Mr. Virgil and Ms. Antoine were in regular and ongoing contact about Nigel and that Ms. Antoine intended that Mr. Virgil have an ongoing and close relationship with their son, as evidenced by all of the pictures and writings proffered by the defense. In other words, the trial court's ruling excluding the defense evidence prevented the jury from considering fully and adequately the extent of Mr. Virgil's ongoing relationship with Ms. Antoine and Nigel that was proffered to spare his life by humanizing him to the jury as a loving father who greatly cared about his son despite his dire circumstances facing the death penalty.

In his closing argument, the prosecutor vigorously argued that Mr. Virgil deserved the death penalty for this crimes against Ms. Lao, especially because of the nature of his crimes against her and his conduct against Rodriguez. (RT 3852-3854.) The prosecutor characterized Mr.

Virgil as less than a "human being" and even worse than an animal because animals do not kill members of their own species. (RT 3854.) The prosecutor continued that if granted life, Mr. Virgil would live a life of ease and paradise [albeit in prison] because he could exercise, get free meals, spend time with his friends, and live life "a hell of lot better than what he was getting out there on the streets." (RT 3856.) The prosecutor argued that Mr. Virgil had suffered two minor felony convictions for second degree burglary and that they failed to provide him with a wake-up call to stop his criminality (RT 3859-3860); he discounted Mr. Virgil's claims of mitigation based on "extreme emotional disturbance" and being under the influence of cocaine (RT 3860-3861, 3864-3865); he argued the factors in aggravation were controlling based on the crimes against Ms. Lao and Rodriguez (RT 3862-3863); and he discounted any defense reliance on Factor (k) because that was a "catchall exception, [that included] everything in the kitchen sink." (RT 3866.) After talking about Mr. Virgil's mother who was not loving but did her best for her children and others who tried to help Mr. Virgil during his childhood, the prosecutor turned to Mr. Virgil's relationship with his son and Ms. Antoine who continued to love him. (RT 3866-3868).

In this regard, the prosecutor argued that he felt "so sorry" for Mr. Virgil's son and that

> "fatherhood from Lester Virgil is no longer a reality. Whether you give Lester Virgil life without the possibility of parole or death, this young tyke is going to have to live with the legacy of his father and that legacy, Ladies and Gentlemen, isn't a question of the punishment that his father deserves. It's the question of what his father did.
>
> "And I hope to God nobody ever tells this young boy about the Doughnut King or about the Hilltop Motel because he has every right to live a normal life and to make his own freedom of choice.
>
> "You may sympathize with this photograph, you may sympathize

with the child that Lester Virgil conceived, but don't confuse that sympathy, sympathy for the defendant in this case, anymore than you should confuse your sympathy for Annie Antoine who obviously loves Lester very much. She obviously only knew one side of Mr. Virgil.

"The legacy that Lester Virgil has left behind for the his child is almost as bad as the fact that this poor tyke had to be born and his father wasn't around because he hadn't left a forwarding address.

"So when we look at defendants in a capital murder cases there is not an [sic] one of them that doesn't have a loving family member, a loving spouse, a loving parent, a loving child, and I suppose that even Hitler had people that loved him; that wouldn't keep me from vigorously imposing or asking for the death penalty."

(RT 3868-3869.)

Under the totality of the circumstances, the trial court's limitation of Mr. Virgil's mitigating evidence violated his rights under *Lockett, Eddings* and *Skipper* to present his penalty jury with all relevant mitigating evidence that he proffered as a basis for a sentence less than death. Given the nature of the prosecutor's exploitive argument urging the jury not to spare Mr. Virgil's life and give effect to his ongoing relationship with Ms. Antoine and Nigel, it cannot be said that the trial court's error was harmless under the federal or state constitutional standards. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Watson, supra,* 46 Cal.2d at p. 824.)

XV.

THE COMBINATION OF THE TRIAL COURT'S ERROR ADMITTING TESTIMONY ABOUT MS. LAO'S LIFE HISTORY BEGINNING WITH HER LIFE AND ESCAPE FROM CAMBODIA THROUGH HER ATTENDANCE AT THE UNIVERSITY OF SOUTHERN CALIFORNIA AND THE PROSECUTOR'S ARGUMENT EXPLOITING THAT TESTIMONY REQUIRES THE REVERSAL OF MR. VIRGIL'S PENALTY JUDGMENT

A. APPLICABLE LAW AND STANDARD OF REVIEW

In *Payne v. Tennessee* (1991) 501 U.S. 808, the United States Supreme Court held that the Eighth Amendment does not prohibit, per se, the introduction of "relevant" evidence and argument about the impact of the specific harm caused by the defendant's conduct. (See *Byrd v. Collins* (6th Cir.2000) 209 F.3d 486, 532.) According to the Supreme Court,

> "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence different than other relevant evidence is treated."

(*Payne v. Tennessee, supra*, 501 U.S. at p. 827.)

But, if the victim impact evidence introduced "is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*People v. Edwards* (1991) 54 Cal.3d 787, 835, citing *Payne v. Tennessee, supra,* 501 U.S. at p. 825.) This is so when the evidence "divert[s] the jury's attention from its proper role or invite[s] an irrational response." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1172.) Though the Supreme Court "did not set the parameters [in *Payne*] for what type of victim-impact evidence would render a trial fundamentally unfair under the Due Process Clause of the Fourteenth Amendment" (*Humphries v. Ozmint* (4th Cir.2005) 397 F.3d 206, 218), the federal constitutional requirements of due

process, trial before a fair and impartial jury, and the need for heightened reliability in capital cases dictate that a trial court's ruling allowing the prosecution to introduce evidence encouraging the jury to decide the case on the basis of emotion prevailing over reason violates a defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (See *Payne v. Tennessee, supra,* 501 U.S. at pp. 825-828; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305 (lead opn. of Powell, J.); *People v. Scott* (1997) 15 Cal.4th 1188, 1220, *People v. Haskett* (1982) 30 Cal.3d 841, 864; *Odle v. Calderon* (N.D.Cal. 1995) 884 F.Supp. 1404, 1430 [the scope of victim impact evidence under *Payne* is not without limits].)

B. PROCEEDINGS REGARDING THE SCOPE OF VICTIM IMPACT EVIDENCE AND THE PROSECUTOR'S OPENING STATEMENT

Before the prosecution introduced victim impact evidence through testimony from Ms. Lao's sister, Lynne Ngov [hereafter "Ms. Ngov"], defense counsel asked that the prosecution make an offer of proof regarding the scope of its proposed evidence. (RT 3429.) According to the prosecutor, Ms. Ngov would testify that she, Ms. Lao, and their brother left Cambodia in the early 1980's to escape the violent regime there; [213] they lived in San Diego for a period of time until Ms. Lao moved to Los Angeles where she enrolled at the University of Southern California ["USC"] and earned a graduate degree in business; Ms. Ngov would testify about Ms. Lao's personality and aspirations and how she helped at the donut shop; and Ms. Ngov would testify about the impact of Ms. Lao's death on her and her family. (RT 3429-3430.)

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[213] As discussed below, the family left Cambodia for economic reasons and not to escape the former violent regime in Cambodia.

Defense counsel objected because the prosecutor, like many prosecutors in Los Angeles County, "w[as] trying to paint a live history of the victim" under the guise of victim impact evidence. (RT 3430.) According to defense counsel, the issues associated with victim impact evidence were very complex and he believed that the Supreme Court's decision in *Payne* [*v. Tennessee*] prevented prosecutors from comparing a victim's good character to the defendant's bad character to persuade the jury that the defendant should die. (RT 3431.) Defense counsel then turned to this Court's decision in *People v. Edwards, supra,* 54 Cal.3d 787, which defense counsel believed involved a very "tortuous" analysis of *Payne* that was intended to vindicate the trial court's ruling admitting the victim impact evidence in that case. (RT 3431.)

More specific to the present case, defense counsel argued that it would violate the scope of permissible victim impact evidence to allow the prosecution to elicit evidence about Ms. Lao's flight from "the killing fields of Cambodia," her arrival in the United States with aspirations, and earning a graduate degree at USC. (RT 3433.) [214] Defense counsel felt that this evidence existed before Ms. Lao's death and victim impact evidence should be limited to the post-effects of her death on her family and friends. (RT 3433.) Accordingly, defense counsel had no objection to evidence that Ms. Ngov was very close with Ms. Lao, Ms. Ngov remains very sad and cries nightly about Ms. Lao's death, and Ms. Ngov wishes that Ms. Lao was still alive. (RT 3433.) But, the prosecution's proposed evidence and argument about Ms. Lao's life history from her days in Cambodia through her

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[214] In urging the trial court to exclude the prosecutor's proposed evidence about Ms. Lao's flight from Cambodia and attendance at USC, defense counsel analogized that evidence to a "home video" introduced in another case in Los Angeles County that was highly prejudicial under the circumstances. (RT 3432.)

attendance at USC should be ruled inadmissible under *Payne v. Tennessee, supra,* 501 U.S. 808, and *People v. Edwards, supra,* 54 Cal.3d 787. Defense counsel argued that the admission and anticipated use of that evidence by the prosecution would be so prejudicial that it would require the reversal of Mr. Virgil's penalty judgment, if he were to be sentenced to death. (RT 3433.)

The prosecutor believed there was case authority supporting the admission and use of the evidence that he proposed to introduce. (RT 3434.) Unlike the other Los Angeles County case referred to by defense counsel, where the prosecution introduced a videotape of the victim's life, the prosecutor believed that he could not establish Ms. Lao's identity as an "individual" without evidence of where she came from and what she was doing at the time of her death. (RT 3434.)

The trial court ruled that defense counsel's analogy to the videotape was inapt because there is a lot of "middle ground" between allowing a videotape intended to elicit sympathy for the victim and having family members merely testify that they miss the victim and wish she was not dead. (RT 3436.) As examples, the court cited the following decisions: *People Clark* (1993) 5 Cal.4th 950, 1033-1034 [prosecutor can show the victim was a unique and valuable human being and it was proper for the prosecution to introduce evidence about her age, vulnerability, innocence, photograph and absence from trial]; *People v. Sandoval* (1992) 4 Cal.4th 155, 191 [the injury inflicted by the defendant – including evidence about the victim and the impact of the crime on the victim's family – is admissible as a circumstance of the crime]; *People v. Thomas* (1992) 2 Cal.4th 489, 536 [prosecutor's argument deemed proper that the jury should have sympathy for the victims' families because their lives will never be the same and expressing hope that the victims did not feel pain when defendant shot them]; and *People v. Wrest* (1992) 3 Cal.4th 1088, 1107

[finding prosecutor's argument proper that the jury should imagine the victims' thoughts as they were being killed and to consider the impact of the defendant's crimes]. (RT 3436.)

Defense counsel replied that the scope of the victim impact evidence was absolutely critical in Mr. Virgil's case because of the pretrial publicity discussing Ms. Lao's death and her flight from Cambodia. [215] RT 3436-3439.) Before the trial court left the issue to address another matter, defense counsel cited *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063, and asked the court to conduct an Evidence Code section 402 hearing pursuant to that case so Ms. Ngov could testify out of the jury's presence and defense counsel could object to any portions of her planned testimony that would be "extremely inflammatory" and unduly prejudicial. (RT 3440.) Because the trial court had not completed its research regarding the scope of victim impact evidence, it requested that the prosecutor's opening statement be as general as possible regarding such evidence. (RT 3512-3513, 3539.) [216]

After it addressed the other matter, the trial court returned to the topic of the prosecution's "victim impact evidence" involving Ms. Lao. (RT 3597.) Before the trial court issued its final decision on this matter,

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215 The prosecutor and the trial court both replied that there was no certainty that the jury had been exposed to such publicity and the court explained that was one reason for using a 60-page juror questionnaire and counsel had an adequate opportunity to explore that matter during voir dire. (RT 3437-3438.) As established above in Argument II, the voir dire was far from adequate and requires the reversal of Mr. Virgil's penalty judgment.

216 In his opening statement at the penalty phase, the prosecutor only told the jury that they would hear from Ms. Lao's sister, Ms. Ngov, who would talk about Ms. Lao and the impact of her death on Ms. Ngov and her family. (RT 3521.)

defense counsel noted that the law in California was "a little vague" concerning the permissible scope of victim impact evidence. The trial judge, who had just researched the issue, agreed. (RT 3597.) [217]

Defense counsel then emphasized that he opposed the prosecution's efforts to introduce

> "a complete life history of Soy [Ms. Lao] from the time she was born, escaping Cambodia, going to a relocation camp, going into the Philippines and eventually ending up in the United States, going to high school [¶] They're [the jurors] already aware, of course, that she is going to U.S.C."

(RT 3597.) [218]

Though he believed the United States Supreme Court "indicate[d]" that such evidence would be acceptable, defense counsel argued that this Court's decision in *People v. Edwards, supra,* 54 Cal.3d 787, that interpreted and applied *Payne* to California's death penalty scheme, prohibited the admission of such "life history" because it "could inflame the jury." (RT 3597-3598.) According to defense counsel, the prosecutor properly could introduce evidence about the effects of Ms. Lao's death on Ms. Ngov and her family, but going beyond those effects would violate the permissible scope of victim impact evidence "under *Payne* as well as *Edwards.*" (RT 3598.)

The prosecutor replied that he wanted to introduce some "basics" about Ms. Lao concerning her age and marital status; where she lived in

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[217] Defense counsel's comment and the trial court's agreement were prescient because the vagueness of the Supreme Court's decision in *Payne* extends to the present. (See *Humphries v. Ozmint,* 397 F.3d at p. 218 [recognizing that even in 2005, the Supreme Court has yet to establish the parameters for admissible victim impact evidence].)

[218] In People's Exhibit No. 14, Ms. Lao is depicted in life wearing a USC sweatshirt.

Los Angeles and with whom; where she came from, why she left Cambodia and how long she had been in the United States and living in Los Angeles; whether her parents were alive or when they died; where her siblings lived and their ages; when Ms. Ngov got married and why Ms. Lao moved to Los Angeles; Ms. Ngov's relationships with Ms. Lao outside of the Donut King and with Ms. Ngov's children; and, when Ms. Ngov last saw Ms. Lao and how she was affected by her death. (RT 3598-3599.)

According to the prosecutor, he was trying to establish by this evidence only that Ms. Lao was a unique individual and the jury should not be forced to "judge victim impact testimony in a vacuum." (RT 3600.) Instead, the jury must know where "these people come from, what their status in life was, what their position was to establish what their relationships were." (RT 3600.) The prosecutor concluded that this Court's decisions in *People v. Raley* (1992) 2 Cal.4th 870, and *People v. Kirkpatrick* (1994) 7 Cal.4th 988, mod. 8 Cal.4th 215A, were controlling and allowed him to introduce his proposed victim impact evidence. (RT 3600-3601.)

The trial court then asked the prosecutor what he thought Ms. Ngov would say about their family's reasons for leaving Cambodia and why her answer might be relevant. (RT 3601.) The prosecutor replied that he expected Ms. Ngov to say they left because of the violent regime there, though he felt too they may have left for economic reasons and not because they had been "persecuted." (RT 3601.) The prosecutor added that this was a young family without parents who came to the United States because it was a "land of opportunity" and they were full of "hopes and dreams and work ethics, and to try to establish a life for themselves." (RT 3601.)

Defense counsel answered that he objected to the proposed evidence about Cambodia and the family's flight because some jurors may have seen the movie "The Killing Fields." knew of the "Pol Pot" regime there, and

knew of its systematic slaughter of the Cambodian people. (RT 3602.) Further, there was much publicity about Mr. Virgil's case because [then Attorney General] Dan Lundgren gave a radio speech that he expected the prosecutor would use against Mr. Virgil – "Soy and her family escaped the killings fields in Cambodia only for Soy to be killed in the killing fields of Gardena." (Emphasis added.) (RT 3602.) Defense counsel believed that such argument would be "very powerful" and "very prejudicial" and victim impact evidence should be forward looking [the effects of the victim's death on her friends and family caused by the defendant's conduct] and not backward looking [the victim's detailed life history]. (RT 3602.)

The trial court disagreed by finding that victim impact evidence should not be limited to forward looking evidence addressing only the effects of the killing on friends and family. (RT 3603.) Instead, the court felt that the jury would not have an adequate reference point from which to consider the effects of the crimes unless they took "a look back." (RT 3603.) The court said it had given the issue "a great deal of thought" and could best summarize its view that the prosecution's proposed evidence admissible by reference to its analogy about a family who sacrificed everything for their "child who got a college education, the only one who had maintained a certain station in life." (RT 3603.) According to the court's analogy and reasoning, a penalty jury should be allowed that evidence because

> "that kind of individuals' loss could certainly have a greater impact than someone who perhaps hadn't attained that kind of greatness in the family's eyes."

(RT 3604.)

On that basis, the court concluded that Mr. Virgil's penalty jury should be allowed to consider the evidence about Ms. Lao's flight from Cambodia

and her accomplishment at USC "in order to make an objective and as dispassionate a decision as possible under the circumstances." (RT 3604.)

Finally, the court ruled that the family's flight from Cambodia to the United States was relevant evidence. (RT 3604-3605.) According to the court, its relevance decision was not based completely on the family's attempt to flee violence. Instead, it was simply because the court felt it would be more affected by a family member's death if the family moved from one location to another and the family member was killed at that new location. (RT 3605.)

C. VICTIM IMPACT EVIDENCE FROM THE TESTIMONY OF LYNN NGOV, MS. LAO'S SISTER, AND THE PROSECUTOR'S CLOSING ARGUMENT REGARDING MS. LAO'S LIFE

1. MS. NGOV'S TESTIMONY

Ms. Ngov testified before the jury that Soy Sung Lao was 22 years old when she died and was the youngest of three brothers and two sisters. (RT 3693.) The family was very close, especially Ms. Ngov and Ms. Lao who were the two youngest siblings. (RT 3693.) Ms. Lao also was very close to Ms. Ngov's children, five-year old Brian and three-year old Ariel whom Ms. Lao had named. (RT 3694, 3701.) Ms. Lao was perhaps even closer to the children than Ms. Ngov because Ms. Lao taught the children to sing, how to write, and the difference between right and wrong. (RT 3694, 3701.) Ms. Lao's death affected Ms. Ngov and her family greatly and even though Ms. Lao was killed years ago, Ms. Ngov still thought about her every day and every night. (RT 3694, 3701-3702.)

Ms. Ngov was 12 years old and Ms. Lao was 10 years old when they fled Cambodia in 1980 with their three brothers and grandmother, after Communist soldiers from Viet Nam invaded the country. (RT 3694-3696, 3700, 3701.) They left Cambodia because life was so difficult there and

they wanted to find political freedom and a better life economically. (RT 3694-3695, 3700-3701.) Their eldest brother, who now lives in Michigan, was 16 or 17 years old when he led the family past soldiers and through the bushes and forests in a "very difficult" journey from Cambodia to a refugee camp in Thailand where they lived for almost a year before arriving in the United States in November 1980. (RT 3694-3695.) They were sponsored for admission into the United States by a church group who also arranged for them to be granted permanent resident status. (RT 3701.) Because their parents died years before [1975 and 1976], the siblings were very close, took care of each other, and all lived together in San Diego until Ms. Ngov married Ty Ngov in 1987. (RT 3696.)

When Ms. Ngov and Ty bought the Donut King in Gardena, they moved to the Los Angeles area, close to their business, and Ms. Lao remained in San Diego until she graduated from high school. (RT 3697.) Ms. Lao then moved to Los Angeles to be closer to Ms. Ngov and attend USC, after borrowing money to finance her education. (RT 3697, 3702.) Ms. Lao was scheduled to graduate in May 1993 with a major in international relations and had many friends at school and at the home she shared with a friend from Taiwan. (RT 3697-3698, 3702.) Ms. Lao also had many female and male friends, but Ms. Ngov was unsure if she had any "steady boyfriend[s]." (RT 3698, 3702.)

Ms. Ngov and her husband were home when a man called around 3:00 PM and said that Ms. Lao had been stabbed. (RT 3698.) Ms. Ngov was in "shock, scared" when she learned about Ms. Lao's stabbing and rushed out of the house and into her car still wearing slippers. (RT 3698.) She and Mr. Ngov drove straight to the donut shop, but Ms. Lao had already been transported to the hospital. (RT 3698.) After Ms. Ngov saw the blood near the front counter, she called her brother and sister to report the attack and Mr. Ngov went to the hospital to monitor Ms. Lao's

condition. (RT 3698-3699.)

The last time Ms. Ngov saw Ms. Lao alive was at the Donut King on the day of her death and the next time she saw her, she was dead because it was at her funeral. (RT 3699.) Ms. Ngov was at the hospital with her husband when the doctor told them that Ms. Lao had died from her injuries, but they decided not to see her body. (RT 3699-3700.)

Ms. Ngov was still in "shock" and "numb" because of Ms. Lao's death, but had not sought therapy. (RT 3700, 3702.) Instead, she worked hard and kept busy to avoid thinking very much about Ms. Lao. (RT 3702.) Ms. Ngov and her husband felt guilty and responsible for Ms. Lao's death because they believed she would be alive if they had not opened the Donut King. (RT 3703.) After Ms. Lao's death, they moved to Orange County and operated a Mexican fast food restaurant there. (RT 3702-3703.)

2. THE PROSECUTOR'S CLOSING STATEMENT AT THE PENALTY PHASE

The prosecutor began by asking jurors to remember what they were doing at the times of the events at issue and then argued that Mr. Virgil was not worthy to be called a "'man,'" he engaged in conduct unworthy of a human being, and he was not even worthy enough to be an "animal" because "even animals don't kill members of their own species." (RT 3852-3854.) The prosecutor reminded the jury that they were there to decide whether Mr. Virgil should live or die and if they could not sentence him to death, they could not ever sentence anyone to death. (RT 3855.) According to the prosecutor, the world was far from perfect and civilized because there are people like Mr. Virgil in it who hunt and prey on others and stab them to death for "12 bucks." (RT 3855-3856.)

The prosecutor talked about how Mr. Virgil could live better in prison than he did on the streets and have some hope for his future, but Ms. Lao had no hopes because she was dead. (RT 3856.) After talking about

how Mr. Virgil attacked Ms. Rodriguez five days after killing Ms. Lao with her blood still drying on his hands, he argued that Mr. Virgil had no conscience. (RT 3857.)

The prosecutor argued there were three aggravating circumstances in Mr. Virgil's case that far outweighed any circumstances in mitigation that Mr. Virgil offered: the circumstances of the crimes against Ms. Lao, Mr. Virgil's two prior convictions for burglary, and the circumstances of his attack against Ms. Rodriguez. (RT 3858-3874.) According to the prosecutor, the jury should feel no "sympathy" for Mr. Virgil because of his past, but should feel only the "the cold fury of outrage" against him because he preyed on Ms. Lao by waiting until she was alone and "probably busy studying for school," he led her into the bathroom, bound her with aprons, and repeatedly stabbed her to the point of his own likely exhaustion. (RT 3872-3874.)

The prosecutor pointed to Ms. Lao's photograph wearing her USC sweatshirt and talked about how she was trying to improve her life by going to school, making friends, taking advantage of her opportunities – all examples of "the work of a good life." (RT 3875.) Then, the prosecutor pointed to the photographs of Ms. Lao in death [People's Exhibit No. 14] and said those "are the work of Lester Virgil." (RT 3875.) [219]

The prosecutor believed that the Ngovs would never get over Ms. Lao's death because Mr. Virgil killed a part of them when he killed her. (RT 3875.) He argued that Ms. Ngovs' children will never again experience Ms. Lao's affection or feel her embraces and though the death of a loved one is painful, nothing is worse than the death of a loved one "at

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219 As established above in Argument III, the trial court's error admitting this exhibit, People's Exhibit No. 14, requires the reversal of Mr. Virgil's entire judgment for the crimes against Ms. Lao.

the hands of a murderer" who "died as savagely" as Ms. Lao. (RT 3875.) The prosecutor believed Ms. Ngov will continue feeling guilt because of her "stupid idea of starting a business at the corner of El Segundo and Van Ness in the defendant's hunting territory." (RT 3875.)

According to the prosecutor, Ms. Lao

> "will never get the business degree she slaved for. She will never breathe another breath; she will never hear another note of music; she will never talk to another friend; she will never read another school book. She's gone. And every breath that Lester Virgil breathes, every moment that he thinks is a moment that she has lost."

(RT 3875-3876.)

The prosecutor then turned to the crimes against Kitty Genovese, who was killed in New York 20 years before after no one came to her aid, and argued that jurors should look to that case and reach a conclusion that such a case cries out for justice and that means a sentence of death for Mr. Virgil. (RT 3876.) The prosecutor argued further that

> "Because Soy Sung Lao came from a country called Cambodia, a country with a government of political repression and of violence, and she came to this country to improve her life. She came here without the guidance of parents; she came here and she went to school on a loan, and she made what she could of the opportunities that this country had to offer. And in this great land of opportunity, Soy Lao found her killing fields at the corner of El Segundo and Van Ness. [¶] And if Lester Virgil did something in this case besides rob this young girl of her life and 12 dollars, he might just have done something worst. He robbed her of her dreams."

(RT 3876.)

The prosecutor concluded his argument by urging jurors not to express sympathy for Mr. Virgil by listening to the occasional "strum of a violin" about his life. 3876-3877.) Instead, jury must not to latch their windows and bolt their doors to Ms. Lao's muffled screams [as neighbors did to Ms.

Genovese's cries for help], but have the courage of their convictions by sentencing Mr. Virgil to death. (RT 3877.).

D. THE TRIAL COURT'S RULING ALLOWING THE PROSECUTOR TO INTRODUCE EVIDENCE OF MS. LAO'S LIFE HISTORY AND THE PROSECUTOR'S ARGUMENT EXPLOITING THAT EVIDENCE REQUIRES THE REVERSAL OF MR. VIRGIL'S JUDGMENT OF DEATH

Though victim impact evidence generally is admissible as relevant to the jury's penalty determination, the admission of such evidence is not without limits because of the protections afforded by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (See *Payne v. Tennessee* (1991) 501 U.S. at pp. 825-827; *Odle v. Calderon, supra,* 884 F.Supp. at p. 1430.) Specifically, these limits operate to prevent the introduction of evidence that is so inflammatory that it elicits from the jury an irrational or emotional response that is not tethered to the facts of the case. (*People v. Pollack* (2004) 32 Cal.4th at 1153, 1180; *People v. Edwards, supra,* 54 Cal.3d at p. 836.) Though the state is not required to present closing arguments devoid of all passion (see *Williams v. Chrans* (7th Cir.1991) 945 F.2d 926, 94; *People v. Brown* (2004) 33 Cal.4th 382, 399-400) and a prosecutor is entitled to some latitude in closing summation (see *United States v. Barker* (6th Cir.1977) 553 F.2d 1013, 1025; *People v. Brown, supra,* 33 Cal.4th at pp. 399-400), there is a line in the sand that the prosecution may not cross by encouraging penalty jurors to allow their emotional response to the victim impact evidence to prevail over their reason. (*Payne v. Tennessee, supra,* 501 U.S. at pp. 825-827.) In other words,

> "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and

> argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed."

(*People v. Edwards, supra,* 54 Cal.3d at p. 836, quoting *People v. Haskett, supra,* 30 Cal.3d at p. 864.)

Because the combination of the trial court's ruling allowing the evidence of Ms. Lao's past and flight from Cambodia and efforts to earn a degree, coupled with the prosecutor's argument, crossed that line case by inviting a purely subjective and emotional response to the prosecution's victim impact evidence, Mr. Virgil's penalty judgment must be reversed.

Defense counsel here sought to exclude Ms. Ngov's anticipated testimony about Ms. Lao's flight from Cambodia because of his concern that such evidence would allow the prosecution to argue that Ms. Lao escaped the violence in that country only to die in the "killing fields" of Los Angeles and that would lead the jury to sentence Mr. Virgil to death on irrational and emotional grounds. (RT 3430-3433.) Further, defense counsel was concerned that the type of evidence sought to be admitted by the prosecution would allow the prosecutor to paint a life history of the victim under the guise of victim impact evidence that was not related directly to the circumstances of the crime or the effects of Mr. Virgil's reported conduct on her family. (RT 3430-3433.) As defense counsel feared, the trial court's ruling allowing Ms. Lao's "life history" was used by the prosecution to urge the jury to sentence Mr. Virgil to death on the basis of this irrelevant, highly emotional and prejudicial evidence.

The evidence about Ms. Lao's childhood and flight from Cambodia and educational efforts at USC was not admissible as "the direct impact of the defendant's acts on the victims' friends and family" because it involved aspects of her life that were not directly related to the effects on her family

caused by Mr. Virgil's conduct. (See *People v. Pollack, supra,* 32 Cal.4th at 1153, 1180-1182; *People v. Panah* (2005) 35 Cal.4th 395, 754, citing *People v. Edwards, supra,* 54 Cal.3d at p. 835 [victim impact evidence "'only encompasses evidence that logically shows the harm caused by the defendant.'") Accordingly, it was irrelevant and should have been excluded on that basis and because it diverted the jury's attention from the sober and rational task at hand by encouraging an irrational response [jurors should feel "the cold fury of outrage" and give him "justice" because "Soy Lao found her killing fields at the corner of El Segundo and Van Ness"]. (RT 3874-3876). (See *People v. Taylor, supra*, 26 Cal.4th at p. 1172.)

Further, the evidence should have been excluded as inflammatory and unduly prejudicial. That is because it allowed the prosecutor to argue that Ms. Lao was a worthy young woman seeking to take advantage of the "good life" that America had to offer, whereas Mr. Virgil was unworthy of any sympathy because he was less than a man and not even worthy enough to be labeled an animal because of his brutality and remorseless savagery. (RT 3854, 3874-3876.) Finally, the evidence should have been excluded as inapt because the trial court's analogy and reasoning for why Ms. Lao's flight from Cambodia and attendance at USC should be admissible is directly contrary to *Payne.*

The trial court ruled that the jury should hear the evidence about Ms. Lao's flight from Cambodia and attendance at USC based on its analogy and reasoning that presumed her life was more valuable and consequently her death would have a greater effect on her family than would the death of a person who had no such experiences. (RT 3603-3604.) Though the Supreme Court's decision in *Payne* overruled *Booth v. Maryland* (1987) 482 U.S. 496, that prohibited the introduction of victim impact evidence, the *Payne* court made clear that some aspects from *Booth* remained

applicable to limit the admission of victim impact evidence. According to the Supreme Court,

> "victim impact evidence is not offered to encourage comparative judgments of this kind – for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be. The facts of [*South Carolina v.*] *Gathers* [490 U.S. 805] are an excellent illustration of this: The evidence showed that the victim was an out of work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being."

(*Payne v. Tennessee, supra,* 501 U.S. at p. 823; *Humphries v. Ozmint, supra,* 397 F.3d at p. 219 [*Payne* "prohibits comparisons that suggest that there are worthy and unworthy victims.")

The trial court's ruling admitting the victim impact evidence at issue was erroneous because it was based on flawed and inapt reasoning and it allowed evidence to be introduced for improper and inflammatory purposes. As defense counsel feared and emphasized by his repeated objections, the prosecutor used the victim impact evidence at issue in a way that was so inflammatory that it elicited from the jury an irrational or emotional response that was not based on the facts of the case. Under the circumstances, the trial court's ruling and the prosecutor's argument exploiting the evidence admitted pursuant to that ruling violated Mr. Virgil's rights to due process, trial before a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*Payne v. Tennessee, supra,* 501 U.S. at pp. 823, 825, 830, fn. 2, and 831 (conc. opn., O'Connor, J.); see also *Greer v. Miller* (1987) 483 U.S. 756. 765; *People v. Edwards, supra,* 54 Cal.3d at p. 836.) Because the error is not harmless beyond a

reasonable doubt, Mr. Virgil's penalty judgment must be reversed. (*Chapman v, California, supra*, 386 U.S. at p. 24.) [220]

XVI.

THE TRIAL COURT ERRED BY FAILING TO LIMIT THE SCOPE OF VICTIM IMPACT EVIDENCE TO THE CAPITAL OFFENSE AGAINST MS. LAO AND THIS ERROR REQUIRES THE REVERSAL OF MR. VIRGIL'S PENALTY JUDGMENT

A. INTRODUCTION

The trial court in Mr. Virgil's case failed to limit the prosecution's victim impact evidence to the circumstances of the capital offense against Ms. Lao under factor (a) of Penal Code section 190.3. Instead, the court also allowed the prosecution to introduce victim impact evidence regarding the physical and emotional effects of the collateral, noncapital offenses against Ms. Rodriguez under factor (b) ["other violent criminal activity"] of Penal Code section 190.3. Because the trial court's failure to limit victim impact evidence to the circumstances of the capital offense exceeded the permissible scope of victim impact evidence under *Payne v. Tennessee, supra,* 501 U.S. 808, and otherwise allowed the jury to consider highly emotional but irrelevant evidence, the court violated Mr. Virgil's rights to due process, trial before a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts. Under the circumstances, the trial court's error is not harmless beyond a reasonable doubt and requires that Mr. Virgil's penalty judgment be reversed.

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[220] In Argument XVII, Mr. Virgil challenges the trial court's error in refusing to give Defense Special Instruction No. 8 that was intended to limit the prejudice from the prosecution's victim impact evidence.

B. Applicable Law And Standard Of Review

This Court has long held that during the penalty phase of a capital trial, the prosecution may present evidence regarding not only the physical and emotional effects of the capital offense being tried under factor (a) of Penal Code section 190.3, but also the effects of a defendant's violent criminal activity under factor (b) of section 190.3 on victims and survivors of that activity. (See *People v. Clark* (1990) 50 Cal.3d 583, 628-629; People *v. Belmontes, supra,* 45 Cal.3d 744, 808-809; *People v. Benson, supra,* 52 Cal.3d 754, 797; *People v. Edwards* (1991) 54 Cal.3d 787, 832-837; *People v. Mickle* (1991) 54 Cal.3d 140, 187; *People v. Thomas, supra,* 2 Cal.4th at p. 535; *People v. Garceau* (1993) 6 Cal.4th 140, 201-202, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118; *People v. Holloway* (2004) 33 Cal.4th 96, 143.) According to this Court, the prohibition against victim impact evidence at the sentencing phase of a capital trial has largely been overruled and thus is not barred by the federal Constitution. (*People v. Holloway, supra,* 33 Cal.4th at p. 143, fn. 13, citing *People v. Garceau, supra,* 6 Cal.4th at pp. 201-202.) A trial court's erroneous admission of victim impact evidence is analyzed under the harmless-error standard from *Chapman v. California, supra,* 386 U.S. at p. 24. (See *People v. Clark, supra,* 50 Cal.3d at p. 629; *Payne v. Tennessee, supra,* 501 U.S. at p. 824.)

C. Under Payne V. Tennessee And California's Statutory Death Penalty Scheme, Victim Impact Evidence Should Be Limited To The Effects Of The Capital Offenses For Which The Defendant Is Being Tried

California, like its sister states of Illinois, Nevada and Tennessee, allows the introduction of victim impact evidence related to the capital case being tried. Unlike California, however, these other states do not allow the introduction of victim impact evidence regarding the effect of crimes or

violent activity that are collateral and unrelated to the capital offense being tried. 221 Based on the persuasive rationale from the Supreme Courts of Illinois, Nevada, and Tennessee limiting victim impact evidence to the capital offense being tried, this Court should follow that rationale and find the victim impact evidence regarding the collateral and unrelated criminal activity against Ms. Rodriguez was irrelevant and its admission violated Mr. Virgil's rights to due process, trial before a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts.

In *People v. Hope* (1998) 184 Ill.2d 39, 49-53 [702 N.E.2d 1282, 1287-1289], the Supreme Court of Illinois considered the admissibility of victim impact evidence relating to crimes other than those for which a capital defendant is being sentenced [prior, unrelated murder] under Illinois statutory law and the United States Supreme Court's decision in *Payne v. Tennessee, supra,* 501 U.S. 808. According to the Illinois Supreme Court,

> "the *Payne* court defined '[v]ictim impact evidence' as 'simply another form or method of informing the sentencing authority about the specific harm caused by *the crime in question.*' (Emphasis added.) *Payne*, 501 U.S. at 825, 111 S.Ct. at 2608, 115 L.Ed.2d at 735."

(*People v. Hope, supra,* 184 Ill.2d at p. 50.)

Accordingly, the Illinois high court held

> "We therefore agree with defendant that *Payne* clearly contemplates that victim impact evidence will come only from a

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221 As discussed below, Tennessee has changed its statutory death penalty scheme to mandate the consideration of victim impact evidence related to collateral and unrelated criminal activity. That change, however, does not affect the argument raised here because the former Tennessee scheme is consistent with the version of Penal Code section 190.3 applicable to Mr. Virgil's case.

> survivor of the murder for which the defendant is presently on trial, not from survivors of offenses collateral to the crime for which defendant is being tried. (Citation.)" (Emphasis added.)

(*People v. Hope, supra,* 184 Ill.2d at p. 51.)

Because the *Hope* court found that the victim impact evidence from the collateral and unrelated prior murder violated the scope of such evidence under *Payne* and Illinois statutory law, it held that the trial court erred by admitting the evidence. Given the highly emotional nature of the evidence at issue and a capital defendant's federal constitutional right to be sentenced on the basis of reason rather than emotion, the Illinois Supreme Court reversed the defendant's sentence of death.

Similarly in *Sherman v. State* (1998) 114 Nev. 998, 1012-1014 [965 P.2d 903, 913-914], the Nevada Supreme Court considered the defendant's claim that certain testimony by a police officer about the effect of a collateral and unrelated prior murder on the community should have been excluded under *Payne v. Tennessee, supra,* 501 U.S. 808, at his capital sentencing hearing Unlike the high court in Illinois, the Nevada Supreme Court held that *Payne* did not expressly exclude victim impact evidence regarding collateral and unrelated prior crimes. Instead, the Nevada high court held that it was error to admit the testimony because Nevada's statutory death penalty scheme did not expressly direct capital sentencing juries to consider the effects of collateral and unrelated criminal activity in deciding the appropriate punishment for the capital crime being tried. Given the brief and unemotional nature of the evidence at issue in *Sherman,* the Nevada Supreme Court held that the error was harmless.

Finally, in *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 891, the Tennessee Supreme Court cited Justice O'Connor's concurring opinion in *Payne v. Tennessee, supra,* 501 U.S. at p. 822, and held:

> "Generally, victim impact evidence should be limited to information designed to show those unique characteristics which

> provide a brief glimpse into the life of the individual who has been killed, [Fn. omitted.] the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family. (Citations.)"

In a footnote, the Tennessee high court also held

> "We reiterate that victim impact evidence of another homicide, even one committed by the defendant on trial, is not admissible. [*State v.*] *Bigbee*, [1994] 885 S.W.2d [797] at 812."

(State v. Nesbit, supra, 978 S.W.2d at p. 891, fn. 11.)

In *Bigbee*, the defendant claimed that the prosecutor's argument during the penalty phase violated his rights under the Eighth and Fourteenth Amendments to the United States and Tennessee Constitutions. The Tennessee high court agreed with the defendant and held that evidence about the circumstances of an unrelated prior murder and the prosecutor's argument that the death penalty was appropriate to punish the defendant for the current and prior crimes was improper and prejudicial. Accordingly, it reversed the defendant's judgment of death. (*State v. Bigbee, supra,* 885 S.W.2d at pp. 811-812.)

At the time of the defendant's sentencing in *Bigbee*, Tennessee Code Annotated, section 39-13-204(c) provided as follows:

> "In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted."

(*State v. Odom* (1994) 137 S.W.3d 572, 580.) [222]

The version of California Penal Code section 190.3, subdivision (a), applicable to Mr. Virgil's case provides in pertinent part as follows:

> "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition."

The Tennessee statute at issue in *Bigbee*, the Nevada statute at issue in *Sherman*, and the California statute at issue in Mr. Virgil's case are identical in the sense that they all refer to the relevancy of other crimes evidence in establishing the existence of an aggravating circumstance. Similarly, these statutes do not expressly "mandate[]" that victim impact evidence from collateral and unrelated criminal be considered in deciding the defendant's punishment for the capital crime for which he is on trial. Given the absence of specific, statutory direction in California mandating the consideration of victim impact evidence regarding collateral and unrelated crimes, such evidence should be found irrelevant and inadmissible in California under the same rationale used by the high courts in Nevada and Tennessee.

The prosecution in Mr. Virgil's case introduced evidence from Ms. Rodriguez and her boyfriend, Julio Montulfar, to prove the aggravating circumstance of the other violent criminal activity against Ms. Rodriguez.

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[222] In 1998, the Tennessee statute at issue [§39-13-204] was amended to "mandate[]" that other violent crimes evidence be considered by the jury in deciding penalty and the weight to be given to that evidence. (*Ibid.*)

(See RT 3624, 3639-3645, 3647-3649, 3657-3663, 3669-3676, 3687-3691.) Much of this evidence, however, was irrelevant and exceeded the permissible scope of victim impact evidence under *Payne* and Penal Code section 190.3 because it involved the effects of Mr. Virgil's reported attack against Ms. Rodriguez [the length of her hospital stay, the extent of her medical treatment and ongoing symptoms, and her ongoing fears and emotional distress, including her refusal to look at Mr. Virgil in court because she believed he tried to kill her].

Under the rationale from the above cases, the effects of Mr. Virgil's reported criminal activity against Ms. Rodriguez not only violated the scope of victim impact evidence under *Payne v. Tennessee, supra,* 501 U.S. 808, as interpreted by the Illinois Supreme Court in *Hope,* but also allowed the jury to hear evidence that was irrelevant and inadmissible under California's statutory death penalty scheme, as in the Nevada and Tennessee cases discussed above. (See Evid. Code §§ 210, 350 [defining relevant evidence and providing that only relevant evidence is admissible].) Because the admission of victim impact evidence from the reported other violent criminal activity against Ms. Rodriguez was irrelevant and highly inflammatory in violation of Mr. Virgil's rights to due process, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts, the inquiry must extend to prejudice.

The prosecutor used the victim impact evidence regarding Mr. Virgil's reported crimes against Ms. Rodriguez to argue that he deserved the death penalty. In this regard, he argued that if the jury was not persuaded that death was warranted for the capital offense against Ms. Lao, the death penalty was the only appropriate punishment when the victim impact evidence from Ms. Rodriguez was considered ["surely the defendant

sealed his fate with that event (the incident involving Ms. Rodriguez)"]. (RT 3852-3854, 3862-3863, 3864-3866, 3870-3871.) (See (*State v. Bigbee, supra,* 885 S.W.2d at pp. 811-812.) Under the totality of the circumstances where the evidence at issue was highly emotional and urged by the prosecution as a significant reason why death was the only appropriate punishment for the capital offense being tried and the crimes against Ms. Rodriguez, it cannot be said that the error was harmless beyond a reasonable doubt and Mr. Virgil's penalty judgment must be reversed. (*Ibid.*; *Chapman v. California, supra,* 386 U.S. at p. 24.)

D. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE VICTIM IMPACT EVIDENCE INVOLVING MS. RODRIGUEZ ON THE GROUNDS URGED HERE DOES NOT WAIVE THE ISSUE ON APPEAL

In *People v. Harris* (2002) 206 Ill.2d 276 [794 N.E.2d 314, 349-351], defendant argued in his second appeal to the Illinois Supreme Court that his first appellate counsel was incompetent because he failed to raise on appeal the improper admission of victim impact evidence for unrelated offenses, which was found to be error in *People v. Hope, supra*, 184 Ill.2d 39. According to the Illinois high court, a reasonably competent attorney in 1993 would not have been expected to raise this claim because there did not appear to be a strong possibility in light of existing authority that such evidence would have been held to be inadmissible. (*People v. Harris, supra,* 206 Ill.2d at p. 60.) Because the existing decisional authority from this Court in 1995 allowed collateral victim impact evidence to be admitted, there was not "a strong possibility that such evidence would be held inadmissible." (*People v. Harris, supra,* 206 Ill.2d at p. 60.) Accordingly, defense counsel's failure to object to the admission of the victim impact evidence concerning the factor (b) evidence involving Ms. Rodriguez would have been futile and presents no bar to raising this issue now on appeal. (See *People v. Hill*, supra, 17 Cal.4th at pp. 820-821; *People v.*

Chavez (1980 26 Cal.3d 334, 350, fn. 5..) [223] Further, because this issue involves a pure claim of law and Mr. Virgil's federal constitutional rights to due process, a fair and impartial jury, and a reliable penalty determination, he is not precluded from raising this issue for the first time on appeal. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277.)

XVII.

THE TRIAL COURT'S REFUSAL TO GIVE DEFENSE SPECIAL INSTRUCTION NOS. 1, 2 AND 8 REGARDING THE CONSIDERATION OF CIRCUMSTANCES IN MITIGATION AND VICTIM IMPACT EVIDENCE REQUIRES THE REVERSAL OF MR. VIRGIL'S PENALTY JUDGMENT

A. INTRODUCTION

Defense counsel proffered three special instructions that he argued were necessary for the jury's proper understanding of the mitigating circumstances in Mr. Virgil's case and to avoid the prejudice from the prosecution's victim impact evidence and argument exploiting that evidence. As will be established below, the trial court's refusal to give these instructions was prejudicial and requires the reversal of Mr. Virgil's penalty judgment under the federal and state constitutions.

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[223] Defense counsel did object to the prosecution's planned introduction of evidence regarding Ms. Rodriguez's lifelong fears and ongoing psychotherapy as a result of the reported incident with Mr. Virgil. (RT 3521-3522, 3585-3586.) Defense counsel's objection, however, was based on a perceived discovery violation and not on the grounds raised here on appeal. (RT 3522.) Further, defense counsel recognized that this Court approved the introduction of this type of victim impact evidence in *People v. Clark, supra,* 50 Cal.3d at pp. 628-629. (RT 3522.) Given his understanding of the decision in *Clark* and the absence of a strong possibility that the trial court would have excluded this evidence as exceeding the scope of permissible victim impact evidence under *Payne* or as irrelevant under the rationale from *Sherman* and *Bigbee,* defense counsel's failure to object is of no consequence.

In Special Instruction No. 1, defense counsel asked to instruct the jury that any mitigating circumstances identified in CALJIC No. 8.85 were merely examples and any of them could be used as a basis not to select a sentence of death; the jury should not limit its consideration of mitigating circumstance to those examples; a mitigating circumstance does not have to be proven beyond a reasonable doubt, but can be based on any degree of evidence; and the jury can consider mercy, sympathy and/or sentiment in deciding the weight to give to any circumstance in mitigation.

In Special Instruction No. 2, defense counsel asked to instruct the jury that if any mitigating evidence gave rise to compassion or sympathy for the defendant, the jury could reject a death sentence on that basis alone; and, a mitigating factor did not have to be proven beyond a reasonable doubt, but could be found and given effect on the basis of any evidence.

And, in Special Instruction No. 8, defense counsel asked to instruct the jury that evidence had been admitted to show the specific harm caused by the defendant's conduct, but jurors must not select a sentence of death as an emotional response to that evidence; jurors, however, were free to find that emotional and relevant evidence could provide a basis to exercise mercy and not sentence Mr. Virgil to death.

Because the instructions were proper and the trial court's failure to give them violated Mr. Virgil's federal and state constitutional rights to due process, trial before a fair and impartial jury, and a reliable penalty determination, the trial court's errors refusing these instructions requires the reversal of his penalty judgment.

B. APPLICABLE LAW AND STANDARD OF REVIEW

The due process, compulsory process, confrontation, and trial by jury clauses of the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution mandate that "as a general proposition a defendant is entitled

to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63, citing *Stevenson v. United States* (1896) 162 U.S. 313 [refusal of voluntary manslaughter instruction in murder case where self defense was primary defense constituted reversible error]; see also *Keeble v. United States* (1973) 412 U.S. 205, 213; *United States v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372; *Bennett v. Scroggy* (6th Cir. 1986) 793 F2d 772, 777-79; *United States. v. Escobar de Bright* (9th Cir. 1984) 742 F2d 1196, 1201-1202.)

"[T]he principle [is] established in American law . . . that a defendant is entitled to a properly phrased theory of defense instruction if there is some evidence to support that theory ... [citations]." (*Virgilio v. State (Wyoming)* (1992) 834 P2d 1125, 1130; *United States v. Kenny* (9th Cir. 1981) 645 F2d 1323, 1337 ["jury must be instructed as to the defense theory of the case"]; see also *Taylor v. Withrow* (6th Cir. 2002) 288 F3d 846, 851 [failure to instruct on self-defense when there is sufficient evidence violates defendant's fundamental due process rights, even though that right has not expressly been stated by the Supreme Court]; *United States v. Oreto* (1st Cir. 1994) 37 F3d 739, 748.)

This is so because "a defendant's right to submit a defense for which he has an evidentiary foundation is fundamental to a fair trial. . . ." (*Whipple v. Duckworth* (7th Cir. 1992) 957 F2d 418, 423 overruled on other grounds in *Eaglin v. Welborn* (7th Cir. 1995) 57 F3d 496; *United States v. Douglas* (7th Cir. 1987) 818 F3d 1317, 1320-21 ["the failure to include an instruction on the defendant's theory of the case . . . would deny the defendant a fair trial. [Citation.]"]; *United States v. Hicks* (4th Cir. 1984) 748 F2d 854, 857-858; *People v. Gurule, supra,* 28 Cal.4th 557, 660 ["criminal defendant has the right to instructions that pinpoint the theory of the defense case"]; cf., *Crawford v. Washington* (2004) 541 U.S. 36

[recognizing the importance of the Sixth Amendment right to confrontation]; and *United States v. Hicks* (4th Cir. 1984) 748 F2d 854, 857-858 [the Fifth and Sixth Amendments' rights to due process and trial by jury and are abridged by the failure to instruct on the defense theory of the case which dilutes the jury's consideration of the issues and directs a verdict against the defendant].)

In *People v. Sears* (1970) 2 Cal.3d 180, 189-190, this Court held, consistent with the law outlined above, that a defendant is entitled to a special instruction that pinpoints or highlights the defense theory of the case. Though "pinpoint" instructions are generally permitted, trial courts properly may refuse "pinpoint" instructions that are "duplicative" of other instructions or "'argumentative'" because they "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence."" (Citation.)" (*People v. Lucero* (2000) 23 Cal.4th 692, 729; *People v. Musselwhite* (1998) 12 Cal.4th 1216, 1270; *People v. Brown* (2003) 31 Cal.4th 518, 569, *People v. Earp* (1999) 20 Cal.4th 826, 886; *People v. Blakeley* (2000) 23 Cal.4th 82, 92-93.)

This Court has held often that the failure to give a properly tailored "pinpoint" instruction during the guilt phase of a capital trial is subject to the state standard of review from *People v. Watson, supra,* 46 Cal.2d at p. 836 [reversal required only if it is reasonably probable that a more favorable result would have occurred but for the error]. (See *People v. Earp, supra,* 20 Cal.4th at p. 887; *People v. Fudge* (1994) 7 Cal.4th 1075, 1112.) The Court has applied a different standard, however, for state-law errors at the penalty phase of a capital trial because of the need for heightened reliability when the penalty judgment is death. (See *People v. Hurtado* (2002) 28 Cal.4th 1179, 1196 (conc. opn. Baxter, J.) ["enhanced concerns over the reliability of death judgments require a standard 'more exacting' than *Watson* for capital penalty phase error, i.e., whether there is

a ""'reasonable possibility"' such error affected the verdict. (Citation.)]; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1207.)

In *People v. Brown* (1988) 46 Cal.3d 432, 447, the Court held

> "It is undisputed that, when reviewing state-law errors occurring at the guilt phase of a trial, the standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243, i.e., whether it is 'reasonably probable' a result more favorable to the defendant would have been reached had the error not occurred. [¶] For over two decades, however, we have recognized a fundamental difference between review of a jury's objective guilt phase verdict, and its normative, discretionary penalty phase determination. Accordingly, we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial. (Citations.)"

In other words, if the trial court erred by failing to instruct Mr. Virgil's penalty jury with Defense Special Instruction Nos. 1, 2, and 8, the error would be reviewed under the "reasonable possibility" standard from *Chapman v. California, supra,* 386 U.S. at p. 24. (See *People v. Carter, supra,* 30 Cal.4th at pp. 1221-1222.)

C. THE REQUESTED DEFENSE INSTRUCTIONS IN MR. VIRGIL'S CASE, THE CIRCUMSTANCES BEHIND THE REQUESTS, AND THE TRIAL COURT'S RULINGS

1. DEFENSE SPECIAL INSTRUCTIONS NOS. 1 AND 2

The defense in Mr. Virgil's case requested that the trial court instruct the jury as follows with Defense Special Instruction No. 1:

> "The mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. A juror should pay careful attention to each of those factors. Any one of them may be sufficient, standing along, [sic] to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstances to these specific factors. [ ] A juror may also consider any other circumstances relating to the case or to the defendant as shown by

> the evidence as reasons for not imposing the death penalty. [ ] A mitigating circumstance does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any substantial evidence to support it no matter how weak the evidence is. [ ] A juror is permitted to use mercy, sympathy and/or sentiment in deciding what weight to give each mitigating factor."

(CT 409; RT 3835-3837, 3851.)

In addition, the defense requested that the trial court instruct the jury as follows with Defense Special Instruction No. 2:

> "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. A mitigating factor does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exist [sic] if there is any evidence to support it no matter how weak the evidence is."

(CT 406; RT 3834-3835.)

According to defense counsel, the requested instructions were standard instructions and would have instructed the jury that a single mitigating factor standing alone could be sufficient to impose a sentence of life without possibility of parole and factors in mitigation, unlike those in aggravation, did not have to be proved beyond a reasonable doubt. (CT 406, 409; RT 3834-3837.)

The trial court cited several reasons for refusing to give Defense Instruction No. 2. According to the court, the instruction in effect instructed that jurors could base their sentencing decision on "their idea of mercy" and that was contrary to more current case law than *People v. Lamphear* (1984) 36 Cal.3d 163, 167, cited by defense counsel in support of the instruction. (RT 3834.) In addition, the court believed that the instruction was covered by other instructions and it was not required to give the defense "pinpoint"

instruction. (RT 3834.)

The trial court also believed that defense Special Instruction No. 1 was similarly a "pinpoint" instruction that "to some extent outlin[ed] in detail examples of mitigating factors." (RT 3835.) The prosecutor agreed with the trial court that the instruction at issue was covered by other instructions, especially Factor (k), "the catch-all exception[]." (RT 3835.) Defense counsel replied that his proposed instruction was similar, but not exactly the same instruction approved in *People v. Wharton* (1991) 53 Cal.3d 522, 600, fn. 23, where the Court held the instruction was favorable to the defendant and consistent with the Eighth Amendment's guarantees. (RT 3835-3836.) The court reviewed the decision in *Wharton* the next morning and said that the defense not only challenged the instruction in that case, but also more recent cases like *People v. Fauber* (1992) 2 Cal.4th 792, 865, held it was improper to instruct regarding "pinpoint specific mitigating factors in that fashion." (RT 3851.) Accordingly, the trial court refused to give the requested instruction. (RT 3851.)

2. DEFENSE SPECIAL INSTRUCTION NO. 8

The defense in Mr. Virgil's case requested that the trial court instruct the jury as follows with Defense Special Instruction No. 8:

> "Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy."

(CT 408.) [224]

During the discussion of penalty phase jury instructions, the prosecutor strongly objected to proposed Defense Instruction No. 8 because it

> "remove[s] from their [the jury's] consideration something that they are entitled to consider. We know it is not an aggravating circumstance, but this particular pinpoint instruction seems to basically tell them it's not relevant and such evidence was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation's soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument."

(RT 3836.)

Defense counsel explained that he requested this instruction not so much because of the victim impact evidence from Ms. Ngov who was very "low-key" in her testimony, but because of the testimony from Ms. Rodriguez who showed "extraordinary emotional reaction from start to finish of crying, refusing to look over at counsel table, and that's why her testimony was so I thought inflammatory that this instruction should be given." (RT 3837.) Defense counsel advised the court that he had no objection to the court limiting the instruction to the testimony from Ms. Rodriguez because Ms. Ngov's testimony was "very low-key." (RT 3837.) The trial court agreed with the prosecution that the instruction should not be given because it was not

> "an appropriate instruction. I think it pinpoints this particular

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224 As included in the record on appeal, the proposed instruction appeared to contain several typographical errors. Nevertheless, it appears that a reasonable jury would have understood the instruction to mean that the jury's sentencing decision should be based on objective facts and not merely an irrational, emotionally-based response to the prosecution's highly charged penalty phase evidence.

> aspect of the evidence the jury should consider in an inappropriate manner. That instruction will be denied."

(RT 3837.)

D. THE TRIAL COURT'S ERRONEOUS RULINGS REFUSING TO GIVE THE REQUESTED INSTRUCTIONS VIOLATED MR. VIRGIL'S RIGHTS TO DUE PROCESS, A FAIR AND IMPARTIAL JURY, AND A RELIABLE PENALTY DETERMINATION UNDER THE UNITED STATES CONSTITUTION AND ITS ANALOGOUS CALIFORNIA COUNTERPARTS

Defense Special Instructions Nos. 1 and 2 would have instructed the jury in virtually the identical language approved by this Court in *People v. Wharton, supra,* 53 Cal.3d at p. 600, fn. 23, and would have clarified for jurors that factors in mitigation, unlike factors in aggravation, did not have to be proved beyond a reasonable doubt. Contrary to the trial court's understanding, the decision in *Fauber* did not support the trial court's ruling.

In *Fauber* the defendant's proposed instruction highlighted specific evidence [defendant's loving family ties, his personal problems, his waiver of extradition, his caring and sensitivity to friends, the absence of criminal activity before and after the crimes at issue] and the Court ruled that the instruction was properly refused as duplicative and argumentative by highlighting certain evidence without further illuminating the legal standards at issue. (*People v. Fauber, supra,* 2 Cal.4th at pp. 865-866.) Further, the trial court in *Fauber* instructed the jury that

> "'[m]ercy, pity and sympathy for the defendant are proper considerations in determining the penalty in this case should you find them to be warranted under the circumstances. [¶] Evidence of mitigating factors related solely to the defendant's background and character must be carefully weighed and may serve as a basis for a sentence less than death.'"

(*Id.,* at p. 865.)

Contrary to the trial court's belief in Mr. Virgil's case, *Fauber* added nothing new, the court simply misread and misapplied the decision in that case.

Defense Special Instructions Nos. 1 and 2 did not mention any specific items of evidence so they could not be said to be argumentative. In addition, the instructions were proper statements of law because they "further illuminat[ed] the legal standards at issue" by instructing the jury that its penalty decision was to be based only on the "evidence" and that a mitigating factor did not have to be proved beyond a reasonable doubt. (CT 406, 409.) In addition, the instructions were not duplicative because the other instructions given in Mr. Virgil's case did not otherwise advise the jury that factors in mitigation, unlike those in aggravation, did not have to be proven beyond a reasonable doubt and could be found on the basis of any evidence, irrespective of the strength of that evidence.

The instructions given in Mr. Virgil's case did not specifically address the legal standard for finding mitigating circumstances; hence, there was a reasonable likelihood that the jury in the instant case did not understand that mitigating circumstances did not have to be found beyond a reasonable doubt. The trial court's failure to give the requested instruction violated the Eighth Amendment's requirement of a reliable penalty determination and proscription against cruel and unusual punishment. (*Ibid.;* see also *Mills v. Maryland* (1988) 486 U.S. 367, 374, "jury

discretion must be guided appropriately by objective standards.") [225]

Defense special instruction No. 8 paraphrased the express language and well-reasoned guidance from this Court's cautionary language in *People v. Haskett* (1982) 30 Cal.3d 841, 864, where the Court concluded

> "Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.' (Citation.)"

(*People v. Edwards, supra,* 54 Cal.3d at p. 836; see also *Payne v. Tennessee, supra,* 501 U.S. at p. 824-825.)

Although this Court has held that "a defendant [is not] entitled to an argumentative instruction that simply highlights particular evidence without further elucidating the relevant legal standards (*People v. Musselwhite, supra,* 17 Cal.4th 1216, 1269-1270; *People v. Yeoman* (2003) 31 Cal.4th 93, 154), the instruction at issue did not suffer from this deficiency. It did

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225 Mr. Virgil is aware that this Court has held that the jury's penalty decision "'is inherently moral and normative, not factual (citation)' and, hence, not susceptible to a burden-of-proof qualification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79; *People v. Turner* (2004) 34 Cal.4th 406, 439.) The Court's holdings as to the burden-of-proof regarding the jury's overall penalty decision, however, is not relevant because the defense special instructions at issue in Mr. Virgil's case referred only to the standard for finding the existence of factors in mitigation so they could be compared to the factors in aggravation. (See *Walton v. Arizona* (1990) 497 U.S. 639, 649-651, revd. on other grounds in *Ring v. Arizona* (2002 536 U.S. 584 [the federal Constitution is not violated if the defendant is required to prove the existence of any factor in mitigation that is then used in the weighing of factors in aggravation against any factors in mitigation].)

not specifically mention or highlight the testimony from Ms. Ngov or Ms. Rodriguez, and it properly "elucidat[ed] the relevant legal standards" governing capital sentencing decisions required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and the analogous provisions of the California Constitution. Accordingly, the trial court erred by refusing the instruction. (*Ibid.*) Therefore, the question must turn to prejudice and whether the error requires the reversal of judgment.

After successfully opposing the defense instruction that would have instructed the jury to make its sentencing decision soberly and rationally and not on the basis of high emotion, the prosecutor obtained unfair advantage because there was no legal check on the testimony from Ms. Ngov about her family's harrowing flight from the "killing fields" in Cambodia and Ms. Rodriguez's highly emotional and graphic testimony about Mr. Virgil's attack on her and the injuries. (RT 3836.) In other words, the trial court's refusal to give the defense instruction allowed the jury to decide the case on the basis of high emotion ["something (the prosecutor believed) that they are entitled to consider"] and not soberly and rationally as required by the controlling decisions from the United States Supreme Court and this Court. (CT 408; RT 3836.) An examination of the prosecutor's closing argument during the penalty phase establishes the prosecutor's intent to obtain a verdict based on the jury's high emotion at the expense of their reason.

The prosecutor argued that Ms. Rodriguez was "savagely attacked and brutalized" by Mr. Virgil (RT 3852-3854) and then urged jurors to choose death as the only appropriate penalty because of "the attack on Benita Rodriguez five days later during the defendant's repeated performance, surely the defendant sealed his fate with that event." (RT 3853.) The prosecutor argued that if death was not appropriate for Mr. Virgil, it would not be [for anyone] in any case and Mr. Virgil's attack on

Ms. Rodriguez five days after killing Ms. Lao established his lack of a conscience. (RT 3855, 3857.)

The prosecutor urged the jury to sentence Mr. Virgil to death because he took Ms. Rodriguez's property and then "want[ed] to get his pound of flesh. He's not satisfied. He's having such a good time doing what he's doing anyway." (RT 3862, 3863.) The prosecutor reminded jurors about Ms. Rodriguez's impression that Mr. Virgil enjoyed stabbing and kicking her and that he attempted to engage in "the sickest exercise" a man can do against a woman by attempting to rape her. (RT 3863.) The prosecutor argued that Mr. Virgil's greed destroyed Ms. Lao's life and almost Ms. Rodriguez's life and there was no evidence that Mr. Virgil was under the influence of cocaine at the time of the offenses, but only that he seemed to enjoy his assault against Ms. Rodriguez. (RT 3864-3865.)

The prosecutor continued by arguing that Ms. Rodriguez was alone at the motel (RT 3869-3870); Mr. Virgil threatened Ms. Rodriguez with a knife while asking about money in the motel's office and gesturing for her to remove her watch and rings (RT 3870); Mr. Virgil was not satisfied with simply taking Ms. Rodriguez's property because he also wanted to restrain and then sexually assault her (RT 3870); Ms. Rodriguez was brutally stabbed many times because she violated Mr. Virgil's primary rule of against resistance and she survived the attack only by grabbing the knife and breaking the blade (RT 3870-3871); Ms. Rodriguez was very seriously injured, spent eight days in the hospital, and still suffers from medical problems [blurred vision and digestive problems] and sleepless nights because of nightmares resulting from Mr. Virgil's attack (RT 3870-3871); and, the jury personally witnessed Ms. Rodriguez's ongoing emotional instability, as reflected by her refusal to look at Mr. Virgil. (RT 3871.)

The prosecutor sought to whip up the jury's emotions against Mr. Virgil by arguing that his attack against Ms. Rodriguez was like having an

open wound that was dipped into a bucket of alcohol. (RT 3872.) After detailing the crime against Ms. Lao and how Mr. Virgil reportedly muffled her screams by wrapping an apron around her face and attempting to bind her feet (RT 3873), the prosecutor argued that Mr. Virgil could have left Ms. Lao bound and gagged in the bathroom, but "he inflicted a savage attack upon a young woman. I cannot imagine for a minute what it must be like to be stabbed with a five-inch blade 30 times." (RT 3873.) During the final part of his argument, the prosecutor urged the jury to ignore sympathy for Mr. Virgil and vote for death on emotional grounds by giving effect to his and "the [jury's] cold fury of outrage" based on Mr. Virgil actions that robbed Ms. Lao of her dreams and ended her life in the "killing fields" at the corner of Van Ness. and El Segundo [in Gardena]. (RT 3874-877.)

Because there is a reasonable probability that the trial court's errors refusing Defense Special Instruction Nos. 1, 2, and 8 affected Mr. Virgil's penalty verdict, the errors were not harmless beyond a reasonable doubt and his penalty judgment must be reversed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Brown, supra,* 46 Cal.3d at p. 447.)

XVIII.

BECAUSE THE JURY FOREPERSON PROFESSED SPECIAL KNOWLEDGE AS A LAW STUDENT, AND THE JURY EVIDENCED CONFUSION DURING THE PENALTY PHASE, THE FAILURE TO CONDUCT AN EVIDENTIARY HEARING ON THE QUESTION OF JUROR MISCONDUCT VIOLATED MR. VIRGIL'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND REQUIRES THE REVERSAL OF HIS PENALTY JUDGMENT

A. INTRODUCTION

The jury selected William Mosby to be the foreperson in both phases of Mr. Virgil's capital trial. Mosby was a first-year law student, but reported to the court and parties during jury voir dire that he had not yet taken any courses in criminal law or procedure. During breaks in the proceedings, defense counsel saw Mosby in the hallway studying what he believed were legal text books. Soon after the jury began deliberating on penalty, Mosby sent a note to the court asking about the consequences of not reaching a unanimous penalty decision, whether the court would determine penalty, or whether Mr. Virgil's sentence would automatically become life without possibility of parole. The note greatly concerned defense counsel because it appeared to have come from someone well-versed in the intricacies of the California's 1977 death penalty law. [226]

After the trial court instructed the jury over defense counsel's' objection that its instruction was coercive under the circumstances, the jury resumed its deliberations. The next morning defense counsel asked the court to conduct a hearing about the possibility that something was amiss regarding the jury's penalty deliberations. Defense counsel believed that

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[226] The trial court's instruction in response to the note is challenged above in Argument XIII.

Mosby was at the center of the controversy and might be preventing jurors from communicating to the court that they were deadlocked. Accordingly, defense counsel asked the court to conduct a hearing with the jury so jurors could communicate directly with the court about whether they were deadlocked.

The court and prosecutor believed there was no basis on the record to support defense counsel's concerns. Defense counsel replied that he had seen Mosby studying legal texts and huddling with jurors so he believed the trial court should question jurors directly because of "the procedural history of deliberations." The court dismissed counsel's concerns about the nature of the deliberations, but agreed to question Mosby about studying legal texts.

The trial court briefly questioned Mosby. During the court's limited examination, Mosby denied looking at anything to do with criminal law and talking with jurors about such matters. Mosby's demeanor suggested differently because, as trial counsel later observed, he seemed very uncomfortable, nervous and evasive when responding to the court's inquiry. (RT 3966.)

Because of Mosby's demeanor and evasiveness during questioning and the nature of defense counsel's concerns about the likelihood of juror misconduct during deliberations, the trial court erred by refusing defense counsel's request to conduct a formal evidentiary hearing where Mosby and other jurors would be sworn and required to testify under oath about the matters at issue. Because the trial court's limited inquiry was insufficient to determine with certainty if serious jury misconduct had occurred, Mr. Virgil's penalty judgment must be reversed.

B. APPLICABLE LAW AND THE STANDARD OF REVIEW

The federal and State Constitutions grant defendants who face criminal charges the right to a trial by an impartial jury. (U.S. Const., 5th, 6th, and 14th Amends.; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278, *Duncan v. Louisiana* (1968) 391 U.S. 145, 149, Cal. Const., art. 1, § 16; see also U.S. Const., 8th and 14th Amends. [as to penalty phase jury trial in capital case].) Jurors commit serious misconduct when they evaluate the facts based on influences outside the courtroom proceedings. (*People v. Honeycutt* (1977) 20 Cal.3d 150, 154-158 [juror's consultation with an outside attorney for advice on the law applicable to the case constitutes juror misconduct].)

The trial court bears a duty to protect these constitutional rights and to inquire into possible juror misconduct. In some instances, that duty requires the court to conduct an evidentiary hearing. California Penal Code section 1120 provides:

> "If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If, during the retirement of the jury, a juror declares a fact which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties in order that the court may determine whether good cause exists for his discharge as a juror."

In addition to the statutory requirement set forth in Penal Code section 1120, the federal and state constitutions impose a duty on trial courts to make reasonable inquiry into allegations of jury misconduct. (See *People v. Engelman* (2002) 28 Cal.4th 436, 442-443, discussing U.S. Const., 6th and 14th Amends., and Cal. Const., art. 1, § 16.) A juror is required to follow instructions given by the court, and refusal to do so during deliberations is ground for dismissal. (*People v. Engelman, supra,* 28 Cal. 4th at p. 443.)

Once the court is alerted to the possibility that one or more jurors may be unable or unwilling to properly perform their duty to render an impartial and unbiased verdict, the court is obligated to make reasonable inquiry into the factual explanation for that possibility. (*Ibid*; *People v. McNeal* (1979) 90 Cal.App.3d 830, 838.) This inquiry must be adequate to ascertain the true facts of the situation. (*People v. Cleveland* (2001) 25 Cal.4th 466, 477; see also *United States v. Rutherford* (9th Cir. 2004) 371 F.3d 634 [evidentiary hearing required on whether jurors' states of mind were affected by outside influences during trial], *Caliendo v. Warden of California Men's Colony* (9th Cir. 2004) 365 F.3d 691 [federal habeas writ granted to reverse State conviction for Sixth Amendment violation in failing to apply rebuttable presumption of prejudice arising from an incident of jury misconduct; evidentiary hearing was conducted but was insufficient to guarantee fair trial].)

Even in circumstances that may not require an evidentiary hearing, it is the responsibility of the trial court to inquire. The trial court has no discretion in that matter; it is the judge's *duty*. The court must make whatever inquiry is reasonably necessary to ascertain the true facts of the situation. Furthermore, in a capital case where the defendant's life is at stake, the Eighth Amendment requires heightened scrutiny as to the fact-finding process. (*Ford v. Wainwright* (1986) 477 U.S. 399, 411.)

The refusal to hold an evidentiary hearing on claimed juror misconduct is tested for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 581-582.)

> "[A hearing] should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing."

In cases that warrant an inquiry not necessarily rising to a formal hearing, the sufficiency of the judicial inquiry should also be tested for abuse of discretion.

Structural error is manifested by juror misconduct, warranting reversal per se. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279, *Arizona v. Fulminante* (1991) 499 U.S. 279, 307-310, *Rose v. Clark* (1986) 478 U.S. 570, 578-579, *Dyer v. Calderon* (9th Cir. 1998) (*en banc*) 151 F.3d 970, 973 fn. 2.)

Alternatively, if the Court finds that the error complained of was not structural (which would be incorrect under the circumstances), the appropriate standard of review is whether the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; *Rose v. Clark, supra,* 478 U.S. at pp. 578-579).

D. CONCERNS ABOUT JUROR MISCONDUCT

The introduction of extraneous law unquestionably constitutes juror misconduct. (*In re Marshall* (1990) 50 Cal.3d 907, 950, *People v. Honeycutt, supra.* 20 Cal.3d at pp. 154-158.) "The law applied by the jury must come only from the court as law-giver or else defendant does not receive a fair trial." (*State v. Sinegal* (La. 1981) 393 So.2d 684, as quoted in *In re Stankewitz* (1985) 30 Cal 3d. 391, 399, fn. 3.)

In re Stankewitz illustrates the applicable principles. In that case, a juror asserted special expertise in the law by virtue of his experience as a police officer. This Court reversed for juror misconduct, reasoning:

> "Here [juror] Knapp likewise violated the court's instructions and 'consulted' his own outside experience as a police officer on a question of law. Worse, the legal advice he gave himself was totally wrong. Had he merely kept his erroneous advice to himself, his conduct might be the type of subjective reasoning that is immaterial for purposes of impeaching a verdict. But he did not keep his erroneous advice to himself; rather, vouching for its

> correctness on the strength of his long service as a police officer, he stated it again and again to his fellow jurors and thus committed overt misconduct."

(*In re Stankewitz, supra*, 40 Cal.3d at pp. 399–400.)

Similarly, the case at bar presents possible juror misconduct based on either explicit or implied assertion of expertise on the part of law student foreperson William Mosby, which may have improperly influenced the penalty verdict of death. (*United States v. Vasquez* (9th Cir. 1979) 597 F.2d 192, 193 [stating that "the key question is whether there exists a possibility that [extrinsic] information influenced the verdict"].)

1. THE FOREPERSON DISPLAYED HIS LEGAL EXPERTISE BY VIRTUE OF HIS STATUS AS A LAW STUDENT

During voir dire on February 7, 1995, then prospective juror William Mosby disclosed that he was a law student, but had completed only one semester by taking classes on torts, contracts, and property. Mosby had not taken criminal law, but would take that course during the summer. Mosby assured the court that he knew it would be improper to research the law on his own. (RT 421-425, 436-439, 445.)

Mosby was seated as a juror and was selected as the jury's foreperson for the guilt and penalty phases. (RT 449, 3395.) Defense counsel believed, however, that Mosby's service as the foreperson in both phases of Mr. Virgil's capital trial was unusual and disturbing, particularly because Mosby was a law student. (RT 3929-3930.) On March 19, 1995, during penalty phase deliberations, counsel further objected

> "I am further disturbed by the fact that I have seen the foreperson, for example at this break just recently, talking to various jurors, huddling with them, and he has had law books with him, studying law books during deliberations, which further disturbs me."

(RT 3930, see also RT 3936-3937 [defense counsel personally observed Mosby studying law books].)

Because Mosby had been placed in a leadership position as the foreperson of the jury for both the guilt and penalty phases, his fellow jurors were constantly reminded of his status as a law student when he studied his law books during breaks in the proceedings. This fact created an impression that Mosby was particularly knowledgeable about and dedicated to the law – something that was not his job as a juror – and that lent him an inappropriate aura of authority as to what the law was.

2. THE JURY'S NOTE ABOUT POSSIBLE FAILURE TO REACH PENALTY VERDICT

On March 16, 1995, the second day of the jury's penalty deliberations, the jury sent the court a written query about the consequences of not reaching a penalty verdict. [227] Specifically, the jury's note asked

> "What happens if the jury is unable to reach a unanimous decision?
>
> "Will the court decide on the sentence?
>
> "Will life without parole be given automatically?
>
> "If the jurors are polled at the end of this procedure, could that be done by number rather than by name?"

(RT 3917.)

The jury's inquiry about the consequences of being unable to reach a unanimous penalty decision concerned defense counsel because it appeared

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[227] Under the 1977 death penalty statute [former Cal. Penal Code §190.4, subd. (b)], if the penalty phase jury failed to unanimously reach a verdict, then the trial court was required to dismiss the jury and impose the sentence of life without the possibility of parole. Under the 1978 Initiative and law applicable to Mr. Virgil's case, if the initial jury cannot unanimously agree on the penalty, then the penalty phase has to be retried by a second jury. If the second penalty phase jury also fails to reach a verdict, then the trial court has discretion to either impanel another jury or to sentence the defendant to life without parole. (Poulos, *The Lucas Court and the Penalty Phase of the Capital Trial: The Original Understanding* (1990) 27 San Diego L. Rev. 521, 541–542.)

that the question came from someone aware of the 1977 death penalty statutes. Counsel observed,

> "[T]he questions that were postulated by the jury yesterday were curiously framed in terms of the foreperson as if he had read the 1977 law that says if you hung, it was an automatic L.W.O.P. And I am further disturbed by the fact that those questions were postulated by somebody that was expressing independent knowledge of law."

(RT 3930.) 228

3. Discomfort Among The Jurors, Suggesting Pressure Towards A Penalty Verdict

The last question in the jury's note – whether the jurors could be polled by number rather than by name – reflects a high degree of perplexity among the jury, motivating them to seek what the trial court characterized as a "hook" and a "way out." (RT 3922-3923.) On some level, this question triggered the court's "smell test" in that it was cause for such comment by the court. Thus, it was obvious that the jurors were very uncomfortable. But, the court ventured only to address the question literally, and did not place it in the more broadly pertinent context, which is that of a jury presided over by a law student who had asserted himself as a leader and displayed his special knowledge of the law by reading law books in the hallway during trial.

In addition, defense counsel stated that at 4:15 p.m. on March 16, 1995, the jury said that they could not stand each other anymore and wanted to go home. (RT 3930, 3934.) Though the trial court did not hear

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228 Defense counsel later repeated these concerns as a basis to continue the defense Motion for New Trial to allow time for jury investigation. (RT 3965-3968.) Because of juror "noncooperation," defense counsel did not argue "anything about juror misconduct as a basis for a new trial." (RT 3986.)

this remark, it simply concluded that there was no evidence to support defense counsel's assertion. (RT 3935.) Instead of fulfilling its constitutionally-based responsibility to protect Mr. Virgil's rights to due process, trial by a fair and impartial jury, and a reliable penalty determination by conducting an inquiry sufficient to determine the facts, as defense counsel repeatedly asked the court to do (RT 3931-3934), the trial court elected to ignore the possibility that rampant and prejudicial juror misconduct was occurring. Further, the trial court's efforts to avoid its responsibility even extended "to correct[ing] the record" in such a way to impugn defense counsel's veracity. (RT 3934-3935.)

As part of his showing that there was a reasonable likelihood that Mr. Virgil was the victim of pervasive jury misconduct, defense counsel referred the court back to the circumstances of Juror Elvin Clay. In this regard, Clay asked to be discharged early in deliberations on the guilt phase, something which defense counsel reasoned raised the possibility that the penalty of death had been discussed by the jurors before commencement of the penalty trial and, indeed, even before the verdict on guilt was delivered. As the court described it:

> "THE COURT: We all saw the note. [Juror Clay] was quite clear on the record he thought that Mr. Virgil deserved whatever anybody would give him; it was just that he didn't have the heart to do it."

(RT 3938.)

Although the court disputed defense counsel's interpretation of Clay's actions, there is no doubt that the question of "whatever anybody would give him" pertained to Mr. Virgil's penalty, rather than his guilt. Without a doubt, Clay's situation and great discomfort that led to his request for discharge raised an additional and very real possibility that something improper had and was occurring within the confines of the jury room. The trial court, however, was consistent in ignoring that possibility

from the guilt phase deliberations through the penalty phase where it even acted to "correct the record" in an attempt to avoid the need to conduct any inquiry into the possibility that rampant and prejudicial jury misconduct was occurring.

The jury's plea for anonymity should have been understood as an indicator of possible flaws in the process to which the court bore a responsibility. Because Mosby, as foreperson, had control of the communications between the jury and the court, the constitutional problem could not have been expressed more blatantly. As defense counsel argued,

> "[B]ecause we have the same foreperson [in both guilt and penalty phases] I think that there are certain jurors that must feel that they do not have the right to communicate with the court except through the foreperson.
>
> "I've seen this happen, albeit rarely, but if a foreperson goes back and tells the jurors that the jurors can only communicate with the court through the foreperson, then they will only communicate with the court through the foreperson. If the foreperson does not send out a note indicating that certain jurors feel they cannot reach a verdict, then the foreperson can coerce a verdict, and I think it is time to clear the air at this point in time especially in light of the procedural history of the deliberations."

(RT 3934.)

Again, the trial court ignored the representations of defense counsel as an officer of the court that an inquiry should be conducted to determine whether or not Mr. Virgil's federal constitutional rights to due process, a fair and impartial jury, and a reliable penalty determination were being violated in the confines of the jury room. For those reasons, the trial court erred by failing to pursue the issue of jury misconduct by not only questioning Mosby about untoward acts involving his role as the foreperson, but also by not questioning the jury in response to defense counsel's reasoned and good faith concerns that Mr. Virgil's fate was being

decided under circumstances that violated his federal and state constitutional rights.

E. BECAUSE THE JURY FOREPERSON ACTED IN A WAY TO ASSERT HIS AUTHORITY AS SOMEONE KNOWLEDGEABLE IN THE LAW THROUGHOUT THE TRIAL AND EXPRESSED NERVOUS AND EVASIVE DEMEANOR DURING QUESTIONING BY THE COURT, AND JURORS COMMUNICATED THEIR CONFUSION ABOUT THE APPLICABLE LAW DURING THE PENALTY PHASE, THE COURT ABUSED ITS DISCRETION BY FAILING TO CONDUCT AN EVIDENTIARY HEARING

Penal Code section 1120 commands a juror who discovers that he has personal knowledge of a point in controversy in the case to disclose that information in open court. If an issue arises during jury deliberations that indicates that the proceedings may have been improperly infected with a juror's personal knowledge, then the court must hold a formal evidentiary hearing to determine whether good cause exists to discharge the juror. (Pen. Code §1120.) Good cause may be found when ". . . improper or external influences . . . [are] brought to bear on a juror...." (*People v. Chavez* (1991) 231 Cal.App.3d 1471, 1482 (citing *People v. Burgener* (1986) 41 Cal.3d 505, 518, *People v. Kaurish* (1990) 52 Cal.3d 648, 694).) In such situations, the trial court should conduct an inquiry to

> "determine the circumstances, the impact thereof upon the juror[s], and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate."

(*Remmer v. United States* (1954) 347 U.S. 227, 230; U.S. Const., 5th, 6th, 8th & 14th Amends.)

When defense counsel raised the issue of foreperson Mosby reading law books in the hall, the trial court conducted a cursory inquiry that did

not afford defense counsel an opportunity to cross-examine the juror. (RT 3940-3942.) [229]

> "THE COURT: Sir, I know you are a law student, and I guess at this point we need to ask: are you still actively going to class now?
>
> "JUROR MOSBY: Yeah, I am going to class now.
>
> "THE COURT: There is some concern you may be reading some law books.
>
> "JUROR MOSBY: Nothing—just property, torts and contracts—nothing to do with criminal. I have not looked at anything to do with anything that vaguely relates to law school—I mean to criminal procedure.
>
> "THE COURT: Do you have law books here while you're waiting in the hallway and such?
>
> "JUROR MOSBY: I have a property book while I'm sitting out in the hall.
>
> "THE COURT: You have not read anything concerning criminal law?
>
> "JUROR MOSBY: Nothing at all. I have Westlaw and Lexus at home on computer and I have not looked at it as you have instructed.
>
> "THE COURT: Have you talked to the jurors about anything at all to do with the criminal law?
>
> "JUROR MOSBY: No. That is why yesterday when the jurors as a whole wanted these questions asked and every time I have sent out a note is because the group as a whole wanted these questions answered.
>
> "THE COURT: Thank you, sir. You may go back out in the hall."

(RT 3939-3940.)

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[229] Curiously, the trial court deferred to defense counsel's representations about Mosby's conduct about studying law books, but refused to extend the same deference to his other concerns about the likelihood of jury misconduct in other regards.

This limited inquiry was far from adequate because Mosby was not sworn before the court questioned him and his "evasive and nervous and very uncomfortable" demeanor during questioning reasonably suggested that something was amiss. (RT 3939-3940, 3966.) [230] For that reason, the court should have conducted a formal hearing where Mosby was sworn as a witness and all parties could have participated in questioning him. (See *Remmer v. United States, supra,* 347 U.S. at p. 230.)

F. THE TRIAL COURT'S FAILURE TO CONDUCT A HEARING WHERE WITNESSES WERE SWORN AND ALL PARTIES WERE ALLOWED TO QUESTION JURORS REQUIRES THE REVERSAL OF MR. VIRGIL'S PENALTY JUDGMENT

The court failed to discharge its constitutionally-mandated duty to assure due process, a fair and impartial jury, and a reliable penalty determination by conducting a hearing where all parties were represented and the court's inquiry was focused and reasonably calculated to resolve the doubts raised about the juror's impartiality. (See *Dyer v. Calderon, supra,* 151 F.3d at pp. 974-975 (citing *Remmer v. United States* (1956) 350 U.S. 377, 379, *Remmer v. United States* (1954) 347 U.S. 227, 230, *Smith v. Phillips* (1982) 455 U.S. 209, 217, *United States v. Boylan* (1st Cir. 1990) 898 F.2d 230, 258).)

By merely bringing in Mosby and asking him a few general questions that were not precisely directed to the issues defense counsel was most concerned with, the court failed to determine if individual jurors ever had questions that Mosby did not communicate to the court, as defense

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230 The prosecutor sought to correct the record by saying that defense counsel's concerns about the jury's deliberations were "just merely allegations from counsel." (RT 3967.) Notably, the prosecutor did not dispute defense counsel's characterizations of Mosby's demeanor and the People should be estopped on appeal from arguing otherwise.

counsel believed was the case. Further, and most important, the court's inquiry of Mosby did not address how the jury of laypersons crafted questions about the effects of the failure of jurors to unanimously agree on a penalty verdict that eerily mirrored the 1977 version of California's death penalty scheme. Further, the trial court failed to note that the nature of Mosby's denials established either that he was hiding something ["doth protest too much, methinks"] [231] or that his admission constituted misconduct per se because he was not deliberating with his fellow jurors by discussing the criminal law [court's instructions] applicable to the facts. Given Mosby's evasive and suspect behavior when questioned by the court and the very real possibility that his answers were either false or evidenced misconduct per se, the trial court was duty-bound to do more regarding defense counsel's concerns about jury misconduct and Mosby's possible role at the heart of that misconduct. [232]

Because the trial court failed to take reasonable steps necessary to determine and resolve whether juror misconduct occurred, Mr. Virgil's penalty judgment must be reversed. This is so because the trial court's error violated Mr. Virgil's federal constitutional right to a fair trial, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and

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231 William Shakespeare, Hamlet, Prince of Denmark act III, sc. 2, line 242.

232 Defense counsel did not object to the trial court's inquiry or ask the court to question Mosby or his fellow jurors any further. (RT 3940-3942.) Given the trial court's ruling that it accepted Mosby's responses at face value and it would not conduct any further inquiry, defense counsel's objection would have been futile. Because defense counsel is not required to make futile objections, his failure to object is of no consequence. (See *People v. Hill*, supra, 17 Cal.4th at pp. 820-821; *People v. Chavez, supra,* 26 Cal.3d at p. 350, fn. 5..)

their analogous California counterparts (See *Dyer v. Calderon, supra,* 151 F.3d at p. 975.)

XIX.

THE TRIAL COURT ABUSED ITS DISCRETION BY REQUIRING THAT MR. VIRGIL WEAR A REACT STUN BELT DURING THE PENALTY PHASE AND THAT ERROR REQUIRES THE REVERSAL OF HIS PENALTY JUDGMENT

A. INTRODUCTION

Mr. Virgil was forced to wear an electronic restraint device around his waist during the penalty phase of his trial, after the prosecution argued that Mr. Virgil "impliedly" attempted to escape. The premise of this claim was that a Sheriff's deputy reportedly saw Mr. Virgil in possession of a staple one morning while awaiting transport to the courtroom and attempting to uncuff another prisoner. There was no direct evidence, however, that Mr. Virgil was trying to escape, and his behavior throughout trial had always been well within the bounds of decorum.

At the time of the incident, the jury was still deliberating on the guilt phase. An entire court day passed without anyone seeing the need to impose heightened restraints on Mr. Virgil. Guilty verdicts were delivered at the end of the day. The next day, upon commencement of the penalty phase, tones of urgency were suddenly voiced to the effect that Mr. Virgil now posed a security issue and absolutely had to be restrained with a stun belt. Before even seeing the report of the purported staple incident or holding any examination, the court had the stun belt brought out. Before, during and after examination, defense counsel vigorously objected and disputed the need for any restraints at all, but the court was unwilling to dispose of the stun belt and instead opted to put it to use. The decision to use the electronic restraint was an abuse of discretion under the "last resort"

standard from *Illinois v. Allen* (1970) 397 U.S. 337, the "'essential state interest'" standard from *Deck v. Missouri* (2005) ___ U.S. ___ [125 S.Ct. 2007, 2009], and the "manifest need" test from *People v. Duran* (1976) 16 Cal.3d 282.

Given the trial court's perception that some additional security measures were needed, defense counsel suggested alternatives to the stun belt. The court found that the stun belt was the least restrictive means possible to increase security of Mr. Virgil's body. The conclusion that the stun belt was the least restrictive means available was incorrect, as a matter of law, and constituted an abuse of discretion. (See generally *People v. Mar* (2002) 28 Cal.4th 1201, and authorities cited therein; *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 636, citing *Holbrook v. Flynn* (1986) 475 U.S. 560, 568-569, and *Stewart v. Corbin* (9th Cir. 1988) 850 F.2d 492, 497, "visible shackling during trial is so likely to cause a defendant prejudice, it is permitted only when justified by an essential state interest specific to each trial" and "due process requires the trial court to engage in an analysis of the security risks posed by the defendant and to consider less restrictive alternatives before permitting a defendant to be restrained.")

The REACT stun belt is paralyzing not only physically upon activation (which occurs accidentally approximately half the time, see Dahlberg, *The React Security Belt: Stunning Prisoners and Human Rights Groups Into Questioning Whether Its Use is Permissible Under the United States and Texas Constitutions* (1988) 30 St. Mary's L.J. 239, 289, fn. 274 [hereinafter Dahlberg]), but also psychologically for the entire time the subject is made to wear it. This, in turn, violates a host of constitutional rights and is inherently prejudicial. Accordingly, Mr. Virgil's penalty judgment must be reversed.

B. LEGAL BACKGROUND AND STANDARD OF REVIEW

Very recently, the United States Supreme Court considered the issue of visible shackling during the penalty phase of a capital trial. In *Deck v. Missouri, supra,* 125 S.Ct. at p. 2012, the high court held that routine, visible shackling in any phase of a criminal trial is "forbidden" because

> "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial. Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial."

(*Deck v. Missouri, supra,* 125 S.Ct. at pp. 2010, 2012.)

Finally, the Supreme Court held that the issue of visible shackling is of special importance during the penalty phase of a capital trial because

> "the appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community – often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point. (Citation.) It also almost inevitably affects adversely the jury's perception of the character of the defendant. (Citation.) And it thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations – considerations that are often unquantifiable and elusive – when it determines whether a defendant deserves death. In these ways, the use of shackles can be a 'thumb [on] death's side of the scale.' (Citations.). Given the presence of similarly weighty considerations, we must conclude that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding."

(*Id.,* at p. 2014.)

Because a defendant's visible shackling before a penalty jury is "'inherently prejudicial'" and the trial court's shackling decision in *Deck* was based on defendant's mere guilt of capital crimes, the Supreme Court

reversed the defendant's sentence of death and remanded the matter for further proceedings not inconsistent with its opinion. (*Id.,* at pp. 2015-2016.)

Stun belts are a method of prisoner restraint, used as an alternative to shackles. As with all forms of physical confinement during trial, the use of stun belts raises numerous constitutional issues. (U.S. Const., 5th Amend. [due process; compulsion to function as witness against self]; 6th Amend. [compulsory due process; neutral jury; right to participate in own defense via assistance of counsel]; 8th Amend. [cruel and unusual to use electronic restraints during penalty phase while defendant is facing jury verdict of life or death; cruel and unusual to impose death penalty that was determined while defendant was electronically restrained; excessive restraint]; 14th Amend. [due process].)

Substantial prejudice may result if the jury sees or becomes aware that the defendant is under restraint. And, imposition of restraints may impede the defendant's ability to communicate with his counsel and to participate in the defense of the case. (*Illinois v. Allen, supra*, 397 U.S. at p. 344.) The use of physical restraints may also "confuse and embarrass the defendant, thereby impairing his mental faculties," and it "may cause him pain." (*Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 748 (internal citations and quotation marks omitted).) To avoid unnecessary implication of these concerns, the United States Supreme Court concluded in *Allen*, "no person should be tried while shackled and gagged except as a last resort." (*Illinois v. Allen, supra*, 397 U.S. at 344.)

These constitutional implications have long been recognized by this Court (*People v. Harrington* (1871) 42 Cal. 165, 168), and were reaffirmed with the "manifest need" standard set forth in *People v. Duran* (1976) 16 Cal.3d 282. "[A] defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a

showing of a manifest need for such restraints." (*People v. Duran, supra,* 16 Cal.3d at pp. 290-291.) This manifest need is presented upon a proper showing that it a physical restraint is necessary to "minimiz[e] the likelihood of courtroom violence or other disruption." (*Id.,* at p. 291.) The particular security measure to be employed should be the "most suitable for a particular defendant in view of the attendant circumstances." (*Ibid.*)

Furthermore, the selected restraint device should be the least restrictive means that effectively will serve the relevant security purposes. (*People v. Mar, supra,* 28 Cal.4th at p. 1226.). In *Mar,* this Court held that a REACT stun belt was not necessarily less restrictive than other physical restraints such as leg shackles. (*Ibid.*)

The trial court's decision to impose physical restraints on the defendant is reviewed for abuse of discretion. (*Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712, 716-717, *People v. Duran, supra,* 16 Cal.3d at p. 292-293.)

C. THE STAPLE INCIDENT

On March 9, 1995 at approximately 8:30 a.m., Deputy Dianna Norris, one of the courthouse deputies, saw Mr. Virgil spit a staple out of his mouth while in the course of being transported to court. (RT 3445, 3451-3453.) Deputy Norris confiscated the staple, gave it to her sergeant, and prepared a report. (RT 3452-3455, 3468.)

The jury delivered guilty verdicts on all charges later that day, at 4:02 p.m. (CT 385-387.)

The next morning, outside the presence of the jury, the court voiced its "security concern." (RT 3414.) Mr. Virgil's counsel immediately objected on constitutional grounds, and demanded that he be shown a report and given an opportunity to cross-examine any law enforcement officers who witnessed the reported incident. (RT 3414-3415.) The report was in

process of being completed; in the meantime, the court had the bailiff bring the stun belt device into the courtroom for counsel to examine. (RT 3417-3418.) Substantial time was spent examining and discussing the stun belt on the record. (RT 3417-3420.)

Finally, the report and the staple were produced for counsel to review, and the court conducted an evidentiary hearing on the question of whether additional security requirements should be imposed. (RT 3440-3441, 3443.)

Deputy Norris testified that on March 9, 1995 at about 8:30 a.m., she and the other deputies were conducting the morning search of defendants in the main lockup. (RT 3445.) Mr. Virgil had already been searched (RT 3482) and, along with two other defendants, was sitting and waiting to be brought to the courtroom. (RT 3446-3447.) Each of the men were waist chained with their hands shackled to their sides leaving room for limited movement, i.e., enough slack to eat a sandwich. (RT 3447, 3450, 3461-3462.) The men were not shackled to each other. (RT 3447.) One of the other defendants, Mr. Ford, was seated facing Mr. Virgil. (RT 3447.) Deputy Norris was in the next room, about three or four feet away, walking down the hallway near the glass portion of the room. (RT 3448-3449, 3464.) She saw Mr. Virgil "playing with Mr. Ford's cuffs", using his right hand "making a motion as a key". (RT 3449.) However, Deputy Norris never saw him "fiddling" with his own cuffs. (RT 3467.)

Deputy Norris asked Mr. Virgil what he had in his hand. Mr. Virgil denied having anything, but she saw a silver object in his mouth and asked him what it was. Mr. Virgil again he replied, "Nothing." (RT 3451.) Still looking through the window, Deputy Norris then saw Mr. Virgil spit the item out of his mouth. (RT 3452, 3468.) After she saw approximately where it landed, she went into the room and retrieved it. (RT 3452.) The item was a 1 ½" heavy duty staple. (RT 3452-3453, People's Exhibit 1.)

The judge was notified of the incident shortly thereafter. (RT 3496.)

E. Because The Need For Increased Security Was Not Sufficiently Demonstrated, The Court Abused Its Discretion By Ordering Mr. Virgil To Wear The Stun Belt

Before a court may order the use of physical restraints on a defendant at trial, "the court must be persuaded by compelling circumstances that some measure is needed to maintain security of the courtroom," and "the court must pursue less restrictive alternatives before imposing physical restraints." (*Duckett v. Godinez, supra*, 67 F.3d at 748 (internal citations and quotation marks omitted).) "In all [ ] cases in which shackling has been approved," there has been "evidence of disruptive courtroom behavior, attempts to escape from custody, assaults or attempted assaults while in custody, or a pattern of defiant behavior toward corrections officials and judicial authorities." (*Id.* at p. 749.).

1. The Staple Incident Does Not Adequately Support The "Inference" That Mr. Virgil Was Attempting To Escape.

The prosecution argued that Mr. Virgil was trying to help Mr. Ford escape, and, by implication, was attempting his own escape. This was an unreasonable assumption for several reasons. (RT 3499.)

First, it is indisputable that Deputy Norris never saw Mr. Virgil try to pick the lock on his own handcuffs. (RT 3467, 3475.) Throughout the trial, Mr. Virgil had never engaged in any assaultive conduct, made no efforts to escape, never attempted to take the deputies' handcuff keys or anything else, and never disobeyed the courtroom deputy's orders. (RT 3497.) No direct evidence exists to suggest that Mr. Virgil was attempting to escape.

Second, Mr. Virgil already had additional shackles on his feet (RT

3473). Under those circumstances, there is no way he could have escaped, or that any reasonable person could have perceived escape as a possibility for Mr. Virgil.

Third, Deputy Norris never inquired of Mr. Virgil as to what he had been doing with the staple (RT 3456), and there is another reasonable explanation. During his stay at County Jail awaiting trial, Mr. Virgil was attacked and stabbed repeatedly by another inmate while handcuffed. (RT 582-585.) Given that incident and Mr. Virgil's appropriate conduct throughout trial, it is more likely that Mr. Virgil possessed the staple for self-defense reasons so he would not be so defenseless if and when he was attacked again. Given the circumstances, it was unreasonable to conclude that Mr. Virgil possessed the staple for the reasons advanced by the prosecution and believed by the court to justify the use of the stun belt.

The point was made that sometimes prisoners use items other than a handcuff key to pick the locks in order to escape. (RT 3465-3467, 3484-3485.) But this is difficult to accomplish (RT 3466, 3469), and so rare that neither Deputy Harvey nor Deputy Norris had ever seen or heard of such an occurrence in the courthouse during the past five years while each had worked there. (RT 3444, 3488, 3489.) Again, therefore, the fact of the staple is not a likely or reasonable indication that an attempted escape was in progress.

The absence of any real danger is clear from the deputies' actions or, more aptly, inaction in response to the staple incident. Deputy Norris obviously was not alarmed because she did nothing other than tell Deputy Harvey, walk away and prepare her report. (RT 3470.) And, upon being told of the incident, Deputy Harvey did not check Mr. Virgil's cuffs to see that they were locked; he was not concerned about Mr. Virgil attacking him and did not feel the need to check Mr. Virgil for any other metal objects or weapons. (RT 3495.) Deputy Harvey was comfortable with the normal

court procedure even though he provided the only security in the courtroom. (RT 3495-3496.)

In characterizing the purported need for increased security as an "implied" attempt to escape, the court fell short of identifying an actual attempt. A "manifest need" arises only upon a showing of unruliness, an objective and realistic need for escape prevention, or evidence of any nonconforming or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained. The imposition of a physical restraint without a record showing of manifest need constitutes an abuse of discretion. (*People v. Hill, supra,* 17 Cal.4th 800, 841; *People v. Cox* (1991) 53 Cal.3d 618, 651; *People v. Duran*, *supra*, 16 Cal.3d at p. 291; *Deck v. Missouri, supra,* 125 S.Ct. at p. 2012.) Mr. Virgil had sat at the counsel table unrestrained for months without incident. [233] The ambiguous evidence of his conduct in the holding area did not warrant using a stun belt on him in court.

2. DELIVERY OF THE GUILT VERDICTS DOES NOT JUSTIFY IMPOSITION OF ADDITIONAL SECURITY RESTRAINTS

The trial judge was notified of the incident shortly after it occurred. (RT 3496.) But, the court simply did not bother to pursue heightened security measures upon the incident with the staple; it was not until a verdict was reached that the "security concern" surfaced. (RT 3414, 3441-3442, 3496.) As defense counsel pointed out, since the incident occurred, an entire court day went by without anyone pressing the need for increased

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[233] Mr. Virgil did refuse to wear civilian clothes during the penalty phase and elected to remain dressed as he was in his jail-issued clothing. (RT 3411-3413.) The fact that Mr. Virgil insisted on wearing his prominent, blue jail clothing throughout the penalty phase renders it almost absurd to conclude that he was planning an escape or even harbored such thoughts.

security. (RT 3441.)

Further, defense counsel argued that the real impetus for shackling Mr. Virgil with a REACT stun belt under the circumstances was the verdict of guilt and commencement of penalty phase and that was not a proper basis for imposing physical restraints on the accused. (RT 3500-3501.) Accordingly, defense counsel felt that nothing should be done, but, if the court felt that something had to be done, the least intrusive means possible should be used like the presence of more bailiffs or leg shackles. (RT 3500-3501.) According to defense counsel, "you can't install shackles because the ante is up. That's what the U.S. Supreme Court decision as interpreted by *Duran* says." (RT 3501.) The court found, however, that the incident with the staple occurred, it rejected defense counsel's argument that the real motivation for application for the stun belt was the jury's special circumstance finding, and stated that it would order the device applied because of the "security issue." (RT 3502.)

3. THE COURT FAILED TO EMPLOY THE LEAST RESTRICTIVE MEANS OF INCREASING SECURITY

Stun belts may "pose[ ] a far more substantial risk of interfering with a defendant's Sixth Amendment right to confer with counsel than do leg shackles." (*United States v. Durham* (11th Cir. 2002) 287 F.3d 1297, 1305.) "Wearing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case." (*Id.*, at p. 1306.) "The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely" hinders a defendant's participation in defense of the case, "chill[ing] [that] defendant's inclination to make any movements during trial--including those movements necessary for effective communication with counsel." (*Id.*, at p. 1305.)

When the court first stated the possible need for additional security

measures, defense counsel had not even contemplated that the court might use electronic restraints:

> "DEFENSE COUNSEL: The court takes testimony and then the court would make that determination what is the least restrictive alternative in a case of this nature.
>
> "And before any security—and when I say security, I'm talking about increased bailiffs, leg covers that are not visible under the table, shackles or whatever—before any of this is imposed, I would request that the court put these deputies on the stand under oath and any reports be prepared."

(RT 3415.)

The court quickly indicated that testimony would be permitted, and then elaborated on the "alternatives":

> "THE COURT: I wanted to put on the record the alternatives that I think are at my disposal at this point in time. One obviously is some form of shackle; the other is increased bailiff personnel, which I'm not so certain is any less visible. It might be somewhat less demeaning, but certainly the jury is going to get the point.
>
> "And the other alternative that we have is a belt device that can be put on the defendant which is out of sight and the only individual who would know that the belt is on is—the only folks that would know are the attorneys and the people that are in this court now. The jury would have no idea that such a device is being used."

(RT 3416.)

The bailiff promptly offered to bring the stun belt device up to the courtroom, along with the incident report which was just being completed. (RT 3417.) The court found that to be a good idea:

> "The Court: Has either counsel seen the belt that I'm speaking of?
>
> "Defense Counsel: No.
>
> "District Attorney: No.
>
> "The Court: Do we have it?
>
> "The Bailiff: Yes, sir.
>
> "The Court: Why don't you take an opportunity to at least take a

look at it.

> "It may be the least intrusive measure we have, assuming that we decide that one has to be taken. But I wanted it brought up here so at least the attorneys can see it."

(RT 3418.)

Sergeant McGlin proceeded to describe the placement and function of the device, the remote control operation, and the fact that, upon activation of the belt, "twenty thousand volts for eight seconds causes the individual to suffer severe muscle contractions and relaxation similar to the Taser device." (RT 3418-3419.) As a matter of policy, if the belt is activated, the subject is taken to the nearest medical facility. (RT 3419-3420.)

The stun belt's primary effect on prisoners is psychological. The belt imposes on the wearer "'total psychological supremacy.'" (*Dahlberg*, *supra*, at pp. 252, 268, 280.) Wearing a belt that packs a 20,000 volt punch produces a "tremendous amount of anxiety." (*Id.*, at p. 252.) Often, individuals bound in such restraints experience fear, humiliation, and resultant agitation, anger, depression and intimidation. (*Id.*, at p. 268.)

As this Court has observed, given "the nature of the device and its effect upon the wearer when activated, requiring an unwilling defendant to wear a stun belt during trial may have significant psychological consequences." (*People v. Mar, supra*, 28 Cal.4th at p. 1205.) "The use of stun belts, depending somewhat on their method of deployment, raises all of the traditional concerns about the imposition of physical restraints. The use of stun belts, moreover, risks 'disrupt[ing] a different set of a defendant's constitutionally guaranteed rights.'" (*Gonzalez v. Pliler* (9th Cir. 2003) 341 F.3d 897, 900, quoting *United States v. Durham, supra*, 287 F.3d at p. 1305.)

In closing argument, Mr. Virgil's defense counsel again argued that the stun belt was unacceptable in view of other, less intrusive options for increasing security in the courtroom. Specifically, counsel suggested that two or three bailiffs be placed in the courtroom in lieu of a restraining device. Alternatively, leg shackles would have been shielded from the jury by the end of the table and would have adequately reassured the court that no escape attempt could occur because there would be no possibility of running. (RT 3500.) Defense counsel could not have been more clear that the stun belt was uniquely objectionable. (RT 3500.)

F. USE OF THE STUN BELT IS PREJUDICIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS

The trial court chose the stun belt based on the supposition that it would not be visible to the jury (RT 3416-3417, 3501-3502), and based on the further supposition that, therefore, it would not be inherently prejudicial. (See *Holbrook v. Flynn* (1986) 475 U.S. 560, 568.) However, as argued by Mr. Virgil's defense counsel (RT 3500), the use of the stun belt is inherently prejudicial because of the devastating psychological effect on the subject, ultimately infringing on numerous constitutional rights.

This Court has acknowledged that, with "the improper use of a stun belt, [] the greatest danger of prejudice arises from the potential adverse psychological effect of the device upon the defendant rather than from the visibility of the device to the jury." (*Mar, supra,* 28 Cal. 4th at p. 1225, fn. 7.) Contrary to the trial court's reasoning, due to the unique characteristics of the stun belt, visibility to the jury is no longer the litmus test on which selection of increased security measures properly hinges.

In *Mar,* this Court found that prejudice was met under the *Watson* "reasonable probability" standard (*People v. Watson* (1956) 46 Cal.2d 818, 836). Therefore, it refrained from delving into the contention that the error was of a federal constitutional dimension subject to *Chapman v. California*

(1967) 386 U.S. 18, 24, requiring reversal unless the State proved that the error was harmless beyond a reasonable doubt. Mr. Virgil contends that the *Chapman* standard is applicable here, but he was also prejudiced under the *Watson* standard.

As this Court recognized in *Mar,* placing a restrictive belt around a defendant, and threatening him with electric shock, causes some degree of psychological, if not physical impairment or pain. The unauthorized use of physical restraints of this nature inevitably tended to confuse and embarrass Mr. Virgil's mental faculties, and thereby materially abridged and prejudicially affected his constitutional rights of defense. (See *People v. Mar, supra,* 28 Cal.4th at 1226-1230; *People v. Harrington* (1871) 42 Cal. 165, 168.) The chilling, draconian message sent to Mr. Virgil was that any movement on his part subjected him to being zapped with 20,000 volts and rendered effectively unconscious. A defendant cannot properly communicate with his counsel, or the judge, when his every movement is subject to electric shock. The effect is paralyzing. Therefore, this Court should reverse for a new penalty phase trial in which Mr. Virgil may participate in his own penalty phase trial without the devastating psychological encumbrance of an electronic restraint device. As such and because Mr. Virgil "need not demonstrate actual prejudice to make out a due process violation" under the circumstances of his case, the error in shackling him cannot be harmless beyond a reasonable doubt. (*Deck v. Missouri, supra,* 125 S.Ct.

XX.

THE TRIAL COURT'S RULING THAT DEFENSE COUNSEL COULD NOT COMPARE MR. VIRGIL'S CASE TO OTHER, MORE EGREGIOUS CASES WHERE THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE DID NOT SEEK THE DEATH PENALTY VIOLATED MR. VIRGIL'S RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS TO HAVE THE JURY FULLY AND ADEQUATELY CONSIDER THE GRAVITY OF HIS OFFENSE IN DECIDING PENALTY

A. INTRODUCTION

From the beginning of Mr. Virgil's trial, the prosecution sought to prevent the defense from making any mention or comparison of Mr. Virgil's case with the then pending case of *People v. O.J. Simpson.* Though defense counsel was clear that he did not want to detail the facts of Mr. Simpson case, he wanted the jury to consider on the basis of that case that the death penalty was sought against homeless people and blacks who kill nonblacks, but not against the wealthy or celebrities. Defense counsel noted that this defense had been raised successfully in a Southern state and his argument should be allowed in Mr. Virgil's under the factor concerning the gravity and circumstances of the offense. Further, defense counsel argued that the trial court's limitation on his ability to argue Mr. Simpson's case [death was not sought] and cases like the "Hillside Strangler" [death sought, but not selected by the jury] and the "Night Stalker" [death sought and selected by the jury] eviscerated the heart of his argument that the death penalty would be arbitrary and capricious if applied to Mr. Virgil when compared to the circumstances of these cited cases. As will be discussed below, the trial court's limitation on defense counsel's argument and its refusal to allow the jury to consider Mr. Virgil's culpability based on intercase proportionality review violated Mr. Virgil's rights to a fair trial, a fair and impartial jury, and a reliable penalty determination under

the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts and requires the reversal of his penalty judgment of death.

B. APPLICABLE LAW AND STANDARD OF REVIEW

The Eighth and Fourteenth Amendments to the United States Constitution permit capital defendants to argue that a sentence of death would be out of proportion to the gravity of his/his offense and the majority of states with the death penalty require courts to determine whether the sentence of death being reviewed is out of proportion to death sentences in other cases before the sentence of death being considered could be affirmed. (See *Pulley v. Harris* (1984) 465 U.S. 37, 48-53, 71.) It is equally well-settled that as of 1984, the majority of States with the death penalty not only allowed, but required courts to determine whether the sentence of death being considered was out of proportion. (*Id.,* at p. 71.) Under the rationale from *Atkins v. Virginia* (2002) 536 U.S. 304, 311-312, where the United States Supreme Court held that the basic concept underlying the Eighth Amendment is the dignity of man and that a maturing society is marked by evolving standards of decency, Mr. Virgil's respectfully requests that this Court abandon its long opposition to intercase proportionality review [234] and join the chorus of the more evolved States that require such review to ensure against the arbitrary and capricious imposition of the death penalty.

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[234] This Court has held that "neither the federal nor the state Constitution compels [intercase proportionality review] . . . and we have in numerous cases declined to undertake such review. (Citations.)" (*People v. Sanders* (1990) 51 Cal.3d 471, 529-530.) Instead, this Court has held that a capital defendant is only entitled to intracase proportionality. (See *People v. Coffman* (2004) 34 Cal.4th 1, 129-130, citing *People v. Mincey* (1992) 2 Cal.4th 408, 476

Even more recently, the United States Supreme Court in *Roper v. Simmons* (2005) __ U.S. ___ [125 S.Ct. 1183, 1189-1190], cited with approval the Missouri Supreme Court's en banc decision in *State ex rel. Simmons v. Roper* (2003) 112 S.W.3d 397, for the proposition that

> "'a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade.' (Citation.)"

As it did in *Atkins*, the Supreme Court also held

> "The prohibition against 'cruel and unusual punishments,' like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual. (Citation.)"

(*Roper v. Simmons, supra,* 125 S.Ct. at p. 1190.)

In finding that the execution of juvenile offenders was prohibited by the Eighth Amendment, the high court found it noteworthy that there is a consistent trend among the States, like that involving the execution of mentally retarded offenders, and in the international community, to prohibit the execution of juvenile offenders. (*Id.,* at pp. 1192-1194.) As discussed below in Argument XXIII, subsection (F)(1), approximately twenty-nine of

the thirty-eight States [235] with the death penalty require comparative or "intercase" sentence review before a death sentence may be imposed. In other words, over 76 percent of the States with the death penalty require intercase proportionality review and this high percentage constitutes a "national consensus" under *Roper* and *Atkins* sufficient to require intercase proportionality review under the Eighth Amendment before a sentence of death may be imposed. Given the development of such a "national consensus," this Court's opposition to comparative or intercase proportionality is contrary to "evolving standards of decency" under the Eighth and Fourteenth Amendments and Mr. Virgil's sentence of death must be reversed in the absence of his right to such review.

Recently, in *People v. Benavides, supra,* 35 Cal.4th 69, 109-110, this Court suggested that its position on intercase proportionality review was evolving. The trial court in *Benavides* ruled that defense counsel could not cite to the facts of cases like the one involving "Angelo Buono, Hillside Strangler" who raped and murdered nine women by strangulation and discarded their bodies by the side of the freeways in Los Angeles and was not sentenced to death as a basis to urge the jury not to sentence his client to death. In upholding the trial court's exercise of discretion preventing such argument, this Court noted that trial courts may exercise their discretion to limit unduly time-consuming arguments involving the recitation of mitigating and aggravating facts from other cases and may do this to ensure that counsels' arguments stay on point. The Court recognized, however, that the trial court also acted within its discretion by ruling that defense counsel could argue "that there were other murderers

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[235] The death penalty schemes in Kansas and New York were declared unconstitutional in 2004, but Mr. Virgil is including those states in his calculation because he assumes the Legislatures in those states will rewrite their laws to comport with constitutional requirements.

worse than he" and the court's admonition that Benavides' jury was not to consider what juries did in other cases "did not prohibit the jury from having a point of reference with other cases with which they were familiar while assessing whether or not defendant was the 'worst of the worse'" in deciding his penalty. (*Id,* at p. 110.)

C. THE DEFENSE REQUEST TO ALLOW ARGUMENT THAT MR. VIRGIL DID NOT DESERVE THE DEATH PENALTY BECAUSE HIS CONDUCT WAS NOT NEARLY AS CULPABLE AS OTHER DEFENDANTS IN LOS ANGELES COUNTY AGAINST WHOM THE DISTRICT ATTORNEY'S OFFICE DID SEEK THE DEATH PENALTY AND THE TRIAL COURT'S RULING

During the discussion of penalty phase jury instructions on March 14, 1995, defense counsel noted that the prosecution planned to object to his argument analogizing Mr. Virgil's case to the then-pending case of *People v. O.J. Simpson.* (RT 3607.) [236] Defense counsel wished to argue before the jury in the penalty phase that the District Attorney's Office's in Los Angeles County was responsible for decisions whether to seek the death penalty and under the rationale from United States Supreme Court Justice Blackmun's last major dissent, the District Attorney's charging decisions have become arbitrary and capricious because only "homeless people, the poor people, blacks that kill whites, blacks that kill non-blacks" are subjected to the death penalty. (RT 3607.) Defense counsel explained that his argument was proper because he did not intend to say anything about the facts in Mr. Simpson's case, but only wanted the jury to consider that decisions about whether to seek the death penalty were "political" in the sense that "people of prominence, people that are celebrities rarely, if ever, get the death penalty. It's always the homeless people, blacks that kill

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[236] The prosecution sought from the beginning of Mr. Virgil's trial to prevent any reference to Mr. Simpson's case. (RT 109-110, 598-602.)

non-blacks" (RT 3607-3608.) In urging the trial court to allow his argument, defense counsel noted that such an argument was allowed recently in Alabama where the defense attorney successfully argued that his client should not be sentenced to death because the prosecution did not seek the death penalty against Mr. Simpson. (RT 33608.)

Defense counsel added that his argument was appropriate because it went to the gravity and circumstances of the offense. In this regard, defense counsel argued that he should be allowed to argue that the death penalty was inappropriate for Mr. Virgil because the District Attorney sought the death penalty for him, but did not seek that same punishment for other killers whose crimes were "much more cold, much more sadistic, much more goal oriented and much more premeditated than anything the court has seen in this trial." (RT 3608-3609.) According to defense counsel, Ms. Lao's murder was more like a rage homicide, just like the attack against Benita Rodriguez that was "most likely [committed while] in a cocaine rage." (RT 3609.) Because decisions about whether to seek the death penalty had become so "political," defense counsel wanted to argue the "politics of death" so the jury would not sentence a "homeless derelict" like Mr. Virgil to death when more serious, but rich and famous killers [like Mr. Simpson and the Menendez brothers] did not face that punishment for political reasons. (RT 3609-3612.)

The prosecutor, as he had from the inception of the case, argued that defense counsel should not be allowed to flaunt the District Attorney's decision not to seek the death penalty against Mr. Simpson [and the Menendez brothers, "two rich white kids"] because argument at the Penalty Phase should be limited to the aggravating and mitigating circumstances of the case. (RT 3610.) Though he denied knowing why his Office chose not to seek the death penalty against Mr. Simpson, the prosecutor urged the court not to allow defense counsel's argument because it was irrelevant and

could "inflame the prejudices of the jury" and distract them from the facts of Mr. Virgil's case and his background. (RT 3610-3611.) [237]

The court tentatively ruled that despite its misgivings about defense counsel's proposed argument, it believed that Penal Code section 190.3 (k) authorized the argument because it addressed "any circumstance which might mitigate the gravity of the offense. And this jury should have at its disposal all reasonable arguments based on comparisons of that sort." (RT 3613, 3614.) The court added that defense counsel must limit his argument to facts from other cases that are "of common knowledge," like the numbers of homicides and the penalties sought because "that's something that the jury can consider in weighing for itself whether the penalty sought here is appropriate." (RT 3614-3615.) Defense counsel clarified that though he believed the jury must reach its own decision about which penalty is appropriate based on the unique facts of the case, he also believed that the jury could only exercise fulfill its role of acting as the conscience of the community by considering the instant crimes in the context of other cases. (RT 3616-3618.) [238]

At the start of the afternoon session on March 14, 1995, the court revisited its earlier ruling regarding the permissible scope of defense

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[237] As will be discussed below, the prosecutor managed to tilt the scales of justice unfairly in his favor by successfully objecting to defense counsel's argument, but then urging his own version of intercase proportionality that favored death.

[238] Defense counsel did not use the phrase "conscience of the community" at that point in his argument, but did so later after the court ruled that it would not allow his proposed argument. Then, defense counsel urged the court to reconsider its ruling because limiting his argument prevented the jury from satisfying its constitutional responsibility of acting as "the conscience of the community in California" in deciding whether death was the appropriate punishment. (RT 3840.)

counsel's closing argument during the penalty phase. (RT 3681.) The court noted that neither defense counsel nor the prosecutor cited any case authority to support their respective positions and the trial court, because of its "misgivings," elected to research the issue on its own. (RT 3681.) 239 According to the court, all three cases it considered discussed making "comparative judgments in terms of penalty. And I may have been too broad in my ruling this morning. I'm not certain, so I have taken the opportunity to read those cases." (RT 3682.) Defense counsel asked for clarification and the court replied that it wanted counsel to review those cases because they addressed "whether or not the jury should be let – anything in terms of argument which would encourage the jury to make comparisons." (RT 3682.) Though the court believed that defense counsel would not "overtly" ask the jury to compare Mr. Virgil's case with other cases, it was concerned that counsel's argument as "posed" would invite the jury to make "impermissible" comparisons. (RT 3682-3683.)

Defense counsel vigorously objected because the court's refusal to allow "comparisons" would "cut out" the "heart of my argument." (RT 3683-3684.) According to counsel, he should be allowed to argue that the decision not to seek the death penalty against Mr. Simpson was based on political considerations, the politics that underlie whether to seek the death penalty render the death penalty "arbitrary and capricious," and counsel should be allowed to argue that Mr. Virgil should not be sentenced to death under a scheme that allows the District Attorney's Office not to seek the death penalty against defendants because they are "famous or celebrities."

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239 The court's research consisted of looking at and considering this Court's decisions in *People v. Grant* (1988) 45 Cal.3d 829, [presumably at pp. 860-861]; *People v. Wright* (1990) 52 Cal.3d 367, [presumably at pp. 431, 448-449]; and *People v. Mincey* 2 Cal.4th 408, [presumably at pp. 464, 476-477]. (RT 3681-3682.)

(RT 3684.) The court agreed to decide the matter the next day after counsel had an opportunity to consider the cases cited by the court. (RT 3684.)

The next day defense counsel told the court that he read the cases cited by the court, he was "not trying to pull rank or anything" because of his 13 years of experience handling capital cases, but this was the first time any court planned to "preclude" him from arguing cases of notoriety like those involving the "Hillside Strangler" and "Richard Ramirez" [the "Night Stalker"] to argue against the death penalty for his client. (RT 3837-3838.) <u>***240***</u> Continuing, defense counsel thought it amazing that the State of Georgia, a State in the "Death Belt" of the United States, requires proportionality review, but California does not, partly because the California Supreme Court has become so "very political" that it finds all errors harmless. (RT 3840.)

The prosecutor again argued that defense counsel should not be allowed to compare the present case to other cases because that would cause the jury to ignore the aggravating and mitigating circumstances and the District Attorney's charging decision in other cases was irrelevant to the jury's decision about the appropriate penalty in Mr. Virgil's case. (RT

<u>***240***</u> See *People v. Ochoa* (2001) 26 Cal.4th 398, 450, referring to Mr. Ramirez as the "Night Stalker." In *Ochoa*, trial counsel, consistent with Mr. Clark's experience in the Los Angeles County trial courts, was allowed to argue that the defendant should not be sentenced to death because that punishment should be reserved for serial killers, like Mr. Ramirez, the "Trailside Strangler" [David Carpenter], the "Freeway Killer" [William Bonin], and Lawrence Bittaker who tortured, raped and killed five teenage girls after recording their death screams. (*Id.,* at p. 450-451.) The defendant in *Ochoa* claimed on appeal that the prosecutor committed misconduct by his response to defense counsel's argument, but this Court held the prosecutor's argument was a fair response to defense counsel's argument. (*Ibid.*) Most significantly, the *Ochoa* court <u>did not</u> hold that defense counsel's argument was impermissible or in any way should have been restricted.

3841-3842.) According to the prosecutor, this Court's decisions in *People v. Mincey, supra,* 2 Cal.4th 408, and *People v. Wright, supra,* 52 Cal.3d 367, were controlling because both cases held, respectively, that arguments based on a co-defendant's punishment and statistical information about how many cases involving special circumstances result in the death penalty being sought properly were excluded as irrelevant. (RT 3842-3844.) Though the prosecutor conceded that defense counsel could and should be allowed to argue that the death penalty is never sought against a rich person, he concluded that it would be improper for defense counsel to support his argument by reference to actual cases. (RT 3844.)

The court ruled that defense counsel could argue generally that the decision to seek the death penalty has become overly political and thus too unfair and arbitrary, but counsel was not allowed to support his argument by making specific reference to other, actual cases. (RT 3845-3846.) According to the court, defense counsel's planned reference to other cases would inevitably lead the jury to make "comparisons" that the court felt would violate the "individualized nature of a jury's sentencing determination." (RT 3846.)

Defense counsel replied by urging the court not to follow the California Supreme Court's decisions in death penalty cases. According to defense counsel, this Court's decisions in capital cases have become so politically motivated that California now has the highest death penalty affirmance rate of any State court in the United States. (RT 3846.) Though he recognized that the trial court was bound by this Court's decisions, counsel also argued that he should be allowed to make his proposed argument under federal law because the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit have held that cases of great notoriety could be included as part of a defense counsel's closing argument. (RT 3846-3847.) Though the trial court believed that

defense counsel's argument had merit, it believed that this Court's rulings were controlling, but it would allow defense counsel as much leeway as possible under this Court's binding authority. (RT 3847, 3849.) [241] Defense counsel concluded by predicting that the United States Supreme Court would reverse the California Supreme Court's body of law concerning the prohibition against intercase proportionality argument and urged the trial court to reconsider its ruling because "the Ninth Circuit is routinely reversing" California Supreme Court cases and that places California's death penalty scheme "in flux." (RT 3846.)

D. THE CLOSING ARGUMENTS OF THE PROSECUTOR AND DEFENSE COUNSEL RELEVANT TO THE ISSUE OF INTERCASE PROPORTIONALITY

The prosecutor began his closing argument by addressing the circumstances of Mr. Virgil's reported offenses against Beatriz Addo, Benita Rodriguez, Joe Draper, and Ms. Lao. (RT 3852-3853.) The prosecutor reminded the jury of the brief nature of the penalty phase, he urged the death penalty for Mr. Virgil because of Ms. Lao's murder and the attack on Rodriguez, and he argued that Mr. Virgil deserved the death penalty because of his "brutalizing" and "remorseless savagery [against] two victims [Ms. Lao and Rodriguez]." (RT 3853-3854.) Anticipating defense counsel's possible penalty argument, the prosecutor added that the jury should not consider the role of the Gardena Police Department [a delayed and inordinately sloppy and inadequate investigation], the role of

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[241] Defense counsel noted for the record that a defendant in Florida was allowed to compare the circumstances of his case to O.J. Simpson's case, a much more egregious case in his view, where the authorities did not seek the death penalty, and the defendant in that case received a sentence of life without possibility of parole. (RT 3847-3848.) The trial court believed that case had no application to California because Florida, like Georgia, allows argument concerning intercase proportionality. (RT 3848-3849.)

District Attorney's Office [its political and arbitrary decision to seek death against a homeless derelict like Mr. Virgil, but not against rich and famous celebrities], the actions of Mr. Virgil's mother [her unloving, terrible and violent parenting], and the effects of cocaine [the other "woman" in Mr. Virgil's life] in deciding penalty. (RT 3854.)

The prosecutor sought to strengthen his own integrity and that of his office in the jurors' minds by arguing that the prosecution of a capital case is

> "reach[ed] . . . with some trepidation. [because] Not all murders are capital murders, and not all capital murders merit the death penalty. Each case has to be decided upon its own facts, upon the presence of aggravating factors or mitigating factors; each case depends upon its own provability. This particular case should be looked at in terms of the evidence in this case, and not what may happen in other instances or in other courtrooms, for only your decision counts here, not the decision of somebody else. (RT 3854-3855.)

The prosecutor continued that during voir dire, jurors were asked if they could impose either life without possibility of parole or death and whether they could envision looking Mr. Virgil in the eye and saying that he should die. (RT 3855.) The prosecutor encouraged jurors to follow their oath and responses to his questions by sentencing Mr. Virgil to death because if they could not choose the death penalty for Mr. Virgil, they could not choose that penalty for anyone. (RT 3855.) In arguing for the death penalty, the prosecutor noted that Mr. Virgil's life would improve in prison because he would not have to rake leaves or steal pies, but that did "not mean that if a rich spoiled brat walked into this courtroom under the circumstances of the same kind of case that I would not be arguing just as loudly for death. In fact I will give him double time." (RT 3856.)

In reminding the jury that it was about to make a qualitative decision based on the aggravating and mitigating circumstances in Mr. Virgil's case, the prosecutor added that the defense wanted the jury to abandon its

concept of morality by concluding that a person's actions are dictated by external factors and not by the exercise of free will, freedom of choice, or hard work. (RT 3857-3867.) According to the prosecutor,

> "[t]here isn't a murderer that can walk into this courtroom and parade before a jury some incident, some insult, some misfortune in his childhood and he can say it caused him to kill. And if you buy that, Ladies and Gentlemen, and if you believe that our courtrooms should become sessions of psychotherapy, then I submit to you you might as well take your morality and flush it down the toilet." (RT 3867-3868.)

The prosecutor argued that Mr. Virgil deserved the death penalty because his siblings grew up in the same environment and they did not commit murder, the prosecutor reminded the jury of President Clinton's upbringing by an abusive alcoholic stepfather, and the prosecutor said he felt so sorry for Ms. Antoine and Mr. Virgil's young son [Nigel] who will have to live with the legacy of his father. (RT 3868.) The prosecutor urged the jury not to spare Mr. Virgil's life because of Nigel and he "hope[d] to God" that no one ever tells Nigel about his father's reported crimes at the Donut King and Hilltop Motel. (RT 3868-3869, 3878.) According to the prosecutor, Mr. Virgil deserved no sympathy, even though the jury might feel some sympathy for Ms. Antoine and Nigel, because he was like a [selfish and uncaring] father who abandoned his son without leaving a forwarding address. (RT 3869.) Seeking to strengthen that theme, the prosecutor argued that

> "when we look at capital defendants in capital murder cases there is not an one of them that doesn't have a loving family member, a loving spouse, a loving parent, a loving child, and I suppose that even Hitler had people that loved him; that wouldn't keep me from vigorously imposing or asking for the death penalty." (RT 3869.)

The prosecutor sought to heighten the emotional impact of the [aggravating] circumstances of the crimes against Ms. Lao by saying that after nine years of prosecuting crimes, he still had not gotten used to

looking at photographs of murders scenes and dead people. (RT 3869-3874.) The jury [apparently like the prosecutor] should feel "the cold fury of outrage" over the circumstances of the crimes against Ms. Lao and Ms. Rodriguez. (RT 3874.)

Finally, the prosecutor argued his own version of intercase proportionality to persuade the jury that Mr. Virgil deserved death. According to the prosecutor,

> "When Kitty Gennovese's body was found 20 years ago in a dark alley in New York because people didn't care, it was because people thought that their civic duty comprised only the paying of taxes and the minding of their own business. And when you look at the facts of a case like that, the only thing that it cries out for is death, the only thing it cries out for is justice." (RT 3876.) [242]

Defense counsel began his closing argument by telling the jury of his experience handling seven death penalty case over a 13-year period and how inadequate he felt arguing these cases because they should be argued by a priest or a person trained in psychology. (RT 3877.) Defense counsel told the jury that the rules have changed in the Penalty Phase of a capital trial to allow the jury to "be guided by mercy, compassion, sympathy, understanding," and render a verdict regardless of public opinion or external pressures. (RT 3877-3878.) Defense counsel noted that he was struck by the prosecutor's extremely "vitriolic argument" that urged the jury to hold Mr. Virgil strictly liable for his actions. (RT 3878.) Counsel reminded the jurors that the prosecutor had talked about President Clinton's

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[242] The prosecutor first raised a comparison to Ms. Genovese's case during his closing argument at the guilt phase. Then, he argued that Ms. Genovese was chased though deserted streets in a bad part of New York and stabbed repeatedly as she screamed out for help. In response, neighbors closed their windows and bolted their doors without even bothering to call 911. (RT 3215-3216.) Unlike in that case, the customers and merchants near the Donut King came to Ms. Lao's assistance. (RT 3216.)

childhood, but he neglected to tell the story of a young black man in Arkansas who had massive brain damage after being shot, an extremely low IQ, and did not even know that he was in prison and about to be executed [at his last meal just before his execution, the man asked to save his pie so he could eat it later in the day]. (RT 3878, 3979.) Because of the man's profound retardation, the Arkansas Board of Prison Terms had recommended clemency to then-Governor Clinton, but he ignored that recommendation and allowed the execution to proceed for political reasons [he was running for President on a strong, pro-death penalty platform]. (RT 3878-3879.)

Defense counsel argued that each juror in the penalty phase is guided by his/her respective personal conscience, jurors are acting as the conscience of the community in this part of the case, and jurors were to temper a desire for retribution with sympathy, compassion, mercy, understanding, and justice. (RT 3879.) Counsel commented that the prosecutor gave a very able and effective argument about strict accountability and how everyone should be able to rise above their background and become model citizens. (RT 3879.) The problem with that argument, however, is that the death penalty in the United States has become "arbitrary and capricious" because District Attorneys decide whether to seek that penalty and they do so only against "anonymous people, blacks that kill nonblacks, poor people, people that are not celebrities and most, importantly, people, who don't have money, who can't afford, four, five, six lawyers." (RT 3881.)

Counsel argued that jurors should consider the arbitrary charging practices because you "are playing God right now," you are the buffer between the District Attorney's arbitrary charging practices, and you are acting as a check against the mood in California to lock up everyone and kill them. (RT 3880-3882.) According to counsel, it was important that

jurors understand they had great discretion in deciding penalty, contrary to the prosecutor's misleading argument that the jurors' only choice was to sentence Mr. Virgil to death. (RT 3882-3883.) Further, counsel urged jurors to exercise their discretion by sparing Mr. Virgil's life on the basis of lingering doubt – a judgment of death is final and there are many gaps in the evidence against Mr. Virgil's because of the poor investigation done in his case. (RT 3883-3384.)

Defense counsel then turned to his personal experience of seeing friends die, his wonder at the heroic efforts by physicians to keep people alive, and though his close friend who died recently had some bad characteristics, he could only remember the good things about him. (RT 3886-3887.) According to counsel, the prosecutor was asking jurors to ignore the good things about Mr. Virgil and simply "[g]as him." (RT 3886-3887.) Counsel reminded jurors that their penalty decision should be based on the person's entire life, not just a portion of his life. (RT 3887, 3891-3892.) Further, counsel argued that people experiencing similar childhood environments can turn out differently, but it is understood and well-documented that people who come from abusive homes are at greater risk to become abusers. (RT 3887-3888.)

Counsel further urged the jury to spare Mr. Virgil's life by reading from an article/poem published in the Los Angeles Times about a man who lost his "beautiful lady" to the "bitch" of "cocaine" who turned her into "a bag of bones." (RT 3888.) Counsel also argued that "crack [cocaine]" can destroy a person's life much, much more quickly than alcohol and even the Los Angeles Police Department recognizes that this drug is so powerful and unpredictable that it can

> "make[] you end up on skid row. . . . And crack cocaine especially has been the scourge and it can take a poor black kid in a chaotic environment where his mother was abusive and drank and beat him and didn't love him and didn't nurture him, causing him to run

away as a youngster. It can take that youngster and rip his heart and soul out of him, and it was like water going down a drain. It went down slow and then as it got to the bottom it went like that." (RT 3889, 3892.)

According to counsel, Mr. Virgil's sister and brother did not end up in Mr. Virgil's circumstances because they did not get "hooked on crack cocaine" and though Mr. Virgil should have gone to the "Betty Ford Clinic" along with "Elizabeth Taylor," he could not because there are ever increasing limits on public resources for people with substance abuse problems. (RT 3889-3890.)

Counsel asked jurors if they had seen the then-recent movie "Boyz in the Hood" because it impressed him greatly with its underlying message that the cycle of violence can only end when people stop killing one another. (RT 3893.) According to counsel, the movie illustrated why the District Attorney's argument urging the jury to kill the killer or seek vengeance through the concept of an eye-for-an-eye is all wrong. (RT 3893.) Continuing, defense counsel discussed how Mahatma Gandhi and Martin Luther King changed their respective societies through nonviolence and reminded the jurors about "Torquemada," the Chief Executioner during the Spanish Inquisition, and asked if he made society better through executions? (RT 3893-3894.)

Counsel then turned to the "pyramid" prepared by someone in his office that was intended to identify the degrees of culpability in a murder case, with the small, top of the pyramid being reserved for those who should be sentenced to death. (RT 3894.) Because the prosecutor theorized that Mr. Virgil killed Ms. Lao in a rage, Mr. Virgil should be placed in the lower part of the pyramid that is reserved for those who commit unpremeditated murder. (RT 3894.) This was especially so because Mr. Virgil was eligible for the death penalty only because the jury found true the special circumstance that the killing occurred during the commission of

robbery. (RT 3894.) Counsel explained that the prosecutor did not adequately address the concept of culpability because he failed to mention that only the people at the top of the pyramid should get the death penalty because they are the worst of the worst, e.g.., those defendants who have no redemptive features and who commit the most cold-blooded, heinous murders. (RT 3895.) Counsel reminded the jury that 12 citizens were picked at random from the community to be "the conscience of the community" and they stand as the chief protection against the death penalty being imposed arbitrarily and capriciously. (RT 3896.)

According to counsel, Ms. Lao's homicide and Mr. Virgil's moral culpability for her homicide should be considered on the low end of culpability [near the bottom of the pyramid], unlike a Mafia-style killing where the person plans and lies in wait for his victim and thereby deserves the death penalty for his cold, calculating conduct. (RT 3897-3898.) For this reason, prosecutors are wrong by arguing that a killing committed in rage is the same as a killing committed with premeditation and deliberation and that a killing in rage deserves an automatic death penalty. (RT 3897-3898.)

Counsel continued that jurors have tremendous discretion in death penalty cases when they consider and weigh aggravating and mitigating factors, but each juror must decide what punishment is appropriate based on the totality of the circumstances, including Mr. Virgil's background. (RT 3898-3899.) Jurors must not make their penalty decision by deciding to make an example out of Mr. Virgil or for purposes of retribution. (RT 3901.) Though the prosecutor in Mr. Virgil's case might have "be[en] good in the Spanish Inquisition," he was wrong by urging the jurors to reject the Factor (k) "catchall" category because jurors must decide penalty by considering the entire person, not just a man who committed a homicide. (RT 3902.)

Defense counsel concluded by discussing the movie "Demetrius and the Gladiators" and how he always loved that movie. (RT 3903.) Defense counsel recounted a scene where one gladiator refused to make friends with another gladiator because that might prevent him from killing the other gladiator and then expressed his concern that jurors may have become friends during the pendency of the trial, but the jurors' sentencing decision should not be based on their collective friendship. (RT 3903-3904.) In conclusion, defense counsel urged the jurors to reach "a proper and just" decision and not an "arbitrary, capricious" one. (RT 3904.)

E. THE TRIAL COURT'S LIMITATION ON DEFENSE COUNSEL'S CLOSING ARGUMENT REQUIRES THE REVERSAL OF MR. VIRGIL'S JUDGMENT OF DEATH

During Mr. Virgil's trial, defense counsel recognized the importance of intercase proportionality by urging the trial court to allow him to compare the circumstances of Mr. Virgil's case to more egregious cases involving multiple murders or murders committed with premeditation and deliberation. (RT 3607-3612, 3683-3684, 3837-3840.) According to defense counsel, the court gutted the heart of his penalty argument by preventing him from arguing comparative cases that would have illustrated in realistic and effective terms the difference between Ms. Lao's homicide, a single killing committed in rage without premeditation and deliberation, and multiple killings or those that were premeditated and deliberate where the District Attorney's Office elected not to seek the death penalty for political reasons. (RT 3683-3684.)

It is clear from defense counsel's argument to the court and his penalty argument that he sought to argue more egregious cases like that of the "Night Stalker," the "Hillside Strangler," the Menendez brothers, and O.J. Simpson's case to establish that the circumstances of Ms. Lao's homicide provided a basis for a sentence less than death under *McLeskey v.*

Kemp (1987) 481 U.S. 279, 304, and *Skipper v. South Carolina* (1986) 476 U.S. 1, 4. Though trial courts retain discretion to exclude evidence as irrelevant [see *People v. Frye* (1998) 18 Cal.4th 894, 1015], the trial court's ruling in Mr. Virgil's case was an abuse of discretion that prevented and interfered with Mr. Virgil's federal and state constitutional rights to have the jury fully and adequately consider the circumstances of his offense and act as the conscience of the community in deciding his punishment. Though this Court has long held to the contrary [see *People v. Beardslee, supra,* 53 Cal.3d at p. 111], the United States Supreme Court has held that evolving standards of decency are at the core of a defendant's Eighth Amendment rights and the majority of States who require intercase proportionality review do so to prevent the arbitrary and capricious imposition of the death penalty. On that basis, this Court should abandon its opposition to such review.

Further, the unique circumstances of Mr. Virgil's case required intercase proportionality to level the playing field. After successfully preventing defense counsel from putting on the heart of Mr. Virgil's penalty defense, the prosecutor suggested his own version of intercase proportionality review and then argued that <u>his</u> review demanded the death penalty for Mr. Virgil. According to the prosecutor, he would seek the death penalty against a rich person if he felt that punishment was warranted, thereby suggesting he knew more than the jury about who deserved the death penalty. More important, however, the prosecutor argued that Mr. Virgil's case should be compared to and determined by the case and circumstances that resulted in the death of Kitty Genovese, some 20 years before in New York. According to the prosecutor, the jury should look to that case because "when you look at the facts of a case like that, the only thing that it cries out for is death, the only thing it cries out for is justice." (RT 3876.) Finally, the prosecutor used that case to urge jurors

not to shut their windows and bolt their doors to Ms. Lao's muffled screams, like those in Ms. Genovese's community, but give effect to those screams by sentencing Mr. Virgil to death. Given the nature of the prosecutor's argument that vouched for his personal integrity, suggested he was someone who knew best that Mr. Virgil deserved the death penalty, and urged the imposition of that penalty against Mr. Virgil on the basis of his own version of intercase proportionality review, the trial court's limitation on defense counsel's argument cannot be harmless beyond a reasonable doubt and Mr. Virgil's penalty judgment must be reversed. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

XXI.

MR. VIRGIL RESPECTFULLY INVOKES HIS RIGHT TO INTRACASE PROPORTIONALITY REVIEW BECAUSE HIS JUDGMENT OF DEATH IS DISPROPORTIONATE TO HIS PERSONAL CULPABILITY AND VIOLATES HIS RIGHTS UNDER THE EIGHTH AMENDMENT AND ITS STATE ANALOGUE

A. APPLICABLE LAW AND STANDARD OF REVIEW

In *In re Lynch* (1972) 8 Cal.3d 410, 424-427, this Court formulated a three part analysis for deciding whether a sentence is cruel and unusual: (1) the nature of the offense and the offender, with particular regard to the degree of danger which both present to society; (2) a comparison of the challenged penalty with the punishment prescribed in the same jurisdiction for other more serious offenses; and (3) a comparison of the challenged penalty with the punishment prescribed for the same offense in other jurisdictions.

In *Solem v. Helm* (1983) 463 U.S. 277, 284-288, 292, the United States Supreme Court held that the Eighth Amendment proscribes not only punishments which are "'barbaric,' but also 'sentences that are disproportionate to the crime committed'" and a "court's proportionality

analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."

In *Harmelin v. Michigan* (1991) 501 U.S. 957, 997, the high court could not reach a majority decision and Justice Kennedy steered a middle course between the views of the conservative and liberal wings of the court. According to Justice Kennedy's plurality opinion [joined by Justices O'Connor and Souter] there are four "common principles that give content to the uses and limits of proportionality review." (*Id.* at p. 998.) These principles may be summarized as follows:

First, the setting of prison terms for specific crimes involves substantive penological judgments within the province of legislatures rather than courts, and courts must give substantial deference to the broad authority legislatures have in setting punishment for crimes. Second, the Eighth Amendment does not compel any particular penological theory, and different criminal justice systems may give different weight at different times to the goals of retribution, deterrence, incapacitation and rehabilitation. Third, "marked divergences" in sentencing and length of prison terms is an inevitable and often beneficial result of a federal structure; that a state has the most severe punishment for a particular crime does not alone render it grossly disproportionate. (*Id.* at p. 1000.) Fourth, proportionality review should be by objective factors to the greatest extent possible, but courts lack "clear objective standards to distinguish between sentences for different terms of years." (*Id.* at pp. 999-1001.)

Whereas *Solem* held "no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment" (*Solem v. Helm, supra*, 463 U.S. at p. 291, fn. 17), *Harmelin*

added that "[o]n the other hand, one factor may be sufficient to determine the constitutionality of a particular sentence." (*Harmelin v. Michigan, supra*, 501 U.S. at p. 1004 (conc. opn. of Kennedy, J.).) In Harmelin's case, according to the concurring justices, the gravity of his crime alone was such that "a comparison of his crime with his sentence does not give rise to an inference of gross disproportionality, and comparative analysis of his sentence . . . need not be performed." (*Id.* at p. 1005.)

Recently, in *People v. Coffman* (2004) 34 Cal.4th 1, 129-130, the defendant invoked her right to intracase proportionality review by claiming that her sentence of death was out of proportion to her personal culpability and violated her rights under the Eighth Amendment to the United States Constitution and its state analogue, California Constitution, article I, section 17. In addressing the defendant's claim, the Court noted that the defendant was not like the immature 17-year old in defendant in *People v. Dillon* (1983) 34 Cal.3d 441, 450, who shot the victim in a panic during the failed robbery of the victim's marijuana crop. Instead, the defendant was 24 years old at the time of the offense and the jury found that she committed murder and engaged in the charged crimes with an intent to kill or aided and abetted her co-defendant in killing the victim. Further, the defendant and her co-defendant committed a similar murder and other felony offenses in Orange County and the jury obviously rejected her mitigating evidence by choosing a sentence of death for offenses that "were of the most serious nature." (*Id.,* at p. 130.) The analysis in *Coffman* that in part relied on the earlier decision in *People v. Mincey* (1992) 2 Cal.4th 408, 476, establishes that this Court's intracase proportionality analysis involves little more than deferring to the jury's finding and does involve a serious evaluation of the defendant's claim. This is especially so given the well-reasoned critique of this Court's Eighth Amendment jurisprudence by the United States Court of Appeals for the Ninth Circuit.

In *Sanders v. Woodford* (9th Cir. 2004) 373 F.3d 1054, 1062-1063, the Court of Appeals considered the constitutionality of this Court's affirmance of defendant's sentence of death after reversing two of the four special circumstances found true by the jury. [243] The Court of Appeals criticized this Court's analysis because it failed to follow

> "the procedures constitutionally mandated for appellate review in a weighing state where an aggravating circumstance has been invalidated. The California court did not remand for resentencing. It also did not independently reweigh the aggravating and mitigating factors to ensure an individualized sentence." (*Id.,* at p. 1063.)

Further, the Court of Appeals noted in *Sanders* that while the Court did conduct some form of harmless-error analysis, it did not, as it was required to do, find the error harmless beyond a reasonable doubt. (*Ibid.*) Finally, the Court of Appeals concluded (1) it could not defer to this Court's review as constitutionally adequate because it seriously doubted whether this Court actually conducted the required analysis; (2) this Court committed a serious error by applying inapplicable law to uphold the jury's verdict of death; and (3) the defendant "did not receive the individualized death sentence to which he was entitled because the California Supreme Court did not conduct an adequate, independent appellate review." (*Id.*,

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243 On March 28, 2005, the United States Supreme Court granted certiorari in *Brown v. Sanders* (2005) ___ U.S. ___ [__S.Ct. ___ ,2005 WL 153310.], on Questions 1 and 3 presented in the petition.

assault p. 1064.) [244] Though the above decisions were raised in a slightly different context following the reversal of two of four or three of four special circumstances, respectively, it remains that the adequacy of this Court's review of Eighth Amendment claims and its harmless-error analysis are not without substantial question.

B. MR. VIRGIL'S PERSONAL CULPABILITY IS DISPROPORTIONATE TO HIS SENTENCE OF DEATH AND REQUIRES THE REVERSAL OF HIS SENTENCE

Undoubtedly, the crimes against Ms. Lao were extremely serious and her death violent and the crimes against Ms. Rodriguez were similarly extremely serious and violent. But, only one person was killed and Mr. Virgil was not allowed to argue that someone like O.J. Simpson [or the other specific multiple murderers mentioned by defense counsel during his in limine argument to the court] who was accused of committing multiple murders was not facing the death penalty and this rendered Mr. Virgil's sentence of death disproportionate to his personal culpability. The other charged crimes, though serious, did not involve any serious, intentional

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[244] The Court of Appeals found that this Court committed the same error in *Beardslee v. Brown* (2004) 395 F.3d 1032, because

"it is apparent from the decision that the California Supreme Court did not consciously undertake an analysis of whether the error was harmless beyond a reasonable doubt" and we agree with the defendant "that, as to the California Supreme Court's consideration of the witness-killing special circumstances, Beardslee's Eighth Amendment rights were violated, and the California Supreme Court did not undertake a proper independent review to determine whether the error was harmless." Ultimately, the Court of Appeals affirmed the district court's denial of his habeas petition because the errors at issue were not prejudicial. (*Id.*, at p. 1044.)

injuries [245] and Mr. Virgil's prior convictions for second degree burglary were very minor offenses, though charged as felonies. Further, there is a substantial basis to conclude that Mr. Virgil was under the influence of cocaine when he committed the crimes against Ms. Lao [startled appearance, wild eyes, and leaving property and eyewitnesses behind] and Ms. Rodriguez [normal and calm, but 10 minutes or so later acting completely differed and crazed]. Though the crimes admittedly were serious and pose a danger to society, they also reflect a diminished degree of personal culpability during their commission because of the well-recognized scourge-like effects of crack cocaine, Mr. Virgil's lack of organized thought, [246] and the lack of adequate treatment programs for a poor and homeless person like Mr. Virgil.

Further, there is a substantial basis to believe that Mr. Virgil has significant redeeming qualities and was a loving person despite his terrible and violent upbringing. Mr. Virgil had no history of committing violence before the two-week period in which the reported charged and uncharged crimes were committed. This was even though he had been attacked with a box cutter and seriously injured by Ms. Antoine during an argument, but she testified that he never retaliated or threatened retaliation against her.

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245 Mr. Draper claimed his fingers were cut when he grabbed the knife, but it cannot be said that his injuries were intentional in the sense that they were akin to stab wounds and he suffered no ill effects from these reported injuries. (RT 2456-2459, 2512, 2525, 2546-2547.) Ms. Addo claimed that she suffered injuries to her back, but these wounds were extremely minor if they even existed at all. (RT 685-686, 742.)

246 In this regard, if Mr. Virgil was the person in the donut shop, he did not attempt to kill witnesses and he left behind property that could be used to identify him. And, if was truly trying to kill Ms. Rodriguez as she claimed, he would have resorted to alternative means like strangulation once she broke the blade of the knife.

He was confronted, cornered and chased by people at the St. Francis Cabrini Church and outside of the M&M Soul Food restaurant and detained after those incidents, but he never violently resisted or even threatened violence during these incidents. Finally, he acted commendably and responsibly immediately after learning that he was a father by communicating with Ms. Antoine and by doing all he could to help her raise his son by notifying his family and enlisting them to help Ms. Antoine and Nigel however they could.

There is no doubt that California and other States with the death penalty allow that punishment for crimes like the ones committed against Ms. Lao. As argued above, however, there is a substantial basis to find that Mr. Virgil's personal culpability was disproportionate because of the effects of rage/cocaine intoxication/withdrawal, the taking of money from the cash register was an afterthought and that his overall character did not warrant the death penalty. Under the totality of the circumstances, Mr. Virgil's respectfully requests that this Court find through its intracase proportionality review that Mr. Virgil's judgment of death must be reversed because it is disproportionate to his personal culpability under the Eighth Amendment to the United States Constitution and its California analogue.

XXII.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT MR. VIRGIL'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. Because this Court has rejected challenges to most of these features, Mr. Virgil presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional

grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that Mr. Virgil's sentence be set aside. [247]

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 to justify the imposition of the death penalty. The arbitrariness of the application of the statute becomes clear as we see that death is imposed even with circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home). 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 – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual

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[247] Mr. Virgil wishes to thank the California Appellate Project for its very substantial contribution to his argument challenging California's death penalty scheme.

prerequisites to the imposition of the death penalty are "found" by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who shall be executed permeates the entire process of applying the penalty of death.

A. MR. VIRGIL'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. 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." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.]. (*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.)

California purports to accomplish the constitutionally obligatory narrowing of a death penalty statute via the provisions for "special circumstances" set forth in section 190.2. As this Court has explained, "[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 Mr. Virgil the statute contained twenty-nine special circumstances [248] 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*

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[248] 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-three.

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 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 intentional 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? (1997) 72 N.Y.U. L.Rev. 1283, 1324-26.) [249] 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. The statutory list of special circumstances justifying the death penalty is so broad as to cover all but a small subset of murders. Section 190.2 does not genuinely narrow the class of persons eligible for the death penalty (nor was it intended to (see 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [California's then-effective "weak death penalty law does not apply to every murderer. Proposition 7 would."]).

This issue has not been addressed by the United States Supreme Court. This Court has routinely rejected challenges to the statute's lack of any meaningful narrowing, and has done 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

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[249] The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

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 Mr. Virgil 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 virtually 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 lead to 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. [250] (See sections B and D of this Argument.)

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[250] In a habeas petition to be filed after the completion of appellate briefing, Mr. Virgil will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, Mr. Virgil will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

B. Mr. Virgil's Death Penalty Is Invalid Because Penal Code § 190.3(A) As Applied Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

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 this factor 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. 251 Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance on the "circumstance of the crime" aggravating factor because three weeks after the crime defendant sought to conceal evidence, 252 or had a "hatred of religion," 253 or threatened witnesses after his

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251 *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.

252 *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

253 *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

arrest, [254] or disposed of the victim's body in a manner that precluded its recovery. [255]

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 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 that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds [256] or because the defendant killed with a single execution-style wound. [257]

b. Because the defendant killed the victim for some purportedly

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[254] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[255] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35, *cert. den.* 496 U.S. 931 (1990).

[256] 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).

[257] 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).

aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification) [258] or because the defendant killed the victim without any motive at all. [259]

c. Because the defendant killed the victim in cold blood [260] or because the defendant killed the victim during a savage frenzy. [261]

d. Because the defendant engaged in a cover-up to conceal his crime [262] or because the defendant did not engage in a cover-up and so must have been proud of it. [263]

e. Because the defendant made the victim endure the terror of anticipating a violent death [264] or because the defendant killed

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258 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).

259 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).

260 See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

261 See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

262 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).

263 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).

264 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.

instantly without any warning. [265]

f. Because the victim had children [266] or because the victim had not yet had a chance to have children. [267]

g. Because the victim struggled prior to death [268] or because the victim did not struggle. [269]

h. Because the defendant had a prior relationship with the victim [270] or because the victim was a complete stranger to the defendant. [271]

These examples show that absent any statutory limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it 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

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[265] See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[266] See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[267] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[268] 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).

[269] See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[270] 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).

[271] See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

use of the "circumstances of the crime" aggravating factor 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, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[272]
>
> b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[273]
>
> c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for

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272 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 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").

273 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).

sexual gratification, to avoid arrest, for revenge, or for no motive at all.274

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day. 275

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location. 276

Thus, in actual application of factor (a), there exists an aggravating factor 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

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274 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).

275 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).

276 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).

homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale. [277]

In practice, section 190.3's broad "circumstances of the crime" aggravating factor 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].) This is unconstitutional.

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH FACTUAL DETERMINATION PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute effectively does nothing to 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.

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277 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 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. (See section C of this argument, below.)

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. In California, juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that the aggravating circumstances 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.

Inter-case proportionality review should be required, but under this loose scheme, such review is not even possible. 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. MR. VIRGIL'S DEATH VERDICT WAS NOT PREMISED ON FINDINGS BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY THAT ONE OR MORE AGGRAVATING FACTORS EXISTED AND THAT THESE FACTORS OUTWEIGHED MITIGATING FACTORS; HIS CONSTITUTIONAL RIGHT TO JURY DETERMINATION BEYOND A REASONABLE DOUBT OF ALL FACTS ESSENTIAL TO THE IMPOSITION OF A DEATH PENALTY WAS THEREBY VIOLATED. [278]

Except as to prior criminality [prior convictions and other violent criminal activity], Mr. Virgil's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not

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[278] To a degree, this argument is similar to the more specific argument *ante* concerning the trial court's instruction with CALJIC No. 8.84.1 and the failure to instruct with CALJIC No. 2.90 and other applicable instructions.

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, 490 [hereinafter *Apprendi*] and *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*].

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 held that Arizona's death penalty scheme, under which a judge sitting without a jury makes factual findings necessary to impose the death penalty, violated the defendant's constitutional right to have the jury determine, unanimously and beyond a reasonable doubt, any fact that may increase the maximum punishment. While the primary problem presented by Arizona's capital sentencing scheme was that a judge, sitting without a jury, made the critical findings, the court reiterated its holding in *Apprendi*, that when the State bases an increased statutory punishment upon additional findings, such findings must be made by a unanimous jury beyond a reasonable doubt. California's death penalty scheme as interpreted by this Court violates the federal Constitution.

More recently in *Blakely v. Washington, supra,* 124 S.Ct. at p. 2536, the United States Supreme Court reaffirmed its commitment to the holdings in *Apprendi* and *Ring* and debunked the State's reasoning by holding that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. When a trial court seeks to go beyond the "maximum punishment" called for the jury's guilt verdicts, the additional facts necessary to impose the maximum punishment must be found by a jury under the beyond a reasonable doubt. As argued above in Argument XII, the jury's findings of guilt for first degree murder and any alleged special circumstances means that the maximum punishment that a judge could impose based on those findings alone is life without possibility of parole. (See also *Sattazahn v. Pennsylvania, supra,* 537 U.S. at pp. 111-112.) This Court has recognized that death is a greater punishment as a matter of law and that sentence can only be imposed if the jury makes two additional findings beyond the guilt verdict and truth of the special circumstance[s]. That is, the jury must find (1) the existence of aggravating circumstances and (2) those circumstances outweigh any in mitigation. Accordingly, Mr. Virgil respectfully submits that this Court's persistence in maintaining that the rule from *Apprendi-Ring-Blakely* does not apply to California's death penalty scheme and capital juries are not required to reach unanimous agreement on the factors in aggravation and that they outweigh those in mitigating under the beyond a reasonable doubt standard is simply wrong and contrary to binding authority from the United States Supreme Court. [279]

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[279] As mentioned above, in *People v. Morrison, supra,* 34 Cal.4th, 731, the Court rejected the claim that *Blakely* applies to California's death penalty scheme.

D. IN THE WAKE OF APPRENDI, RING AND BLAKELY, ANY AGGRAVATING FACTOR NECESSARY TO THE IMPOSITION OF DEATH MUST BE FOUND TRUE BEYOND A REASONABLE DOUBT

Most of the states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and a few states have related provisions. [280] Only California and three other states (Florida, Montana, and New Hampshire) fail to statutorily address the matter.

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[280] See Ala. Code § 13A-5-45(e) (1975); Ariz. Rev. Stat. Ann. § 13-703.01 (West 2002); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. §§ 16-11-103(d), 18-1.3-1201 (West 2002); Del. Code Ann. tit. 11, 4209 (2002); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (Michie 2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9 (Michie 2002); 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); Mo. Rev. Stat. § 565.030.4 (2003); Mont. Code Ann. § 46-1- 401 (2002); 2003 Mont. Laws 154 § 1; Neb. Rev. Stat. § 29-2522 (2002); *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. 175.554 & 175.556 (2003); 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. 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).) Connecticut requires that the prosecution prove the existence of penalty phase aggravating factors, but specifies no burden. (Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

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, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors. [281] According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "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

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281 This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility; 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.)

outweigh mitigating factors. [282] These factual determinations 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. [283]

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 is based on a truncated view of California law. As section 190, subd. (a),

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282 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 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.)

283 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.)

[284] indicates, the maximum penalty for *any* first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring* to no avail:

In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(c) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. . . . 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 115. (*Ring*, *supra,* 536 U.S. at pp. 603-604; see also *Sattazahn v. Pennsylvania, supra,* 537 U.S. at pp. 111-112, and *Blakely v. Washington, supra,* 124 S.Ct. at p. 2537, where that reasoning was reaffirmed and the rationale used by this Court to find that *Apprendi* and *Ring* do not apply to California's death penalty scheme was completely debunked.)

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[284] 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 this regard, California's statute is no different than Arizona's. [285] 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 in a formal sense." (*Ring*, *supra*, 536 U.S. at p. 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." (Section 190, subd. (a).)

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 finding that one or more aggravating circumstances substantially outweigh(s) 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].)

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285 As argued previously in Argument XII, this Court's decision in *People v. Prieto, supra,* 30 Cal.4th at p. 263, finding that California's death penalty scheme differs appreciably from Arizona's death penalty scheme and therefore that the rule from *Apprendi-Ring-Blakely* does not apply is wrong.

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, [286] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances. [287]

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 p. 602.) The issue of *Ring*'s applicability hinges on whether as a practical matter, the sentencer must make additional fact-findings during the penalty phase before determining

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[286] 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 enumerated aggravating circumstances and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

[287] California Penal Code 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." In *People v. Brown* (1985) 40 Cal.3d 512, 541, 545, fn. 19, the California Supreme Court construed the "shall impose" language of section 190.3 as not creating a mandatory sentencing standard and approved an instruction advising the sentencing jury that a finding that the aggravating circumstances substantially outweighed the mitigating circumstances was a prerequisite to imposing a death sentence. California juries continue to be so instructed. (See CALJIC 8.88 (7th ed. 2003).)

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 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. The finding of an aggravating factor is an essential step before the weighing process begins.

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.) 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. The fact that no single factor determines penalty does not negate the requirement that facts be found as a prerequisite to considering the imposition of a death sentence.

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. The presence of at least one aggravating factor is the functional equivalent of an element of capital murder in California and requires the same Sixth Amendment protection. (See *Ring, supra,* 536 U.S. at p. 602.)

Finally, this Court relied on the undeniable fact that "death is different," but used the moral and normative nature of the decision to choose life or death 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 with the argument 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." 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, citing 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"].) [288] As the high court stated in *Ring*, "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." (*Ring*, *supra*, 536 U.S. at p. 589.) "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." (*Id.*, at p. 609.)

The final step of California's capital sentencing procedure is indeed a free weighing of aggravating and mitigating circumstances, and the decision to impose death or life is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the facts that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but also as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any

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[288] In *Monge*, the U.S. Supreme Court foreshadowed *Ring*, and expressly found the *Santosky v. Kramer* (1982) 455 U.S. 745, 755, rationale for the beyond-a-reasonable-doubt burden of proof requirement applicable 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.'" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added) (quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 [quoting *Addington v. Texas* (1979) 441 U.S. 418]).)

part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

1. 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 Mr. Virgil'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 further offends the Fifth, Sixth, Eighth, and Fourteenth Amendments. [289] The Fifth, Sixth, Eighth, and Fourteenth Amendments are further violated by imposition of a

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[289] See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

death sentence absent any assurance that 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 ultimate deliberative process in which normative determinations are made. The U.S. Supreme Court has made clear that such factual determinations must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring*, *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.) Particularly given the "acute need for reliability in capital sentencing

proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732;[290] *accord, Johnson v. Mississippi* (1988) 486 U.S. 578, 584), the Fifth, 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., 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 U.S. 957, 994), and certainly

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290 The *Monge* court developed this point at some length, explaining as follows:

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,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (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.)

no less (*Ring, supra,* 536 U.S. at p. 608). [291] See section D, *post.*

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. [292] 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 federal and state Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

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 did not 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

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[291] Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

[292] 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].)

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, *Apprendi-Ring-Blakely* make clear that the finding of one or more aggravating circumstance that is a prerequisite to considering whether death is the appropriate sentence in a California capital case is precisely the type of factual determinations for which Mr. Virgil is entitled to unanimous jury findings beyond a reasonable doubt.

2. THE DUE PROCESS AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTION REQUIRE THAT THE JURY IN A CAPITAL CASE 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.

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." (*Stantosky 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 that of 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" (*Stantosky*, *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."

(*Id.,* at p. 756.)

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 *Stantosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Stantosky*, *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 *Stantosky* 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 *Stantosky* 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.'" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added) (quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 [quoting *Addington v. Texas* (1979) 441 U.S.

418]).) Thus, for a death sentence to pass constitutional muster under the Eighth Amendment and the due process clause, the sentencing jury must find beyond a reasonable doubt not only that the factual bases for its decision are true, but also that death is the appropriate sentence.

3. 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, PROOF BY A PREPONDERANCE OF THE EVIDENCE WOULD BE CONSTITUTIONALLY COMPELLED AS TO EACH SUCH FINDING.

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, 51 [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*, *supra*, 447 U.S. at p. 346.)

Accordingly, Mr. Virgil respectfully suggests that *People v. Hayes, supra,* – 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, Mr. Virgil's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty. Sentencing Mr. Virgil 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 Fifth, Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana*, *supra*.) Accordingly, the death judgment must be reversed.

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*, *supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, *supra*, 428 U.S. at p. 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 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. [293]

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

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[293] As also argued *infra* in Argument XII, the instruction with CALJIC No. 8.84.1 instructing the jury to disregard all guilt phase instructions, including the presumption of innocence, definition of beyond a reasonable doubt, and the burden of persuasion and then failing to instruct with CALJIC No. 2.90 was hopelessly confusing and the gave the jury no guidance on how to consider the Factors (b) and (c) evidence alleged against Mr. Virgil.

is obvious: Without an instruction on the burden of proof, the jurors might 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. [294] This raises the constitutionally unacceptable possibility a juror 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 Fifth, 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*.)

E. CALIFORNIA LAW VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO REQUIRE THAT THE JURY BASE ANY DEATH SENTENCE ON WRITTEN FINDINGS REGARDING AGGRAVATING FACTORS.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived Mr. Virgil of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) 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

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[294] See, e.g., *People v. Dunkle*, No. S014200, RT 1005, cited earlier in Mr. Virgil's Opening Brief at page 439.

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.) [295] The same analysis 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].)

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[295] 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.

In a *non*-capital case, California law requires the sentencing judge 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 sentencing jury 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*, 486 U.S. 367, 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., *id.* 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 obviate the need to articulate its specific factual basis.

The importance of written findings is recognized throughout this country. Of the thirty-eight post-*Furman* state capital sentencing systems, at least 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. [296]

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* and *Blakely v. Washington* have made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual 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 *Blakely* 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

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296 See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment and the overall right to a fair trial under the Fifth and Fourteenth Amendments.

F. CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THE CALIFORNIA SUPREME COURT FORBIDS INTERCASE PROPORTIONALITY REVIEW, THEREBY GUARANTEEING ARBITRARY, DISCRIMINATORY, OR DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY, IN VIOLATION OF THE EIGHTH AMENDMENT [297]

The United States Supreme Court has lauded proportionality review as a method of protecting against arbitrariness in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia, supra*, 428 U.S. at p. 198; *Proffitt v. Florida* (1976) 428 U.S. 242, 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase

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[297] Mr. Virgil's wishes to thank the Office of the State Public Defender for its substantial contribution to this argument. Mr. Virgil's similar, but separate argument, is presented above in Argument XX.

proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> "[I]n *Pulley v. Harris*, 465 U.S. 37, 51, 104 S.Ct. 871, 879-880, 79 L.Ed.2d 29 (1984), the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" Id., at 53, 104 S.Ct., at 881, quoting Harris v. Pulley, 692 F.2d 1189, 1194, 1195 (CA9 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris*."

(*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).)

The time has come for *Pulley v. Harris* to be reevaluated since, as this felony-murder case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia, supra*, 408 U.S. at p. 313 (conc. opn. of WHITE, J.).) Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital

punishment require comparative or intercase proportionality review. [298]

The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the *Pulley* Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris, supra*, 465 U.S. at p. 51.) Even assuming, for purposes of this argument, that the scope of California's special circumstances is not so broad as to render the scheme unconstitutional, the open-ended nature of the aggravating and mitigating factors – especially the circumstances of the offense factor delineated in Penal Code section 190.3, subdivision (a) – and the discretionary nature of the sentencing instruction under CALJIC No. 8.88 grant a jury unrestricted (or nearly unrestricted) freedom in making the death-sentencing decision. (See *Tuilaepa v. California, supra*, 512 U.S. at pp. 986-988 (dis. opn. of BLACKMUN, J.) .)

California's authorization of the death penalty for felony-murder works synergistically with its far-reaching and flexible sentencing factors and unfettered jury discretion at the selection stage to infuse the state capital sentencing scheme with flagrant arbitrariness. Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed herein. Thus, the statute fails to provide

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[298] As argued in Argument XX, there is a national consensus regarding the critical importance of intercase proportionality review to the constitutionality of a death sentence and the absence of such review in California violates the evolving standards of decency that underlie the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty.

any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

1. THE LACK OF INTERCASE PROPORTIONALITY REVIEW VIOLATES MR. VIRGIL'S RIGHT TO EQUAL PROTECTION OF THE LAW

The United States Supreme Court repeatedly has directed that a greater degree of reliability in sentencing 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 pp. 731-732.) Despite this directive, California provides significantly fewer procedural protections for ensuring the reliability of a death sentence than it does for ensuring the reliability of a noncapital sentence. This disparate treatment violates the constitutional guarantee of equal protection of the laws. (U.S. Const., 14th Amend.)

At the time of Mr. Virgil's sentence, California required intercase proportionality review for noncapital cases. (Former Pen. Code § 1170, subd. (d).) The Legislature thus provided a substantial benefit for all prisoners sentenced under the Determinate Sentencing Law (DSL) – a comprehensive and detailed disparate sentence review. (See generally *In re Martin* (1986) 42 Cal.3d 437, 442-444 [detailing how system worked in

practice].) However, persons sentenced to the most extreme penalty – death – are unique among convicted felons in that they are not accorded this review. This distinction is irrational.

In *People v. Allen* (1986) 42 Cal.3d 1222, this Court rejected a claim that the failure to provide disparate sentence review for persons sentenced to death violates the constitutional guarantee of equal protection of the laws. The contention raised in *Allen* also contrasted the death penalty scheme with the disparate review procedure provided for noncapital defendants, but this Court rejected the argument. The reasoning of *Allen*, however, was flawed.

The *Allen* court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case 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 p. 1286.) Although the observation may be true, it ignores a more significant point, i.e., the requirement that any death penalty scheme must ensure that capital punishment is not randomly and capriciously imposed. It is incongruous to provide a mechanism to assure that this type of arbitrariness does not occur in noncapital cases, but not to provide that same mechanism in capital cases where so much more is at stake for the defendant.

Further, jurors are not the only bearers of community standards. Legislatures also reflect community norms in the delineation of special circumstances (Pen. Code, § 190.2) and sentencing factors (Pen. Code, § 190.3), and a court of statewide jurisdiction is well situated to assess the objective indicia of community values that are reflected in a pattern of verdicts. (See *McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality remain alive in the area of capital sentencing by prohibiting death penalties that flout a societal consensus as to particular

offenses or offenders. (*See Ford v. Wainwright* (1986) 477 U.S. 399; *Enmund v. Florida* (1982) 458 U.S. 782; *Coker v. Georgia* (1977) 433 U.S. 584.) But juries – like trial courts and counsel – are not immune from error, and they may stray from the larger community consensus as expressed by statewide sentencing practices. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

Jurors are not the only sentencers. A verdict of death always is subject to independent review by a trial court empowered to reduce the sentence, and the reduction of a jury's verdict by a trial judge is required in particular circumstances. (See Pen. Code, § 190.4, subd. (e); *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) Thus, the absence of disparate sentence review in capital cases cannot be justified on the ground that a reduction of a jury's verdict would render the jury's sentencing function less than inviolate, since it is not inviolate under the current scheme.

The second reason offered by the *Allen* Court for rejecting the defendant's equal protection claim was that the sentencing 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 1287, emphasis added.) The idea that the disparity between life and death is a "narrow" one, however, defies constitutional doctrine: "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 [lead opn. of Stewart, Powell, and Stevens, JJ.].) The qualitative difference between a prison sentence and a death sentence thus militates for – rather than against – requiring the State to apply its disparate review procedures to capital sentencing.

Finally, this Court in *Allen* relied on the additional "nonquantifiable" aspects of capital sentencing when compared to noncapital sentencing as supporting the different treatment of persons sentenced to death. (See *People v. Allen, supra*, 42 Cal.3d at p. 1287.) The distinction, however, is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered aggravating and mitigating circumstances in a capital case. (Compare Pen. Code, § 190.3, subds. (a) through (j) with Cal. Rules of Court, rules 421 & 423.) It is reasonable to assume that precisely because "nonquantifiable factors" permeate all sentencing choices, the legislature created the disparate review mechanism discussed above.

The equal protection clause of the Fourteenth Amendment to the United States Constitution guarantees every person that he or she will not be denied fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (See *Bush v. Gore* (2000) 531 U.S. 98, 104-105.) In addition to protecting the exercise of federal constitutional rights, the equal protection clause prevents violations of rights guaranteed to the people by state governments. (See *Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The arbitrary and unequal treatment of convicted felons, like Mr. Virgil, who are condemned to death cannot be justified, as this Court ruled in *Allen*, by the fact that a death sentence reflects community standards. All criminal sentences authorized by the Legislature, whether imposed by judges or juries, represent community standards. Jury sentencing in capital cases does not warrant withholding the same type of disparate sentence

review that is provided to all other convicted felons in this state – the type of review routinely provided in virtually every death penalty state. The lack of intercase proportionality review violates Mr. Virgil's Fourteenth Amendment right to equal protection and requires reversal of his death sentence.

G. THE USE OF RESTRICTIVE ADJECTIVES IN THE LIST OF POTENTIAL MITIGATING FACTORS IMPERMISSIBLY ACTED AS BARRIERS TO CONSIDERATION OF MITIGATION BY MR. VIRGIL'S JURY.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

H. THE FAILURE TO INSTRUCT THAT STATUTORY MITIGATING FACTORS WERE RELEVANT SOLELY AS POTENTIAL MITIGATORS PRECLUDED A FAIR, RELIABLE, AND EVENHANDED ADMINISTRATION OF THE CAPITAL SANCTION.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. 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). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating

circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

It is thus likely that Mr. Virgil's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated Mr. Virgil "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

The impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of

the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973 quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma, supra*, 455 U.S. at 112.)

I. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS

As noted in the preceding arguments, the United States Supreme Court has 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 pp. 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 must be more strict; and any purported justification by the State of the discrepant treatment must 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 designed to make a sentence more reliable.

In *Prieto*, [299] as in *Snow*, [300] this Court analogized the process of

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[299] "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.)

[300] "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. 32.)

determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. If that were so, then 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 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 most states where death is a sentencing option and all persons being sentenced to 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 the loss of their 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* (1986) 42 Cal.3d 1222, 1286-1288.) There is no hint in *Allen* that the two procedures are in any way analogous. In fact, the decision centered on the fundamental differences between the two sentencing procedures. However, because the Court was seeking to justify the extension of procedural protections to persons convicted of non-capital crimes that are not granted to persons facing a possible death sentence, the Court's reasoning was necessarily flawed.

In *People v. Allen, supra*, this Court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws. The Court offered three justifications for its holding.

(1) The Court initially distinguished death judgments by pointing out 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 that are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) How can we ensure principles of uniformity and proportionality in death sentencing? We do so, in part, 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* (1982) 458 U.S. 782; *Ford v. Wainwright, supra*; *Atkins v. Virginia, supra*). Juries, like trial courts and counsel, are not immune from error. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

While the State cannot limit consideration of any factor that could cause the sentencing jury or judge to reject the death penalty, it can and must provide rational criteria that narrow the discretion to impose death. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes.

Jurors are also not the only ones responsible for imposition of the death sentence. 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 absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

(2) 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. . . 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 (citation omitted)). "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 (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.) [301] The qualitative

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[301] 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*, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (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.)

difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply its disparate review procedures to capital sentencing.

(3) Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as 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. 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 that the legislature created the disparate review mechanism discussed above.

In sum, 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.) 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 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*; see also *Roper v. Simmons, supra,* 125 S.Ct. at pp. 1189-1194, holding that "'the evolving standards of decency that mark the progress of a maturing society'" prohibit the execution of juvenile offenders.)

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. (*Ring v. Arizona, supra.*) [302] California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence 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.*)

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[302] 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. . . . . [Par.] 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 p. 589, 609.)

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.

J. 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; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"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.].) (In 1995, South Africa abolished 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 have

now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website [www.amnesty.org].) ***303***

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. ***304*** "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 [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; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409.)

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

303 These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

304 In *Roper v. Simmons, supra,* 125 S.Ct. at pp. 1198-1199, the Supreme Court acknowledged that that countries of the world are in 'virtual unanimity" against the execution of juvenile offenders and the Supreme Court has looked to practices in other countries of the world in interpreting the Eighth Amendment's prohibition against cruel and unusual punishment.

"draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, *supra*, 356 U.S. at p. 100; *Atkins v. Virginia*, *supra*, 536 U.S. at pp. 311-312; *Roper v. Simmons,* 125 S.Ct. at p. 1190.) 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 and juvenile offenders, 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," as are the execution of juvenile offenders. (*Atkins v. Virginia, supra,* 536 U.S. at p. 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; *Roper v. Simmons, supra,* 125 S.Ct. at pp. 1198-1199.)

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; *Roper v. Simmons, supra,* 125 S.Ct. at pp. 1198-1199.) 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]. See Argument XXIV, *post.*

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." [305] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities and juvenile offenders (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra; Roper v. Simmons, supra.*)

Thus, the very broad death scheme in California and the employment of death as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Mr. Virgil's death sentence should be set aside.

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[305] 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* (1995) 46 Case W. Res. L.Rev. 1, 30.)

XXIII.

MR. VIRGIL'S SENTENCE MUST BE REVERSED BECAUSE POLITICAL CONSIDERATIONS DOMINATE THE DEATH PENALTY REVIEW PROCESS IN CALIFORNIA.

Mr. Virgil's death sentence was obtained in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 9, 15, 16, 17, and 24 of the California Constitution because, in the nine years preceding Mr. Virgil's trial, the courts of California have been politically biased toward imposition of the death penalty. [306] The political and economic pressures created by the voters' ouster of the Bird court have made it impossible for the courts of California to decide death penalty cases in a fair and impartial manner, resulting in a capital sentencing scheme that is applied in an arbitrary and capricious manner. This problem lies inherent in a judiciary where judgeships are perpetuated with retention elections rather than lifetime tenure. [307]

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306 Defense counsel argued in the trial court that the California Supreme Court is "a very political Supreme Court," California does not allow proportionality argument whereas even a State [Georgia] in the "Death Belt" allows such argument, and this Court has turned on its "end" what the "Rose Bird" court did by finding all errors harmless in death penalty cases. (RT 3840.)

307 Mr. Virgil notes California Supreme Court Chief Justice George's ongoing efforts to "protect the neutrality of judges and minimize politicization of the judicial branch" by his proposed amendments to "Article VI of the California Constitution," one of which would be to "[i]ncrease judges' terms from six to 10 years." (McCarthy, *Bench, Bar Mull Overhaul of State Court System* (April 2005) California Bar Journal, at pp. 1, 7.) Though these efforts are highly commendable, they also represent persuasive acknowledgement that politics have too great an effect on California's judiciary.

In 1986, the voters of California ousted California Chief Justice Rose Bird and Justices Reynoso and Grodin in the 1986 election. According to exit polls following this election, of those voting against Justice Bird, eleven percent said it was because she was unqualified, eighteen percent because she was too liberal, and sixty-six percent said it was because she opposed the death penalty. This clear message from the electorate has caused a political taint unduly favoring imposition of the death penalty in California murder trials. This political bias is unacceptable because it has systematically eroded the independence of the judiciary in the adjudication of capital cases.

At the dawn of our constitutional system of law, the founding fathers recognized the importance of an independent judiciary:

> "This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime to occasion dangerous innovations in the government, and serious oppressions of the minor party."

(Hamilton, *The Federalist Papers,* No. 78.)

More recently, Supreme Court Justice Stevens has had occasion to comment on the risk incurred in modern times when our system of justice departs from this principle:

> "The 'higher authority' to whom present-day capital judges may be 'too responsive' is a political climate in which judges who covet higher office--or who merely wish to remain judges--must constantly profess their fealty to the death penalty. . . . The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III."

(*Harris v. Alabama* (1995) 513 U.S. 504, 519-520 (dis. opn. of Stevens, J.).)

The system of retention elections rather than lifetime appointments manifests improper political impact on criminal cases in particular. "One reason for the reluctance to reverse in criminal cases--even in the face of serious procedural error--is that criminal appeals are often the subjects of political campaigns, and always in the same way: American judges are never criticized for affirming convictions, only for reversing them." (Mathieson and Gross, *Review for Error* (2003) 2 Law, Probability & Risk 259, 267 and fn. 30, citing the successful campaign to recall Chief Justice Rose Bird as "a classic example" of the politicization of the process of judicial review.)

The fundamental right to trial by an impartial court (*Tumey v. Ohio* (1927) 273 U.S. 510, 535) is inextricably intertwined with the existence of an independent judiciary. "If judges are going to make their decisions on the basis of what people would like then there can't be any justice." (*Geary v. Renne* (9th Cir. 1990) 911 F.2d 280, 313, fn. 5 (en banc) (dis. opn. of Alarcon, J.) [quoting Los Angeles Superior Court Judge Alfred Gitelson who was defeated at the polls in 1970 after ordering the Los Angeles public schools to be integrated], vacated on other grounds (1991) 501 U.S. 312.)

In order to ensure the independence of the judiciary, the United States Constitution provides for federal judges to be appointed for life. The California Constitution of 1849, reflecting Jacksonian populist sentiment, provided for election of judges. Because these elections became highly politicized, in 1934 the current system of retention elections for appellate judges was adopted, in an attempt to regain some independence for the judiciary. (Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections* (1988) 61 So.Cal.L. Rev. 1969, 1971-1972 [hereafter "Grodin"].)

In 1986, however, it became clear that the retention election system could not even remotely begin to guarantee the independence of the

judiciary. Three sitting California Supreme Court justices—Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso—were voted out of office primarily because of the Court's reversal rate in death penalty cases. Between 1979 and 1986, the Bird court had reversed 95 percent of the death cases it reviewed. (See Poulos, *Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California* (1990) 23 U.C. Davis L. Rev. 160, 209 [hereafter "Poulos"].)

Pro-death penalty forces spent millions of dollars to oust the three justices. (Grodin, *supra,* at p. 1981, citing reports on file with the California Fair Political Practices Commission.) Exit polls showed that 64 percent of those who voted against Chief Justice Bird's confirmation said that did so because of her position on the death penalty. (*Id.,* at p. 1980, fn. 30.) This Court itself has stated that Justices Bird, Grodin, and Reynoso were "the objects of a strenuous and well publicized campaign to unseat them at the impending retention election. It coalesced around the high percentage of death penalty reversals. . ." (*People v. Cox* (1991) 53 Cal.3d 618, 696.)

"Governor George Deukmejian served as a vigorous public spokesman for the forces seeking to oust the incumbent Supreme Court justices in the 1986 election. When his view prevailed, he was able to appoint successors whose positions on controversial issues more closely matched his own." (*Geary v. Renne* . . . [9th Cir. 1990] 911 F.2d [280,] . . . 290-291, n.8 (conc. opn. of Reinhardt & Kozinski, JJ.) He announced his opposition to Chief Justice Rose Bird because of her votes in capital cases. Deukmejian then publicly threatened Associate Justices Cruz Reynoso and Joseph Grodin that he would oppose them in their retention elections unless they voted to uphold more death sentences. Deukmejian carried out his threat [and] opposed the retention of all three justices and all lost their seats after a campaign dominated by the death penalty. (Bright and Keenan,

Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases (1995) 75 Boston Univ. L. Rev. 759, 760-761.)

On March 26, 1987, a "fully reconstructed California Supreme Court met for the first time. Given the retention election, the Governor's views on capital punishment, and the reputation of the new appointees as 'conservative-to-moderate, with views on capital punishment not greatly different from those of the Governor, observers anticipated that the 'Lucas court' would dispense a different brand of justice than what was delivered by the Bird court, especially in death penalty cases. The prediction proved to be true." (Poulos, *supra,* at pp. 220-221.)

In a radio broadcast on November 5, 1988, Governor Deukmejian said, "I have now had an opportunity to appoint five new justices to the state supreme court" and noted that "Chief Justice Rose Bird upheld only four death sentences in nine years. In just the last year and a half, the new supreme court, under the leadership of Chief Justice Malcolm Lucas has affirmed 43 cases." (Poulos, *supra,* at p. 220, fn. 336 [quoting from transcript of radio broadcast].)

In 1989, Professor Gerald Uelmen, former dean of Santa Clara University School of Law, reviewed the capital sentencing record of this Court for the prior decade. Professor Uelmen contrasted this Court's death judgment review from 1979 through 1986 with its record from 1987 through 1989. He found the disparity to be so dramatic as to suggest the existence of "two courts." He explained:

> From 1979 through 1986, the Supreme Court of California reviewed sixty-four judgments of death. Five of them, or 7.8 percent, were affirmed. From 1987 through March of 1989, the Supreme Court of California reviewed seventy-one judgments of death. Fifty-one of them, or 71.8 percent, were affirmed. In two short years, the California affirmance rate for state supreme court review of death judgments moved from the third lowest in the

> United States to the eighth highest. The revolution which demarcates this dramatic shift was the retention election of November, 1986, in which the voters of California removed Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso. (Uelmen, *Review of Death Penalty Judgments by the Supreme Court of California: A Tale of Two Courts* (1989) 23 Loy. L.A. L. Rev. 237, 238-244.)

More recently, in the years immediately preceding Mr. Virgil's trial, this Court's affirmance rate rose yet again. Between 1990 and 1996 the affirmance rate was 93.5 percent. *People v. Horton* (1995) 11 Cal.4th 1068 and *People v. Quartermain* (1997) 16 Cal.4th 600 are the only capital cases in which a conviction and sentence in a capital case were reversed on direct appeal during this period. This Court's 71.8 percent affirmance rate for the period 1986-1989 ranked slightly lower than Georgia (73.1 percent affirmance rate, based on 245 decisions), slightly above Texas (67.1 percent affirmance rate, based on 319 decisions), and considerably above Florida (53.7 percent affirmance rate, based on 443 decisions). Nationwide capital appellate review was bounded by affirmance rates from 50 to 75 percent during this period. This Court's post-1990 affirmance rate outstrips that of every other capital sentencing jurisdiction in the country. The capital affirmance rates in Georgia, Florida, and Texas remained virtually unchanged during this same period. Indeed, for the years 1990-1992 cumulatively, the affirmance rate for the Supreme Court of Georgia was 70 percent; for Florida, 63 percent; and for Texas, 77 percent.

Subsequently, when the retention election for Chief Justice George's seat on this Court came up in 1998, it was apparently politically necessary for the Chief Justice to pointedly distinguish himself as being the polar opposite of former Chief Justice Rose Bird:

> "Hoping to win the Republican Party endorsement in September, the George campaign is trying to fend off conservative opposition by portraying the incumbent as an ideological opposite of Bird, who was ousted by voters twelve years ago because of her liberal

> opinions. One of George's brochures heralds his 'conservative record' and refers critically to Bird or the court she led no fewer than eight times. The brochure says the George court 'has restored common sense and individual responsibility to our civil justice system by overturning numerous Rose Bird-era precedents. George's campaign also wants to remind voters of Bird's penchant for overturning death sentences, while playing up the George Court's 90 percent rate for upholding capital convictions. . . ."
>
> George's campaign tactics, meanwhile, have caused some uneasiness among those worried about politicization of the judiciary. Santa Clara University Law Professor Gerald Uelmen . . . described George in a recent *Los Angeles Times* opinion piece as a 'thoughtful judge who has risen above politics.' But waving an anti-Bird banner, added Uelmen, allows George to be perceived as a judge who is 'willing to compromise his independence to win and election.' (Egelko, *George Goes Bird Hunting,* California Lawyer (June 1998), p. 17; emphasis added.)

Former Governor Gray Davis also indicated his intent to use the death penalty as a litmus test for judicial appointees. Following in the activist pro-death penalty footsteps of ex-Governors Deukmejian and Wilson, Governor Davis made it clear during his 1998 campaign that he would only appoint and support judges who favor the death penalty: "Any judge I appoint will understand my strong support for public safety, long-standing commitment to the death penalty . . . ." (Weinstein, *Sparring for Best Crime-Fighting Honors,* Los Angeles Times, October 12, 1998, Part A, p. 3.) This statement, coupled with his public support of Justices George and Ming Chin prior to their retention election (Governor Davis wrote to Justice George: "Your tough, common-sense approach on the issues of crime and violence, and in particular your leadership in obtaining legislation to reduce the lengthy delays in processing death penalty appeals, alone merits your retention" [Bernstein, *Candidates Divided on Retaining Justices,* Sacramento Bee, September 26, 1998, p. A3]), suggests that former Governor Davis would have opposed any justice of this Court who faced a retention election if it appeared that that justice did not consistently

profess fealty for the death penalty. (See also Mintz, Death Sentence Reversals Cast Doubt on System: Courtroom Mistakes Put Executions on Hold, San Jose Mercury News, posted on Apr. 14, 2002, at http://www.bayarea.com/mld/mercurynews/news/special_packages/3062323.htm [observing that "[s]upport for the death penalty has continued to be just as important to Democratic Gov. Gray Davis" as to Davis' Republican predecessors, Governors Deukmejian and Wilson].)

And, former Governor Davis' press secretary, Michael Bustamante said, "No one knows better than Gray the importance of selecting judges who represent the governor's point of view." (Offbeat, *Judicial Litmus,* LA Weekly, July 9, 1999.) During the 1998 gubernatorial campaign, Governor Davis stated, "I'm going to make clear to people who want to be a judge that they are an extension of me... They're supposed to represent my view of the world." (Ostrom, *Davis Has Always Managed to Maintain His Focus,* San Jose Mercury News, September 20, 1998.) As Bustamante put it, "The Governor has made no secret of the fact that he strongly supports the death penalty, and he thinks it's important that those he appoints understand where he's coming from on that issue." (Off-Beat, *Judicial Litmus,* LA Weekly, July 9, 1999.)

In a nutshell, the governor in place for several years before the recent change made it crystal clear that he expected judges to be pro-death penalty, rather than to function as an independent judiciary. [308]

Yet more evidence of the pervasive politicization of the judiciary in California can be found in the behavior of candidates in judicial elections, elected judges, and campaigning politicians. The death penalty is

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[308] Similarly, current Governor Schwarzenegger believes that the death penalty "is a necessary and effective deterrent to capital crimes." (Source: Campaign website, JoinArnold.com Aug 29, 2003.)

extremely prominent in the election, retention, and elevation of judges, and this prominent politicization becomes manifest in various ways in California. These manifestations include campaigning judges making blatantly pro-death penalty statements, "hit-piece" advertising by campaigning politicians criticizing rivals for supporting judges described as "soft" on the death penalty, and judges appointing incompetent defense counsel due to a lack of political incentive to appoint appropriate counsel. (See Bright & Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, *supra*.) Aside from the glaring example of the retention election ousting Chief Justice Bird and her colleagues, Bright and Keenan offer the following examples of the politicization of the California judiciary:

> Sacramento Municipal Court Judge Gary Mullen, a candidate for superior court in California in 1992, ran a television commercial that criticized the judicial system for taking too long to execute Robert Alton Harris, the first person executed under California's current death penalty law. (*Id.,* 75 Boston Univ. L. Rev. at p. 786.)
>
> Edward D. Webster, a former prosecutor in Riverside, California, publicly criticized a federal court of appeals for its decision in a capital case, even though he is now the presiding superior court judge in Riverside. Judge Webster, speaking 'as a former prosecutor,' expressed his 'outrage' at a decision by the United States Court of Appeals for the Ninth Circuit remanding a capital habeas corpus case on grounds that the federal district court had failed to provide funds for expert assistance in support of the habeas petition . . . Judge Webster accused the federal court of anti-death penalty bias and called upon Congress to prevent all federal courts except the Supreme Court from reviewing death penalty cases. (*Id.,* at p. 812.)
>
> [After voting to confirm the nomination of Judge Rosemary Barkett to the Eleventh Circuit] Senator Diane [*sic;* Dianne] Feinstein was . . . attacked for voting for Barkett: Challenger Michael Huffington's advertisement described Judge Barkett as having overturned the death penalty 'even more than Rose Bird.' A Huffington television commercial concluded by stating, 'Feinstein

> judges let killers live after victims died.' In full-page newspaper advertisements, the Huffington campaign described the grisly facts of three capital cases in which Barkett had voted to reverse. (*Id.,* at p. 790.)
>
> . . . judge in Long Beach, California, assigned the representation of numerous indigent defendants to a lawyer who tried cases in very little time, not even obtaining discovery in some of them . . . The attorney has the distinction of having more of his clients sentenced to death, eight, than any other attorney in California. (*Id.,* at p. 802.)

Additionally, recent studies have consistently found that empirical data comparing the death penalty sentencing rates of various states (including California) with rates of relief in state appellate courts, as well as rates of relief at state and federal levels combined, indicates that the state appellate courts are politicized. (See Sanger, *Comparison of the Illinois Commission Report on Capital Punishment With the Capital Punishment System in California* (2003) 44 Santa Clara L. Rev. 101, 106 [discussing Howard Mintz, Death Sentence Reversals Cast Doubt on System: Courtroom Mistakes Put Executions on Hold, San Jose Mercury News, posted on Apr. 14, 2002, at http://www.bayarea.com/mld/mercurynews/news/special_packages/3062323.htm and Howard Mintz, State, U.S. Courts at Odds on Sentences: Different Standards Lead to Reversals, San Jose Mercury News, posted on Apr. 15, 2002, at http://www.bayarea.com/mld/mercurynews/news/special_packages/3067231.htm]; Blume and Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study* (1999) 72 S. Cal. L. Rev. 465.) As observed by Sanger:

> "[A] study also found that California conflicts with the federal courts more than any other state. The California Supreme Court's reversal rate is 10%, the lowest in the country, while the federal courts have reversed 62% of the death sentences affirmed by the California Supreme Court, the highest rate nationally."

(Sanger, *supra,* 44 Santa Clara L. Rev. at p. 106.)

Blume and Eisenberg statistically analyzed states' rates of obtaining death penalties and compared these rates with statistics of relief at both the state appellate level, and with statistics of relief that included both state appellate and federal review. They found "no correlation between states' rates of obtaining death penalties and state courts' reversing capital convictions or sentences." (Blume and Eisenberg, *supra,* 72 S. Cal. L. Rev. at p. 467.) In other words, state appellate courts maintained the same rate of reversal without regard to either high death-obtaining levels or low death-obtaining levels. Conversely, Blume and Eisenberg's data showed that, when including federal review,

> "States that obtain death penalties at a high rate tend to have them overturned at a high rate. This finding is consistent with the view that high death-obtaining rates correspond to death penalties being imposed in less death-worthy cases. Courts understandably overturn more capital sentences in such cases."

(*Id.* at p. 503.)

When considering that this correspondence did not appear in their state appellate decision data, Blume and Eisenberg concluded that:

> "It may be that the independence of federal judges led them to be more likely to grant relief in marginal death sentence cases than state judges. This could lead to the observed correlation between grants of relief in the BJS [Bureau of Justice Statistics, which includes data from both federal and state courts] data and the rates of death-obtaining behavior. That this effect does not emerge in the state court appellate data may show that state judges know they face traditional elections or retention elections at some point in their career. More than a decade ago California's experience proved that the selection method did not provide insulation from politicization of the death penalty. Only the life tenure and independence of federal judges may provide the luxury of assessing death penalty cases based on their death-worthiness."

(*Id.* at p. 497.)

Meaningful appellate review with non-arbitrary and non-capricious decision making is a constitutional cornerstone for every capital sentencing jurisdiction. In each of the cases affirming that meaningful appellate review was being provided by the state courts, the Supreme Court has regularly looked at the affirmance rates of the state court. In the first opinions assessing the meaningfulness of the appellate scrutiny—the 1976 capital decisions—the Supreme Court emphasized the frequency with which death judgments had been reversed. In *Gregg v. Georgia, supra,* 428 U.S. 153, the lead opinion noted "[I]t is apparent that the Supreme Court of Georgia has taken its review responsibilities seriously" and recited various principles that the state court regularly relied upon as a basis for scrutinizing, and occasionally invalidating, death sentences. (*Gregg,* 428 U.S. at pp. 205-206, opn. of Stewart, Powell, and Stevens, JJ.) In *Profitt*, the lead opinion observed that the Florida Supreme Court, "like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated 8 of the 21 death sentences that it has reviewed to date." (*Profitt v. Florida* (1976) 428 U.S. 242, 253 (opn. of Stewart, Powell, and Stevens, JJ.) And in *Jurek v. Texas* (1976) 428 U.S. 262, the lead opinion observed that Texas "has thus far affirmed only two judgments imposing death sentences under its post-*Furman* law." (*Jurek,* 428 U.S. at p. 270 (opn. of Stewart, Powell, and Stevens, JJ.)

The concerns for the states' affirmance rates has not abated. In *Pulley v. Harris* (1984) 465 U.S. 37, the Supreme Court was confronted with California's appellate review process and held that intercase proportionality review—an appellate court's comparison of the sentence in the case before it with the sentence imposed for others convicted of the same crime—is not constitutionally required. (*Id.*, at pp. 43, 45.) The Supreme Court did not overlook, however, that the California Supreme

Court's opinions included "many reversals in capital cases." (*Id.,* at p. 42, fn. 5.) In fact, the Court observed that it was "aware of only one case besides this one in which the [state] court affirmed a death sentence." (*Ibid.*)

And in *Barclay v. Florida* (1983) 463 U.S. 939, Justices Stevens and Powell expressly cast their concurring votes because the Florida Supreme Court's reversal record refuted contention that he state court failed to provide meaningful appellate review. Justice Stevens explained:

> "[T]he question is whether, in its regular practice, the Florida Supreme Court has become a rubber stamp for lower court death-penalty determinations. It has not. On 212 occasions since 1972 the Florida Supreme Court has reviewed death sentences; it has affirmed only 120 of them. The remainder have been set aside, with instructions either to hold a new sentencing proceeding or to impose a life sentence."

(*Id.,* at p. 973 (conc. opn. of Stevens, J.).)

In contrast, this Court has not been presented with virtually picture-perfect, error-free death judgments from 1987 through today. It is simply not the case that the trial courts of California have somehow eradicated error from their proceedings to attain an unparalleled level of perfection unknown throughout the rest of the country, if not the world. In fact, the evidence is clearly to the contrary. This Court's own decisions show a steady rate of error. (See, e.g., *People v. Hardy* (1992) 2 Cal.4th 86 [15 errors deemed harmless]; *People v. Kelly* (1992) 1 Cal.4th 495 [14 errors deemed harmless]; *People v. Mincey* (1992) 2 Cal.4th 408 [8 errors deemed harmless]; *People v. Pinholster* (1992) 1 Cal.4th 865 [8 errors deemed harmless].)

Federal courts have found this Court's harmless error jurisprudence to be inadequate to satisfy the federal Constitution. In one such case, two members of the United States Supreme Court said that this Court's "cursory review [for prejudice] is clearly insufficient. . . ." (*Pensinger v. California*

(1991) 502 U.S. 930, 931 (O'Connor, J., joined by Kennedy, J., dissenting from denial of certiorari), referring to *People v. Pensinger* (1991) 52 Cal.3d 1210, 1271-1272. *People v. Hamilton* (1988) 45 Cal.3d 351, 375-376 [internally inconsistent and partially inaccurate instruction stating that person sentenced to life without parole might be considered for parole if his sentence were commuted was harmless error, because one part of the instruction told the jury not to consider topics discussed in other parts] with *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1162-1164 [finding same error prejudicial on same record, because of presence of significant mitigating evidence, reference to the topic by the prosecutor in closing argument, and lengthy jury deliberations]. Compare *People v. Wade* (1988) 44 Cal.3d 975, 994-995 [omission of intent element from instruction on special circumstance harmless, because it was included in instruction on similar but not identical theory of first-degree murder liability] with *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1321-1322 [finding same error prejudicial on same record, because jury did not necessarily find first-degree murder on that theory]. See also *Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1477 [this Court's "analysis mistakenly focuses on a hypothetical jury, when the role of the reviewing court in conducting harmless error analysis is 'to consider . . . not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the . . . verdict in the case at hand'," quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279. See generally Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases—A Comparison & Critique* (1991) 26 U.S.F. L. Rev. 41.)

In a series of cases in which it found error under *Skipper v. South Carolina* (1986) 476 U.S. 1, and *Lockett v. Ohio, supra,* 438 U.S. 586, this Court, while purporting to apply the harmless error standard of *Chapman v.*

California (1967) 386 U.S. 18, improperly shifted the burden after the defendant made an initial showing of prejudice from the record. (See, e.g., *People v. Fudge* (1994) 7 Cal.4th 1075, 1118 [retired prison warden who had interviewed defendant erroneously prevented from testifying that it was likely that defendant would adjust well as a life-term prisoner; error harmless because "the facts of defendant's crime provided powerful aggravating evidence"]; *People v Whitt* (1990) 51 Cal.3d 620, 648 [trial court prevented trial counsel from eliciting testimony from the defendant, at the penalty phase, in answer to the questions "Do you want to live?" and "Why do you deserve to live?," but error found harmless; "though the question . . . might produce a significant answer, . . . we cannot know whether the defendant's actual response might have influenced the penalty determination"]; *People v. Robertson* (1989) 48 Cal.3d 18, 53-57 [trial court, acting as sentencer, expressly stated: "The Court does not consider the fact that [defendant] does not appear to pose a threat to society as long as he's confined to prison to be either a factor in aggravation or mitigation [of] punishment"; error harmless because trial court's emphasis on mutilation of victim shows that the mitigating evidence "could have affected its penalty determination"]; *People v. McLain* (1988) 46 Cal.3d 97, 109 [excluding prison psychologist's testimony that "defendant would not pose a danger if spared [but incarcerated]" held to be error, but harmless because "excluded testimony would have had no marginal effect on the balance of aggravating and mitigating factors"]. See also *In re Carpenter* (1995) 9 Cal.4th 634 [holding that the presumption of prejudice from jury misconduct might not be applicable because of the possibility that the weight of the evidence of guilt might meant hat the compromised juror was actually not biased].)

Other examples of inappropriate harmless error analysis are numerous, and cover the spectrum of possible constitutional errors in a

capital case. (See, e.g., *People v. Roberts* (1992) 2 Cal.4th 271, 327-328 [at single trial, defendant-inmate sentenced to death for murder of another inmate and to life for murder of guard; instructional error regarding proximate cause required reversal of conviction for murder of guard but was not prejudicial as to penalty phase because in absence of error jury would still have been aware that guard died in the melee, and would have been aware of other aggravating evidence]; *In re Marquez* (1992) 1 Cal.4th 584, 604-605 [ineffective assistance of counsel, resulting in failure to discover 17 credible alibi witnesses, not prejudicial]; *People v. Sheldon* (1989) 48 Cal.3d 935, 951-952 [evidence erroneously admitted that defendant previously shot at police officer and told his grandmother, "I tried to take one with me," but had been acquitted of attempted murder of officer; error harmless because jury was told of the acquittal, prosecutor did not discuss the incident in closing argument, and trial counsel argued possibility shot had been accidentally fired]; *People v. Morris* (1991) 53 Cal.3d 152, 228-232 [written instruction erroneously told jury that if they had a reasonable doubt between death and life without parole, they must impose life with [rather than without] parole; error harmless, even though jury asked for explanation of the instruction (at the same time they asked the consequences of a hung jury) and judge told them instruction was self-explanatory, because other instructions and closing argument referred to life without parole].)

Judgments of harmless error such as these are what the unanimous United States Supreme Court, speaking through Justice Scalia, characterized thus: "A reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 281, quoting *Rose v. Clark* (1986) 478 U.S. 570, 578.)

This Court has also dismissed violations of law in summary fashion with citation to *past* findings of harmless error; thus replacing a meaningful analysis of the harm in the case at hand. (*People v. Wright* (1990) 52 Cal.3d 367, 399 ["We have never held *Boyd* error alone constituted reversible error"]; *People v. Hayes* (1989) 49 Cal.3d 1260, 1282 [instruction that jurors should not consider the consequences of their verdict "will seldom be prejudicial"]; *People v. Turner* (1990) 50 Cal.3d 668, 680 ["[W]e have consistently declined to deem such improper argument [under *Davenport*] a basis for reversal of a death judgment"]; *People v. Beardslee* (1991) 53 Cal.3d 68, 82 ["We have consistently found such double counting [of evidence under factor (b)] harmless"]; *People v. Miller* (1990) 50 Cal.3d 954, 969 [excessive charging of special circumstances has never been held to be prejudicial].)

By now, this perplexing phenomenon of political pressure influencing the outcome of capital appeals has been blatantly recognized:

> "the California Supreme Court itself has been reprimanded by the state's voters in the 1980s for appearing too 'activist,' especially in the area of capital punishment. Less than two decades ago, the voters of California ousted three sitting Supreme Court Justices--Chief Justice Rose Bird and Justices Joseph Grodin and Cruz Reynoso--in a heated election whose result startled many veteran observers. *That experience remains fresh in the minds of California jurists who want to avoid being seen as stepping into political controversies too willingly.*"
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> (Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons From the California Recall Experience* (2004) 92 Cal. L. Rev. 927, 939 (emphasis added).)

Stare decisis—the foundation upon which our common law system of justice was built—has also been ignored by this Court, to the consternation of the United States Supreme Court. In *Stansbury v. California* (1994) 511 U.S. 318, 324-326, the high court remanded a death penalty case because this Court failed to follow "well settled" precedent.

> "[P]eriodically, when the political winds gust in a new direction, it becomes necessary to remind all concerned of the virtues of a steady course. As lawyers and judges, we sometimes deliver our reminder in Latin; *stare decisis* . . . the circumstances which warrant changes in the law do not include changes in personnel of the court. If the law were to change with each change in the makeup of the court, then the concept that ours is a government of law and not men would be nothing more than a pious cliché."
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> (*People v. Anderson* (1987) 43 Cal.3d 1104, 1152-53 (dis. opn. of Broussard, J.).)

Like Governor Deukmejian, former Governor Wilson, in office at the time of Mr. Virgil's trial, also exhibited little patience with an independent judiciary. He publicly criticized some of his own nominees (a United States senator) to the federal courts because they had voted against the State of California in civil as well as criminal matters. Wilson said the "federal bench should not be a refuge of judicial scofflaws" and lambasted his nominees for "abusing" their lifetime appointments. (See *Wilson Criticizes Views that Some of his Choices for Judgeships Now Hold,* Los Angeles Daily Journal (June 29, 1993).) Governors who disagree with state court judges can do more than give speeches, however. They can ultimately get them removed from office. Thus, as Justice Stevens noted, when judges are elected, in order to remain judges they must constantly express their "fealty to the death penalty." (*Harris v. Alabama, supra,* 513 U.S. 504, 519.)

In *Tumey v. Ohio, supra,* 273 U.S. 510, the United States Supreme Court reversed a conviction and fine because the judge received a percentage of all fines collected for his personal use. A judge whose income depends upon finding the defendant guilty cannot possibly be fair and impartial, and adjudication by such a judge violates due process. (See also *Ward v. Monroeville* (1972) 409 U.S. 57 [same rule where the judge did not personally receive the fines, but served as mayor, and was

responsible for the town finances which depended in large part on revenue from fines].) California Supreme Court justices face comparable pressures to reach a conclusion against the death-row inmate. As the retention election of 1986 proved, for a California Supreme Court justice to keep his or her job, death sentences must be affirmed. The political system simply does not permit this Court to be fair and impartial.

The qualities of arbitrariness and susceptibility to political influence have been identified in a report by the International Commission of Jurists (ICJ) as "disturbing" aspects of the imposition of the death penalty in the United States. (International Commission of Justice, *Administration of the Death Penalty in the United States,* issued June 1, 1996.) Focusing on the influence of electoral politics on judge and district attorneys, the ICJ report considered that "the prospect of elected judges bending to political pressures in capital punishment cases is both real as well as dangerous to the principle of fair and impartial tribunals." Specifically, the ICJ found that "among elected judges, those who covet higher office—or those who merely wish to retain their status as judges—must constantly proclaim their fealty to the death penalty." (*Ibid.*) It also concluded that the administration of death sentences in this country is "arbitrary, and racially discriminatory, and prospects of a fair hearing for capital offenders cannot . . . be assured." (*Ibid.*) The qualities of arbitrariness and susceptibility to political influence are characteristic of this Court's capital case jurisprudence, which must be considered to be outside accepted international legal and social norms. (*Ibid.*)

To use the vivid metaphor by the late Justice Otto Kaus described these circumstances, Mr. Virgil's state and federal constitutional rights to due process, an impartial decision maker, and reliability in the capital adjudication process are not satisfied when his judgment of death is reviewed in the presence of a "crocodile in your bathtub." (Vick,

Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences (1995) 43 Buffalo L.Rev. 329, 396, fn. 323.) For these reasons, the Fifth, Sixth, Eighth, and Fourteenth Amendments require that Mr. Virgil's capital conviction and sentence be reversed.

XXIV.

THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE LIKEWISE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND MR. VIRGIL'S CONVICTIONS AND PENALTY MUST BE SET ASIDE

Mr. Virgil was denied his right to a fair trial by an independent tribunal and his right to minimum guarantees for the defense under principles established by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration). [309] For reasons set forth previously, Mr. Virgil contends that his rights under the state and federal constitutions have been violated. However, he further submits that these errors also violate principles of international law and provisions of treaties which are co-equal with the United States Constitution and binding upon the judges of the courts of all the states pursuant to the Supremacy Clause. (U.S. Const., art. VI, cl. 2.) In addition, these contentions are being raised here as the first step in exhausting administrative remedies in order to bring Mr. Virgil's claim in front of the Inter-American Commission on Human Rights on the grounds that the defects in the judgment are violations of the American Declaration of the Rights and Duties of Man.

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[309] Mr. Virgil wishes to thank the California Appellate Project for its very substantial contribution to this argument.

A. THE UNITED STATES AND THIS STATE ARE BOUND BY TREATIES AND BY CUSTOMARY INTERNATIONAL LAW

1. BACKGROUND

The two principal sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank with the Constitution and federal statutes as the supreme law of the land. [310] Customary international law is equated with federal common law. [311] International law must be considered and administered in United States courts whenever questions of a right which depends upon it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Murray v. The Schooner, Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 102.) When a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of nations, if any possible construction remains...." (*Weinberger v. Rossi* (1982) 456 U.S. 25, 33.) The United States Constitution also authorizes Congress to "define and punish ... offenses against the law of nations," thus recognizing the existence and force of international law. (U.S. Const. Article I, section 8.) Courts within the United States have responded to this mandate by looking to international legal obligations, both customary international law and

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310 Article VI, section 1, clause 2 of the United States Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

311 Restatement Third of the Foreign Relations Law of the United States (1987) pp. 145, 1058. See also *Eyde v. Robertson* (1884) 112 U.S. 580.

conventional treaties, in interpreting domestic law. (*Trans World Airlines, Inc. v. Franklin Mint Corporation* (1984) 466 U.S. 243, 252.) [312]

International human rights law has its historical underpinnings in the doctrine of humanitarian intervention, which was an exception to the general rule that international law governed regulations between nations and did not govern rights of individuals within those nations. [313] The humanitarian intervention doctrine recognized intervention by states into a nation committing brutal maltreatment of its nationals, and as such was the first expression of a limit on the freedoms of action states enjoyed with

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[312] See also *Oyama v. California* (1948) 332 U.S. 633, which involved a California Alien Land Law that prevented an alien ineligible for citizenship from obtaining land and created a presumption of intent to avoid escheat when such an alien pays for land and then transfers it to a U.S. citizen. The court held that the law violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion stating that the U.N. Charter was a federal law that outlawed racial discrimination, noted, "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned." (*Id.* at p. 673.) See also *Namba v. McCourt* (1949) 185 Or. 579, 204 P.2d 569, invalidating an Oregon Alien Land Law: "The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed.... When our nation signed the Charter of the United Nations we thereby became bound to the following principles (Article 55, subd. C, and see Article 56): 'Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' (59 Stat. 1031, 1046.)" (*Id.*, at p. 604.)

[313] See generally, Sohn and Buergenthal, International Protection of Human Rights (1973) p. 137.

respect to their own nationals. [314]

This doctrine was further developed in the Covenant of the League of Nations. The Covenant contained a provision relating to "fair and human conditions of labor for men, women and children." The League of Nations was also instrumental in developing an international system for the protection of minorities. [315] Additionally, early in the development of international law, countries recognized the obligation to treat foreign nationals in a manner that conformed with minimum standards of justice. As the law of responsibility for injury to aliens began to refer to violations of "fundamental human rights," what had been seen as the rights of a nation eventually began to reflect the individual human rights of nationals as well. [316] It soon became an established principle of international law that a country, by committing a certain subject matter to a treaty, internationalized that subject matter, even if the subject matter dealt with individual rights of nationals, such that each party could no longer assert that such subject matter fell exclusively within domestic jurisdictions. [317]

2. Treaty Development

The monstrous violations of human rights during World War II furthered the internationalization of human rights protections. The first modern International human rights provisions are seen in the United Nations Charter which entered into force on October 24, 1945. The U.N.

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314 Buergenthal, International Human Rights (1988) p. 3

315 *Id.*, pp. 7-9.

316 Restatement Third of the Foreign Relations Law of the United States (1987) Note to Part VII, vol. 2 at 1058.

317 Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco (1923) P.C.I.J., Ser. B, No. 4

Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." [318] By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

In 1948, the UN drafted and adopted both the Universal Declaration of Human Rights [319] and the Convention on the Prevention and Punishment of the Crime of Genocide. [320]. The Universal Declaration is part of the International Bill of Human Rights, [321] which also includes the

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[318] Article 1(3) of the U.N. Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, became effective October 24, 1945. In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

"The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere -- without regard to race, language or religion -- we cannot have permanent peace and security in the world."

[319] Universal Declaration of Human Rights, adopted December 10, 1948, U.N. Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization (hereinafter "Universal Declaration").

[320] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, became effective January 12, 1951 (hereinafter "Genocide Convention"). Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. (See generally Buergenthal, International Human Rights, *supra*, p. 48.)

[321] See generally Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills" (1991) 40 Emory L.J. 731.

International Covenant on Civil and Political Rights, [322] the Optional Protocol to the ICCPR, [323] the International Covenant on Economic, Social and Cultural Rights, [324] and the human rights provisions of the UN charter. These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing human rights through international obligations. Additionally, the United Nations has sought to enforce the obligations of member states through the Commission on Human Rights, an organ of the United Nations consisting of forty-three member states, which reviews allegations of human rights violations.

The Organization of American States, which consists of thirty-two member states, was established to promote and protect human rights. The OAS Charter, a multilateral treaty which serves as the Constitution of the OAS, entered into force in 1951. It was amended by the Protocol of Buenos Aires which came into effect in 1970. Article 5(j) of the OAS Charter provides, "[t]he American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex." [325] In 1948 the Ninth International Conference of American States proclaimed

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322 International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, became effective March 23, 1976 (hereinafter ICCPR).

323 Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, became effective March 23, 1976.

324 International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, took effect January 3, 1976.

325 OAS Charter, 119 U.N.T.S. 3, took effect December 13, 1951, amended 721 U.N.T.S. 324, took effect February 27, 1970.

the American Declaration of the Rights and Duties of Man, a resolution adopted by the OAS, and thus, its member states. The American Declaration is today the normative instrument that embodies the authoritative interpretation of the fundamental rights of individuals in this hemisphere. [326]

The OAS also established the Inter-American Commission on Human Rights, a formal organ of the OAS which is charged with observing and protecting human rights in its member states. Article 1(2)(b) of the Commission Statute defines human rights as the rights set forth in the American Declaration, in relation to member States of the OAS who, like the United States, are not party to the American Convention on Human Rights. In practice, the OAS conducts country studies, on-site investigations, and has the power to receive and act on individual petitions which charge OAS member states with violations of any rights set out in the American Declaration. [327] Because the Inter-American Commission, which relies on the American Declaration, is recognized as an OAS Charter organ charged with protecting human rights, the necessary implication is to reinforce the normative effect of the American Declaration. [328]

The United States has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization

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326 Buergenthal, International Human Rights, *supra*, pp. 127-131.

327 Buergenthal, International Human Rights, *supra*. As previously indicated, this appeal is a necessary step in exhausting Mr. Virgil's administrative remedies in order to bring his claim in front of the Inter-American Commission on the basis that the violations Mr. Virgil has suffered are violations of the American Declaration of the Rights and Duties of Man

328 Buergenthal, International Human Rights, *supra*.

of American States. As an important player in the drafting of the UN Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights. [329] Though the 1950s was a period of isolationism, the United States renewed its commitment in the late 1960s and through the 1970s by becoming a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation. [330]

Recently, the United States stepped up its commitment to international human rights by ratifying three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the International Covenant on Civil and Political Rights; President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial Discrimination [331] and the International Convention Against Torture and Other Cruel, Inhuman or

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[329] Sohn and Buergenthal, International Protection of Human Rights (1973) pp. 506-509.

[330] Buergenthal, International Human Rights, *supra*, p. 230.

[331] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, took effect January 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. (See, http://www.hri.ca/fortherecord1997/documentation/reservations/cerd.htm.) More than 100 countries are parties to the Race Convention. (*Ibid.*)

Degrading Treatment or Punishment [332] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law. [333] All of these treaties were ratified and in effect at the time of Mr. Virgil's trial and comprise part of "the supreme Law of the Land" which is binding upon "the Judges of every State." (U.S. Const, art. VI.)

3. Customary International Law

Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation. [334] The United States, through signing and ratifying the ICCPR, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. The substantive clauses of these treaties articulate customary international law and thus bind our government. When the

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[332] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, became effective on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong. 2d Sess., 136 Cong. Rev. 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 21, 1994. (See http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html.)

[333] Buergenthal, International Human Rights, *supra*, p. 4.

[334] Restatement Third of the Foreign Relations Law of the United States, section 102. This practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state and empirical evidence of the extent to which the customary law rule is observed.

United States has signed or ratified a treaty it cannot ignore this codification of customary international law and has no basis for refusing to extend the protection of human rights beyond the terms of the U.S. Constitution. [335]

Customary international law is "part of our law." (*The Paquete Habana*, *supra*, 175 U.S., at p. 700.) According to 22 U.S.C. section 2304(a)(1), "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries." [336] Moreover, the International Court of Justice, the principal judicial organ of the United Nations, lists international custom as one of the sources of international law to apply when deciding disputes. [337] These sources confirm the validity of custom as a source of international law.

The provisions of the Universal Declaration are accepted by United States courts as customary international law. In *Filartiga* v. *Pena-Irala* (2d Cir. 1980) 630 F.2d 876, the court held that the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights ...." (*Id.* at 882.) The United States, as a member state of the OAS, has international obligations under the OAS Charter and the American Declaration. The American Declaration, which has become incorporated by reference within the OAS

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335 Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills" (1991) 40 Emory L.J. 731 at 737.

336 22 U.S.C. section 2304(a)(1).

337 *Statute of the International Court of Justice*, art. 38, 1947 I.C.J. Acts and Docs 46. This statute is generally considered to be an authoritative list of the sources of international law.

Charter by the 1970 Protocol of Buenos Aires, contains a comprehensive list of recognized human rights which includes the right to life, liberty and security of person, the right to equality before the law, and the right to due process of the law. [338] Although the American Declaration is not a treaty, the United States voted its approval of this normative instrument and as a member of the OAS, is bound to recognize its authority over human rights issues. [339]

The United States has acknowledged the force of international human rights law on other countries. Indeed, in 1991 and 1992 Congress passed legislation that would have ended China's Most Favored Nation ("MFN") trade status with the United States unless China improved its record on human rights. Though President Bush vetoed this legislation, [340] in May 1993 President Clinton tied renewal of China's MFN status to progress on specific human rights issues in compliance with the Universal

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338 American Declaration of the Rights and Duties of Man, Resolution XXX, Ninth International Conference of American States, reprinted in the Inter-American Commission of Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser. L/V/II.50, doc. 6 (1980).

339 Case 9647 (United States) Res. 3/87 of 27 March 1987 OEA/Ser. L/V/II.52, doc. 17, para. 48 (1987).

340 See Wines, Bush, This Time in Election Year, Vetoes Trade Curbs Against China, N.Y. Times (September 29, 1992), p. A1.

Declaration. [341]

The International Covenant on Civil and Political Rights, to which the United States is bound, incorporates the protections of the Universal Declaration. Where other nations are criticized and sanctioned for consistent violations of internationally recognized human rights, the United States may not say: "Your government is bound by certain clauses of the covenant though we in the United States are not bound." [342]

B. THE NUMEROUS DUE PROCESS VIOLATIONS AND OTHER ERRORS WHICH OCCURRED IN THIS CASE ARE ALSO VIOLATIONS OF INTERNATIONAL LAW, AND THE JUDGMENT MUST BE REVERSED ON THAT BASIS.

The factual and legal issues presented in this brief demonstrate that Mr. Virgil was denied his right to a fair and impartial trial in violation of

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[341] President Clinton's executive order of May 28, 1993 required the Secretary of State to recommend to the President by June 3, 1994 whether to extend China's MFN status for another year. The order imposed several conditions upon the extension including a showing by China of adherence to the Universal Declaration of Human Rights, an acceptable accounting of those imprisoned or detained for non-violent expression of political and religious beliefs, humane treatment of prisoners including access to Chinese prisons by international humanitarian and human rights organizations, and promoting freedom of emigration, and compliance with the U.S. memorandum of understanding on prison labor. (See Orentlicher and Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China* (1993) 14 Nw. J. Int'l L. & Bus. 66, 79.) Though President Clinton decided on May 26, 1994 to sever human rights conditions from China's MFN status, it cannot be ignored that the principal practice of the United States for several years was to use MFN status to influence China's compliance with recognized international human rights. (See Kent, *China and the International Human Rights Regime: a Case Study of Multilateral Monitoring, 1989-1994* (1995) 17 H. R. Quarterly, 1.)

[342] Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures* (1993) 42 DePaul L.Rev. 1241, 1242.

customary international law as evidenced by Articles 6 and 14 of the International Covenant on Civil and Political Rights [343] as well as Articles 1 and 26 of the American Declaration.

The United States deposited its instruments of ratification of the ICCPR on June 8, 1992 with five reservations, five understandings, four declarations, and one proviso. [344] Article 19(c) of the Vienna Convention on the Law of Treaties declares that a party to a treaty may not formulate a reservation that is "incompatible with the object and purpose of the treaty." [345] The Restatement Third of the Foreign Relations Law of the United States echoes this provision. [346]

The ICCPR imposes an immediate obligation to "respect and ensure" the rights it proclaims and to take whatever other measures are necessary to give effect to those rights. United States courts, however, will generally enforce treaties only if they are self-executing or have been

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343 The substantive provisions of the Universal Declaration have been incorporated into the ICCPR, so these are incorporated by reference in the discussion above. Moreover, as was noted above, the Universal Declaration is accepted as customary international law.

344 Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights* (1992) S.Exec.Rep. No. 23, 102d Cong., 2d Sess.

345 Vienna Convention, *supra*, 1155 U.N.T.S. 331, took effect January 27, 1980

346 Restatement Third of the Foreign Relations Law of the United States, (1987) sec. 313, comment b. With respect to reservations, the Restatement lists "the requirement ... that a reservation must be compatible with the object and purpose of the agreement."

implemented by legislation. [347] The Executive Branch of the United States has declared that the articles of the ICCPR are not self-executing. [348] The first Bush Administration, in explanation of proposed reservations, understandings, and declarations to the ICCPR, stated: "For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated." [349]

But under the Constitution, a treaty "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." (*Asakura v. Seattle* (1924) 265 U.S. 332, 341.) [350] Moreover, treaties

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[347] Newman and Weissbrodt, International Human Rights: Law, Policy and Process (1990) p. 579. See also *Sei Fujii* v. *California* (1952) 38 Cal.2d 718, where the California Supreme Court held that Articles 55(c) and 56 of the U.N. Charter are not self-executing.

[348] Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights* (1992) S.Exec.Rep. No. 23, 102d Cong., 2d Sess.

[349] Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights* (1992) S.Exec.Rep. No. 23, 102d Cong., 2d Sess. at 19.

[350] Some legal scholars argue that the distinction between self-executing and non self-executing treaties is patently inconsistent with express language in Article 6, section 2 of the United States Constitution that all treaties shall be the supreme law of the land. (See generally Jordan L. Paust, *Self-Executing Treaties* (1988) 82 Am.J. Int'l L. 760.)

designed to protect individual rights should be construed as self-executing. (*United States v. Noriega* (1992) 808 F. Supp. 791.) In *Noriega*, the court noted, "It is inconsistent with both the language of the [Geneva III] treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs -- not to create some amorphous, unenforceable code of honor among the signatory nations. 'It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests .... Even if Geneva III is not self-executing, the United States is still obligated to honor its international commitment.'" (*Id.* at 798.)

Moreover, the United States Supreme Court is making increasing use of international law in its reasoning and holdings. In finding in *Atkins v. Virginia* that capital punishment for the mentally retarded exceeds the bounds of decency in violation of the Eighth Amendment, the Supreme Court noted that, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, n.21, 122 S.Ct. 2242, 2249; and see *id.,* citing *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830, 831, n. 31, 108 S.Ct. 2687 [considering the views of "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community"]; *Roper v. Simmons,* 125 S.Ct. 1183 [considering the international opposition against the execution of juvenile offenders.) Furthermore, in finding a Texas anti-sodomy law to be unconstitutional, the Supreme Court in *Lawrence v. Texas* looked heavily to the norms and values practiced by other countries, particularly in Europe, reasoning,

"The court held that the laws proscribing the conduct were invalid

> under the European Convention on Human Rights. . . . Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization."

(*Lawrence v. Texas* (2003) 539 U.S. 558, 123 S.Ct. 2472, 2481 (overruling Bowers v. Hardwick (1986) 478 U.S. 186, 106 S.Ct. 2841.)

Thus, the customs and practices of the international community are recognized as being relevant to the query of whether capital punishment passes muster under the Eighth Amendment.

Though reservations by the United States provide that the treaties may not be self-executing, the ICCPR is still a forceful source of customary international law and as such is binding upon the United States.

Article 14 provides, "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him .... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article 6 declares that "[n]o one shall be arbitrarily deprived of his life ... [The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court." [351] Likewise, these protections are found in the American Declaration: Article 1 protects the right to life, liberty and security of person; Article 2 guarantees equality before the law; and Article 26 protects the right of due process of law. [352]

In cases where the UN Human Rights Committee has found that a State party violated Article 14 of the ICCPR, in that a defendant had been denied a fair trial and appeal, the Committee has held that the imposition of

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[351] International Covenant on Civil and Political Rights, *supra,* 999 U.N.T.S. 717.

[352] American Declaration of the Rights and Duties of Man, *supra.*

the sentence of death also was a violation of Article 6 of the ICCPR. [353] The Committee further observed, "the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review of conviction and sentence by a higher tribunal.'" [354]

Further, Article 4(2) of the ICCPR makes clear that no derogation from Article 6 ("no one shall be arbitrarily deprived of his life") is allowed. [355] An Advisory Opinion issued by the Inter-American Court on Human Rights concerning the Guatemalan death penalty reservation to the American Convention on Human Rights noted "[i]t would follow therefore that a reservation which was designed to enable the State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it." [356] Implicit in the court's opinion linking nonderogability and incompatibility is the view that the compatibility requirement has greater importance in human rights treaties, where

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353 *Report of the Human Rights Committee*, p. 72, 49 U.N. GAOR Supp. (No. 40) p. 72, U.N. Doc. A/49/40 (1994).

354 *Id.*

355 International Covenant on Civil and Political Rights, *supra*, 999 U.N.T.S. 717.

356 Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of September 8, 1983, Inter-Amer.Ct.H.R., ser. A: Judgments and Opinions, No. 3 (1983), reprinted in 23 I.L.M. 320, 341 (1984).

reciprocity provides no protection for the individual against a reserving state. [357]

Mr. Virgil's rights under customary international law, as codified in the above-mentioned provisions of the ICCPR and the American Declaration and customary international law, were violated throughout his trial and sentencing phase.

All of the due process violations enumerated herein violated Mr. Virgil's right to a fair hearing as guaranteed by Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 6(1) of the European Convention, Article XXVI of the American Declaration, and Article 8 of the American Convention.

Accordingly, Mr. Virgil is entitled to relief not only pursuant to individual provisions of the United States and California Constitutions, but also pursuant to international treaties which are co-equal with the United States Constitution and binding upon the judges of this state through the Supremacy Clause. The United States must honor its role in the

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[357] Edward F. Sherman, Jr. The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation (1994) 29 Tex. Int'l L.J. 69. In a separate opinion concerning two Barbadian death penalty reservations, the court further noted that the object and purpose of modern human rights treaties is the "protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all individuals within their jurisdiction." (Advisory Opinion No. OC-2/82 of September 24, 1982, Inter-Am. Ct.H.R., ser. A: Judgments and Opinions, No. 2, para. 29 (1982), reprinted in 22 I.L.M. 37, 47 (1983).) These opinions are an indicator of emerging general principles of treaty law, and strengthen the argument that the United States death penalty reservation is impermissible because it is incompatible.

international community by recognizing the human rights standards in our own country to which we hold other countries accountable.

XXV

CUMULATIVE ERROR

Even if none of the individual errors identified above is deemed sufficient to reverse Mr. Virgil's judgment, the cumulative effect of these many errors rendered Mr. Virgil's trial fundamentally unfair and requires the reversal of the entire judgment. (See *United States v. Sepulveda* (1st Cir.1993) 5 F.3d 1161, 1195-1196; *People v. Sanders* (1995) 11 Cal.4th 475, 565; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1236.) According to the Court of Appeals

> "claims under the cumulative error doctrine are sui generis. A reviewing tribunal must consider each such claim against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the district court dealt with the errors as they arose (including the efficacy--or lack of efficacy--of any remedial efforts); and the strength of the government's case. See, e.g., *Mejia-Lozano*, 829 F.2d at 274 n. 4. The run of the trial may also be important; a handful of miscues, in combination, may often pack a greater punch in a short trial than in a much longer trial." (*United States v. Sepulveda, supra,* 5 F.3d at p. 1196.)

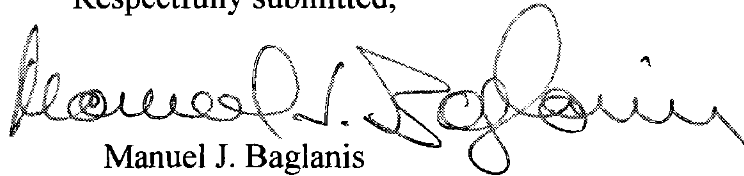
Because the many errors in each phase of Mr. Virgil's trial taken together operated to deny him his constitutional rights to a due process, trial before a fair and impartial jury, confrontation, the assistance of counsel, and a reliable penalty determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and its analogous California counterparts, the entire judgment must be reversed.

CONCLUSION

For all the above reasons, Mr. Virgil's convictions and judgment of death must be reversed.

Dated: July 3, 2005

Respectfully submitted,



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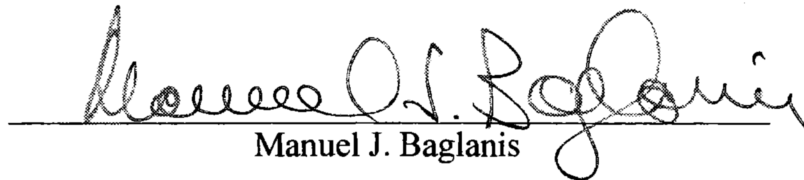
CERTIFICATE OF COMPLIANCE

CALIFORNIA RULES OF COURT, RULE 36(B)(1)(A)

I, Manuel J. Baglanis, hereby declare that the total number of words in the appellant's Opening Brief accompanying this Certificate of Compliance, is 166.583 words.

Dated: July 3, 2005



Manuel J. Baglanis

DECLARATION OF SERVICE

I, Manuel J. Baglanis, declare that I am over 18 years of age, and not a party to the within cause; my business mailing address is P.O. Box 700035 San Jose, CA 95170-0035. A true copy of the attached: **APPELLANT'S OPENING BRIEF**

was served on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

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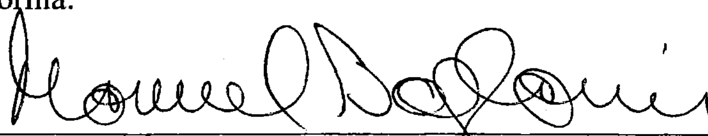
Each said envelope was then, on July 5, 2005, sealed and deposited in the United States Mail at SAN FRANCISCO, California, with the postage thereon fully prepaid. I declare under penalty that the foregoing is true and correct. Executed on July 5, 2005, at San Jose, California.



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