IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

Brandon Arane Taylor

Defendant and Appellant

Case No. S062562

San Diego County
Superior Court No.
SCD113815

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Diego

Frederick L. Link

The Honorable Judge [redacted]e

MICHAEL J. HERSEK
State Public Defender

ALISON PEASE
Deputy State Public Defender
Cal. State Bar No. 91398

801 K Street, Suite 1100
Sacramento, CA 95814-3518
Telephone (916) 322-2676

Attorneys for Appellant

TABLE OF CONTENTS (CONT'D)

Pages

TABLE OF CONTENTS (CONT'D)

Pages

TABLE OF CONTENTS (CONT'D)

Pages

TABLE OF CONTENTS (CONT'D)

Pages

TABLE OF CONTENTS (CONT'D)

Pages

TABLE OF CONTENTS (CONT'D)

TABLE OF CONTENTS (CONT'D)

TABLE OF CONTENTS (CONT'D)

Pages

TABLE OF CONTENTS (CONT'D)

Pages

TABLE OF CONTENTS (CONT'D)

Pages

TABLE OF CONTENTS (CONT'D)

Pages

TABLE OF CONTENTS (CONT'D)

TABLE OF CONTENTS (CONT'D)

TABLE OF CONTENTS (CONT'D)

Pages

TABLE OF CONTENTS (CONT'D)

Pages

TABLE OF CONTENTS (CONT'D)

Pages

TABLE OF CONTENTS (CONT'D)

Pages

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

PAGES

CONSTITUTIONS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGES

JURY INSTRUCTIONS

TEXT AND OTHER AUTHORITIES

TABLE OF AUTHORITIES

PAGES

TABLE OF AUTHORITIES

STATEMENT OF APPEALABILITY

This is an automatic appeal from a verdict and judgment of death. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF THE CASE

On June 27,1995, a complaint was filed in the Municipal Court of California in the County of San Diego, charging appellant, Brandon Arnae Taylor, with first degree murder with four special circumstances as well as rape, burglary, forcible oral copulation and robbery. (1 CT 1-4.)[1] Appellant was arraigned on that date. (8 CT 1626.) Initially, the Court appointed the San Diego Public Defender's Office to represent appellant. (8 CT 1626.)

At a hearing on July 7, 1995, the San Diego Public Defender's Office declared a conflict of interest in its ability to represent defendant. (2 RT 101.) In a hearing on July 10, 1995, the Hon. David J. Danielsen relieved the Public Defender's Office as counsel and appointed Mary Ellen Attridge of the Office of the Alternate Defender as new counsel for appellant. (2 RT 203; 8 CT 1628.) The Preliminary Hearing occurred on August 14 and 15, 1995. (8 CT 1631-1632.) Appellant was arraigned on October 4, 1995, and pled not guilty and denied all allegations. (8 CT 1634.) The prosecutor stated her intent to seek the death penalty. (3 RT 303.) When the court said it would assign the case to Judge Mudd, appellant's counsel filed a challenge to him under Penal Code section 170.6. (8 CT 1634; 3 RT 304.) A new judge was assigned to the case. (8 CT 1636.) Appellant waived his speedy trial rights, and trial was set for May 13, 1996. (3 RT 306.)

---

[1] All citations to the record include the volume number followed by the RT or CT page number.

In a hearing on January 25, 1996, defense counsel, Mary Ellen Attridge, expressed doubts about appellant's competency to stand trial and asked the new judge, the Hon. Frederic L. Link, to schedule a hearing pursuant to Penal Code section 1368. (8 CT 1638; 4 RT 601.) After some discussion, Judge Link agreed that a 1368 proceeding was needed and suspended criminal proceedings. (8 CT 1638; 4 RT 605.)

The court appointed a psychologist, Dr. Greg Michel, to do an evaluation of appellant. At a hearing on February 22, 1996, the trial judge accepted Dr. Michel's determination that appellant was competent to stand trial. (5 RT 607-608.) Appellant's counsel requested a jury trial on the issue of appellant's competence. (5 RT 609.) During in camera proceedings, defense counsel explained that she had hired two mental health experts to evaluate appellant's competency. Dr. Macspeidan found appellant to be schizoid-typal, and Dr. Ronald Segal diagnosed him as having full-blown paranoid schizophrenia. (8 CT 1639; 5 RT 612.)

At a hearing on February 23, 1996, appellant told the judge that he wanted a new attorney. (8 CT 1640; 5 RT 614.) He explained that he couldn't get along with either Ms. Attridge or Mr. Lee, the co-counsel appointed by the court. The trial judge declined to address the "*Marsden*" issue until he settled the 1368 issues. (5 RT 614.) At this hearing, Judge Link appointed two additional doctors, Dr. Cerbone and Dr. Ornish, to examine appellant in order to determine his competency to stand trial. (8 CT 1640.) The prosecutor named Dr. Ornish as the psychiatrist who would testify on behalf of the state at the 1368 hearing. (6 RT 625.)

The prosecutor also advised the trial judge that he needed to schedule a *Marsden* hearing even though the criminal proceedings had been suspended under section 1368. (6 RT 626-631.) An in camera proceeding

regarding appellant's request for the appointment of new counsel was held, and the judge denied this request. (8 CT 1640; 6 RT 641.)

At a hearing on March 18, 1996, Judge Link granted the prosecutor's motion to quash deposition subpoenas issued by the defense pursuant to the Code of Civil Procedure. (8 CT 1643.) The trial judge accepted the prosecutor's view that criminal discovery rules applied to the section 1368 proceedings. (7 RT 653.)

On April 8, 1996, the section 1368 trial began. Initially, the parties prepared for a jury trial; however, after the noon recess, defense counsel announced that she was going to waive appellant's right to a jury trial under section 1368. (8 CT 1648-1649; 10 RT 770.) Appellant stated that he did not wish to waive his jury trial rights. (10 RT 771-772.) Over appellant's objection, the trial judge accepted defense counsel's waiver of a jury. (10 RT 772.)

Testimony in the non-jury competency trial began on April 9, 1996, and concluded on April 15, 1996. (8 CT 1650, 1657.) The trial judge found appellant to be mentally competent. (8 CT 1657.) Appellant again requested a new lawyer, and the trial judge again denied this request. (8 CT 1657.) The next day, the trial judge conducted a *Marsden* hearing in camera; thereafter, he relieved the Alternate Defender's Office as counsel and appointed the Public Defender's Office. (8 CT 1658.)

On September 9, 1996, the trial judge ruled upon various in limine motions filed by the defense. (8 CT 1664-1666.) The court ruled on the prosecution's in limine motions on September 10, 1996. (8 CT 1668.) Another hearing on motions filed by both the defendant and by the prosecution occurred on October 2, 1996. (8 CT 1671.)

Jury selection began on October 28, 1976, and concluded on

November 4, 1996. (8 CT 1676-1679.) The prosecution commenced its case-in-chief on November 4th, and it took three and a half days to complete. (8 CT 1680-1685.) The defense case-in-chief was presented in one day, on November 12, 1996. (8 CT 1686-1687.) The prosecution did not offer any rebuttal evidence. (8 CT 1688.) At the request of the prosecutor, the trial judge dismissed the special circumstance of robbery. (8 CT 1688.) Counsel gave their closing arguments; Judge Link instructed the jury and the jury began its deliberations. Two hours later the jury returned with guilty verdicts on all charges.[2] (8 CT 1689.)

The first penalty phase trial began on November 18, 1996, and the prosecution presented its case in one day. (8 CT 1700-1701.) Appellant again requested that his attorneys be removed. (8 CT 1700.) Judge Link conducted another *Marsden* hearing and denied appellant's request for a new attorney. (8 CT 1701.)

The defense case in mitigation was presented over the course of two days. (8 CT 1702-1705.) On November 21, 1996, the attorneys gave their closing arguments, and the judge instructed the jury. Jury deliberations lasted for two and a half days. On the third day, the jury informed the court that they were deadlocked. (8 CT 1710.) After counsel and the trial judge spoke to the jury, it was agreed that the jury would attempt to formulate questions that might help them reach a verdict. The jurors subsequently submitted a question, asking if intent to murder can be used as a circumstance of the crime. After receiving the judge's answer to this question, the jury continued to deliberate. Within about a half hour, the jury

---

[2] The jury returned guilty verdicts on five counts (8 CT 1690-1694) and true findings on the three special circumstances allegations. (8 CT 1695-1697.)

returned to the courtroom to report being hopelessly deadlocked. The court polled the jury and then declared a mistrial in this first penalty phase trial. (8 CT 1711.)

Jury selection for the second penalty phase trial began on April 28, 1997, and lasted for a day and a half. (8 CT 1718-1719.) At this second penalty phase, the prosecution recalled some witnesses who had testified at the guilt phase to describe the events surrounding the crimes alleged in this case. (8 CT 1720-1724.) In addition, the State recalled the witnesses who had testified at the first penalty phase trial. (8 CT 1725-1728.)

Defense counsel presented appellant's case in mitigation over the course of three days. (8 CT 1728-1734.) The prosecution introduced one rebuttal witness. (8 CT 1735.) On May 14, 1997, counsel delivered their closing arguments to the jury. (8 CT 1735-1736.) The second penalty phase jury deliberated for less than a day and returned a verdict of death on May 16, 1997. (8 CT 1738.)

On June 27, 1997, Judge Link heard the defense motion for modification of the jury verdict pursuant to Penal Code section 190.4, subdivision (e), and denied it. (8 CT 1739.) The judge formally sentenced appellant to death on Count 1 and stayed the sentences on Counts 2, 3, 4 and 5, pursuant to Penal Code section 654. (8 CT 1739.)

STATEMENT OF FACTS

A. The Guilt Phase

On the evening of June 23, 1995, Rosa Mae Dixon was sitting in her living room with her sister, Betty Hayes, who was visiting from Kansas. (24 RT 2260.) At about 9:30 p.m., they noticed that there was an African-American man standing in the room, looking at them. Apparently, he had come from the rear of the house. (24 RT 2262.) Mrs. Hayes testified that both she and her sister were "scared to death" when they first saw the strange man in their house. (24 RT 2299.) He said something to them. Mrs. Hayes could not understand him, but she thought he said his name. (24 RT 2299.) He closed the front door and then sat down between Mrs. Dixon and Mrs. Hayes for a "minute." (24 RT 2262-2263.) When Mrs. Dixon started to get up, the man also got up and grabbed her clothing. (24 RT 2263.) After her sister told her to call 911, Mrs. Hayes went into the bedroom, picked up the phone, and then the man grabbed the telephone and pulled the phone wire out of the wall. (24 RT 2263.)

The man pushed the two women into the back bedroom. There he raped Mrs. Dixon while she was down on the floor. (24 RT 2265-2266.) He then tried unsuccessfully to place his penis in Mrs. Dixon's mouth. (4 RT 2268.) Initially, Mrs. Dixon seemed to be breathing heavily and gasping for air. After the rape and attempted sodomy, Mrs. Hayes could not hear her sister breathing. (4 RT 2268-2269.)

The man left Mrs. Dixon and took money out of Mrs. Hayes' purse which was open and sitting on a table at the edge of the bedroom door. (24 RT 2271-2272.) After he went out the back door, Mrs. Hayes began yelling for help. (24 RT 2274.) When she went out of the front door, the police were already there. (24 RT 2274.) About 45 minutes later the police

took her to the alley behind her sister's house, where she identified appellant as the assailant. (24 RT 2276.)

Officer Timothy Jones of the San Diego Police Department was one of the first officers to arrive at Mrs. Dixon's house. When he arrived, at about 10:30 p.m. on June 23, 1995, appellant was already in a patrol car in the custody of two other officers. (24 RT 2316.) It was parked in the alley behind Mrs. Dixon's house. (24 RT 2317.) After appellant stated that he needed to urinate, Officer Jones directed him to urinate into a sample bottle. (24 RT 2313.) Officer Jones reported that appellant appeared calm and did not show any signs of being intoxicated. (24 RT 2314-2315.)

A number of other police officers received a burglary-in-progress call to the Dixon residence. Officer Thomas Gardenhire and his partner, Wendy Brown, arrived at the Dixon house at about 9:36 p.m. on June 23, 1995. (24 RT 2320-2322.) They parked in a driveway north of the house and spoke to Erik Kirkpatrick, who lived next door to Mrs. Dixon. (24 RT 2321-2322.) When Gardenhire went into Mrs. Dixon's backyard, he heard someone yelling for someone to stop. When he climbed up on the back fence, he could see the officers had handcuffed someone. (24 RT 2324.)

When Officer Gardenhire walked back towards Mrs. Dixon's house, he went through the partially opened back door but he could not go through the house as the door to the kitchen was locked. After he heard screaming, he left the house and walked to the front yard. There he saw a woman, screaming for help as she came out the front door. (24 RT 2325.) This woman and Officer Gardenhire went back into the house through the front door. He saw another woman lying on the floor in the rear bedroom; one of the police officers already in the house said they needed a paramedic. (24 RT 2326.) Gardenhire then administered CPR to her; she had only a faint

pulse and did not seem to be breathing. (24 RT 2327.) Her nightgown was bunched up at her waist; she was not wearing underwear and there was blood on her left leg and on the carpet below her vagina. (24 RT 2329.)

At about 9:39 p.m. on June 23, 1995, Officer Robert Gassman and his partner, Officer Frank Caropreso, also responded to a call about a crime in progress at Mrs. Dixon's house. Because they saw police cars already parked at the front of the house, they drove into the alley behind it. (24 RT 2343-2344.) While they were in the alley, Officer Gassman heard some noise and then saw a man, whom he identified as appellant, on top of the fence. The officer told appellant to stop; he and Carapreso pulled appellant off the fence and handcuffed him. (24 RT 2346-2347.) Appellant was carrying a dark plaid shirt, which appeared to have blood on it. (24 RT 2348, 2354.) When asked what he was doing, appellant said he thought the house was vacant and denied that he lived in one of the houses in the alley. (24 RT 2349.) Appellant also said that his friend, whom he identified as a white male named John Hall, had just raped an old woman inside the house. (25 RT 2432-2433.) About a half an hour later, they conducted a curbside line-up of appellant for two witnesses . (24 RT 2350-2351.)

In his report, the officer noted that appellant did smell of alcohol at the time he was apprehended. (24 RT 2353-2354.) He did not remember any other signs that appellant was drinking at the time of the incident. (24 RT 2354.) Neither Gassman nor Carapreso did an evaluation to determine if appellant was under the influence of drugs or narcotics. Such an evaluation would include checking appellant's pupils, his tongue and his pulse. (25 RT 2446.)

Erik Kirkpatrick lived next door to Mrs. Dixon; they were friendly and saw one another almost every day. (25 RT 2378-2379.) At about 9:30

p.m. on that date, he saw a woman come out of the front door of Mrs. Dixon's house and call for help. (25 RT 2394-2395.) He went to investigate and found that Mrs. Dixon's front door was closed. When he went to the side of her house and looked through the window, he saw appellant on his knees and hunched over. (25 RT 2395.) He thought he heard someone say "shut up" and "I don't want to hurt you." (25 RT 2396.) Kirkpatrick went back to his own house and called 911. (25 RT 2383.) After the police came, Kirkpatrick was asked to identify appellant during a curbside line-up. (25 RT 2392.)

Paramedic Brandon Halle arrived at Mrs. Dixon's house at about 9:40 p.m. on June 23, 1995. When he went into the house, he found two police officers giving her CPR. (25 RT 2398.) Halle and his partner set up an advanced cardiac life-support monitor and administered emergency heart medication through an IV. (25 RT 2399.) The victim was not breathing, and her heart was not beating, although the heart's electric system was still functioning. She appeared to be in cardiac arrest. (25 RT 2399.) After administering more drugs, her heart began to beat again. (25 RT 2400.) She was then placed on a ventilator to help her breathe. (25 RT 2403.) Halle told Mrs. Dixon's sister that he did not think she was going to live, but they were doing everything they could to revive her. (25 RT 2402.)

Meredith Ann Jackson did an examination of appellant after his arrest. The purpose of the examination was to collect evidence regarding an alleged sexual assault. She collected hair and blood from him.[3] (25 RT 2450-2451.) She also swabbed the outside of his penis and his urethra.

---

[3] She collected four vials of blood for testing purposes: one for DNA, one for drugs, one for alcohol and one for sexually transmitted diseases. (25 RT 2455.)

There was a bright red fluid on these swabs as well as on his clothing and underwear. (25 RT 2453-2454.) Ms. Jackson thought that appellant smelled of alcohol, and he said he had been drinking. (25 RT 2458.) She did not ask him if he had taken any non-prescription drugs. (25 RT 2458.)

Elizabeth Palermo, an evidence technician with the San Diego Police Department, collected evidence from the crime scene. She took a series of photographs inside Mrs. Dixon's house. (25 RT 2469-2471.) Palermo also swabbed a red stain which was on the carpet in the back bedroom. (25 RT 2471.) She collected items, such as a red wallet, clothing worn by appellant at the time of his arrest, currency from the crime scene and from appellant's wallet as well as a number of photographs taken of Mrs. Dixon's house and the crime scene. (25 RT 2470-2489.)

Patricia Lawson, a criminalist employed by the San Diego Police Department, testified regarding her DNA analysis of blood and sperm found on appellant at the time of his arrest as well as on the victim and her clothing. (25 RT 2498.) She determined that sperm found on the shirt which appellant had in his possession at the time of his arrest was consistent with his sperm. (25 RT 2502.) The blood found on appellant and on his clothing was consistent with that of the victim and not consistent with his own blood. (25 RT 2503-2504.) Vaginal swabs taken from the victim contained a combination of sperm which was consistent with appellant's and blood which was consistent with Mrs. Dixon's. (26 RT 2514-2519.)

Dr. Mark A. Super, a Deputy Medical Examiner for San Diego County, conducted the autopsy of Mrs. Dixon, who was 80 years old at the time of her death. (26 RT 2524-2525.) He testified that her body had various bruises and abrasions on her right arm and hand as well as on her left shoulder and elbow. There also was bruising on her sternum or

breastbone, which could have resulted from the CPR used to restart her heart. (26 RT 2527.) Dr. Super identified several photographs which were taken at the time of the autopsy. (26 RT 2528-2529.) He opined that the injuries revealed in the photographs were consistent with Mrs. Dixon having been involved in a struggle; he did not believe that they were the result of medical interventions to save her life. (26 RT 2530.)

Dr. Super also testified using a diagram [4] of a vaginal area. He stated that there was a one-half inch long tear of the posterior fourchette, the place where the two side walls of the vagina come together. (26 RT 2531.) There were two larger tears inside (about three or four inches from the surface) of her vagina. (26 RT 2533.) These injuries were consistent with a forcible rape. (26 RT 2534.) A great deal of blood had accumulated in Mrs. Dixon's vagina. (26 RT 2534.) He did swabs of the vagina and found sperm.

In Dr. Super's view, Mrs. Dixon died of cardiac arrest following a sexual assault. (26 RT 2535.) He opined that she experienced physiological stress as a result of the struggle with her assailant and that the psychological trauma of rape also caused the release of adrenaline, causing her heart to race. (26 RT 2536.) This process led to abnormal heart rhythms and ultimately to cardiac arrest, according to Dr. Super. (26 RT 2535-2536.) He further opined that Mrs. Dixon would not have died when she did but for this assault. (26 RT 2536.) According to Dr. Super, although the autopsy revealed that her body had some changes due to age, such as arteriosclerosis in her aorta, she had no life-threatening systemic illnesses.

---

[4] The trial judge explained to the jury that he had decided that the doctor should use a diagram rather than photographs to explain the vaginal injuries suffered by Mrs. Dixon. (26 RT 2532.)

(26 RT 2537.)

On cross-examination, Dr. Super testified that, before the autopsy, the police told him about the circumstances surrounding the death of Mrs. Dixon. Indeed, Detective Torgerson of the San Diego Police Department was present during the autopsy. (26 RT 2539-2540.) His report stated that Mrs. Dixon's death was cardiac arrest following a sexual assault, with arteriosclerotic or cardiovascular disease as a contributing cause. (26 RT 2540.) He described her injuries, which included injuries she sustained when medical personnel attempted to resuscitate her. (26 RT 2527.) Dr. Super agreed that a younger woman would have survived the assault. (26 RT 2541.) He acknowledged that he did not see any of Mrs. Dixon's medical records before he did the autopsy. (26 RT 2542.) He also stated that in his examination of her heart he did not see any evidence of a previous heart attack or myocardial infarction. (26 RT 2546.)

Teresa Kinsey, a registered nurse working with the Sexual Assault Response Team ("SART") at Villaview Hospital, examined Mrs. Dixon at Mercy Hospital on June 23, 1995. (26 RT 2551-2552.) Mrs. Dixon was in the ICU, in critical condition, on a ventilator and comatose. (26 RT 2552-2553.) She collected hair (including pubic hair), saliva, blood and urine samples as well as vaginal swabs from Mrs. Dixon. (26 RT 2553.) According to Kinsey, there was a lot of blood inside the victim's vagina, indicating internal injuries, which are unusual in rape cases unless some object has been used. (26 RT 2556.) On cross-examination, Ms. Kinsey agreed that it is more likely for an 80-year-old woman to be injured during a rape than a much younger woman. (26 RT 2558.) Kinney took the photographs of Mrs. Dixon shortly after midnight On June 24, 1995. (26 RT 2559.)

Peter Gaughen, an officer with the San Diego Police Department, testified that appellant was in his custody for about four to four and a half hours on June 24, 1995. (26 RT 2566.) Officer Gaughen first saw appellant at about 2 a.m., and appellant was under his constant observation until about 6 a.m. According to Gaughen, appellant's mood, attitude and conduct remained the same throughout this period. (26 RT 2562-2563.) Gaughen did not believe that appellant was under the influence of alcohol or drugs. At about 5 a.m., appellant was tested for alcohol; the tests showed that he had .01 percent alcohol in his blood at that time. (26 RT 2563-2564.) Appellant was not tested for drugs. (26 RT 2566.)

Officer Terry Torgerson, another San Diego police officer, also testified about his observations of appellant in the early morning hours of June 24, 1995. He first saw appellant at the police station at about 2:30 a.m., some five hours after the incident. (26 RT 2614.) Based on his observations, Torgerson did not believe that appellant was under the influence of either alcohol or drugs, and he did not test appellant for either. (26 RT 2612, 2615.)

Dr. Thomas Diggs, a cardiologist, treated Mrs. Dixon on June 23, 1995, in the emergency room of Mercy Hospital. He first saw her at about 11 p.m.. She was critically ill, unresponsive, was on a ventilator and being treated with very powerful cardiac medications. (26 RT 2619.) Dr. Diggs opined that had Mrs. Dixon not received medical intervention at the scene, she would have died within five minutes of her cardiac arrest. (26 RT 2622.) Before she arrived at the emergency room she had undergone cardiac arrest, but the hospital aggressively tried to revive her. (26 RT 2620, 2623.) Her condition continued to decline and after the doctors determined that she was totally brain dead, they took her off the ventilator, and she died

at about 10 p.m. on June 24, 1995. (26 RT 2624.) Dr. Diggs testified that in his opinion Mrs. Dixon died of cardiac arrest resulting from a sexual assault. (26 RT 2625.) He opined that the cardiac arrest resulted from the stress and extreme fear caused by the sexual assault. (26 RT 2626.)

Dr. Diggs also reviewed Mrs. Dixon's medical records pre-dating the attack and concluded that she did not have any illnesses which would have caused her death. (26 RT 2626.) On cross-examination, Dr. Diggs stated that it would be possible for fear alone to cause cardiac arrest, particularly in an 80-year-old woman. (26 RT 2929.) Her medical records did show that Mrs. Dixon had once had an irregular EEG, and that she had some arteriosclerosis, had experienced chest pains and edema. (26 RT 2629.) Dr. Diggs also conceded that Mrs. Dixon had diabetes and high blood pressure, for which she had been taking medication for some time. (26 RT 2629.)

Dr. Mark Cerbone, a psychiatrist, testified for the defense regarding appellant's mental state. In addition to interviewing appellant while he was incarcerated in county jail in 1996, Dr. Cerbone reviewed four other mental assessments of appellant; the records from his hospitalizations for substance abuse; police and other investigative reports concerning the incident; and summaries of interviews of appellant's family members, friends and acquaintances. (29 RT 2742.) At age 16, appellant was twice hospitalized at Harbor View, an inpatient psychiatric rehabilitation program. (29 RT 2727, 2751.) Each stay was for several weeks. (29 RT 2751.) His mother placed him in Harbor View because she believed he was abusing drugs. (29 RT 2745.) The records from these hospitalizations showed that appellant began using crystal methamphetamine ("crystal meth") when he was between the ages of 12 and 14. (29 RT 2747.) In the years afterwards and

before his first admission to Harbor View, appellant was also using LSD, alcohol and cocaine. (29 RT 2747.)

Dr. Sambs, a psychiatrist at Harbor View, diagnosed appellant as being substance dependent, including dependence on crystal meth, marijuana, and poly-substances. (29 RT 2747.) During their initial interview, appellant told Dr. Sambs that when he was "tweaking" he heard non-existent conversations and communicated with the devil. (29 CT 2748.) The term, "tweaking," refers to being acutely intoxicated on crystal meth. Appellant told Sambs that he had been using about half a gram of crystal meth daily for three to five years. (29 RT 2748.)

While at Harbor View, appellant was also given several anti-psychotic drugs, including Haldol, Mellaril and Thorazine because at times his behavior was out of control. (29 RT 2749-2750.) In addition, there were times when he was placed in restraints and sedated. (29 RT 2750, 2752.) These problems occurred during both hospitalizations at Harbor View. Appellant also exhibited general paranoia, suspecting others were laughing at him or talking about him. (29 RT 2752.) Another example of his paranoia was his delusion that Dr. Sambs and his mother had stolen appellant's ideas about teenage Ninja Turtles and sold them to Hollywood. (29 RT 2757.)

Other records, including police reports concerning two incidents in 1994, indicated that appellant was acting in a paranoid manner after his second release from Harbor View. (29 RT 2755.) Dr. Cerbone also stated that the records indicated that appellant was suffering from paranoid delusions, including the belief that the police were after him and people were spying on him. (29 RT 2756.) While appellant was in the California Conservation Corps in 1993 and 1994, he continued to behave in a paranoid

way. (29 RT 2758.) In the opinion of Dr. Cerbone, appellant suffers from mental illness, including crystal meth and cannabis dependence, substance-induced psychotic disorder, and psychotic disorders not otherwise specified. (29 RT 2759.)

Dr. Cerbone initially diagnosed appellant in February of 1996 in connection with the competency trial. At that time he was only concerned with a diagnosis relative to the competency issue. (29 RT 2790-2791.) Dr. Cerbone testified that since that time he had looked at many more documents relevant to appellant's mental health and his history of substance abuse, and Cerbone now believed that the appropriate diagnosis for appellant was substance dependence causing psychosis. (29 RT 2792.) Also relevant to the diagnosis was the fact that appellant's father had been diagnosed as paranoid schizophrenic. (29 RT 2792.) Dr. Cerbone also opined that when an individual is significantly substance-dependent, it is difficult to separate the problems created by that condition from a personality disorder. (29 RT 2793.)

Dr. Steven Stahl, a psychiatrist, testified as an expert in psychopharmacology. (29 RT 2803.) He described how people who abuse methamphetamine ("meth") over a long period of time often develop paranoia, depression, disordered thinking and impulsivity. (29 RT 2808-2809.) Meth is a chemical which mocks one of the brain's natural neurotransmitters, dopamine. (29 RT 2806.) LSD is a chemical which stimulates the release of another neurotransmitter, serotonin. (29 RT 2811.) When a chronic user of meth, such as appellant, also uses LSD, it is likely he will experience both paranoia and psychosis. (29 RT 2812.)

The chronic abuse of meth will affect the brain even if there is no sign of meth in a person's blood. Chronic abuse leads to a depletion of the

dopamine in one's brain, and it can take days or even months for the brain to recover from such abuse. Therefore, even if there is no sign of meth in a person's urine that does not mean that his/her brain has not been altered by long-term abuse. (29 RT 2813.) Similarly, abuse of LSD has lasting effects. LSD dissipates from the urine rather rapidly;[5] therefore, the fact that testing showed only .4 nanograms of LSD in appellant's urine taken after his arrest does not mean that he was not suffering the effects of LSD at the time of the crime. LSD use can result in behavioral changes that last for weeks and even months. (29 RT 2815.)

As noted previously, there was evidence that appellant had been drinking on the day of the incident. Dr. Stahl testified that alcohol is another drug which causes the user to become uninhibited. (29 RT 2814.) His consumption of alcohol, in combination with chronic abuse of meth and use of LSD, would result in appellant becoming very impulsive. (29 RT 2815-2816.) Any individual with a pre-existing mental illness who took these three drugs together would be even more likely to experience a lack of inhibition, paranoia and impulsiveness. (29 RT 2817.)

Dr. Paul Wolf, a pathologist and Director of Autopsy at the Veterans' Administration in La Jolla, testified for the defense regarding the condition of the heart and circulation system of Mrs. Dixon. (29 RT 2842.) In preparing to testify, Dr. Wolf reviewed the following: (1) Mrs. Dixon's medical records; (2) the tissue slides done of her heart, lungs and other

---

[5] Dr. Stahl testified that failure to refrigerate a urine sample as well as exposure to light will speed the degradation of LSD in the sample. (29 RT 2839-2840.) Another witness testified that appellant's urine sample was not refrigerated and was stored in an area with some lighting. (27 RT 2666-2667.)

organs at her autopsy as well as photographs of portions of these slides; (3) paramedic and other hospital records of Mrs. Dixon on the night of the incident; and (4) the transcripts of the testimony of Dr. Diggs and Dr. Super at the preliminary hearing. (29 RT 2846-2847.)

Based on his review of these documents and other materials, Dr. Wolf concluded that Mrs. Dixon had pre-existing heart disease, consisting of arteriosclerosis. He found about fifty percent blockage of her main coronary arteries, which was the result of cholesterol, fibrosis, collagen and scar tissue. (29 RT 2854.) In addition, some of her lung tissue had stiffened up probably as a result of emphysema. (29 RT 2853.) In addition, Mrs. Dixon was a diabetic, and the tissue samples as well as the photographs indicated that she was suffering from diabetic heart disease. (29 RT 2855.)

Dr. Wolf testified that scar tissue in her heart indicated that Mrs. Dixon had a heart attack at least ten days before her death, and perhaps weeks, months or years before. (29 R 2858.) Alternatively, the damage to her heart may have resulted from some viral condition. (29 RT 2859.) Dr. Wolf also believed that she had an acute heart attack a few hours before her death. (29 RT 2861.) According to Wolf, Mrs. Dixon's pre-existing heart disease made her more vulnerable to a cardiac arrest or a heart attack caused by trauma. That is, if there is scar tissue in the heart, the release of the stress hormones will obstruct the flow of electric energy to all parts of the heart. (29 RT 2863.)

Dr. Wolf said that a person can go into cardiac arrest as a result of experiencing extreme fright. (29 RT 2864.) In this case, it is impossible to know whether the initial fright experienced by Mrs. Dixon when she saw appellant in her house or the subsequent pain she experienced as a result of the rape caused her to go into cardiac arrest. (29 RT 2864.)

On cross-examination, Dr. Wolf agreed that Mrs. Dixon's pre-existing heart disease was not severe, but that her records showed that she had complained of chest pain, shortness of breath and swelling of her ankles. She also had high blood pressure and an enlarged heart. (29 RT 2871.) Wolf stated that fright and fear played a large part in causing Mrs. Dixon to go into cardiac arrest, although the pain she experienced might also have contributed. He also stated, however, that there is no way of proving that the pain contributed to the cardiac arrest. (29 RT 2881.)

Dr. Randall Baselt, a forensics and clinical toxicologist, testified about his analysis of appellant's urine sample. (29 RT 2883.) He received the sample on July 20, 1995, almost a month after the sample was taken, and tested it for the presence of alcohol, marijuana, meth, and LSD. (29 RT 2887.) He used two different tests; both showed the presence of LSD. (29 RT 2889.) Baselt also tested the urine for the presence of meth and amphetamine. One test showed a very weak positive for meth, but it did show the presence of amphetamine. (29 RT 2891.) Baselt also analyzed the urine for blood alcohol level. By extrapolation, based on time factors, Dr. Baselt opined that at the time of the crime, appellant had a blood alcohol level of between .12 to .14 percent. (29 RT 2893-2895.)

B. The Second Penalty Phase [6]

1. The Evidence in Aggravation

Because there was a penalty mistrial in this case and a second jury was chosen to hear the penalty retrial, the prosecutor presented a lot of guilt phase evidence at the second penalty trial. In addition to such evidence, the

---

[6] The first penalty phase trial ended in a mistrial; therefore, this brief will not describe that proceeding.

prosecution's case in aggravation included evidence regarding appellant's alleged involvement in unadjudicated acts of violence or threats of violence and victim-impact evidence presented through the testimony of family members and people from the community.

a. Guilt Phase Witnesses

Twelve police officers testified about their involvement with the investigation of this case. As they had done in the guilt phase trial, these officers described the call to Mrs. Dixon's house, the crime scene, the arrest and identification of appellant and appellant's demeanor in the hours after the arrest. (41 RT 3987-4034; 42 RT 4140-4160.)

Maria Elizabeth Palermo, an evidence technician with the San Diego Police Department, testified, as she had at the first trial, about processing the crime scene. Ms. Palermo photographed the interior and exterior of the Dixon house. (41 RT 4054-4058.) She also collected items of evidence, including clothing and other items belonging to appellant as well as the clothing and other items belonging to Mrs. Dixon. (41 RT 4060-4070.)

Meredith Jackson, a sexual assault nurse examiner, testified about collecting evidence from appellant after his arrest; this evidence included a urine sample, blood samples, pubic hair and material swabbed from his penis. (41 RT 4080-4082, 4084.) She also collected and bagged the clothes appellant was wearing. (41 RT 4083.) Similarly, Chistina Dunn Davis, a forensic toxicologist employed by Poison Lab Inc., testified as she had at the first trial about her testing of the blood and urine samples of appellant, collected on June 23 and 24, 1996. These samples were tested for the presence of amphetamines, methamphetamine, cocaine, opiates, PCP, barbiturates, benzodiazepines and LSD. All tests were negative. (42 RT 4096-4098.)

Dr. Mark Super, the deputy medical examiner who had conducted the autopsy on Mrs. Dixon and who was a witness at the guilt phase, testified about his findings, including descriptions of the injuries to her body and to her vagina. (43 RT 4275-4284.) He opined, as he had during his guilt phase testimony, that Mrs. Dixon died as a result of cardiac arrest following a sexual assault. (43 RT 4286.)

Dr. Thomas Diggs, a cardiologist who examined Mrs. Dixon at Mercy Hospital on June 23, 1995, testified as he had at the guilt phase trial. (42 RT 4182.) When he saw her, she was unconscious and on life support systems. (42 RT 4187-4188.) Theresa Kinsey, a nurse with the Sexual Assault Response Team ("SART") who saw Mrs. Dixon in the Intensive Care Unit at Mercy Hospital after the assault on June 23, 1995, testified about her examination of Mrs. Dixon's vaginal area. Ms. Kinsey described in great detail the injury and trauma to the area and several graphic photographs that she had taken during her examination. (42 RT 4204-4211.) When asked by the prosecutor how the level of injury in this case compared with injuries she had seen in some 400 examinations of sexual assault victims, Ms. Kinsey opined that it was one of the most brutal assaults that she had ever seen. (42 RT 4211.) On cross-examination, Kinsey conceded that Dr. Diggs had examined Mrs. Dixon before her, and he reported that there was a small amount of blood in the vaginal area while Kinsey reported that there was a gross amount of blood. (42 RT 4221.)

Mrs. Dixon's neighbor, Eric Calvin Kirkpatrick, testified as he had at the first trial about what had happened at Dixon's house on the night of the killing. (42 RT 4103.) He described how he heard a scream from her house; saw appellant in the back bedroom and telephoned 911. (42 RT 4103-4115.)

The prosecutor asked Mr. Kirkpatrick whether the murder of Mrs. Dixon had affected him. He answered: "It has in a sense that she was a very kind person to me. I do miss her. I do have to go on with my life, I do miss her and I wish it hadn't happened to her." (42 RT 4119-4120.)

b. Victim Impact Evidence

Betty Hayes, Mrs. Dixon's sister who was with her at the time of the crime in this case, testified as the prosecution's first "victim impact" witness. Because this was a second penalty phase trial with a new jury, Mrs. Hayes repeated some of the testimony she gave at the guilt phase about what happened on the night of the crimes. (41 RT 3954-3969.) She described appellant's sudden appearance in the living room, how he pulled both of them into the back bedroom, raped her sister and attempted to have her orally copulate him. (41 RT 3958- 3964.) Mrs. Hayes also described how her sister seemed to develop severe breathing problems during the course of the rape and her conclusion that her sister was already dead by the time appellant had left the house. (41 RT 3964-3965.)

Mrs. Hayes talked about what impact witnessing this incident and coming to terms with her sister's death had on her:

> . . . it has ruined my life. She was my sister and my best friend and we just had an awful good time together. Being gone just spoiled the rest of my life.

(41 RT 3972.) Mrs. Hayes also reported that she thought about what happened all the time and had trouble sleeping as a result. (41 RT 3973.) She identified a photograph, Court's Exhibit 22, taken of her and her sister the day before she died. (41 RT 3973.)

Six other members of Mrs. Dixon's family testified about their relationships with her, their feelings about the crimes in this case, and the

effect they have had on them. Derrick Haynes, the 13-year-old great-grandson of Mrs. Dixon, described her as his "best friend." (43 RT 4290.) Derrick said he saw her almost every weekend, and he could talk to her about all of his problems, including the fact that he doesn't know the identity of his father. Derrick was very upset because his grandmother "died a real painful death." (43 RT 4291.) When pressed to describe the impact his grandmother's violent death had on him, Derrick testified that he thought about her every night, had trouble sleeping and sometimes woke up crying in the middle of the night. (43 RT 4292-4293.)

Derrick's mother, Sandra Quillin, also testified about the effect of her grandmother's death. Like her son, she described Mrs. Dixon as her best friend. (43 RT 4294.) When asked about the impact Mrs. Dixon's death had on her, Ms. Quillen said it caused her to lose her business and a long-term relationship and made it harder to raise her son on her own. (43 RT 4295.) Ms. Quillin described Mrs. Dixon's death as the 'most painful agonizing death anybody could die from." (43 RT 4295.) She also stated: "He [appellant] took one of the sweetest women in the world and tortured her to death." (15 RT 4295.) Because of the awful way her grandmother died, Quillin said "there is no healing from that." (43 RT 4295.)

Doris Homik, one of Mrs. Dixon's daughters, testified about her mother's work in the community. (43 RT 4305.) Among other activities, Mrs. Dixon was a "volunteer grandma" with the Jefferson Child Development Center and also volunteered with the senior adult services. (43 RT 4306.) Ms. Homik described the effect of her mother's death on her friends and neighbors:

> This is a dear friend of theirs who was taken from them in the most violent manner that they could imagine, and I think it is something

> that elderly women live in fear of. It is like that's the ultimate violation of their dignity or their independence.

(43 RT 4307.) Ms. Homik testified that her mother's violent death had "devastated four generations of a very close family" and compromised the health of all members of her family. Ms. Homik, who has multiple sclerosis, said the violent death of her mother had caused her to become even sicker. (43 RT 4308-4309.)

Another daughter, Bonnie Dixon, described her mother's death as a "slaughter." (43 RT 4311.) Ms. Dixon identified a photograph of the children at the Jefferson School with whom her mother had worked. (43 RT 4313.) She also said that her mother was always helping her neighbors who were in need. (43 RT 4314.) Ms. Dixon described the anger and bitterness that she and other family members felt toward appellant for killing her mother. (43 RT 4317.)

Jana Homik, Mrs. Dixon's youngest grandchild, testified that she had called her grandmother "Precious." She spent a lot of time with her when she was growing up and "absolutely adored her." (44 RT 4383.) Ms. Homik also said that her grandmother's violent death had adversely affected her; she suffers from clinical depression, insomnia, social withdrawal and great sadness. (44 RT 4386-4387.) Ms. Homik said it was not the fact that her grandmother died, but the manner in which she died. (44 RT 4387.)

Emmanuel Francouis testified about Mrs. Dixon's work at the Child Development Center of the San Diego Unified School District. She volunteered once a week at the Center; she played games with the children, watched them draw or joined in other activities with them. (44 RT 4331.) On Mrs. Dixon's 80th birthday, the children walked to her house to give her a large card, decorated with their names and their artwork. This card,

marked as Court Exhibit 102, was shown to the jury. (44 RT 4334-4335.) When asked about the effect of Mrs. Dixon's death on the children and staff of the Center, Francouis testified that some of the children had known her for years, and many of them cried and were sad. (44 RT 4334.)

c. Factor b Evidence Offered in Aggravation

At the penalty phase retrial in this case, the prosecutor offered the testimony of six witnesses as factor b evidence; that is, evidence showing that appellant had engaged in conduct involving use or attempted use of force or violence or the express or implied threat to use force or violence. (Pen.Code § 190.3, (b).)

Three sheriff's deputies testified regarding an "extraction" of appellant from his cell at the San Diego County Jail where he was incarcerated before and during his trial in this case. Deputy Sheriff Brian Perry testified that on the evening of March 9, 1996, he was instructed by his sergeant to move appellant from his cell to a more secure unit, module 5-A. (42 RT 4232-4233.) After being told about the move, appellant objected, stating that Perry did not have the authority to move him and that he needed to talk to his lawyer. (42 RT 4233.)

Because of appellant's refusal to leave his cell, the sergeant ordered Perry and five other deputies to remove appellant forcibly with the use of a nova shield [7] and pepper spray. (42 RT 4233-4234.) After appellant came out of his cell, he resisted the officers and ran from them. (42 RT 4234-4235.) Deputy Perry conceded that appellant could not have gotten out of the jail because all of the doors to the outside were controlled by officers.

---

[7] A nova shield is plastic, about 3 by 1½ feet in size and emits an electrical charge. (42 RT 4244.)

(42 RT 4237-4239.) Two other deputy sheriffs, Officer Juan Lozoya and Sergeant Craig Walker, offered similar testimony about appellant's resistance to being transferred to a new jail cell. (42 RT 4246-4262.)

Officer John Cherski, a San Diego police officer, testified about his encounter with appellant on August 11, 1994. On that date Cherski was working a special plain-clothes detail in downtown San Diego. (42 RT 4264.) Appellant was with a group of workers from an urban renewal project who were cleaning up the sidewalk. (42 RT 4265.) According to Cherski, appellant walked past him, stopped and began staring at him. When Cherski made eye contact, appellant asked him why he was staring. (42 RT 4265.) Cherski testified that appellant then made a "threat of violence" when he said, "That's good for you. I will fuck you up." Cherski then showed appellant his badge and arrested him. (42 RT 4266.)

On cross-examination, Officer Cherski agreed that because he was in plain clothes, appellant could not have known that he was a police officer until he showed him his badge. He also agreed that after he identified himself and told appellant that he was going to arrest him, appellant was fully cooperative. (42 RT 4268.)

At the penalty retrial in this case, Jason Labonte testified that he was born on October 25, 1976, and was about three and a half years younger than appellant.[8] (44 RT 4351-4352.) Labonte and his mother, Carol, lived with appellant and his mother on and off for about eight years, from the time Labonte was three years old. (44 RT 4352.) He testified that when he he was about eight years old, and defendant was about twelve or thirteen

---

[8] Appellant was born on March 23, 1973. (1 CT 8.)

years old,[9] appellant "raped" and "molested" him. (44 RT 4353.) According to Labonte, one day after school, when he and appellant were alone in the house, appellant asked him to masturbate him and give him a "blow job." When he refused, appellant got a little steak knife and forced Labonte to orally copulate him, and then appellant inserted his penis into Labonte's buttocks. (44 RT 4353.) Labonte was sobbing and crying; it caused him both physical and emotional pain. (44 RT 4354-4355.) Appellant then made him write a note describing the incident and promising to never tell anyone. (44 RT 4355.)

Appellant and he never talked about the incident again, and their relationship went on as before. Appellant was nice to him. (44 RT 4356.) At some point later, Labonte told his mother about the incident, and she told appellant's mother. (44 RT 4357.) They did nothing about it. (44 RT 4357.) He kept the incident to himself, except for talking to his wife and his mother about it. After he was subpoenaed to testify at this trial, he decided to tell the prosecutor since he was going to have to testify under oath. (44 RT 4358-4359.)

On cross-examination, Labonte agreed that he had smoked marijuana with appellant while they were growing up and that his mother had on occasion accused him of stealing her marijuana. (44 RT 4459.) He also acknowledged that there were times when his mother had accused him of lying. (44 RT 4459.) He could not explain why she did not take him to a doctor after he had told her about the molestation. (44 RT 4360.) Labonte did not know if her failure to do anything about the incident meant that she

---

[9] If, in fact, Labonte was eight years old when this alleged incident occurred, appellant would not have been older than twelve.

did not believe him. (44 RT 4360.)

The trial judge read a stipulation by the parties, a document marked as Court Exhibit 103, about an incident involving Mary Ellen Attridge, appellant's counsel during the competency proceedings in this case. The stipulation stated that on January 25, 1996, appellant was seated next to Ms. Attridge in court. After she told the trial judge that she believed that appellant was incompetent to stand trial, appellant stated that he did not want her to be his attorney. Thereafter he got out of his chair, lunged at Ms. Attridge and called her a fucking cunt. Ms. Attridge jumped out of the way and was not injured. (37 CT 8105; 43 RT 4303.)

The prosecution also called a fire captain from Placer County, Keith Burson, as a witness. Captain Burson had taught appellant cardiopulmonary resuscitation ("CPR") [10] in a class which took place on November 12-13, 1994. (44 RT 4339.) Appellant received an "A" in the course, one of six people in a class of eighteen who received this grade. (44 RT 4340-4341.) Captain Burson testified at length about the content and requirements of the course on CPR and first aid. (44 RT 4341-4349.)

2. The Evidence in Mitigation

Albert Evans Cressey III, an attorney, testified about his friendship with appellant, whom he met in 1993 when they lived in the same apartment complex in San Diego. (44 RT 4406.) They became friends and spent time together watching movies, playing baseball and talking. For a period of about fourteen months, he saw appellant about three times a week. (44 RT

---

[10] This evidence was allowed because appellant had two cards in his wallet when he was arrested on June 23, 1995: a CPR card and a standard first aid card, both issued in appellant's name by the Placer Area District American Red Cross. (44 RT 4338.)

4414.) Initially, Cressey saw appellant as an amiable, friendly and fairly ordinary 19-year to 20-year old. (44 RT 4407.) On two occasions, however, he saw a different side of appellant. Once when they were watching a movie, he heard appellant having a heated and extended conversation with himself. (44 RT 4408.) Cressey believes there was a second time, again at a movie, when he heard appellant have a conversation with himself. (44 RT 4408-4409.) Cressey testified that he never saw appellant do anything violent. (44 RT 4409.) He had seen appellant interact with his young nephews, the sons of appellant's sister, and his behavior around them was perfectly appropriate. (44 RT 4410.)

Rosemary Lynch testified about her relationship with appellant over a ten year period. She had lived with appellant's mother and thought of herself as a second mother to appellant. (44 RT 4416.) He was about 13 years old when she first met him, and she described him as being a "very loving guy." Although most of the time he seemed like a typical teenager, he and his friends were using marijuana. Sometimes appellant would not come home or go to school. (44 RT 4417-4418.) Eventually, both appellant's mother and Ms. Lynch became so concerned about appellant that they decided to move away from the area and put appellant into a treatment program. (44 RT 4418.) Appellant seemed to be unhappy with the fact that his mother was in a relationship with Ms. Lynch. In order to allow his mother to spend more time with appellant, she and Ms. Lynch stopped living together. (44 RT 4420.)

Ms. Lynch continued to spend time at their apartment. During this period, appellant become more isolated; he didn't want to follow the rules set up by his mother or take care of his room. (44 RT 4421.) Appellant started talking about how people, including neighbors and strangers, were

watching him. (44 RT 4421.) On one occasion, he went up into the crawl space of the apartment to determine if someone was watching or listening to what was going on in his apartment. (44 RT 4422.) He also became obsessed by the belief that the producers of the Teenage Ninja Turtles movies had stolen martial arts moves that he had invented. (44 RT 4422-4423.)

Eventually, appellant's mother told him that he couldn't live with her anymore. He became homeless except when he was staying at the St. Vincent DePaul's shelter. (44 RT 4427.) Later, he was allowed to move in with his mother and Ms. Lynch. Although this arrangement went well for awhile, when things deteriorated, appellant's mother convinced him to go into the California Conservation Corps ("CCC"). (44 RT 4429-4430.) He was in the CCC for about a month and then was dismissed from the program. (44 RT 4430-4431.) According to Ms. Lynch, appellant came home from the CCC feeling completely defeated. (44 RT 4431.) They moved to an apartment on Utah Street, and appellant moved in with them.

During this period, Ms. Lynch reported seeing appellant getting into fights with himself and giggling inappropriately while watching sad movies on television. (44 RT 4433, 4435.) Initially, when they all moved into the Utah Street apartment, things went well. Appellant cooperated around the house, and he found a job working at a retirement home. (44 RT 4433, 4435.) Although he seemed happy about the job when he first got it, he eventually quit. (44 RT 4435.)

Ms. Lynch was devastated when she learned about the death of Mrs. Dixon because she had not believed that appellant was capable of such violence. She had not seen anything suggesting that he wanted to hurt anyone other than himself. (44 RT 4438.)

Dr. Paul Wolf, a pathologist, testified at the second penalty trial as he had testified at the guilt phase about his views about the cause of death for Mrs. Dixon. He reviewed the autopsy report, the photographic slides of Mrs. Dixon's heart, lung and kidney, Mrs. Dixon's medical records and her records from Mercy Hospital where she died. (45 RT 4477.) Wolf testified that Dr. Super, who had conducted the autopsy, erroneously had minimized Mrs. Dixon's pre-existing heart problems, although Super had conceded that there was extensive scarring in her heart and that there was some stenosis of the major coronary arteries. (45 RT 4478.) Super's report also acknowledged that Mrs. Dixon had extensive arteriosclerosis in her blood vessels and in her kidneys and was also suffering from emphysema. (45 RT 4479.)

According to Dr. Wolf, Mrs. Dixon had a typical diabetic cardiomyopathy or heart disease. Her records also showed that she was being treated for diabetes, high blood pressure and fluid retention, which itself is a symptom of heart failure. (45 RT 4480-4481.) She had emphysema, extensive cholesterol and scarring in her primary coronary arteries as well as extensive occlusion and stenosis of the small vessels in the heart. (45 RT 4483-4485.) Dr. Wolf opined that Mrs. Dixon had an "acute heart attack" about thirty minutes before her death. He also believed that, as a result of both diabetes and high blood pressure, she had previously had several small heart attacks. (45 RT 4486-4487.)

In Dr. Wolf's opinion, Mrs. Dixon's cardiac arrest resulted from a catecholamine surge caused by the stress resulting from appellant's sudden appearance in her house as well as the subsequent sexual assault. (45 RT 4488.) Dr. Wolf also believed that some of the vaginal bleeding in Mrs. Dixon's case may have come not only from the tear in her vagina but also

as a result of bleeding from capillaries in the vagina, uterus and cervix caused by low oxygen flow which resulted from the fact that Mrs. Dixon was in the process of dying and was experiencing heart failure. (45 RT 4497-4498; 4514.)

During cross-examination, Dr. Wolf continued to maintain that Mrs. Dixon's cardiac arrest, which occurred at her house during the sexual assault, did not necessarily result in brain death. The prosecutor tried unsuccessfully to get Wolf to state unequivocally that Mrs. Dixon was dead at the scene. (45 RT 4499-4507.) On re-direct examination, Dr. Wolf reasserted that the CPR had resuscitated her, allowing her to breathe again with the assistance of a ventilator and with medications. Therefore, Wolf testified "that she may not have been brain dead after the defendant had the sexual assault on her and so restoration of blood flow to the brain had occurred relating to CPR and she survived another maybe 15 to 20 hours at Mercy Hospital." (45 RT 4516.)

Dr. Steven Gabaeff, a board-certified emergency physician, also testified as part of appellant's case in mitigation at the penalty retrial. In his practice, he had treated many patients who were victims of sexual assault, and he also had done extensive research in that area. (45 RT 4527-4528.) Although Dr.Gabaeff had done many vaginal examinations of women who had been sexually assaulted, only a small number of these women were post-menopausal.[11] (45 RT 4531.)

Dr. Gabeaff reviewed the autopsy report on Mrs. Dixon, the medical reports from Mercy Hospital, all of Mrs. Dixon's medical records, and

---

[11] He estimated that he had examined less than five post-menopausal women who had been raped. (45 RT 4531.)

paramedic reports from the crime scene. (45 RT 4531-4532.) According to Gabeaff, the records showed that Mrs. Dixon had a long history of atrophic vaginitis which results in the thinning of the tissue of the vagina because of diminished estrogen levels. (45 RT 4534-4535.) This process makes the lining of the vagina more susceptible to tearing as a result of trauma. (45 RT 4537.)

Dr. Alex Stalcup, a medical doctor certified as a specialist in addiction medicine,[12] also testified as a mitigation witness. He has been a consultant to both the prosecution and the defense in criminal cases. (45 RT 4547, 4549.) Stalcup testified that the research regarding addiction has established that there is a genetic predisposition for drug addiction. Eight out of ten addicts have a family history of addiction within two generations, parent or grandparents. (45 RT 4554.) Another risk factor for addiction is childhood sex abuse or other childhood trauma. (45 RT 4554-4555.) A third key risk factor is mental illness. Stalcup explained that having a mental illness makes one's addiction worse, and conversely, addiction worsens one's mental illness. (45 RT 4556.)

Although Dr. Stalcup had not interviewed appellant, he had reviewed all of appellants' records from Harbor View, investigative reports from both the defense and the prosecution, all of the transcripts from the proceedings in this case, and statements of people who have known appellant. (45 RT 4557, 4561.) Based on all of that information and on his experience working with mentally ill drug addicts, Stalcup concluded that appellant suffers from paranoid schizophrenia. (45 RT 4563.) Stalcup clarified that

---

[12] Stalcup was also the director of the Haight-Ashbury Free Medical Clinic and medical director of the New Leaf Treatment Center. (45 RT 4547, 4549.)

this was appellant's current mental status, and he could not say for how long appellant had been a paranoid schizophrenic. (45 RT 4563-4564.)

Dr. Stalcup testified that the records in this case revealed that appellant had a long-standing mental illness. For example, one of his uncles reported that appellant had exhibited mental problems as a toddler. The records of appellant's hospitalizations at Harbor View confirm that he was suffering from a severe mental illness. While the Harbor View doctors did not diagnose appellant as schizophrenic, they treated him with fairly heavy doses of anti-psychotic medications. Clearly, the physicians treating him thought that his behavior was psychotic or else they would not have been able to justify the use of these drugs.[13] (45 RT 4564.)

In addition, childhood friends of appellant described behavior which Dr. Stalcup saw as clearly psychotic, such as his belief that the television was talking to him and his delusion that Dr. Sambs, his doctor at Harbor View, had stolen his ninja moves and that his mother had conspired with Dr. Sambs to sell them to Hollywood. There were also reports from various people who knew him in the CCC and when he was homeless that appellant talked to himself. (45 RT 4565.) Dr. Stalcup characterized this behavior as "very florid psychotic behavior." (45 RT 4566.)

The doctors at Harbor View diagnosed appellant as suffering from poly-substance abuse, which means the abuse of multiple classes of drugs. Appellant particularly abused meth, LSD, marijuana and alcohol. (45 RT 4567.) Stalcup described meth as a stimulant drug that produces

---

[13] At Harbor View, on multiple occasions, appellant received both oral and intramuscular injections of Haldol, the strongest anti psychotic drug. He also received large doses of Mellaril and Thorazine. (45 RT 4565.)

extraordinary levels of euphoria and interferes with sleep. In his practice, Stalcup had seen meth addicts who would go without sleep for as long as fifteen days.

Meth, if used habitually, will almost invariably produce a drug-induced mental illness with symptoms virtually identical to paranoid schizophrenia. (45 RT 4567.) Chronic users of meth begin to hallucinate and become paranoid. They become intensely anxious, sometimes to the point of panic, and in the delusion that they are being persecuted or in danger they sometimes act out aggressively to defend themselves. (45 RT 4568.) These same symptoms are also typical of paranoid schizophrenia. (45 RT 4568.)

According to Dr. Stalcup, the manifestation of paranoid schizophrenia is subtle. Initially, it can just seem to be odd behavior. The disease typically manifests itself in late teens or early adulthood. Under conditions where stress levels are low, somebody with paranoid schizophrenia can look quite normal. While under conditions of high stress, they undergo a process called decompensation and begin to look very disturbed and psychotic. (45 RT 4568-4569.)

According to Stalcup, schizophrenics often use meth because one of the most distressing symptoms of schizophrenia is an inability to experience pleasure. Because meth is a drug that gives extraordinary pleasure, schizophrenics are at risk for using it because it allows them to feel something that they otherwise never feel at all. (45 RT 4570.) One cannot predict how someone is going to look or act under the influence of a drug if he or she has a mental illness. A schizophrenic under the influence of drugs might look normal because the drug is making him or her focus better and feel more energetic. On the other hand, a mentally ill person who is using

drugs might seem quite disturbed. (45 RT 4571.)

Dr. Stalcup testified that the symptoms of paranoid schizophrenia come and go. Many people with schizophrenia will go through periods of days, weeks or months where they are pretty normal, and then with or without provocation, they will go through days, weeks or months where they are very psychotic and symptomatic. (45 RT 4572.) It is difficult to diagnose schizophrena in teenagers and young adults because in the developing stages of the disease it looks like a half dozen other mental disorders. (45 RT 4573.)

Because psychotic behavior is anti-social, the disease often looks like anti-social personality disorder. That is, very commonly, paranoid schizophrenics exhibit a lot of anti-social behavior, such as rudeness, speaking out of turn, and making threats. (45 RT 4573.) The differences between individuals with anti-social personality disorder and those with paranoid schizophrenia are significant. The former are cold, scheming, ruthless, and calculating people whose primary goal is self-gratification while schizophrenics have a mental illness which prevents them from conforming to social norms. For example, if a schizophrenic believes that someone is reading his or her mind, he might become enraged and act out. (45 RT 4574.) To the person on the receiving end, this behavior will doubtless look anti-social; however, in fact, the behavior is the result of the schizophrenic's own psychosis and delusions which makes him or her feel persecuted, threatened, anxious and panicked. (45 RT 4575.)

Based on his review of the records in this case, Dr. Stalcup testified that he did not believe that appellant has an anti-social personality disorder because appellant consistently acts in a counterproductive way which does not benefit him. His behavior is impulsive rather than manipulative. (45 RT

4575.)

According to Stalcup, the records show that appellant had many of the risk factors for both paranoid schizophrenia and drug addiction. (45 RT 4576.) First, the Veterans Administration records of his biological father, Mr. Pollard, showed that he was both a paranoid schizophrenic and an alcoholic. Also, appellant had a history of learning disabilities. Further, his childhood was filled with stress; he grew up without a father, and he was very unhappy with the fact that his mother was a lesbian. (45 RT 4577.) Moreover, appellant was exposed to alcohol, marijuana, LSD and perhaps meth in his own household while he was growing up. (45 RT 4578.)

On cross-examination, the prosecutor confronted Dr. Stalcup with what she considered to be conflicting opinions and diagnoses in the testimony and reports of the mental health professionals who had testified at appellant's competency hearing. Nonetheless, Stalcup did not change his diagnosis of appellant as a paranoid schizophrenic with a history of serious drug addiction. (45 RT 4596-4600.)

Marianella Camarillo, who met appellant when they were both patients at the Harbor View Medical Center, testified about her friendship with appellant in 1989 and 1990. Appellant and some of the other young men left the hospital without authorization; when they were apprehended by the police, they were punished. (46 RT 4615.) Because he was so upset at being returned to the in-patient program, appellant was strapped down and given Thorazine. (46 RT 4616.) She continued to see appellant after they completed the in-patient program because both of them were enrolled in an "aftercare" program at Harbor View. Eventually, he stopped going to these meetings. (46 RT 4617.) During a group therapy session, appellant talked about having a problem with the gay "lifestyle" because either his sister or

his mother was a lesbian. (46 RT 4618.)

Damian Gutierrez also met appellant while they were both hospitalized at Harbor View. Mr. Gutierrez said that he thought appellant seemed "different" because he saw appellant "space out" several times. (46 RT 4626.) He explained what he meant by spacing out: "Like he is not thinking with everyone else." (46 RT 4627.) Gutierrez testified that he had heard appellant say more than once that he was upset with his mother because she was a lesbian. (46 RT 4628.)

Another witness, Ella Davidson, was friends with appellant in the period when he was fourteen to sixteen years old. (46 RT 4637.) They were all part of a group who hung out together at Ocean Beach and smoked marijuana. Davidson estimated that appellant used marijuana every day, two or three times a day. (46 RT 4631.) At that time, appellant appeared to be a very mellow person who became even more mellow when he was on marijuana. (46 RT 4631.)

Davidson described changes she saw over time in appellant's personality. When she first knew him, he was a really nice person, who was always smiling and trying to make other people happy. Suddenly, appellant did not want to hang out with his friends; he hardly smiled and started to look dirty and unkempt. (46 RT 4634.) After this change, she saw him lose his temper two times. The first time, he got very angry at his mother and cursed her. (46 RT 4633.) The second incident occurred when appellant got into a fight with someone who called him a nigger. He was the only Black person in that group of young people, and when people jokingly used that word he would usually go along with it. However, as his personality changed, he was no longer willing to tolerate being called a nigger. (46 RT 4635.) Ms. Davidson described appellant as drifting away from the larger

group as he started to spend more time with a smaller group who were using very heavy drugs, such as PCP, crystal meth, and cocaine. (46 RT 4640.)

Rebecca Goot testified about the period when she knew appellant, from 1992 to 1994. She met appellant because she and her husband were neighbors of his mother. (46 RT 4641.) At that time, her husband owned a jazz club where appellant worked as doorman. Ms. Goot got to know appellant quite well; she liked and trusted him. (46 RT 4643.) He liked to play with her young son and even babysat him one time. According to Ms. Goot, at the time appellant had hope and a desire to make something of his life. She also said he seemed a little bit frustrated and lonely. (46 RT 4643.) Ms. Goot testified that she thought appellant's mother used him and when she moved, appellant was left homeless. (46 RT 4644.)

Her husband, Melville Goot, a musician and adjunct professor of music, also testified as a mitigation witness. (46 RT 4647.) During the early 1990s, Goot owned a jazz club, Holy Smokes, in downtown San Diego. His partner in that venture was Carl Evans, Jr. (46 RT 4648.) The club was open for only about three and a half months, and he employed appellant as doorman. (46 RT 4649.) He and his partner hired appellant because they liked his sense of humor, his people skills, and the fact that he had a background in martial arts. They were very satisfied with him as an employee. Not only did appellant act as doorman, he was willing to do all sorts of other jobs around the club. (46 RT 4650.)

Mr. Goot, like his wife, testified about his social relationship with appellant, which included eating meals together as well as going to church. When the jazz club closed, he tried unsuccessfully to get appellant to join the army. (46 RT 4651-4652.) Mr. Goot testified that appellant was left homeless when his mother moved to a new residence and did not tell him

where she was living. (46 RT 4652.)

He believed that appellant was quite talented in writing rap lyrics with a positive message, without the usual violence and degradation of women. Goot did notice that appellant could be quite unrealistic. For example, he spent all the money he had on a old Cadillac with the plan that he would use it to run a limousine service to the airport even though he didn't have a license or insurance. The car broke down within about 2 1/2 weeks. (46 RT 4653.)

Mr. Goot noticed that appellant sometimes said strange things. For example, they would be talking about something relatively serious, and appellant would start talking about what Mighty Mouse would have done, or that the Power Rangers or Ninja Turtles could help them out. It gave Goot the impression he was talking to a five or six-year-old, but he thought it was just appellant's sense of humor. (46 RT 4654.) When he heard about appellant's arrest, Mr. Goot could not believe appellant could have committed the crimes of which he has been convicted. (46 RT 4656.)

Mr. Goot's partner in the jazz club, Carl Evans, also testified. He first met appellant when they were setting up the club. His first impression of appellant was that he had a very big heart. As he got to know him better, he became concerned that appellant had no education; he also seemed sad and disappointed. Evans and Mel Goot tried to talk appellant into going back to school because they wanted to see him do well and were so fond of him. (46 RT 4703.)

Evans described appellant as a very good and eager worker, who seemed to enjoy being part of a team. Appellant reminded him of the character Lenny from the story "Of Mice and Men" because he did not have it all together intellectually. (46 RT 4704.) Evans described an incident

when he asked appellant if he would like to come to a martial arts class attended by Evans' children. At first, appellant seemed interested, but then he seemed to disappear mentally. There was silence for about six or seven minutes, then appellant came back to the present and consciousness. Evans had never seen that happen with anyone before. (46 RT 4706.) After the jazz club folded, Evans lost contact with appellant. He was shocked when he learned about appellant's involvement in this case. Evans expressed sympathy for the victim and her family, but he said, "I don't think he's [appellant] quite up to par to be judged like anybody else should be judged." (46 RT 4709.)

Sean Evans testified about his friendship with appellant when appellant was in junior high school. (46 RT 4663.) Appellant is about three years younger than Evans. They lived near each other and were members of a group of young people for about three years. (46 RT 4664.) Evans described appellant as nice and smart but as having serious problems. His behavior during those years was so strange that the kids talked about him behind his back. When appellant was teased about his behavior, he usually would just pretend not to hear it.

This group of kids liked to imitate the television show, Kung Fu. They would play karate, but when they stopped playing the game appellant would stay in character all day. Even when the kids would tell him to stop, appellant didn't seem to seem to understand that the game was over. (46 RT 4665.) Evans also testified that appellant had a habit of forgetting things he had done or said. This would anger other people because he would steadfastly deny that he had done or said something even though others insisted that he had. (46 RT 4666.) Sometimes when someone said something unpleasant to appellant, he would get a glassy look in his face

and stare straight ahead. It was as though appellant suddenly stopped hearing you and went into his own world. (46 RT 4667.)

Evans described one incident where appellant really seemed to lose control. An openly gay man named Chucky had styled appellant's hair with a jheri curl; it was botched job, and Evans and his brother laughed at appellant. (46 RT 4670.) At first appellant took the teasing in good humor, but then he went berserk. He started chasing Evans and when appellant caught him, he shook Evans and yelled "Chucky" and faggot, as though he believed Evans was Chucky. Appellant threw him on the sidewalk and when Evans got up and prepared to fight him, appellant turned around and walked off as though nothing had happened. (46 RT 4671.)

Evans thought that appellant had a very odd relationship with his mother. The atmosphere in appellant's house was very cold. (46 RT 4672.) Inside their house, appellant's mother was always very critical of appellant, but if an outsider complained to her about appellant's behavior, she adamantly defended him, denying that he had done anything wrong. (46 RT 4673.)

Margarita Kennedy testified about her friendship with appellant. They met in 1986 when she was in the sixth grade. When she started seventh grade, appellant asked her to become his girlfriend. (46 RT 4682-4683.) Over the summer, appellant had become thin, tall and handsome. She learned later that he had lost weight because he was using crystal meth. (46 RT 4684.) Her father kicked her out of the house because he didn't like the fact that appellant was African American; she went into foster care. (46 RT 4685.) According to Kennedy, during this period appellant was nice, caring and understanding. He dressed well, was clean and optimistic about life. (46 RT 4686.)

As an interracial couple, they attracted some attention in Ocean Beach. A lot of Caucasian people stared at them, which upset appellant. (46 RT 4688.) Appellant and she broke up when they were 16 years old, and she married somebody else when she was almost 17.

When she saw him again about three or four years later, appellant did not look well. He was dirty and disheveled; he was wearing an orange vest and picking up trash. She learned that he was living at the St. Vincent DePaul shelter. (46 RT 4691.) Appellant had changed; instead of being happy and outgoing, he had become sad and hopeless about his life. (46 RT 4692.) He said his mother would be better off if he were dead. (46 RT 4693.) Sometimes appellant had confrontations with people on the street. One time a homeless person asked her for money, and he got upset. (46 RT 4693.)

The last time Ms. Kennedy saw appellant was in November or December of 1994, when their relationship ended. She told her husband that she wanted a divorce because she wanted to be with appellant, but appellant told her not to leave her husband for him because he did not have anything to offer her or her daughter. (46 RT 4694.)

Pauletta Taylor, appellant's mother, also testified. By the time he was about 14 years old, she had concluded that he had a serious drug problem; he was abusing marijuana, LSD and meth. (46 RT 4714.) He was missing school, failing to come home for meals and would disappear for days at a time. (46 RT 4715-4716.) Eventually, she sought help for appellant. First, he saw Dr. Norman Chambers, who was either a psychologist or a psychiatrist. Appellant met with Dr. Chambers once or twice but refused to talk. (46 RT 4717.) Mrs. Taylor testified that she was able to get appellant into treatment only after he broke his ankle playing

basketball. She told him that she was taking him to Harbor View so a doctor could look at his ankle. Instead, he was put in "lockdown." (46 RT 4720.)

When she committed appellant to Harbor View, he was already upset about her "lifestyle" and the fact that his father was absent. Also, he was very angry that she had tricked him into going to Harbor View. (46 RT 4723.) He claimed that the nurses used racial slurs. She did not believe him until she heard a nurse call him a nigger. (46 RT 4724.) Appellant telephoned her constantly to complain about what was going on. Since he did not seem to be getting better, she took him out of Harbor View. He was home for about two or three weeks, but when he reverted to his old behavior, she again committed him to Harbor View. (46 RT 4725.)

During his second stay at Harbor View, she participated in family counseling with his primary doctor, Dr. Sambs, and two other therapists. During the course of that counseling, she finally told appellant the truth about her relationship with his father: he was conceived when his father raped her. This information shattered appellant's dream that his parents would reunite, and they would live together as a family. (46 RT 4727-4728.)

Mrs. Taylor again let appellant leave the in-patient program at Harbor View. He was supposed to attend the aftercare program, but he only did that for a short time. As soon as he got out of Harbor View, he told his mother that he didn't think he could stay away from drugs if he continued to live in Ocean Beach, so they moved back to North Park. After this move, he totally withdrew from social interactions and refused to see anyone. (46 RT 4729.) He spent more and more time in his bedroom, and he became paranoid, complaining that the people downstairs were outside his

room talking about him and that the people across the street were shining bright lights into his bedroom and filming him. None of this was true. (46 RT 4730.) Appellant started keeping the blinds closed and would not turn the lights on in his room. He insisted that there was someone in the crawl space attic; when they looked, there was no one there, but he was not satisfied. (46 RT 4731.)

When appellant was about 18 years old, Mrs. Taylor started a floral business. She went to floral design school, and appellant insisted on accompanying her to class because he was afraid to stay in their apartment by himself. (46 RT 4731.) She operated this business out of her house, and she set up her floral stand on street corners. Appellant insisted on being there with her, but he caused problems because he would stare at the customers and sometimes actually confront them. (46 RT 4732-4733.) When she told him that she didn't think it was a good idea for him to come with her, he agreed but showed up anyway. (46 RT 4734.)

According to Mrs. Taylor, appellant showed other signs of paranoia. He accused her of colluding with Dr. Sambs to sell his Kung Fu moves to the Teenage Mutant Ninja Turtles. (46 RT 4736.) He continuously accused her of hiding money from him and staring at him at the dinner table. (46 RT 4740.) Appellant yelled at passing cars and talked to the television and to himself. (46 RT 4741.) Finally, after he locked himself in the bathroom with a shotgun, she made him move out. (46 RT 4741.) He started living on the streets or staying at the St. Vincent DePaul shelter. (46 RT 4742.)

Mrs. Taylor also described appellant's relationship with her long-time lover, Carol Labonte. Labonte was very harsh with appellant, and Mrs. Taylor tried to stop her from disciplining or hitting him. Carol Labonte also abused drugs, including LSD, mushrooms and crystal meth.

(46 RT 4743.) The relationship between Mrs. Taylor and Ms. Labonte lasted for about eight years, although they actually lived together only about fifty percent of the time. (46 RT 4744.)

Mrs. Taylor remembered that Jason Labonte had accused appellant of sodomizing him. She had examined Jason and did not find any physical evidence that Jason had been sexually assaulted. At the time of the alleged incident, there was a gay man living at the house and Jason's mother had left him with this man. According to Mrs. Taylor, as a child, Jason had a habit of lying. (46 RT 4744.) She recounted an incident when Jason was about three years old. He kept banging on the wall and saying, "No, Brandon, stop." When she went into the room, she found Jason alone. Appellant was outside riding his bike. (46 RT 4745.)

Nathan Hare, who is both a pyschologist and sociologist, testified as an expert on the impact of society on the development of the Black male. (46 RT 4763, 4766.) Drawing from the theories of Erik Erikson, Dr. Hare testified about the eight stages of human development. (46 RT 4769.) Using the family and medical history of appellant, Dr. Hare described the ways in which appellant's progression through the stages of development was hindered by the circumstances of his life and by his genetic history. The following themes emerged from Hare's analysis. From birth onward, appellant's development was hindered by the insecurity and instability of his mother's life. (46 RT 4772.) Appellant keenly felt the absence of his father and was deeply ashamed of the fact that his mother was a lesbian. (46 RT 4773-4775.) In addition, he experienced abuse at the hands of one of her long-time lovers, Carol Labonte. Ms. Labonte not only treated appellant very harshly, but she also was a drug addict, who exposed him from an early age to illegal drugs, including marijuana, LSD, cocaine and

crystal meth. (46 RT 4679.) According to Dr. Hare, Carol Labonte became both a verbally and physically abusive father figure. This confused appellant because she was neither Black nor male. (46 RT 4779.)

Dr. Hare testified that there is a direct correlation between a child's relationship with his parent(s) and his later relationships with various authority figures. Because of his troubled home life, appellant never developed a sense of competence and mastery, which are essential to successful development. He did not graduate from high school; he did not learn how to deal with authority figures; nor did he develop the social skills he needed to make the kind of friends he wanted. Without a father to respect, appellant could not respect himself. (46 RT 4784.)

According to Dr. Hare, appellant also did not develop a strong sense of identity. He observed, "as a Black boy [appellant] runs up against the idea that society does not want me to thrive, does not want me to do well, does not allow me to do well." (46 RT 4786.) He cited appellant's preference for white girls as evidence of his confused identity. Hare opined that the desire of the Black man to sleep with the White woman is basically a desire to be White. (46 RT 4787.)

Appellant's failure to pass successfully through the earlier stages of development set him up for failure in the stage of development crucial to young adults: when they are challenged to make satisfactory love relationships, particularly with the opposite sex, but also with friends of the same sex. Dr. Hare testified that by his middle teen years, appellant had been emotionally so devastated that he had already turned away from his friends. During this period of self-imposed isolation, the record shows that appellant was experiencing what appeared to be delusions and hallucinations. (47 RT 4796.)

All stages of development are successive, and each one feeds into and affects the other. (47 RT 4797.) Hare testified that if a child does not successfully complete one stage, this failure will likely distort the next phase. He explained that studies show that Black males tend to get stuck in one stage or another, which limits their abilities to develop normally and successfully. This certainly happened to appellant. (47 RT 4798.)

Suzette McGee testified about contacts with appellant at St. Paul Manor, a retirement community. She hired him to be a dishwasher and a waiter. (47 RT 4822, 4824.). While he worked at St. Paul Manor for only about seven days in February of 1995, she found him to be a satisfactory employee. He was articulate and worked well with other employees. (47 RT 4823.)

Dr. Samuel Benson, one of the psychiatrists who testified at appellant's competency hearing, also testified at the second penalty trial. (47 RT 4831.) Benson had been practicing psychiatry since 1973 and had seen hundreds, perhaps thousands of patients. In addition, Benson has worked on a contract basis in California prisons for ten years. (47 RT 4837.)

Dr. Benson explained that he has been employed and paid by the defense to examine and diagnose the defendant. He reviewed police reports, medical reports, investigative reports of various witnesses and people who knew the defendant, and transcripts of previous hearings in the case. (47 RT 4849.) Benson initially evaluated appellant for competency to stand trial. He had met with appellant between six and eight times; the last meeting occurred shortly before the penalty retrial. (47 RT 4850.)

Benson's first interview of appellant took place in March of 1996, and lasted for 30 to 45 minutes. He formed an opinion as to appellant's

mental state at that time; he believed that appellant was psychotic and suffering from an Axis I diagnosis of schizophrenia paranoid type, in addition to substance abuse. He tried several times to see appellant again, but appellant refused the visits. (47 RT 4850-4851.) In March of 1997, Benson met with appellant for a second time as a result of appellant contacting him. At this meeting, appellant seemed a bit more relaxed; he was able to make eye contact but was still somewhat guarded. (48 RT 4852.) Benson believed that appellant had become more cooperative because he was being medicated. On February 22, 1997, appellant started taking Zyprexa. (47 RT 4854-4855.)

Dr. Benson described the various symptoms of schizophrenia. Auditory and visual hallucinations, delusions, psychotic denial and paranoia make it very difficult for the schizophrenic to function outside of an institutional or hospital setting. Even when a schizophrenic is able to live outside, his or her quality of life is diminished as the patient often loses his or her drive, becomes emotionally and socially withdrawn, and has severe difficulties with abstract thinking and spontaneity. (47 RT 4856.) If a schizophrenic uses meth his or her symptoms worsen because the drugs overwhelm the person's dopamine system. (47 RT 4859-4860.) Indeed, meth psychosis is almost clinically indistinguishable from schizophrenia. (47 RT 4860.)

Benson explained the nature of anti-social personality disorder. Under the system set forth in the DSM IV, antisocial personality disorder is an Axis II diagnosis. An individual suffering from an Axis I diagnosis can, however, behave in an antisocial way. The DSM makes clear that if a person suffers from an Axis I diagnosis, such as schizophrenia and manic depression, he cannot be diagnosed with an anti-social personality disorder.

(47 RT 4863.)

As she had done during the competency proceedings, the prosecutor cross-examined Dr. Benson about the reports and diagnoses of other mental health professionals who had made different assessments of appellant. (47 RT 4886-4896.) In the course of this cross-examination, the prosecutor was able to tell the jurors about these various diagnoses, although the experts were not actually called as witnesses at this penalty retrial.

During this cross-examination, Dr. Benson opined that the records in this case showed that appellant already suffered from schizophrenia when Benson first saw him in March of 1996. (47 RT 4897.) Benson also believed that appellant's isolation in county jail had caused him to decompensate further. (47 RT 4899.) The prosecutor also questioned Benson about a report generated by Dr. Sambs, who was appellant's principal doctor while he was hospitalized at Harbor View. This report stated, inter alia, that appellant was not psychotic but rather antisocial, bad-tempered, and heavily into drugs. (47 RT 4899.) Dr. Benson countered that Sambs had prescribe for appellant strong anti-psychotic medications, such as Haldol and Thorazine. (47 RT 4899.) While conceding that some doctors used such medications to sedate unruly patients, Benson said that such use of these drugs was not proper. (47 RT 4900.)

On re-direct examination, Dr. Benson explained that in the first stages of schizophrenia the symptoms come and go. (47 RT 4902.) Typically, the onset of the disease occurs in late adolescence or early adulthood. Appellant's jail records show that in February and March of 1997, the treating psychiatrist prescribed Zyprexa (Olanzapine) for appellant. (47 RT 4903.) Those same records show that the prescribing doctor specifically found that appellant was not malingering. (47 RT 4904.)

Dr. Benson also stated that the different reports of mental health professionals used by the prosecutor in cross-examination were done well before appellant started receiving Zyprexa. (47 RT 4904.) Moreover, those expert reports focused on the question of appellant's competency to stand trial while the focus of Benson's current testimony was the historical course of defendant's mental illness. In addition, he had obtained more information about appellant than had the other experts when they were considering his competency. (47 RT 4905.)

James Esten testified as a correctional expert. He worked for the California Department of Corrections ("CDC") for over 19 years. While at the CDC, he had classified approximately 12,000 prisoners. A prisoner convicted of first degree murder with special circumstances who is sentenced to life in prison without possibility of parole ("LWOP") automatically will be assigned to a level four prison, the highest level of security in the California prison system. (47 RT 4916.)

Esten showed the jury several photographs of the type of cell an LWOP prisoner would live in at a level four prison. (47 RT 4916-4918.) Any inmate serving LWOP automatically is designated a close "A" inmate, which means that he must be under direct and constant observation by correctional staff at all times. (49 RT 4921.) Based on information he received from the defense as well as two meetings with appellant, Esten predicted that appellant would be categorized as a level four, close "A" prisoner, for a long time. (47 RT 4927-4930.) Esten did not believe that appellant would pose a threat either to other inmates or to prison staff if he were sentenced to LWOP. (47 RT 3932.)

3. The Prosecutor's Rebuttal

In rebuttal, the prosecutor called Dr. Steven Ornish, a board-certified forensic psychiatrist. (47 RT 4941.) Ornish described what he characterized as his significant experience treating both schizophrenics and patients with other types of psychotic disorders. (47 RT 4942.) Although he had a court order requiring appellant to submit to a mental examination, appellant refused to meet with him. (47 RT 4943-4944.)

Based on his extensive review of the records in this case, Dr. Ornish opined that the crimes in this case were not due to a psychosis or a delusion. Rather, according to Ornish, these crimes were the work of someone with considerable anti-social traits who committed a very purposeful and predatory act. (47 RT 4945.) Ornish cited the following factors as demonstrating the purposeful nature of the crime: the forced entry into the house; the ripping out of the telephone when Mrs. Hayes attempted to call 911; the violence of the crime; the robbery; the attempt to flee and the appellant's decision to take off his plaid shirt, which was readily identifiable, as he left the crime scene. (47 RT 4946.) Ornish also noted that after he was apprehended by the police, appellant tried to create an alibi and blame another person for raping Mrs. Dixon. (47 RT 4947.) According to Ornish, this was not the behavior of a delusional and psychotic individual because it was too purposeful and organized.

Dr. Ornish rejected the view that appellant was psychotic because he had chosen an eighty-year-old woman to rape. He opined that because rape is not about sexual arousal but about violence, degradation and control, the fact that the victim in this case was old did not prove that the perpetrator was mentally ill. (47 RT 4949.) Indeed, Ornish argued, her advanced age made her a more attractive target because she was so vulnerable. A

younger woman would be more likely to fight back or attempt to flee. Ornish cited research showing that about three percent of rape victims are elderly, and they are raped by young assailants. (47 RT 4950.)

Dr. Ornish also testified that there is no positive correlation between being paranoid schizophrenic and committing violent sex crimes. (47 RT 4951.) He noted that two studies found that only .03 percent (3 out of 1000) rapes were committed by psychotic individuals; therefore, psychosis does not predispose an individual to sexual assault. Indeed, according to Ornish, it could even be argued that psychosis protects individuals from becoming rapists. (47 RT 4951.)

Ornish further asserted that the most common diagnosis for rapists is anti-social personality disorder, which allegedly is found in 48 percent of rapists. (47 RT 4952.) He then launched into an extended description of the very negative characteristics of a person with anti-social personality disorder, and explained why he believed appellant has this disorder. (47 RT 4953-4954.) Ornish pointed first to the rape in this case and then cited the alleged rape and sodomy of Jason Labonte, appellant's altercations while he was in the CCC, and his confrontations with the jail deputies and his confrontation with the plain clothes officer as evidence that he has anti-social personality disorder. (47 RT 4954-4955.)

When questioned about the different diagnoses made of appellant over the years, Ornish focused on the diagnosis of malingering. He testified that the records show that appellant had tried to draw attention to his symptoms and indeed to manufacture them. According to Ornish, a true schizophrenic is embarrassed by his symptoms and tries to hide them. (47 RT 4957-4958.) He also claimed that appellant's symptoms didn't wax and wane but rather changed dramatically from one day to the next; this pattern

was consistent with malingering not with schizophrenia. (47 RT 4959.)

Ornish did concede that there was some evidence in the records that appellant had some genuine psychotic symptoms but he believed that they were the result of appellant's abuse of meth and LSD. Meth classically causes paranoia and hallucinations, thus mimicking the symptoms of schizophrenia. A person can have drug-induced symptoms which would look like schizophrenia, but these symptoms disappear after the effects of the drug wears off. (47 RT 4961.)

Dr. William Hocter, who was a psychiatrist working in the San Diego County Jail, testified about appellant's mental health treatment while in custody. (48 RT 4969.) Dr. Hocter described appellant's county jail medical records. On September 5, 1996, appellant saw another doctor in the jail. The notes of this meeting stated that appellant did not have a history of thought disorders; he appeared alert, cooperative, and coherent; his speech was clear and well-directed; he did not report auditory hallucinations or delusions and he did not have suicidal or homicidal ideations. Moreover, appellant denied having any psychiatric history. (48 RT 4972.)

Hocter described the notes from a November 13, 1996, visit with appellant by Dr. Peroiso, another jail psychiatrist. Appellant wanted to be transferred to a new cell because he feared other inmates given the charges against him. Dr. Perosio reported that appellant's speech was coherent and that he did not have auditory or visual hallucinations, delusions, suicidal or homicidal thoughts. The notes also observed that appellant's mood and affect were appropriate, and that his orientation, memory, insight and judgment seemed alright. Appellant was not being treated with either medications or psychotherapy. (48 RT 4973-4974.)

On November 26, 1996, Dr. Hocter met with appellant, who told him that he had been diagnosed recently with schizophrenia. Appellant maintained, however, that he did not suffer from this illness. Hocter's notes stated that appellant had an odd, mildly inappropriate affect. In that meeting, appellant denied having auditory or visual hallucinations or any suicidal or homicidal thoughts. Appellant did not want treatment, and Hocter found him competent to make that decision. (48 RT 4975.)

Dr. Hocter's next meeting with appellant occurred on February 12, 1997, and it was at appellant's request. Appellant had written a list of symptoms that he was experiencing and asked for medication. (48 RT 4977.) He reported having trouble sleeping and asked for medications that would help him dream. Hocter's notes stated that while appellant's speech was coherent, he seemed to be illogical. Appellant also said he was having auditory hallucinations but did not describe their content. (48 RT 4978-4979.) Appellant described the voices as being persistent, but he denied having suicidal or homicidal thoughts. According to Hocter's notes, appellant seemed to be alert and oriented but his insight and judgement were poor. Dr. Hocter diagnosed him as having a psychotic disorder not otherwise specified. Hocter's notes ruled out malingering, and he prescribed a new anti-psychotic medication, Zyprexa or Olanzapine. (48 RT 4980.)

He saw appellant again on March 12, 1997, and they discussed his medication. (48 RT 4981.) Appellant reported that there had been a decrease in the voices, but he also complained about the jail staff, alleging that they were conspiring to steal his body. (48 RT 4983-4984.) During this interview, appellant told him that he had actually been hearing the voices for seven years. (48 RT 4985.) The trial judge then asked Dr. Hocter if he

knew that appellant had been seen by at least five psychiatrists or psychologists. Although Hocter did not know about these examinations or about the competency proceedings in this case, he testified that he did not believe that having such information would have changed his diagnosis and treatment of appellant. (48 RT 4987.)

Dr. Gregory Michel, a clinical and forensic psychologist who testified during appellant's competency hearing, was called again as a prosecution witness at the penalty retrial. Dr. Michel testified that he had done a competency evaluation of appellant on February 15, 1996, at the direction of the trial judge. (48 RT 4990-4991.)

Michel's evaluation was based on various records and one interview with appellant. He also observed appellant's interactions with the attorneys who were representing him in the competency proceedings. He diagnosed appellant as malingering, as having anti-social personality disorder and substance abuse problems. (48 RT 4992.) He found appellant to be oppositional and sometimes illogical. Michel did not believe, however, that either appellant's history or his behavior at the time Michel saw him in February of 1996 showed appellant to be a paranoid schizophrenic. (49 RT 4993-4994; 4997.)

I.

THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S NUMEROUS REQUESTS FOR APPOINTMENT OF NEW COUNSEL BOTH BEFORE AND DURING HIS COMPETENCY HEARING

A. Factual Background

In a hearing on January 25, 1996, counsel for appellant, Mary Ellen Attridge, notified the trial judge that because she believed that appellant was not competent to stand trial, she wanted a 1368 hearing.[14] (4 RT 601.) Immediately, the judge expressed skepticism about the basis of her request by minimizing the problem of appellant's inability to cooperate with counsel. (4 RT 602.)

During this hearing, which initially focused on defense counsel's concerns about appellant's competency, appellant told the judge that he believed that his attorney had "turned against" him. (4 RT 604.) Counsel mentioned that the hearing might be turned into a *Marsden* [15] hearing, a notion that the trial judge dismissed. Appellant stated: "She [his attorney] has been insubordinate. She totally forgot the case of the law where my case is concerned. You have committed larson [sic] and so forth. You have

---

[14] Penal Code section 1368, subdivision (b) provides: If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369. If counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing. Any hearing shall be held in the superior court.

[15] In *People v. Marsden* (1970) 2 Cal.3d 118, this Court discussed the procedure that should be used by trial courts when a criminal defendant asks for a new lawyer because of dissatisfaction with the one he has.

turned a federal court case over to some psychologist I don't even know." (4 RT 604-605.) At that point, the trial judge changed tack, declared a doubt about appellant's mental competency, and suspended the criminal proceedings so that appellant could be evaluated under Penal Code section 1368. (4 RT 605.) Appellant persisted in describing his dissatisfaction with his counsel: "Excuse me, Judge. I have fired this attorney." (4 RT 605.) Although the trial judge ignored this statement, appellant continued: "She has no client." (4 RT 606.)

At the next hearing, on February 22, 1996, which also focused on the competency question, appellant again expressed his dissatisfaction with his lawyer: "So far my attorney believes that I am incompetent and for that reason I decide that I need another attorney." (5 RT 614.) The trial judge responded that, because of appellant's dissatisfaction, Mr. John Lee had joined the defense team. The addition of Lee did not appease appellant: "Mr. Lee works with Mrs. Attridge and I have tried to speak with both of them. We don't get along at all. I don't believe that she can represent me in court. I believe she is insubordinate, rude–I can't accept her legal advice." (5 RT 614.) The trial judge told appellant that he would not address the "Marsden problem" until after he had settled the competency issue. (5 RT 614.) Appellant would not, however, let go of the "Marsden problem." Later in the February 22nd hearing, appellant told the judge:

> At this point I am asking for another attorney. I no longer accept her legal advice. It doesn't benefit me. . . I can go–I can't go to trial in this state with an attorney that I don't trust, that doesn't benefit me. . . .Like riding a horse with a broken leg.

(5 RT 616.)

The trial judge continued to ignore the defendant's clear request for

appointment of a new lawyer. Appellant persisted, stating: "Clearly see that they [his attorneys] are all against me. . . . They are against me, or she is. . . She is not helping me." (5 RT 616.)

The next hearing occurred the following day, on February 23, 1996; only appellant, his two appointed counsel, and the trial judge were present. (6 RT 634.) When asked why he wanted to replace Ms. Attridge, appellant asserted that she gave him misleading legal advice, "lashed out" at him, was "insubordinate" and ignored his request for a quick and speedy trial. (6 RT 635.) Counsel responded by stating that she believed appellant's dissatisfaction with her stemmed from his "mental defect" and delusional disorder. (6 RT 635, 637.) She explained some of the disagreements she had with appellant about his defense, including the fact that she still had to do extensive investigation and thus could not comply with his request that they go to trial within 24 hours. (6 RT 636-637.)

After listening to both appellant and Ms. Attridge, the judge denied the *Marsden* motion. (6 RT 639.) The judge explained that he believed Attridge to be a highly competent criminal defense lawyer and that any problems between appellant and her were due to appellant's mental problems. (6 RT 638-639.) The trial judge also found that the attorney/client relationship between them had not broken down and that the fact John Lee, another lawyer at the San Diego Alternate Defender's office, was now also on the case would ameliorate problems between appellant and Attridge. (6 RT 639.)

Another *Marsden* hearing occurred on April 15, 1996, immediately after the trial judge found the appellant competent to stand trial. Once again the appellant complained that his lawyer was not representing him because she was questioning his sanity, trying to get him declared

incompetent and sent to a mental institution. (15 RT 1586.) Once again, the trial judge found insufficient reason to relieve Ms. Attridge and denied the Marsden motion. (15 RT 1587.)

By the next day, however, the trial judge had decided to reverse his position. Claiming that the things that came up at the *Marsden* hearing of the previous day caused him to change his mind, the judge stated that appellant had said at that hearing that he couldn't trust Attridge again because she had gone against his wishes in asking for a competency hearing. (16 RT 1590.) The judge also cited the fact that defense counsel, both Ms. Attridge and Mr. Lee, testified at the competency hearing as a basis for finding that appellant's loss of trust and inability to cooperate with Ms. Attridge required that appellant be given new counsel. (16 RT 1591.)

After granting the *Marsden* motion, the judge immediately appointed the San Diego Public Defender to represent appellant. (16 RT 1595.) Earlier in the case, the Public Defender had been removed as appellant's counsel on the ground that the office had a conflict of interest. (2 RT 202-203; 34 CT 7524-7525.) Neither the nature of this conflict nor the basis for allowing the San Diego Public Defender to resume representation of appellant, are explained in the record.

B. The Law

A defendant is entitled to have appointed trial counsel discharged upon a showing that counsel "is not providing adequate representation" or that counsel and defendant "have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Marsden, supra*, 2 Cal.3d at p. 123.) Marsden motions are subject to the following well-established rules. "When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts

inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations]." (*People v. Memro* (1995) 11 Cal.4th 786, 857.)

Denials of *Marsden* motions are reviewed under an abuse of discretion standard. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1070.) "Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would 'substantially impair' the defendant's right to assistance of counsel." (*People v. Valdez* (2004) 32 Cal.4th 73, 95.) A denial of a motion to substitute counsel also implicates the defendant's Sixth Amendment right to counsel under the United States Constitution. (*People v. Hart* (1999) 20 Cal.4th 546, 603.)[16]

---

[16] Federal courts, even when reviewing a state conviction, have uniformly applied a three-part test for assessing whether a state trial court's denial of a motion to change counsel constituted an abuse of discretion: [W]hen reviewing the denial of a motion to substitute counsel for abuse of discretion, the following three factors are considered: (1) timeliness of the motion; (2) adequacy of the court's inquiry into the defendant's complaint; and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense. (*United States v. Walker* (9th Cir.1990) 915 F.2d 480, 482 (internal quotations omitted.) These elements, required under the Sixth Amendment, are consistent with California state law, which protects the defendant's constitutional right to counsel of his choice. (See, e.g., *People v. Ortiz* (1990) 51 Cal.3d 975, 980; *People v. Marsden* (1973) 2 Cal.3d 118, 123.)

The appellate court reviews a trial court's decision on the request for substitution for an abuse of discretion. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1086.) "Judicial discretion must be informed, so that its exercise does not amount to a shot in the dark." (*Estate of Herrera* (1992) 10 Cal.App.4th 630, 637; see also *Schlumpf v. Superior Court* (1978) 79 Cal.App.3d 892, 901.)

A trial judge may not base the denial of a Marsden motion on previous demonstrations of courtroom skill by the challenged attorney. Instead, the trial court must give the defendant an opportunity to relate specific instances of counsel's asserted inadequacy. (*People v. Hill* (1983) 148 Cal.App.3d 744, 753, 755.) Certainly it is possible that an accused may have a "good attorney," but the relationship between the two individuals could lead to a poor attorney-client relationship. The proper focus of the inquiry in a Marsden hearing is not merely on the competence of counsel but also on the nature and extent of the conflict between a defendant and his appointed counsel. (*United States v. Moore* (9th Cir. 1998) 159 F.3d 1154, 1160.)

C. Failure to Substitute Counsel Until After the Completion of the Competency Hearing Constituted anAbuse of Discretion

In this case, before the competency hearing as well as during it, appellant told the judge no less than four times that he did not want Ms. Attridge to be his lawyer, that he did not trust her and that he had fired her. (5 RT 604-606; 6 RT 614-616; 7 RT 635; 16 RT 1586.) The judge chose to ignore, until after the competency hearing was over, the appellant's concerns and never fully addressed whether a complete and irretrievable breakdown in communication had occurred between appellant and his

attorney.

The trial judge based his decision to deny appellant's request for a new lawyer on the fact that he believed (1) that Ms. Attridge was a competent lawyer and (2) that all problems between them were the result of either appellant's mental problems or his obstreperousness. (6A RT 638-639.) [17] However, as noted previously, a trial judge may not base the denial of a Marsden motion on previous demonstrations of courtroom skill by the challenged attorney. (*People v. Hill, supra*, 148 Cal.App.3d at p. 755.)

In any event, the competency vel non of Ms. Attridge was never the issue. The issue was whether appellant and Attridge had become "embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Marsden, supra*, 2 Cal.3d at p. 123.) Further, if the trial judge was right that the problems between appellant and his counsel were the result of appellant's mental problems, then he should not have found appellant competent to stand trial. A criminal defendant is not competent to stand trial if his mental problems make it impossible for him to assist his counsel in a rational manner.[18] Therefore, either it was error for

---

[17] The trial judge stated: I find that there is no breakdown in this relationship [between appellant and his attorney]. If it could be said there is a breakdown in this relationship or deterioration in this relationship it was occasioned solely by the defendant's eitherwillful, recalcitrant or defiant attitude which would show a conscious attempt to thwart the process or this deterioration has been caused by some mental problems that the defendant suffers from, and in my opinion, I do not see any reason why Ms. Attridge and Mr. Lee cannot adequately represent Mr. Taylor in the future. (6A RT 639.)

[18] The U.S. Supreme Court has defined competence to stand trial as involving four elements: (1) being rational; (2) having a sufficient present ability to consult with counsel with a "reasonable degree" of rational understanding; (3) having both a rational and factual understanding of the

the trial judge to deny the Marsden motion before the crucial competency proceedings had begun, because appellant's disagreements with his lawyer were based on appellant's mental illness, or it was error to find appellant competent to stand trial. The trial judge abused his discretion when he insisted that the competency proceedings go forth with an attorney from whom appellant felt completely alienated. Not only does the record show a complete breakdown in appellant's relationship with Attridge, but appellant did not see the addition of Mr. Lee to his defense team as lessening in any way the role of Ms. Attridge.[19]

The decision by the trial judge to substitute counsel after the completion of the competency hearing supports the position that the substitution should have been granted before the start of the competency hearing. The record establishes that the breakdown in the relationship between appellant and Ms. Attridge occurred before the competency hearing started. Indeed, according to a stipulation between counsel offered

---

proceedings; and (4) having the ability to assist counsel in preparing his or her defense. (*Dusky v. United States* (1960) 362 U.S. 402, pp (per curiam) and *Drope v. Missouri* (1975) 420 U.S. 162, 171.)

[19] Trust and effective communication are the two pillars supporting the attorney-client relationship. This is true especially in a criminal case. This Court has held that effective assistance of counsel contemplates a relationship of
trust and cooperation between attorney and client, particularly when the attorney is defending the client's liberty. (*Smith v. Superior Court* (1968) 68 Cal.2d 547, 561-562; see also *People v. Crandell* (1988) 46 Cal.3d 833, 893.) The American Bar Association Standards for Criminal Justice provide: "[d]efense counsel should seek to establish a relationship of trust and confidence with the accused." (*ABA Standards for Criminal Justice* 4-3.1 (a) (2d. ed. 1980).) The Standards also recognize: "[n]othing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence." (*Id.* at section 4.29 (commentary).)

i.e. before Attridge and Lee testified, does not make sense. Many factors existed both before and during the competency hearing which compelled the replacement of defense counsel.

The decision in *People v. Solorzano* (2005) 126 Cal.App.4th 1063 is instructive on this issue. In that case, the defendant had requested a jury trial on the issue of competency. Subsequently, his lawyer decided to waive the jury trial and try the competency issue to another judge based solely on the two initial psychological evaluations. Defendant Solorzano asked the court to "fire" his attorney because he had failed to request his school and medical records which were relevant to the competency issue. The trial judge stated that he would not consider a Marsden motion until the competency proceedings were concluded. (*Id.* at p. 1067.) Defendant was found competent, and he renewed his Marsden motion before his trial. The trial judge denied the motion, and defendant was convicted. (Id. at p. 1068.)

The court of appeal reversed. Citing *People v. Stankewitz* (1990) 51 Cal.3d 72, 87-88, the appellate court found that the trial judge should have decided appellant's Marsden motion before he adjudicated the competency issue. Quoting from this Court's decision in *People v. Marsden, supra*, the court of appeal also found that this error required reversal:

> On this record we cannot ascertain that [Solorzano] had a meritorious claim, but that is not the test. Because [he] might have catalogued acts and events beyond the observations of the trial judge to establish the incompetence of his counsel, the trial judge's denial of the motion without giving [him] an opportunity to do so denied him a fair trial. We cannot conclude beyond a reasonable doubt that this denial of the effective assistance of counsel did not contribute to [the finding he was competent to stand trial]. (Ibid., 2 Cal.3d at p. 126 [citation omitted].)

(*People v. Solorzano, supra*, 126 Cal.App.4th at p. 1070.) The court of

as aggravating evidence by the prosecution at appellant's penalty phase trials, on January 25, 1996, appellant had lunged at Mary Ellen Attridge and called her a "fucking cunt." (37 CT 8105; 43 RT 4303.) Certainly, if this incident did not irretrievably damage the relationship between appellant and Ms. Attridge, it is hard to imagine anything that would.

Moreover, the record of the case does not support the judge's position that the breakdown in the attorney/client relationship occurred after the conclusion of that hearing. While it is true, as the trial judge observed, that the defense attorneys did testify at appellant's competency hearing, the relationship between appellant and his attorneys was already damaged. There is nothing in the record showing that his lawyers' testimony further damaged the relationship. In any event, the trial judge knew before Ms. Attridge and Mr. Lee testified that there was a real question about the propriety of them acting as both advocates and witnesses[20] in the competency hearing. (11 RT 864-869.) Therefore, the judge's claim that he had decided to grant appellant's Marsden motion only after the conclusion of the competency hearing rather than before the conflict actually occurred,

---

[20] "It is a judicially noted truism that: 'An attorney who attempts to be both advocate and witness impairs his credibility as a witness and diminishes his effectiveness as an advocate.'" (*People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1031; citing, *Comden v. Superior Court* (1978) 20 Cal.3d 906, 912. "'The roles of an advocate and a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.'" (*People v. Guerrero* (1975) 47 Cal.App.3d 441, 445; quoting ABA Ec 5-9.) Although the virtual prohibition against permitting a party's attorney from simultaneously serving as a witness has been relaxed (see *Smith, Smith & Cring v Superior Court* (1997) 60 Cal.App.4th 573, 579), it is only where the client has given his informed consent so that he can be represented by his chosen counsel. (*Ibid.*)

appeal concluded that: "'Given the inherent difficulties' of 'retrospectively determining an accused's competence to stand trial,' due process compels us to reverse the judgment, remand the matter, and order a new trial." (*Ibid.*, citing *Drope v. Missouri* (1975) 420 U.S. 162, 183; *Pate v. Robinson* (1966) 383 U.S. 375, 387; *Dusky v. United States* (1960) 362 U.S. 402, 403.)

For all of the foregoing reasons, the trial judge abused his discretion in failing to replace appellant's trial counsel until after the conclusion of the competency proceeding.

D. Prejudice

In the *Marsden* case, this Court applied the Chapman standard of prejudice. (See quotation ante from *People v. Marsden, supra*, 2 Cal.3d at p. 126.) In *People v. Hill* (1983) 148 Cal.App.3d 744, 755, the court of appeal observed: "*Marsden* error is typically treated as prejudicial per se, since the very nature of the error precludes meaningful appellate review of its prejudicial impact." (See also *People v. Munoz* (1974) 41 Cal.App.3d 62, 67; *People v. Groce* (1971) 18 Cal.App.3d 292, 296-297.) It is difficult, if not impossible, to quantify the prejudice created in this case by the trial court's failure to replace Ms. Attridge until after the conclusion of the competency hearing. There is simply no way to know how the competency proceedings would have turned out had appellant had a lawyer whom he trusted and with whom he was able to cooperate. The record does show, however, that counsel waived appellant's right to a jury trial over appellant's objection.

Given the facts of this case, this decision by counsel did not make sense. Initially, defense counsel Mary Ann Attridge invoked appellant's right to a jury trial in the Penal Code section 1368 hearing. (5 RT 609.) The trial judge balked at this request but agreed to it only after the prosecutor

stated her belief that the defendant had a right to a jury trial if he wanted one. (5 RT 610.) A jury trial was then planned until, literally moments before the trial judge was going to bring in a venire panel for voir dire, defense counsel informed the court that she would waive jury trial on the competency issue. (10 RT 770.) Appellant, however, objected to this waiver, stating: "I would prefer to have a jury." (10 RT 772.) When the court reconvened after a recess, appellant asked the trial judge if he were denying him a jury. (10 RT 774.) The trial judge told appellant that his attorneys had requested a jury waiver and that the law allowed them to do so without his permission. (10 RT 774.) Appellant responded: "I fired her [Ms. Attridge]. I've constantly repeated that she is not my attorney." (10 RT 774.)

This Court should apply a reversal per se test because of the fundamental right to counsel involved. However, even if this Court decides to apply the *Chapman* standard, appellant was prejudiced by the fact that the trial judge failed to grant appellant's continuing requests for appointment of new counsel in a timely way. If the judge had appointed new counsel, appellant likely would not have been deprived of his right to a jury trial on the competency issue.

Appellant acknowledges that this Court has found that an attorney may waive, over the objection of the defendant, the right to a jury trial regarding competency. (*People v. Masterson* (1994) 8 Cal.4th 965, 973.) While it may be within counsel's purview to waive a jury, under the facts of this case, this waiver only further increased appellant's alienation from Ms. Attridge and thus made his cooperation in the competency hearing even less likely.

The record of the competency hearing shows that appellant's lack of cooperation did affect the case. For example, he refused to cooperate with Dr. Benson because he said he was tired of seeing doctors whom he didn't need to see, and he wanted a new lawyer. (12 RT 1039.) Accordingly, Dr. Benson spent only about 30 to 45 minutes interviewing appellant. (12 RT 1088-1089.) Similarly, Dr. Cerbone reported difficulties interviewing appellant. When he told appellant that Ms. Attridge had retained him, appellant stated that she was not his lawyer, that she was working for the prosecution and that she wasn't even a lawyer. (13 RT 1137.) Appellant also told Cerbone that he was not crazy. (13 RT 1137.) Appellant remained wary during Cerbone's interview. He said he would not proceed with the interview unless his lawyer was present and that Ms. Attridge was not his lawyer. (13 RT 1140.) In describing his decision to find appellant competent, the trial judge stated that one of the reasons he had rejected Dr. Cerbone's evidence was because his interview with appellant was so short. (15 RT 1577.) These examples demonstrate that appellant's broken relationship with his attorney led him to be uncooperative, which, in turn, adversely affected the course of the competency proceedings.

Therefore, counsel's decision to waive the jury, after having insisted upon it for months, and despite appellant's objection to waiving it, is further evidence that the trial judge's refusal to grant appellant's Marsden motion earlier was not harmless beyond a reasonable doubt.

The ultimate constitutional question that the courts must answer is not whether the state court "abused its discretion," but whether "this error actually violated [a defendant's] constitutional rights in that the conflict between [him] and his attorney had become so great that it resulted in a total lack of communication or other significant impediment that resulted in

an attorney client relationship that fell short of that required by the Sixth Amendment." (*Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1026.)

For all of the foregoing reasons, this Court should reverse appellant's convictions and death sentence. The erroneous failure to grant appellant's Marsden motions before the commencement of the competency hearing resulted in an unreliable competency determination which compels reversal.

*****

II.
THE TRIAL JUDGE ERRED IN FAILING TO CONDUCT ADEQUATE AND APPROPRIATE JUROR VOIR DIRE, THUS VIOLATING APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

There were two jury selections in this case because the first penalty phase trial ended in a mistrial when the jury failed to reach a verdict. The selection processes used for both juries were improper and unconstitutional.

A. Appellant's Motions Regarding Jury Selection

Appellant submitted several written pre-trial motions regarding the voir dire process. He filed a Motion for Use of Open-ended, Non-leading Questions in Voir Dire (Volume 1, CT 167-170) as well as a Motion for Supplemental Attorney-conducted Voir Dire. (1 CT 171-178.) Later, appellant filed two additional motions concerning voir dire: A Motion for Use of Individual and Sequestered or Small Group Voir Dire (2 CT 233) and a Motion for Modified Struck System Jury Selection. (2 CT 271.) All of these motions were denied by the trial judge. (8 CT 1664-1667.)

The trial judge did state that he would use a "modified struck system" (8 RT 1682), but that it was his practice to bring in groups of about 50 prospective jurors to discuss their answers to the written questionnaires. (8 RT 1685.) Defense counsel argued that in large groups jurors felt more pressure to conform their answers to questions addressed orally to the group. He further argued that many people do not want to admit to prejudices in the presence of a large group. (18 RT 1687.) Defense counsel urged the trial judge to limit the groups of prospective jurors to be interviewed en masse to 15 or 20 people. (18 RT 1688.) The trial judge rejected the defense argument about the pressures created by large group

voir dire, opining that because the death penalty was such a polarizing issue that people tend to have fixed ideas about it and will answer questions about it honestly and not succumb to "herd instinct." (18 RT 1689-1691.) The trial judge stated his intention to conduct personally all voir dire. (18 RT 1691.)

B. Voir Dire and the Constitutional Right to an Impartial Jury

The Sixth and Fourteenth Amendments to the United States Constitution require jury impartiality at the guilt phase of trial. (People v. Earp (1999) 20 Cal.4th 826, 853; People v. Williams (1997) 16 Cal.4th 635, 666, citing Morgan v. Illinois (1992) 504 U.S. 719, 726-728 and 740 (dis. opn. of Scalia, J.) [clarifying the constitutional underpinnings of the Morgan holding].) California's Constitution provides an identical guarantee. (Cal. Const., art. I, § 16; People v. Williams, supra, 16 Cal.4th at p. 666; see People v. Johnson (1992) 3 Cal.4th 1183, 1210-1211; People v. Gordon (1990) 50 Cal.3d 1223, 1248, fn. 4.) Similarly, under both the United States and California Constitutions, a sentencing jury in a capital case must be impartial. (People v. Williams, supra, 16 Cal.4th at pp. 666-667; see also Morgan v. Illinois, supra, 504 U.S. at pp. 726-728.)

Voir dire plays a critical function in assuring that a criminal defendant's constitutional rights to an impartial jury will be honored. "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (Rosales-Lopez v. United States (1981) 451 U.S. 182, 188; see Connors v. United States (1895) 158 U.S. 408, 413; In re Hitchings (1993) 6 Cal.4th 97, 110.)

While the right to an impartial jury enjoys constitutional protection,

the precise manner of choosing that jury is not mandated. (*People v. Cardenas* (1997) 53 Cal.App.4th 240, 246.) "[T]here is no constitutional right to any particular manner of conducting the voir dire and selecting a jury so long as such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries are not transgressed." (*People v. Boulerice* (1992) 5 Cal.App.4th 463, 474; see also *People v. Bittaker* (1989) 48 Cal.3d 1046, 1086 [right to voir dire as means to achieve impartial jury].) The United States Supreme Court also has observed: "The Constitution ... does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." (*Morgan v. Illinois, supra*, 504 U.S. at p. 729.)

C. The State Statute Governing Voir Dire

The version of Code of Civil Procedure section 223 ("section 223") the statute governing voir dire, in effect at the time of appellant's trial provided:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper....
>
> Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.
>
> The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

This Court previously has noted that because of section 223, the trial judge has primary responsibility for questioning prospective jurors. (*People*

v. Box (2000) 23 Cal.4th 1153, 1178-1179; see also *People v. Wilborn* (1999) 70 Cal.App.4th 339, 347.) "With the heightened authority of the trial court in the conduct of voir dire, mandated under [section 223], goes an increased responsibility to assure that the process is meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors." (*People v. Taylor* (1992) 5 Cal.App.4th 1299, 1314.)

Given the provisions of section 223, the relevant decisional law, and the fact that the scope and nature of voir dire is within the trial judge's discretion, to which great deference is ordinarily accorded (People v. Waidla (2000) 22 Cal.4th 690, 713-714), such discretion is abused only when the trial judge, as here, has made neither a sincere nor reasoned effort to evaluate possible juror bias or prejudice or "if the questioning is not reasonably sufficient to test the jury for bias or partiality." (*People v. Silva* (2001) 25 Cal.4th 345, 385.)

D. The Trial Judge's Failure to Conduct Individual Sequestered Voir Dire Violated Appellant's Constitutional Rights and His Rights Under Code of Civil Procedure Section 223

As noted previously, appellant filed a Motion for Use of Individual and Sequestered or in the Alternative Small Group Voir Dire. (2 CT 242-258.) In that motion, appellant acknowledged that the version of section 223 applicable at the time of trial required the voir dire of prospective jurors occur in the presence of other jurors, "where practicable," but argued that the facts of the case made such group voir dire not practicable.[21] (2 CT

---

[21] The defense motion also argued that appellant was entitled to individual voir dire under the Sixth and Fourteenth Amendments of the United States Constitution, which guarantee an impartial jury. (2 CT 248-249.)

244.) As the motion observed, the facts of this case were likely to evoke strong prejudices in potential jurors since the victim was an elderly white woman who had died allegedly as the result of a sexual assault by appellant, a young African-American man. In addition, the case received a good deal of negative publicity in the San Diego area. Given these factors, appellant would not receive a fair trial unless these sensitive issues could be probed extensively by individual voir dire. (2 CT 244.)

At the hearing on this motion, the trial judge rejected the idea that this case required that he modify his "usual" method of picking a jury. He described his usual procedure for jury selection as follows:

> What I will do is bring them [the venire panel] in, hardship in the morning, full questionnaire in the afternoon and that's when I do the script and go through all that. I go over the death penalty with them, I go through the different facts and then when I am finished, I give them the questionnaire and then I bring them back two or three days later. Normally I bring them back – I think last time it was two groups, two or one. We can either do it two or one. I don't bring them back singly or in small groups. Hovey [Hovey v. Superior Court (1980) 28 Cal.3d 1, 81] is gone, and I don't use Hovey – And I bring them back in two groups and then you will have two or three days to go through the questionnaires and I go through the questionnaires word for word, line per line and acquaint myself with these people, bring them back. In all probability, I will bring back them back [sic] in two groups of 50 each and then I will do the confidentials [sic] in chambers. And then we'll – after I get through the confidential information, then I will put 30 in the box, I will voir dire them. Based on the questionnaires and the -- their responses and that's that . . . .

(18 RT 1685-1686.)

Defense counsel argued that they wanted Hovey sequestered voir dire or, in the alternative, voir dire in small groups of 5 to 15 people because "[t]he problem is that people, human beings, all of us, are herd instinct animals, all

of us." (18 RT 1686.) The trial judge disagreed: "I am not. I hate the herd, I go off by myself." (18 RT 1686.)

Defense counsel reiterated his concerns about how group pressure would distort the jury selection process in this case:

> . . .The point is that when people are sitting here with 50 people, there is that much more conformity pressure, like being that much deeper into the water. There is that much more pressure, then the pressure is not to answer the question of one's own heart but out of the perception of what the audience is going to expect you to say. And consequently, you get a very great dispersion and affects the prosecution as much as the defense because that pressure is to answer questions in the middle, as it were, and I think that it distorts a jury selection process in a capital case far, far more than it does in an ordinary run-of-the-mill case where there isn't that much variation.

(18 RT 1687.)

Counsel also emphasized that the incendiary circumstances of this case further threatened the effectiveness of a large group voir dire:

> . . .particularly in a capital case of this kind where you have the very simple situation, a young black male, an elderly white female who is the victim. You have a tremendous amount of pressure on everybody that is going to be here for potential jury selection to say, what, me, prejudiced; might be prejudice for the defense, might be prejudice for the prosecution. There are going to be enormous capacities for bias in this case, and as I say, can affect the prosecution as well as the defense. The more people we have here in the courtroom as we go through this jury selection process, the greater the pressure it is for anyone to answer any question in an absolutely neutral term as they can possibly do it without actually lying...

(12 RT 1687-1688.)

The prosecutor opined that she did not see anything "special" about this case and that the trial judge should follow his usual procedure for jury

selection. (2 RT 1688.) Even after the defense enlarged the size of their proposed small groups, the prosecutor dismissed the idea that a smaller group voir dire would result in a more effective and fair process for choosing an impartial jury in this case. (18 RT 1689.)

The trial judge asserted that a San Diego jury panel would not be subject to "herd instinct" in answering voir dire questions about the death penalty because on the subject "attitudes within the community are fairly fixed " on the subject. (18 RT 1690.) He explained:

> So I am not afraid of there being a herd instinct to rush to the death penalty. I think that is what you are trying to say, Mr. Owen [defense counsel], that you feel that the instinct of the community is to rush to the death penalty if everybody is talking in the room. My experience has been the opposite. I feel if people are against, they say so and if they aren't they say so. . .so I don't feel the necessity to go to a smaller group or one at a time or five at a time. I don't think I will treat this any differently than I would treat any other case other than I will probably cut the groups down and end up with a group of 50 qualified or a hundred qualified and break them up to two groups of 50 basically for convenience. I would do as much from my courtroom, so I don't see any reason to go to that. The motion for individuals [sic] or small group voir dire is denied.

(18 RT 1690-1691.)

The trial court's failure to conduct individual sequestered voir dire, and its unreasonable and unequal application of state law governing such voir dire, violated appellant's federal constitutional rights to due process, equal protection, trial by an impartial jury, effective assistance of counsel, and reliable guilt and penalty determinations, and his right under California law to individual juror voir dire where group voir dire is not practicable.

E. The Voir Dire in This Case was not Sufficient to Discover any Racial Biases of Prospective Jurors

Voir dire on racial and ethnic prejudice is constitutionally required where a defendant is accused of a violent crime against a victim of another race or ethnicity. (See, e.g., *Turner v. Murray* (1986) 476 U.S. 28; see also *Aldridge v. United States* (1931) 283 U.S. 308; *Rosales-Lopez v. United States, supra*, 451 U.S. 182.) This Court has held that "adequate inquiry into possible racial bias is . . . essential in a case in which an African-American defendant is charged with commission of a capital crime against a White victim." (*People v. Holt* (1997) 15 Cal.4th 619, 660.)

In *Turner v. Murray, supra*, a jury of four African Americans and eight Caucasians convicted Turner and recommended a death sentence in the penalty phase. The United States Supreme Court reversed the death judgment, holding that the trial court's refusal to question prospective jurors about possible racial bias compelled automatic reversal of the penalty phase verdict. Further, the Court held that the trial judge's failure to undertake even minimal voir dire on race was per se prejudicial, making unneeded any showing of prejudice. The Court remarked: "In the present case, we find the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized." (*Turner v. Murray, supra*, 476 U.S. at p. 36.) The Turner majority expressed concern that potential racial bias might have operated more freely in the penalty phase of trial because of the essentially normative judgments involved in capital sentencing. The Supreme Court stated:

> This judgment is based on a conjunction of three factors: the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case.

(Id. at p.37.)

Like the United States Supreme Court in *Turner*, California appellate courts have expressed concerns about the subtle nature of racial bias and the difficulty in discovering these attitudes on voir dire. In *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1312, the court of appeal observed that "bias is seldom overt and admitted." An individual juror "'may have an interest in concealing his own bias or may be unaware of it.'" (Id. at p. 1312, quoting *Smith v. Phillips* (1982) 455 U.S.209, 221-222 [conc. opn. by O'Connor, J.].) The Taylor court, quoting from an earlier decision, found that "[b]ecause racial, religious or ethnic prejudice or bias is a thief which steals reason and makes unavailing intelligence and sometimes even good faith efforts to be objective, trial judges must, where appropriate, be willing to ask prospective jurors relevant questions which are substantially likely to reveal such juror bias or prejudice, whether consciously or unconsciously held." (*People v. Taylor, supra*, 5 Cal.App.4th at pp. 1312-1313 [citation omitted].)

In the instant case, the trial judge's voir dire was completely insufficient for discovering racial biases in prospective jurors. As noted previously, racial issues were especially sensitive in this case since it involved the sexual assault and murder of an elderly white woman allegedly by a young African-American man. For appellant to receive a fair trial before an impartial jury, it was essential to exclude prospective jurors who could not be impartial because of their racial prejudices. The trial judge's voir dire was wholly inadequate for discovering this information. Indeed, as the description of the record *ante* will establish, the trial judge did not ask any of the people who sat on appellant's two juries about their racial attitudes. The facts of this case required careful and searching voir dire of the sort designed to reveal subtle biases which might alter the prospective

jurors' views of the evidence.

1. Selection of the First Jury

The juror questionnaire used to select the first jury in this case contained four questions dealing with racial attitudes; all of which allowed the prospective juror to check either yes, no or none. Each question allowed for comment but did not require it. The four questions were as follows:

> 51. Do you have any racial or ethnic prejudices?
> Strong___ Moderate____ Mild____ None____
>
> 52. In this case the defendant is African-American. Would this fact affect you as a juror at all? Yes___ No____
>
> 53. Can you be an impartial juror in this case where an African-American male is accused of committing crimes against a Caucasian female? Yes ___No___
>
> 55. Do you have any bias for or against the defendant based on his race? Yes____ No____

(See, e.g., 9 CT 1752.) [22]

As the following discussion will show, very little was known about the racial attitudes of any of the people chosen to sit on appellant's first jury despite the use of juror questionnaires and some limited voir dire. More importantly, there were inconsistencies on the juror questionnaires of some of these jurors which were never explored by the voir dire process.

For example, Juror # 3 made no comments in response to the four questions about race. He simply checked "no" and "none." In answer to the question about whether he could be an impartial juror in a case where an African-American male is accused of committing crimes against a Caucasian

---

[22] Question 54 did not ask directly about racial attitudes.

female, he answered "no." This contradicted his answers to the other three questions as those answers indicated that he had no racial prejudices. (9 CT 1804.) During voir dire, the trial judge failed to question this juror about this contradiction or about the racial aspects of the case. (23 RT 2078-2082.) Accordingly, Juror # 3 sat on this jury even though he had stated on his juror questionnaire that he could not be impartial in a case involving the facts of this case.[23]

The written responses of Juror # 5 to questions 51, 52, 53 and 55 were somewhat contradictory and certainly required some follow-up questions on voir dire. In explaining why she had marked both "mild" and "none" to the question of whether she had any racial or ethnic prejudices, Juror # 5 wrote: "On occasion I find myself fearful around large numbers of blacks, Hispanics – or even whites – [if] it is in an unsafe area." (9 CT 1856.) After answering "yes" to question 53 about whether she could be an impartial juror in a case where an African-American male is accused of committing crimes against a Caucasian female, she wrote: "Color of skin or ethnic background does not increase or decrease severity of charges, or liklyhood [sic] of guilt or innocence." These responses were sufficiently vague and ambiguous as to require a more searching voir dire on the issue of race. However, the trial judge did not ask any questions about her racial attitudes;

---

[23] The juror questionnaire of Juror # 3 did show that he followed the O.J. Simpson trial and believed there was a preponderance of evidence to "convict" Mr. Simpson. (9 CT 1800.) The Simpson case, of course, involved allegations that an African-American man had killed two Caucasian victims. Nonetheless, the trial judge did not follow up and probe what prejudices about interracial violence that Juror # 3 might have developed as a result of "following" the O.J. Simpson case.

in fact, he only asked her six questions in total, two of which concerned the occupations of her two children. (23 RT 2123-2124.)

Juror # 8 answered the questions about racial attitudes by simply marking "no" to questions 52, 53, and 55 and marking "none" to question 51. She responded "no" to question 53 about whether she could be impartial given the race of the defendant and the race of victim. (9 CT 1934.) On voir dire, the trial judge did not ask about this response–which indicated an inability to be impartial– nor did he ask her any questions about her racial attitudes. Indeed, the judge asked this juror only eight questions, half of them having to do with Corvettes (this juror had written in her juror questionnaire that she was a member of the Corvette Club of San Diego). (9 CT 1928.)

Apart from these three jurors whose juror questionnaires contained contradictions or ambiguities which required some voir dire on the issue of race in the case, the record shows that the trial judge did not ask any of the jurors who actually sat on appellant's first jury any questions about their racial views.

Given the situation of Juror # 2, the trial judge should have asked him at least one question about his racial views. According to the responses on his juror questionnaire, Juror # 2 had no racial prejudices. (9 CT 1778.) However, he was questioned in chambers after he notified the court that he had just remembered that his 88-year-old grandmother had been raped in Alabama. (9 RT 2015.) During the voir dire about this incident, the trial judge never asked Juror # 2, who is white, the race of the man who was convicted of this rape. (23 RT 2014-2017.) He was not asked any questions about his racial views.

2. Selection of the Second Jury

As noted previously, it was necessary to choose a second jury in this case because the first jury was not able to reach a verdict on sentence. The selection process of the second jury was also deficient in terms of determining whether any of the jurors had racial attitudes that would compromise their impartiality.

The questionnaire used for the second jury also contained four questions dealing with the interracial circumstances of this case; these questions differed slightly from those appearing on the first questionnaire.[24] The four questions on the second questionnaire were:

> 52. Do you have any racial or ethnic prejudices?
> Strong___ Moderate____ Mild___ None_____
> A. Please explain:
> B. How do you compensate for these attitudes?
>
> 53. In this case the defendant is African-American. Would this affect you as a juror at all? Yes___ No___
> If "Yes,"please describe:
>
> 54. In a case where an African-American male is convicted of committing crimes against a Caucasian female, can you be impartial in determining the appropriate penalty?
> Yes ___ No___
>
> 56. Do you have any bias for or against the defendant based upon his race? Yes___ No___
> If "Yes," please describe:

(17 CT 3547-3578.) In the original questionnaire, there was no section B to the first question asking about racial or ethnic prejudices.

---

[24] The numbering of the questions was different in the second questionnaires: question 51 became 52; question 52 became 53; question 53 became 54; and question 55 became 56.

A review of the record shows that the trial judge's voir dire, including his inquiry about the race issues raised by the facts of this case, was even more cursory in the second jury selection than it had been in the first.

The answers on the questionnaire of the person who became Juror #1 were ambiguous, and the trial judge should have followed up with adequate voir dire. In answer to question 52, this juror noted that he had "mild" racial or ethnic prejudices, stating "I feel all of us have some ethnic prejudices and I am no different." (17 CT 3547.) In answer to part (B) of question 52, Juror # 1 wrote: "I feel the Holy Spirit convicts [sic] me and I adjust my attitudes in light of the Gospel." (17 CT 3547.) The meaning of this statement is unclear; however, the trial judge did not ask Juror # 1 to clarify it or to explain his "mild" prejudices or to explain this statement about the Holy Spirit. Indeed, the entire voir dire of this juror consisted of the following:

Q: Mr. Kramer, Hyatt Lake Tahoe?
A: It is a Regency.
Q: That's the Old Kings Castle?
A: Yes, Old Kings Castle.
Q: So you talk about your strong religious beliefs, but you still feel with your strong beliefs you also feel that the death penalty can be imposed?
A: Yes, sir.
The Court: All right. Thank you.

(40 RT 3809.)

On his questionnaire, Juror # 3 wrote that he had "mild" racial or ethnic prejudices. In the space for explanation, he wrote: "influence of parents." In answer to the question of how he compensated for these attitudes, he wrote: "Respecting the individual as an individual not as being of an ethnic group." (17 CT 3603.) During voir dire, the trial judge did not ask this juror about his "mild" prejudices, nor did he ask any questions about

the racial issues in this case. (40 RT 3811-3812.)

In response to question 52, Juror # 7 wrote that she had "mild" racial or ethnic prejudices. Her explanation for these prejudices were: "I think we are too lax on our borders for example." (17 CT 3715.) In answer to the question of how she compensated for these attitudes, she wrote: "I understand we are short of resources for that problem. I have had examples in my family to not judge too quickly what may appear differently to others-things are not always what they seem." (17 CT 3715; emphasis in the original.) During voir dire, the trial judge did not ask her any questions about her "mild" prejudices or about her unclear answers, quoted above, to question 52. (40 RT 3843-3844.)

The questionnaire answers of Juror #12 to the four questions were a little bit more informative than those of other jurors. She did write that she had "mild" racial and/or ethnic prejudices. Her explanation for these prejudices was "I was raised in all white area and school. I have worked to overcome racial prejudices." Juror # 1 also stated that she was "active in civil rights movement during the 60's." (18 CT 3883.) During voir dire, the trial judge did not ask her anything about her "mild" prejudices or anything else about how her racial attitudes might affect her impartiality in this case. (40 RT 3870-3872.)

F. The Trial Judge Relied too Heavily on the Jury Questionnaires

The record in this case, as detailed in the description above, shows that the trial judge failed to meet his obligation to insure that the jurors deciding this case, at both the guilt and penalty phases, did not have racial views that would prevent them from being impartial in judging a case where a young African-American man was charged with sexually assaulting and

killing an elderly white woman. The record demonstrates that the trial judge failed to ask any of the venire panel who actually sat on either of appellant's juries questions on the subject during voir dire. He relied too heavily on the juror questionnaires to satisfy his statutory and constitutional duties to insure that appellant received a fair trial before an impartial jury.[25]

In *People v. Stewart* (2004) 33 Cal.4th 425, this Court reversed Mr. Stewart's death sentence on the ground that the trial judge improperly had excused prospective jurors for cause based solely on their responses to the juror questionnaire regarding their attitudes toward the death penalty. The Stewart decision observed:

> . . .the trial court erred in dismissing the five prospective jurors for cause without first conducting any follow-up questioning. Indeed,

---

[25] Indeed, the record in this case established that the voir dire process during both jury selections was incredibly cursory. It appeared that the trial judge was much more concerned with dispatch than with carefully selecting an impartial jury to decide a capital murder case. For example, the trial judge asked the person chosen to be Juror # 4 at the first trial a total of six questions. (23 RT 2183-2184.) He asked Juror #10 a total of twelve questions, five of which involved "small talk" about the juror's job. (23 RT 2102-2104.) The trial judge asked Juror # 12 of the first jury a total of seven questions. (23 RT 2183-2184.) As noted previously, the trial judge breezed through the voir dire of the second jury with even greater dispatch. He asked the person who became Juror # 3 at the second trial a total of eleven questions; five of which dealt with the juror's job and his daughter's educational record. (40 RT 3811-3812.) He asked Juror # 4 only six questions; three of them dealt with her job and the remaining concerned her previous jury experience. (40 RT 3888-3889.) The trial judge did not ask Juror # 8 any questions on voir dire. The only things he said to this juror were: "Good morning. Thank you. Good answers." (40 RT 3801.) He asked Juror # 11 twelve questions; however, all of these questions, except two, were about such extraneous matters as the juror's Jaguar, his British father's job as a solicitor, his wife's job and his own job. (40 RT 3872-3874.)

> although the poor phrasing of the juror questionnaire used in this case contributes to our conclusion that the prospective jurors were in violation of Witt, supra, [citation], we note that even if the questionnaire had tracked the "prevent or substantially impair" language of Witt, we still would find that the prospective jurors could not properly be excused for cause without any follow-up voir dire by the court.

(*People v. Stewart, supra*, 33 Cal.4th at p. 452.) This Court also stated that "a juror questionnaire will not obviate the need for oral voir dire, but instead merely will shorten the time necessary to be spent on oral voir dire." (*Ibid.*) The Court also quoted from *California Center for Judicial Education* and Research (CJER), *Death Penalty Benchguide 989: Pretrial and Guilt Phase* (2001) section 98.24 (1):

> Use of a jury questionnaire substantially shortens the jury selection process . . . Oral voir dire, whether by judge or counsel, may be largely limited to clarifying unclear or incomplete questionnaire responses. . . The Court should follow up on ambiguous answers or give counsel the opportunity to do so.

(*Id.* at 98-27, 98-35.)

Appellant acknowledges that, unlike the trial court in the Stewart case, the trial judge in this case did conduct some voir dire of prospective jurors; however, he did not ask any of the sitting jurors about how the racial dimensions of the case would affect their ability to determine impartially the guilt and penalty issues. Moreover, the *Stewart* decision clearly recognized the obligation of the trial judge to allow follow-up questions to clarify unclear and/or ambiguous responses on the juror questionnaire. (*People v. Stewart, supra*, 33 Cal.4th at p. 452.) As detailed in the previous section of this argument, there were jurors whose answers on the questionnaires to the four pertinent questions were such that there was a definite need to clarify

their views through voir dire. The trial judge erred and abused his discretion when he failed to ask those follow-up questions.

G. The Inadequate Voir Dire Concerning Race Requires Reversal of Appellant's Convictions and Death Sentence

The decision of the California Court of Appeal in *People v. Taylor*, supra, 5 Cal.App.4th 1299, offers some guidance for assessing the limited inquiry of prospective jurors on the important issue of interracial crime presented by this case. *In Taylor, supra*, the trial court pointed out to the venire panel that the defendant was African-American and the victim Hispanic. The trial judge also instructed the prospective jurors that race should be a neutral factor under the law and that people should not be judged based on race or ethnicity. He then asked the jurors if anyone disagreed with that principle.

The court of appeal found this voir dire on racial bias to be inadequate:

> [Tlhe [trial] court asked no questions designed to elicit whether any juror actually held such bias. In a case such as this, where there is a potential of racial or other invidious prejudice against the defendant, a further inquiry should be made.

(*People v. Taylor, supra*, 5 Cal.App.4th at p. 1316 [this opinion discussed, inter alia, Mu'Min v. Virginia, supra, 500 U.S. 415; *Turner v. Murray, supra*, 476 US. 28; *Aldridge v. United States, supra*, 283 US. 308; *Rosales-Lopez v. United States, supra*, 451 U.S. 182].) Noting that the United States Supreme Court has not endorsed particular means for discovering bias during voir dire and that both state and federal cases allow the trial judge considerable discretion concerning the methods used to root out prejudice in voir dire, the Taylor court strongly suggested, however, that significant attorney

participation and open-ended questions would be effective for discovering bias. (*People v. Taylor, supra*, 5 Cal.App. 4th at p. 1316.)

In *State v. Williams* (N. J. 1988) 550 A.2d 1172, the New Jersey Supreme Court reversed the defendant's conviction and death sentence due in part to the inadequacy of the voir dire on race. Both the defendant and the victim were African-American. The trial court posed only one question about the prospective jurors' racial attitudes: "Defendant is a Black man. Would that, in any way, prejudice or influence your sitting as a juror in this case?" (*Id.* at p. 1191.) The New Jersey Supreme Court noted that Williams was not a case where race was "inextricably bound up with the conduct of the trial," and further noted that there were no indications that racial prejudice may have influenced the verdict. (*Id.* at p. 1190, quoting *Ristaino v. Ross* (1976) 424 U.S. 589.) Nonetheless, the Court held that, where requested by the defense, more thorough voir dire on racial attitudes is mandatory in a capital case: racial prejudice may be either blatant and easy to detect or subtle and therefore more difficult to discern. A probing voir dire that elicits more than a 'yes' or 'no' response will aid the trial court in excusing prospective jurors for cause and will assist the defense in exercising its peremptory challenges. When the defendant is a member of a cognizable minority group, a more searching voir dire should be conducted, if requested. (*Ibid.*)

The New Jersey Supreme Court recognized not only that voir dire is essential where the defendant is a minority, but that the voir dire must be searching and thorough. In the instant case the questions on racial attitudes were inadequate for the same reasons the New Jersey Supreme Court stated in Williams. Moreover, the need for racial voir dire was even greater here because this case involved a young African-American man accused of

killing an elderly white woman during a sexual assault while the Williams case involved a black-on-black crime.

In the instant case, more thorough and probing voir dire was clearly necessary to discover racial biases. The trial court could have accomplished a constitutionally appropriate voir dire on race through several means. Attorney-conducted questioning, as defense counsel requested, would have been one way to ferret out biases. Also, the trial judge could have followed up on the questionnaire's inquiries in this area, particularly where the prospective juror's responses were unclear or indicative of possible bias. Open-ended questions would have been especially helpful here because the answers might have revealed something about a juror's thought processes which, in turn, might suggest a further question leading to relevant information. In addition, individual, sequestered voir dire of prospective jurors would have created an environment where they might have felt more comfortable acknowledging that they did in fact have some feelings and beliefs which might impair their judgment in this case.

In *Turner v. Murray, supra*, the United States Supreme Court found that the failure to question prospective jurors about race in a capital case involving interracial violence requires automatic reversal of the death sentence. (*Id.*, 476 U.S. at p. 37.) In *People v. Wilborn* (1999) 70 Cal.App.4th 339, 348, the court of appeal found that, under the facts of the case, the trial judge's refusal to question prospective jurors about racial bias violated the defendant's constitutional right to a fair and impartial jury and required automatic reversal. In the *Wilborn* case, the defense of the African-American defendant rested entirely on a credibility challenge to the White police officers; therefore, the trial court had an obligation to make some inquiry as to racial bias of the prospective jurors.

The trial court has a clear "duty" to see "that the jury as finally selected is subject to no solid basis of objection on the score of impartiality ...." (*Frazier v. United States* (1948) 335 U. S. 497, 51.) Because bias warranting the dismissal of a potential juror for cause "can only be demonstrate[d] in the responses to questions on voir dire," the courts have held that prospective jurors must be adequately questioned on voir dire and that it is the responsibility and duty of the trial court to ensure that prospective jurors are adequately questioned on voir dire with respect to their ability to apply the law fairly, impartially and without bias. (See *United States v. Haynes* (2d Cir. 1968) 398 F.2d 980, 984; see, also *United States v, Barnes* (2d Cir. 1979) 604 F.2d 121,137 ["[A]t least some questioning [is required] with respect to any material issue that may arise, actually or potentially, in the trial ..."]; *Rosales-Lopez v. United States* (1981) 451 U. S. 182, 188 (purality opinion) ["without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's, instructions and evaluate the evidence cannot be fulfilled.'].) Accordingly, it is only after "the proper questions have been asked at voir dire, [that] 'the trial court, when empaneling a jury, has ... broad discretion in its rulings on challenges therefor.'" (*United States v. Torres* (2d Cir. 1997) 128 F.3d 38, 44, *quoting Haynes, supra*, 398 F.2d at p. 984 (quoting *Dennis v. United States* (1950) 339 U. S. 162, 168).) The trial court's discretion in ruling on challenges only comes into being after proper questions have been asked on voir dire because findings of actual bias are "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." (See *Torres, supra*, 128 F.3d at p. 44, citing *Wainwright v. Witt* (1985) 469 U. S. 412, 428; see also *United States v. Ploof* (2d Cir. 1972) 464 F.2d 116, 118.) Similarly, in *United States v. Gillis* (10th

Cir. 1991) 942 F.2d 707, the court held that a district judge abuses its discretion if the scope of voir dire is so limited that it does not create any reasonable assurances that prejudice would be discovered if present. (*Id.* at pp. 709-10.) In that case, the trial court abused its discretion by failing to ascertain in voir dire whether the panel members were prejudiced by having served as prospective jurors and as panel members on an earlier trial. (*Id.* at p. 710.)

In terms of the respective roles of the judge and the parties during voir dire, a distinction has been drawn between actual bias and suspected bias:

> The principal purpose of voir dire is to probe each prospective juror's state of mind to enable the trial judge to determine actual bias and to allow counsel to assess suspected bias or prejudice.

(*Darbin v. Nourse* (9th Cir. 1981) 664 F.2d 1109, 1112, emphasis added.) This Court recently confirmed this same principle, regarding the respective roles of the trial judge and the parties:

> Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. [Citation.] Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule.

(*People v. Roldan* (2005) 35 Cal.4th 646, 689, emphasis added.) Thus, voir dire enables the parties to gather information about "suspected bias" for purposes of exercising peremptory challenges, leaving questions of actual bias for the trial court. (*Dennis v. United States* (1950) 339 U.S. 162, 168 ["the trial court has a serious duty to determine the question of actual bias."].)

For all of the foregoing reasons, both the guilt and penalty verdicts must be reversed due to the trial court's complete failure to undertake even minimal precautions, including adequate voir dire, to prevent racial bias from influencing murder and special circumstances guilt verdicts and a death sentence.

*****

III.

THE VERSION OF CODE OF CIVIL PROCEDURE SECTION 223 IN EFFECT AT THE TIME OF APPELLANT'S TRIAL WAS UNCONSTITUTIONAL BECAUSE IT TREATED CRIMINAL DEFENDANTS LESS FAVORABLY THAN CIVIL LITIGANTS

As noted in Argument II, *ante,* appellant filed several pre-trial motions challenging the voir dire process proposed by the trial judge in this case. Those motions requested individual, sequestered voir dire by the attorneys in this case, arguing inter alia that both the state and federal Constitutions guaranteed such procedures.

A. The Version of Section 223 in Effect at the Time of Appellant's Trial Violates Equal Protection Rights

The equal protection clause of the Fourteenth Amendment to the United States Constitution[26] 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.) The federal equal protection clause prohibits a state from legislating "that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the object of that statute." (*Eisenstadt v. Baird* (1972) 495 U.S. 438, 446-447.)

A state statute violates the equal protection clause if it treats similarly situated groups or individuals differently. (See, e.g., *McLean v. Crabtree*

---

[26] The California Constitution also contains an equal protection clause, article 1, section 7. In some cases the state guarantee may provide broader protection than the federal equal protection clause. (*People v. Leung* (1992) 5 Cal.App.4th 482, 494.)

(9th Cir. 1999) 173 F.3d 1176, 1185.) To succeed on a claim under the equal protection clause, a defendant first must show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*Batchelder v. United States* (1979) 442 U.S. 114, 123 - 125; *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 568.) At issue in this case is the disparate treatment of criminal defendants and civil litigants by the version of Code of Civil Procedure section 223 (hereinafter "section 223") in effect at the time of appellant's trial.

Criminal and civil litigants are "similarly situated" for the purposes of the equal protection analysis applicable here. This Court recently addressed this aspect of such analysis in *People v. Hofsheier* (2006) 37 Cal.4th 1185. In that decision, the question was whether sex offenders, who had committed different crimes: voluntary sexual intercourse with a minor over 16 and voluntary oral copulation with a minor over 16, were similarly situated for purposes of determining their criminal culpability. In Hofsheier, the Court observed:

> Under the equal protection clause, we do not inquire 'whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'

(*Id.* at p. 1199; citations omitted.)

This Court concluded, for purposes of determining whether the disparate punishment accorded to people convicted of one sexual offense as opposed to another, that the two groups were similarly situated:

> The only difference between the two offenses is the nature of the sexual act. Thus, persons convicted of oral copulation with minors and persons convicted of sexual intercourse with minors 'are sufficiently similar to merit application of some level of scrutiny to determine whether distinctions between the two groups justify the unequal treatment.'

(*Ibid.*, citing People v. Nguyen (1997) 54 Cal.App.4th 705, 715.) The analysis set forth in the Hofsheier opinion applies to the equal protection question presented here. The purpose of the statutory voir dire provisions is to insure a fair and impartial jury. Criminal and civil litigants are similarly situated in that regard.

Equal protection analysis varies according to the interests affected by the challenged law. In an equal protection challenge, the level of judicial scrutiny varies according to the type of classification involved and the nature of the right affected. One of three standards of review may apply: strict scrutiny, intermediate scrutiny, or rational basis review. (See *Romer v. Evans* (1996) 517 U.S. 620, 631-632.) Classifications affecting fundamental rights are given the most exacting scrutiny. (*Clark v. Jeter* (1988) 486 U.S. 456, 461.) Strict scrutiny review is applied where the statute in question affects a fundamental constitutional right.

At issue here are differing standards, as defined by California statutes in effect at the time of appellant's trial, for voir dire in criminal and civil cases. Both civil litigants and criminal defendants have an interest in receiving a fair trial before qualified jurors. However, for the right of the criminal defendant that interest is greater; the United States Supreme Court has found that a criminal defendant's right to a fair trial before an impartial jury is a fundamental right. (See, e.g., *Irwin v. Dowd* (1961) 366 U.S. 717, 722.

B. Criminal Defendants are Treated less Favorably Under Section 223 than are Civil Litigants Under Code of Civil Procedure 222.5

The provisions governing procedures for jury voir dire were changed by passage of Proposition 115 which went into effect in 1990 as section 223.

Prior to this change, a criminal defendant in a capital case was entitled to individual sequestered voir dire conducted by his/her attorney. (*People v. Hovey* (1980) 28 Cal.3d 1.) Section 223, as enacted by Proposition 115, put into place a process in which the trial judge conducts the voir dire of prospective jurors in the presence of other jurors "where practicable;" only upon a showing of good cause and with the permission of the trial court can defense counsel question prospective jurors. The version of section 223 relevant to this case also allowed voir dire aimed only at making challenges for cause.[27]

By contrast, the jury selection process in civil cases, governed by Code of Civil Procedure section 222.5 (hereinafter "section 222.5"), allows each party's counsel to question prospective jurors in order to enable counsel "to intelligently exercise both peremptory challenges and challenges for cause." These distinctions between the selection procedures for criminal and civil juries violates the equal protection clauses of both the United States and California Constitutions.

This Court has rejected this claim in previous opinions (see, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 612; *People v. Ramos* (2004) 34 Cal.4th 494, 512-513), but appellant urges the Court to reconsider its position on this issue. In those earlier decisions, the Court determined that this version of section 223 did not violate the equal protection clauses of the two constitutions because the distinction was rationally related to a legitimate state purpose, i.e., "to curb commonly known abuses during the

---

[27] The applicable version of section 223 stated: "Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause."

voir dire process in criminal cases." (*Ibid.*)

There are several reasons why the Court should reconsider its equal protection analysis of the differences between section 223 and section 222.5. First, the Court should reconsider its previous determination of this issue because it applied the wrong level of scrutiny in its equal protection analysis. As noted previously, there are three standards of review available when examining an equal protection claim: strict scrutiny, intermediate scrutiny, and rational basis review. In *People v. Ramos, supra*, 34 Cal. 4th 494, the Court rejected the view that strict scrutiny should be applied to the fact that, for purposes of choosing an impartial jury, section 223 treats criminal defendants less favorably than section 222.5 treats civil litigants. The Court reasoned:

> We conclude. . .that Code of Civil Procedure former section 223 did not violate the equal protection clauses of the United States and California Constitutions, and reject defendant's claim that his equal protection challenge is subject to the strict scrutiny doctrine, which is applied when there is a significant interference with the exercise of a fundamental right. [citation] The right to voir dire the jury is not constitutional, but is a means to achieve the end of an impartial jury. [citation]. . .

(*Id.* at p. 512.)

The Court further found that there is no constitutional right to a particular manner of conducting voir dire. However, as this Court observed in *People v. Bittaker* (1989) 48 Cal.3d 1046, 1086, "the right to voir dire . . . is not a constitutional right but a means to achieve the end of an impartial jury." It is impossible to assure an impartial jury without adequate voir dire. (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.) In the *Ramos* case, supra, the trial court posed questions to the prospective jurors on general voir dire and then permitted counsel for both sides to pose additional

questions. Applying the lowest standard of scrutiny, the Court held that "the statute's distinction between criminal and civil voir dire is constitutional as long as it is rationally related to a legitimate state purpose under the rational relationship test, a test met here." (*People v. Ramos, supra*, 34 Cal.4th at p. 513.) According to the Court, the rational state purpose behind this version of section 223 was the voters' desire "to prevent abuse of the jury selection process in criminal cases." (*Ibid*; see also *People v. Robinson, supra*, 27 Cal.4th at p. 613.)

Giving civil litigants what is, in effect, preferential treatment over criminal defendants when it comes to voir dire defies traditional notions of due process in our law. Going back to common law, criminal defendants have enjoyed greater procedural rights because it is their liberty, and in a capital case their lives, which is at stake. As the United States Supreme Court noted in *In re Winship*:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in Speiser v. Randall, supra, 357 U.S. at pp. 525--526: 'Due process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the factfinder of his guilt.'

(*In re Winship* (1970) 397 U.S. 358, 363, emphasis added.)

This Court's earlier determination that the statutes which accord civil litigants a better voir dire procedure than that conferred on criminal defendants is not logical. It turns on its head the notion that criminal

defendants, who face loss of liberty and even loss of life in a capital case, should have greater procedural protections than civil litigants for whom only loss of property is at stake. The appropriate standard of scrutiny required here is the highest level, known as strict scrutiny.[28]

While all litigants, civil as well as criminal, have a right to a fair trial before qualified jurors, the interest of criminal defendants is greater. As noted previously, a criminal defendant's right to a fair trial is a fundamental personal right. (*Irvin v. Dowd* (1961) 366 U.S. 717, 722.) Without an effective and fair voir dire procedure, a criminal defendant cannot assure that he will have an impartial jury, as he is guaranteed under the Constitutions of both the United States and California. It is immaterial, therefore, that there is not any constitutional right to voir dire. Voir dire is simply the crucial part of the procedure for insuring that a defendant receives a fair trial before an impartial jury.

The second reason why the Court should reverse its earlier determination of the equal protection challenge to section 223 is that the underlying rationale found by this Court is entirely speculative. What evidence is there to support this Court's assertion in earlier opinions that the voters' supposed concern with "abuses" of the voir dire process in criminal cases was the rationale for the changes in section 223 wrought by the passage of Proposition 115? That proposition did not state that the purpose

---

[28] Under the strict scrutiny standard, the state must show that the challenged statutory classification: (1) bears a close relationship to the promotion of a compelling state interest; (2) is required to achieve the government's goal; and (3) is narrowly drawn to achieve the goal by the least restrictive means necessary. (*Craig v. Boren* (1976) 429 U.S. 190, 218-219.) Laws subject to such review will be upheld only where a compelling state interest is shown and the statute is narrowly drawn to achieve that interest by the least restrictive means. (*Romer v. Evans, supra,* 517 U.S. at pp. 632-633.)

of the changes in the voir dire procedure in criminal cases was to deal with "abuses" of the jury selection process which occurred only in criminal cases.[29]

Two decisions by the California Court of Appeal, relied upon by this Court in the *Ramos* and *Robinson* decisions, upheld section 223 based on the "common knowledge" of voir dire abuses by criminal litigants. (*People v. Leung* (1992) 5 Cal.App.4th 482, 496; *People v. Boulerice* (1992) 5 Cal.App.4th 463, 480.) These two court of appeal cases, in turn, relied upon

---

[29] Another reason why the Court should re-evaluate its earlier holdings on this issue is that the California Legislature implicitly acknowledged the shortcomings of section 223, as enacted by Proposition 115, when it amended this statute in 2000. The statute now provides that after the trial judge conducts an initial examination of prospective jurors, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. In the new version, the trial judge retains discretion to limit the counsels' questioning. In enacting this amendment, the Legislature described the purpose and effect of this change:
Under existing law, which was enacted by initiative measure, in a criminal case, the court is required to conduct the examination of prospective jurors, except that the court may permit the parties, upon a showing of good cause, to conduct a further inquiry. . . This bill would amend the initiative measure to instead require the court to conduct an initial examination and thereafter give the counsel for each party the right to examine, by oral and direct questioning, any or all of the prospective jurors. . .
(AB 2406, Migden. CA Legis. 192 (2000).)

This action by the Legislature to reinstate some of the rights of criminal defendants in the voir dire process undermines this Court's earlier determination that there was a legitimate state purpose underlying the changes first made in section 223 as a result of the passage of Proposition 115.

two very old cases[30] for the proposition that it was common knowledge that attorneys abused the voir dire process in criminal trials. The speculation that abounds in all of these decisions does not offer adequate support for a statutory scheme that allows disparate treatment of two similarly situated groups, i.e., civil and criminal litigants, in the important area of jury selection.

For all of the foregoing reasons, this Court should declare that the version of section 223 in effect at the time of appellant's trial violated the equal protection rights of criminal litigants. This Court should find this constitutional error is comparable to improper cause challenges under *Wainwright v. Witt* (1985) 469 U.S. 412, 424 and *Davis v. Georgia* (1976) 429 U.S. 122, 123; that is, this error requires reversal of defendant's convictions and death sentence without inquiry into prejudice. (*People v. Stewart* (2004) 33 Cal.4th 425, 454.)

******

[30] *People v. Estorga* (1928) 206 Cal. 81, 84 and *People v. Adams* (1971) 21 Cal.App.3d 972, 979.)

IV.

THE TRIAL JUDGE ERRED IN DENYING DEFENSE MOTIONS DURING JURY SELECTION THAT THE PROSECUTOR HAD VIOLATED THE PRINCIPLES OF BATSON V. KENTUCKY BY STRIKING AFRICAN AMERICAN JURORS BASED ON THEIR RACE

A. Introduction

The jurisprudence of the United States Supreme Court has consistently condemned the presence of racial discrimination in the judicial system. In *Rose v. Mitchell* (1979) 443 U.S. 545, 555, the Court observed: "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." This type of discrimination "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." (*Smith v. Texas* (1940) 311 U.S. 128, 130.) In *Batson v. Kentucky* (1986) 476 U.S. 79, 85, the Court held that the State denies an African American defendant equal protection of the laws, as required by the Fourteenth Amendment, when it puts him on trial before a jury from which members of his race[31] have been excluded because of their race.

The *Batson* decision recognized as well that denying a person participation in jury service on account of race not only harms the accused but also undermines public confidence in the fairness of our system of justice by unconstitutionally discriminating against the excluded juror(s). (*Id.* at p. 87.)

---

[31] In *Powers v. Ohio* (1991) 499 U.S. 400, 402, the Supreme Court eliminated the requirement that the defendant and the stricken juror share the same race.

Batson set forth a three-step process to determine whether a peremptory challenge is race-based in violation of the constitution. The United States Supreme Court recently reiterated the three steps in its decision in *Johnson v. California* (2005) 545 U.S. 162:

> First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations omitted.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations omitted.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." (Citations omitted.]

(*Id.* at p. 168.)

In the third step of the Batson analysis, it is not sufficient that a trial court deem the prosecution's facially-neutral explanation "plausible," (*United State v. Alanis* (9th Cir. 2003) 335 F.3d 965, 969, fn.3) or "probably . . . reasonable." (*Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 832.) Rather, in determining whether the challenger has met his or her burden of showing intentional discrimination, the court must conduct a "sensitive inquiry" into such circumstantial and direct evidence of intent as may be available. (*United State v. Alanis, supra*, 335 F.3d at p. 969, fn. 3 [citing *Batson*, 476 U.S. at p. 93].) Such an inquiry will necessarily require looking beyond the proffered reasons to determine whether they hold up under closer scrutiny. Thus,

> [i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step.

(*Miller-El v. Dretke* ("*Miller-El II*") (2005) 545 U.S. 231, 241, emphasis in original.) [32]

In *People v. Wheeler* (1978) 22 Cal.3d 258, decided eight years before Batson, this Court presaged *Batson* by holding that a defendant's right to a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution was violated by the use of peremptory challenges to remove prospective jurors on the sole ground of group bias. (*Wheeler, supra*, 22 Cal.3d at pp. 276-277.) Group bias was defined as "a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds." (*People v. Gonazlez* (1989) 211 Cal.App.3d 1186, 1191, citing *People v. Johnson* (1989) 47 Cal.3d 1194, 1215 and *People v. Wheeler, supra*, 22 Cal.3d at p. 276.)

In Wheeler, the California Supreme Court set forth procedures similar to those later adopted in *Batson*: One who believes his opponent is using peremptory challenges for improper discrimination must object in timely

---

[32] Even before the *Miller-El II* decision, the use of comparative analysis has been the rule, rather than the exception, among the federal circuit courts, and has been employed by courts in many jurisdictions to review, for the first time on appeal, the grounds upon which a trial court has based a ruling pursuant to *Batson*. (See, e.g., *Jordan v. Lefevre* (2d Cir. 2000) 206 F.3d 196, 201; *Caldwell v. Maloney* (1st Cir. 1998) 159 F.3d 639, 653; *Devose v. Norris* (8th Cir. 1995) 53 F.3d 201, 204 (quoting *Doss v. Frontenac* (8th Cir. 1994) 14 F.3d 1313, 1316-17; *Splunge v. Clark* (7th Cir. 1992) 960 F.2d 705, 709; *People v. Randall* (Ill.App. 1996) 671 N.E.2d 60; *Mattison v. State* (Ga. 1994) 451 S.E.2d 807; *Holmes v. Great Atl. & Pac. Tea Co.* (La.App. 1993) 622 So.2d 748; *State v. Reliford* (Mo.App. 1988) 753 S.W.2d 9.) *People v. Valdez* (2004) 32 Cal.4th 73, 95

fashion and make a prima facie showing [33] that prospective jurors are being excluded because of race or group association. (*People v. Wheeler, supra*, 22 Cal.3d at p. 280; see, e.g., *People v. Davenport* (1995) 11 Cal.4th 1171, pp; *People v. Crittenden* (1994) 9 Cal.4th 83, 115; *People v. Garceau* (1993) 6 Cal.4th 140, 170.) As is also required by Batson, if the trial court finds a prima facie case, the burden shifts, and the party whose peremptory challenges are under attack must then provide a race or group-neutral explanation, related to the particular case, for each suspect challenge. (See, e.g., *People v. Turner* (1994) 8 Cal.4th 137, 164-165; *People v. Fuentes* (II) (1991) 54 Cal.3d 707, 714.) Once the challenged party, in this case the prosecution, has stated its reasons for each of the peremptory challenges, the trial court has a duty to make "'a sincere and reasoned attempt to evaluate the prosecutor's explanation' [citation] and to clearly express its findings [citation]" in light of all the circumstances. (*People v. Silva* (2001) 25 Cal.4th 345, 385-386; accord Batson, supra, 476 U.S. at p. 98.)

If the trial court makes such a "sincere and reasoned" effort to

---

[33] *Wheeler* held that the moving party "must show a strong likelihood" that peremptory challenges were being used against persons associated with a specific group and that the trial court could find a prima facie case if a "reasonable inference [arose] that peremptory challenges [were] being used on the ground of group bias alone." (*People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281.) In *People v. Johnson* (2003) 30 Cal.4th 1302,1313, this Court found that *Wheeler's* "strong likelihood" standard did *not* set a higher standard than *Batson's* "reasonable inference" standard, for establishing a prima facie case, and that the two terms were interchangeable. However, the United State Supreme Court has recently rejected that view, holding that "California's 'more likely than not' standard is not an appropriate yardstick by which to measure the sufficiency of a prima facie case . . . *Batson* itself . . . provides no support for California's rule." (*Johnson v. California, supra*, 545 U.S. at p. 168.)

evaluate the justifications offered, its conclusions are entitled to deference on appeal. (*People v. Ervin* (2000) 22 Cal.4th 48, 75; *People v. Arias* (1996) 13 Cal.4th 92, 136.) However, where an insufficient inquiry is made and the prosecution's reasons are either unsupported by the record or inherently implausible, the trial court's unsupported acceptance of the prosecution's reasons is not entitled to deference. (*People v. Silva, supra*, 25 Cal.4th at pp. 385-386; see *People v. Montiel* (1993) 5 Cal.4th 877, 909.) Justifications for a particular peremptory challenge remain a question of law and thus are properly subject to appellate review. (*People v. Turner* (1994) 8 Cal.4th 137, 169.[34])

A trial court's failure to engage in such a careful assessment of the prosecution's stated reasons is itself reversible error. (*People v. Silva, supra,* 25 Cal.4th at p. 386; *People v. Fuentes, supra*, 54 Cal.3d at p. 721;[35] see *Purkett v. Elem* (1995) 514 U.S.765, 768 [third step in Batson process requires trial court to determine whether facially non-discriminatory reasons are implausible or pre-textual]; *United States v. Alcantur* (9th Cir. 1996) 897

---

[34] Overruled on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn.5.

[35] This Court carved out an exception to the requirement that a trial court make explicit and detailed findings regarding the prosecution's use of peremptory challenges. In *People v. Reynoso* (2003) 31 Cal.4th 903, 929, the Court held that a trial court is not required to make specific finding in instances where the trial court decides to credit the prosecution's demeanor-based reasons for exercising a peremptory challenge. Appellant submits that in this case, the prosecution's stated challenges were not demeanor-based. Moreover, because of the over-reliance on the jury questionnaires and the very limited voir dire, there really was no way to make a demeanor-based challenge. To the extent it could be argued the reasons were demeanor-based, appellant further submits that the *Reynoso* exception is contrary to *Batson* and its progeny and should be reconsidered.

are implausible or pre-textual]; *United States v. Alcantur* (9th Cir. 1996) 897 F.2d 436, 438.)

B. The Facts of this Case

There were two jury selections in this case because the first penalty phase trial ended in a mistrial when the jury failed to reach a verdict. During both of the jury selection processes, the defense objected to the prosecutor's peremptory challenges of African-American and other minority prospective jurors.

1. The First Jury Selection

The defense objected when the prosecutor peremptorily challenged Tanisha Brooks, alleging that the sole basis was her race, "Afro-American." (23 RT 2155-2156.) The prosecutor denied the charge, but the judge asked the prosecutor to explain the non-discriminatory reasons for the challenge of Ms. Brooks. (23 RT 2156.) The prosecutor gave the following explanation:

> She is 23 years old, which I have a rating as to youth and life experience, so it is a standard form I use for all the jurors. When I use the form, that's a negative being that age. I have an 18 to 29 range which is a negative, 23 years old, single, no children, basically no life experience and the main reason is that she was undecided on death. I pretty much exercise this right who is undecided or opposed, and I have all the papers that corroborate that. Her brother was arrested in '89. I didn't feel she was very forthright about what his crime was. . . .She did not vote, which is one of the things that I have on my check list.

(23 RT 2156-2157.) The judge disputed the prosecutor's last assertion, saying that Ms. Brooks had stated that her brother was convicted of manslaughter and that she thought he had received fair treatment. (23 RT 2156-2157.) Defense counsel "submitted it," and the trial judge, without any explanation, immediately denied the defense motion. (23 RT 2157.)

Analysis

While the Batson decision and its progeny generally requires that the defendant first establish a prima facie case (step one, described *ante*) of discriminatory juror challenges by the prosecutor, that requirement became moot when the trial judge asked the prosecutor for her race neutral reason(s) for her challenge of Ms. Brooks. As the U.S. Supreme Court noted in *Hernandez v. New York* (1991) 500 U.S. 352, 359:

> Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.[36]

In the instant case, the reasons given by the prosecutor, enumerated supra, met the requirement of step two of the *Batson* analysis. Accordingly, the question before this Court now is whether the trial judge erred in finding the reasons sufficient to overcome the inference raised by appellant's assertion that the prosecutor violated the dictates of both the *Batson* and *Wheeler* decisions regarding racial discrimination in jury selection.

Therefore, the Court should proceed to the third step of the Batson analysis to determine whether the justifications offered by the prosecutor in this case were pre-textual. As the Court noted in *People v. Silva* (2001) 25 Cal.4th 345, after the prosecutor has stated her reasons for each of the peremptory challenges questioned by the defense, the trial judge has a duty to make "'a sincere and reasoned attempt to evaluate the prosecutor's explanation' [citation] and to clearly express its findings [citation]" in light of all the circumstances. (*Id.* at pp. 385-386.)

Although the trial judge disputed the prosecutor's last assertion, the record in this case shows that he did not engage in any meaningful

---

[36] See also *People v. Schmeck* (2005) 37 Cal.4th 240, 267.

evaluation of the remainder of the prosecutor's explanations. He simply denied the motion after the prosecutor stated her alleged reasons for challenging Tanisha Brooks. (23 RT 2157.) There is no evidence that he made anything more than the most cursory evaluation of the prosecution's explanation.

A review of the record shows that for each of the reasons offered by the prosecutor for challenging Ms. Brooks, there was at least one white juror who sat on the first jury who exhibited the characteristic which the prosecutor identified as a non-racial justification for the challenge of Ms. Brooks.

The first reason given by the prosecutor was:

> She is 23 years old, which I have a rating as to youth and life experience, so it is a standard form I use for all the jurors. When I use the form, that's a negative being that age. I have an 18 to 29 range which is a negative, 23 years old, single, no children, basically no life experience. . .

(23 RT 2156.)

Two white jurors who sat on the first jury in appellant's case were in the age group of 18 to 29 years,[37] identified as "a negative" by the prosecutor. Seated Juror # 4 [38] was 27 years old at the time of the trial. (9 CT 1820.) Like Ms. Brooks, he was also single and did not have children. (9 CT 1822-1823.) Also, like Ms. Brooks, Juror # 4 had a close relative who had

---

[37] In the second jury which served during appellant's second penalty phase trial, there was another young juror not challenged by the prosecutor. Juror # 2 in the second jury was a 29- year-old white woman. (17 CT 3565.) She was also unmarried and did not have children (17 CT 3567-3568), two other factors identified by the prosecutor as race-neutral reasons for her peremptory challenge of Tanisha Brooks.

[38] He is also identified in the record as No. 163387997. (42 CT 8672.)

been arrested and apparently convicted of a serious crime. In his case, the relative was his father who was caught "picking up a ransom for a fake kidnapping." (9 CT 1834.)

Similarly, seated juror # 9 [39] (identified in the reporter's transcript as No. 165595109) was 29 years old at the time of the trial. (9 CT 1898.) While she was married, she did not have any children. (9 CT 1900, 1901.)

Another reason offered by the prosecutor for her peremptory challenge of Tanisha Brooks was "She did not vote, which is one of the things that I have on my check list." (23 RT 2157.) No less than four jurors who actually sat on appellant's first jury [40] also failed to vote: (1) Juror # 6 [41] (9 CT 1973); (2) Juror # 8 [42] (9 CT 1925); (3) Juror # 12 [43] (10 CT 2029); and Alternate Juror # 4[44] (10 CT 2123).[45] Also, these four jurors were all unmarried at the time of appellant's trial. As noted previously, the prosecutor identified the fact that Ms. Brooks was single as another reason why she used a peremptory challenge to eliminate Brooks from the jury.

In explaining the allegedly non-discriminatory reasons for her

---

[39] She is identified as Juror # 7 in the clerk's transcript. (9 CT 1897.)

[40] Also, one of the jurors, Juror # 5, who sat on appellant's second jury also failed to vote in the last election. (17 CT 3650.)

[41] He is also identified in the record as No. 164512662. (42 CT 8673.)

[42] She is also identified in the record as No. 164156350. (42 CT 8672.)

[43] She is also identified in the record as No. 157369099. (42 CT 8673.)

[44] He is also identified in the record as No. 165655471. (42 CT 8674.)

[45] In addition, there were jurors chosen for the second jury who did not vote. Indeed, Juror # 5 [on the second jury] was not registered to vote and did not vote in the last presidential election. (17 CT 3650.)

challenge of Tanisha Brooks, the prosecutor stated: ". . . the main reason is that she [Ms. Brooks] was undecided on death." (10 RT 2156.) A review of the record shows that one white juror (Juror # 8)[46] who sat on appellant's first jury had marked the "undecided" option on the question "[w]hich of the following best describes your general attitude toward the death penalty." (9 CT 1941.) This is exactly what Ms. Brooks did on her juror questionnaire. (13 CT 2904.)

In both instances – involving Juror # 8 and Ms. Brooks – the trial judge certainly did not engage in any searching questioning about the fact that they had marked the "undecided" option on the death penalty in their questionnaires. The following represents the total voir dire of juror # 8:

The Court: All right. Next comes (No. 164156350). How are you?

Prospective Juror: Fine, thanks.

The Court: What year Corvette do you have?

Prosp. Juror: '80.

The Court: Got it fixed up pretty good?

Prosp. Juror: Yes.

The Court: You don't drive it much, do you?

Prosp. Juror: No.

The Court: Wouldn't have any '63 or '65 that are available?

Prosp. Juror: You have to look in the want ads.

---

[46] There was also a white juror, Juror # 10, selected to sit on appellant's second jury who marked the "undecided" option for the question on the questionnaire concerning his general view about the death penalty. (18 CT 3807.)

The Court: They want too much for them. Okay. Death penalty. Do you support or oppose, no support, no oppose, you put none.

The Prosp. Juror: It would depend on the case. I would have to listen to all the facts first. I am not biased either way.

The Court: So are you telling me we go into a penalty phase in this case, that all possible sentencing options are open to you?

Prosp. Juror: Yes, sir.

The Court: Are you telling us that you have no attitude or feelings about death penalty to the extent that either the death penalty is foreclosed or life without possibility is foreclosed?

Prosp. Juror: Right, it could be either way.

The Court: You would listen to the facts?

Prosp. Juror: Yes, sir.

The Court: Thank you.

(23 RT 2086-2087.)

As the above shows, the trial judge asked Juror # 8 as many questions about her Corvette as he did about her views about the death penalty. His voir dire of Tanisha Brooks contained more substantive questions; however, it too was a generally cursory examination. The entire questioning of Ms. Brooks by the trial judge follows:

The Court: No. 165611179. You say you have a friend that is a deputy marshal.

Prospective Juror: Yes.

The Court: He or she?

Prosp. Juror: Yes.

The Court: What is his name?

Prosp. Juror: Michael O'Neil.

The Court: Does he ever talk to you about anything that happens down there?

Prosp. Juror: No.

The Court: Not so far. In regard to your brother's problem back in 1989, referring to question 69, folks, based upon what you know about it, I don't care what he feels or anybody else in your family. Based on what you know about his situation, do you feel he was treated unfairly by the criminal justice system?

Prosp. Juror: No.

The Court: Is there anything about that case that would anyway affect your thinking in this case if you were selected?

Prosp. Juror: No.

The Court: Did he go to trial?

Prosp. Juror: No, plea bargain.

The Court: Now, we talked about the law in this area, the law that you may have to follow, and this morning I talked to you that the rule in California is that the judge gives you the instructions of the law and you must follow that. Do you understand that?

Prosp. Juror: Yes.

The Court: You understand I am relying on you saying that right now. You sit here, well, if I didn't, I can talk to the judge and be replaced by an alternate juror. That is not a legitimate reason to be replaced. You are telling me now that you will follow the law as I give it to you?

Prosp. Juror: Yes.

The Court: By saying not being a legitimate reason, now is the time to tell me, not two weeks from now, all right?

Prosp. Juror: Yes.

The Court: Okay. In regard to your feelings and attitudes about the death penalty, do any of those feelings and attitudes prevent you in any way or substantially impair you from following the law in the state of California as far as I have explained it to you as it involves the death penalty?

Prosp. Juror: No.

The Court: Thank you.

(23 RT 2123-2124.)

While the trial judge chose, for some reason, to question Ms. Brooks much more closely than he did Juror # 8, there is nothing to distinguish the answers given by the two women. Accordingly, there is no basis apparent (other than race) in the record of this case to explain why the prosecutor challenged the African-American juror and not the white juror, both of whom wrote in their questionnaire answers that they were undecided about the death penalty but stated during voir dire that they could consider it as a possible sentence against appellant. Juror # 8 also shared other qualities with Ms. Brooks, which the prosecutor had identified as reasons for her challenge of Brooks: she was single (9 CT 1926), and she had not voted in the last presidential election. (9 CT 1927.)

2. The Record Shows the Trial Judge Erred in Allowing the State to Challenge Tanisha Brooks

In *Miller-El II, supra*, the U.S. Supreme Court based its finding that two of the prosecutor's strikes were racially motivated in part on "side-by-side comparisons of some black venire panelists who were struck while white panelists allowed to serve."[47] (Id. 540 U.S. at p 241.) Thus,

> [i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step.

(*Ibid.*, emphasis in original.)

The above analysis, a side-by-side comparison as described in *Miller-El II, supra*, of how white jurors who shared characteristics found objectionable by the prosecutor in African-American prospective juror Tanisha Brooks were not challenged establishes that the trial judge failed to

---

[47] While this Court historically has rejected comparative juror analysis. In *People v. Cornwell* (2005) 37 Cal.4th 50, 72, the Court recently acknowledged that the *Miller-El II* decision may mean that such analysis is appropriate even if it were being conducted for the first time on appeal. Even before *Miller-El II,* other jurisdictions used comparative juror analysis for the first time on appeal. See, e.g., *Riley v. Taylor* (3rd Cir. 2001) 277 F.3d 261, 273-294 [conducting comparative analysis of struck black jurors with unstruck white jurors for first time on appeal]; *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698-699 [appellate court may overturn the finding of the trial court where a comparison between the answers given by prospective jurors who were struck and those who were not fatally undermines the prosecution's credibility]; *Young v. State* (Tex.Crim.App. 1992) 826 S.W.2d 141, 146 ["this type of analysis is significant, maybe even more so, on appeal when the appellate court is reviewing the trial judge's findings as to purposeful discrimination"].)

do an evaluation adequate enough to determine whether the prosecutor violated the Batson rule against racial discrimination in jury selection. In fact, the judge did nothing but listen to the reasons given by the prosecutor and then immediately deny the Batson motion. (23 RT 2157.) As the foregoing comparative analysis demonstrates, the stated reasons were "inherently implausible in light of the whole record." (*Turner, supra*, 42 Cal.3d at p. 720, fn. 6; *People v. Gonzalez, supra*, 211 Cal. App.3d at p. 1193; *People v. Granillo* (1987) 197 Cal.App.3d 110, 120.) Reversal is required if only one prospective juror is excluded for race-based reasons. (*People v. Silva, supra*, 25 Cal.4th at p. 386.)

3. The Second Jury Selection

As noted previously, there was a second jury selected in appellant's case because the first penalty phase trial ended in a mistrial due to the failure of the jury to reach a verdict. As in the first jury selection process, the defense objected under *Batson/Wheeler* to the prosecution's exclusion of African-American prospective jurors.

During the second jury selection, defense counsel made the following motion:

> Motion for a mistrial in this case because the prosecution, in keeping with the practice in the first trial in this case, is kicking off everybody of color. She left one on in the first case and kicked off four or five.

(40 RT 3866; emphasis added.)

The defense then named three prospective jurors whom they believed had been peremptorily challenged by the prosecutor in the second jury selection process based on their race: Mr. Al Fulton, Ms. Carol Doxtator and Ms. Madelyn Estrada. (40 RT 3866.)

Prospective Juror Al Fulton

When the trial judge asked for her explanation for the peremptory challenge of Al Fulton, the prosecutor stated:

> With regard to Mr. Fulton, he was a probation officer for 28 years. Similarly [sic] to Mr. James Hastings who was Juror No. 6 who was white, 61-year-old male. He was also a U.S. probation officer. My general feeling is that people who have had that many years in the system have their own precomposed [sic] ideas about the system, they are seen in so much of it that they come in and have a lot of preformed ideas. He might have seen – in my mind, my analysis, he might have seen cases that in his mind would be worse than this or less, and so he comes in with all of that baggage, just as Mr. Hastings did and he was kicked. In addition to that, he has what I categorize a social worker therapy type job. I have that under a category to consider in a very – I have a form that I use that is predeveloped [sic] for everybody, the same form that I use and I have those category [sic] of occupations as – and training under exclude, but to really look at to exclude. He has a social welfare degree from San Diego State University. He still counsels, has that counseling angle.
>
> A lot of his questions that he answered, for example, question no. 72, he said society needs to look at with regard to crime and what to do about it–I am rephrasing, this is my summary form – needs to look at not only the illegal use but the inequities and causes for that illegal use. So since I already know that the defense primarily is going to rely on causes and explanations for the defendant's behavior in this case, being illegal use or whatever, I can see from this that he's a gentleman who's very open.

(40 RT 3867-3868.) Instead of asking the prosecutor any follow-up questions about her explanation, the trial judge said: "You have said enough about Mr. Fulton. What about Ms. Doxtator?" (40 RT 3868.)

Prospective Juror Carol Doxtator

Apparently recognizing that the trial judge was receptive to her position, the prosecutor gave a much shorter explanation for her peremptory challenge of Carol Doxtator:

> Ms. Doxtator, your honor, is a psychiatric nurse. She discusses–that is her occupation. She discusses in her papers, mentioned that she has

seen delusions, et cetera, exactly the kind of person that's – that's where she works. I don't know how much she knows or what opinions she really has about the mentally ill, whether she is going to buy everything that the doctors say on behalf of the defendant. I mean, that's mainly it, and then in addition, she started off undecided on the death penalty.

(40 RT 3868.) Once again displaying his willingness to accept the prosecutor's position without question, the trial judge stated: "I have heard enough. Estrada." (RT 3868.)

Prospective Juror Madelyn Estrada

The colloquy concerning the prosecutor's peremptory challenge of Madelyn Estrada follows.

Deputy District Attorney: One of the main things I looked at is that she sat on a murder jury and that jury had no verdict, so I– that's what I have on my form, I can double-check it.

The Court: That was the reason why you excused her?

DDA: That is one of the reasons I excused her. She also is, I have no feelings either way, she says I do not oppose the death penalty, my problem is with the consistency of the death penalty and who gets it, so, again, that indicates that she has – she is not trusting the system.

The Court: That's fine. Defense wish to say anything else?

Defense Counsel: No.

The Court: At this point I see no systematic exclusion of these protected groups.

Defense Counsel: We have nothing to add, your honor.

The Court: I see no exclusion. I might want to say that I noticed that the defense knocked off a person of color . . . I don't find any exercise of systematic exclusion at this time. There were reasons why you exercised your peremptories in this case, and in this court's opinion, it has nothing to do with having people of color off the jury.

(40 RT 3868-3869.)

Analysis

The first part of prosecutor's explanation about excluding Mr. Fulton focused on his job as probation officer, which the prosecutor characterized as a "social worker therapy type job." (40 RT 3867.) The second part of her explanation concerned Fulton's alleged attitude toward crime:

> A lot of his questions that he answered, for example, question no. 72, he said society needs to look at with regard to crime and what to do about it–I am rephrasing, this is my summary form – needs to look at not only the illegal use but the inequities and causes for that illegal use. So since I already know that the defense primarily is going to rely on causes and explanations for the defendant's behavior in this case, being illegal use or whatever, I can see from this that he's a gentleman who's very open.

(40 RT 3867-3868.)

Several of the white jurors who served on appellant's second jury and who were not challenged by the prosecutor showed similar attitudes about the factors that lead to crime. For example, Juror # 9 [48] wrote, in response to question no. 37 about what should be done about crime, "make more jobs with liveable wages." (18 CT 3767.) He responded yes to question no. 55, "[d]o you think that some groups of people are treated unfairly in our courts?" In explaining his answer to that question, he wrote; "Those who can't afford special lawyers & get special evidence tested." (18 CT 3772.)

Similarly, Juror # 2 [49] also responded "yes" to question no. 55; she

---

[48] This juror was also identified as No. 171353742 in the record. (39 CT 8529.)

[49] This juror was also identified as No.161262242 in the record. (39 CT 8530.)

wrote: "People who aren't wealthy to hire the best representation for their case." (17 CT 3576; emphasis added.) In her responses to the questions about mental illness (nos. 65 and 66), Juror # 2 gave truly "social worker therapy type" answers. For example, she described her feelings about mentally disturbed people as follows:

> Sadness because of the lack of control due to biological breakdown (chemical imbalance) in the brain. Most people don't have control and need to be on medication for the rest of their lives.

(17 CT 3579.) She also wrote that the mentally disturbed "[n]eed to be understood more, not many of these people can control (except while taking medication) their actions." (CT 3579.)

Juror # 5 [50] answered "yes" to question no. 55 about whether some groups of people are treated unfairly in our courts. He explained: "It would appear that poor people and racial minorities sometimes get a bumpier ride on the road to justice than the affluent or mainstream population." (17 CT 3660.)

As the above summary establishes, three of the white jurors who actually sat on appellant's second jury gave answers on their jury questionnaires [51] that showed at least as great a tendency as Mr. Fulton, one of the African-Americans peremptorily challenged by the prosecutor, to see inequities in society and in the judicial system as well as to "rely on causes and explanations for the defendant's behavior in this case." (RT 3868.)

---

[50] This juror was also identified as No.171501751 in the record. (40 CT 8530.)

[51] The voir dire of these three jurors was very cursory and did not clarify anything important about their viewpoints as set forth in their jury questionnaires. (See their testimony at 40 RT 3854-3855–Juror # 9; 40 RT 3875-3877–Juror # 2; 40 RT 3856-3858–Juror # 5.)

As described previously, the prosecutor justified her peremptory challenge of African-American Carol Doxtator based on the fact that she is a psychiatric nurse [52] and because:

> I don't know how much she knows or what opinions she really has about the mentally ill, whether she is going to buy everything that the doctors say on behalf of the defendant. I mean, that's mainly it, and then in addition, she started off undecided on the death penalty.

(40 RT 3868.) As already noted, the answers of Juror # 2, who had received a Bachelor of Arts degree in Psychology (17 CT 3566), showed at least as much receptivity to the defense mental health evidence as those given by Carol Doxtator. Regarding the prosecutor's concern about Ms. Doxtator's being undecided about the death penalty, two white jurors who sat on appellant's second jury also stated they were uncertain about the death penalty. On question no. 80, asking, "[d]o you support or oppose the death penalty,"Juror #2 marked the support option and wrote in the word "reluctantly." On question no. 81 regarding his general attitude about the death penalty, he wrote in his own category, "marginally support." (17 CT 3667.) Ms. Doxtator wrote in her questionnaire that "I've never really formed an opinion one way or the other" about either the death penalty or life without possibility of parole (questions nos. 77 and 78). (CT 4926.) She did check the "undecided" option for question no. 81 (regarding her attitude about the death penalty), but so did Juror #10, a white woman who actually sat on appellant's second jury. (18 CT 3807.) In answering questions nos. 77 and 78, Juror # 10 wrote: "I have mixed feelings."(18 CT 3806.)

The voir dire of Ms. Doxtator and Juror # 10 does not show a

---

[52] Alternate Juror #1 was a nurse, who had experience in psychiatric nursing. (18 CT 3882.)

distinction between the two women in terms of being undecided about the death penalty. As was true for virtually all of the prospective jurors in this case, the judge's voir dire of them was very superficial and cursory. In the case of Juror # 10, the judge focused on her questionnaire responses about being able to impose the death penalty for an unintentional murder occurring during the course of a felony rather than on her "mixed feelings" and "undecided" attitude about the death penalty. In fact, the judge did not ask her anything about her statements on the jury questionnaire which suggested ambiguous feelings about the death penalty and life without possibility of parole. (18 CT 3804-3805.) In his voir dire of Ms. Doxtator, the trial judge first questioned her about an incident in which she was hurt on the job by a mentally ill patient. (18 RT 3859-3860.) He then turned to her attitude about the death penalty:

> The Court: Now, you talk about your attitude toward the death penalty and you say undecided. Then you say you are not automatically going to vote for it, not automatically going to vote for life without the possibility of parole, but are undecided. Let me ask you this question. If the evidence was such you felt that the aggravating factors substantially outweigh the mitigating factors, would you be able to vote for the death penalty?
>
> Ms. Doxtator: Yes, sir.
>
> The Court: If you felt that they did not substantially outweigh, would you be able to vote for life without the possibility of parole?
>
> Ms. Doxtator: Yes, Sir.
>
> The Court: You sure?
>
> Ms. Doxtator: Yes.
>
> The Court: Good. You are not undecided anymore. Thank you.

(40 RT 3860.)

The reasons given by the prosecutor for challenging Madelyn Estrada also applied to white jurors who were not challenged and actually served on appellant's second jury. As described above, the prosecutor justified her striking of Ms. Estrada, a Latina, on the grounds that (1) she sat on a murder case and the jury did not reach a verdict and (2) she stated some concern about the consistency with which the death penalty was applied. (40 RT 3868-3869.) The first reason seems nonsensical: how can one juror be held responsible for the fact that the whole jury could not reach a verdict? This Court has found an "inherently implausible" reason given by the prosecutor for a peremptory challenge of a prospective juror, which is challenged under *Batson/Wheeler*, is not entitled to deference. (*People v. Silva, supra*, 25 Cal.4th at pp. 385-386.)

The second reason given by the prosecutor for the challenge of Ms. Estrada concerned her alleged mistrust of the system because she wrote that while she supported the death penalty, she was concerned that it wasn't always consistently applied. As discussed at length above, there were three white jurors (Jurors #s 2, 5, and 9) who actually served on appellant's second jury who expressed similar concerns about whether all people received equal treatment in our judicial system.[53] In addition, Ms. Estrada's answers on the jury questionnaire regarding capital punishment were less ambiguously in support of the death penalty than the equivocating answers, already discussed earlier in this argument. (See her questionnaire at 23 CT 5094-5095.)

---

[53] Like those three jurors, in answering question no. 55, Ms. Estrada expressed the view that people with more money were more favorably treated in our courts than those with less money. (23 CT 5088.)

C. Conclusion

The foregoing analysis shows that both the prosecutor and the trial judge violated appellant's equal protection rights under the Fourteenth Amendment during the jury selection process in this case. The prosecutor, for her part, failed to offer credible explanations for her striking minority venire members. The record for both the jury selections which occurred in this case shows the prosecution unlawfully challenged several prospective jurors because of their race or ethnicity. Accordingly, reversal of the entire judgment is required. (*Batson v. Kentucky, supra*, 476 U.S. at p. 97; *People v. Wheeler, supra*, 22 Cal.3d at p. 283.)

The errors of the trial judge provide additional bases for reversal. The trial judge failed to make either an adequate review of the jury questionnaires or the record or to engage in an adequate voir dire of the prospective jurors. In this case, the judge relied inordinately on juror questionnaires. His voir dire of prospective jurors was almost exclusively limited to a few questions. However, as this Court noted in *People v. Silva, supra*, once the challenged party has stated his/her purported race or group neutral reasons for each disputed peremptory challenge, the trial court has a duty to make "'a sincere and reasoned attempt to evaluate the prosecutor's explanation' [citation] and to clearly express its findings [citation]" in light of all the circumstances. (*Id.* at pp. 385-386.) The trial court's evaluation is not entitled to deference from the appellate court unless it has made a sufficient inquiry into the justifications offered for the disputed challenges. (*People v. Ervin* (2000) 22 Cal.4th 48, 75.) A trial judge's failure to engage in a careful assessments of the prosecution's stated reasons is itself reversible error. (*People v. Silva, supra*, 25 Cal.4th at p. 386.) Reversal is required if only one prospective juror is excluded for race-based reasons.

(*Ibid.*) Thus, the trial judge clearly erred when he stated, "I don't find any exercise of systematic exclusion at this time." (40 RT 3868-3869.) Moreover, that the defense used a peremptory challenge to exclude a person of color is irrelevant to the Batson/Wheeler inquiry.

For all of the foregoing reasons, this Court should reverse appellant's convictions and his death sentence.

*****

V.

THE TRIAL JUDGE ERRED IN ALLOWING THE PROSECUTOR TO CROSS-EXAMINE A DEFENSE EXPERT WITNESS AT TRIAL REGARDING HIS TESTIMONY AT THE COMPETENCY HEARING AND EVIDENCE GENERATED BY THAT HEARING

A. The Motion and the Hearing

On August 9, 1996, appellant filed a Motion to Preclude the use of any Evidence From the Penal Code Section 1368 Hearings at Either the Guilt or Penalty Phases. (2 CT 440-448.) In the Points and Authorities filed in support of the motion, appellant argued that the admission of evidence from the competency proceedings at either the guilt or penalty phases of appellant's trial would violate his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitutional as well corresponding rights under the California Constitution. (2 CT 447-448.) The prosecutor filed her opposition to this motion on August 30, 1996. (4 CT 806-807.)

There were two hearings on this motion. At the first hearing, the trial judge observed:

> The law is pretty clear that evidence presented in a 1368 proceeding cannot be used against the defendant in the guilt phase and what we have to talk about is what can and cannot be used.

(18 RT 1788.)

The trial judge acknowledged that under the holding of the *Tarantino*[54] decision:

> . . .even if the defendant puts his mental health in question at the trial, the People cannot use the testimony, use the statements of the psychiatrists appointed under the 1368 hearing, and in addition, 'Neither the statements of petitioner to the psychiatrists appointed

---

[54] *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 454.

> under 1368, nor the fruits of such statements may be used in trial on the issues of petitioner's guilt.'

(18 RT 1789-1790.)

Counsel for appellant agreed with the trial judge that none of the evidence produced at the 1368 hearing could be used by the prosecution in the guilt phase. (18 RT 1790.) This evidence included the reports of the various mental health experts employed as part of the 1368 process as well as appellant's medical and psychiatric records. (18 RT 1790-1791.) As defense counsel argued:

> The whole purpose of the 1368 hearing, the whole humanitarian idea is we don't let mentally incompetent people go to trial and to allow the possible cushion to use the fruits of that which is clearly what they are trying to do in aggravation, I think goes against the whole idea of the 1368 itself. And it is fundamentally unfair and gross abuse of due process to allow this to happen, and Mr. Taylor didn't want this placed into evidence but his attorneys did and that's fine. They place it into evidence on the ground that he simply can't aid counsel and is incompetent and as a result of that, now the State is seeking to use that very same evidence or fruits of this to kill him. I believe it is just not right, not fair.

(18 RT 1792.)

The prosecutor attempted to refute the defense position regarding evidence introduced at the competency hearings and any "fruits" of such evidence. First, she argued that only Dr. Cerbone and Dr. Haroun were hired to evaluate appellant for purposes of determining his competency to stand trial. (18 RT 1792.) The prosecutor further claimed that the prohibition against using evidence from the 1368 procedure in a subsequent guilt phase only covered evidence which was "compelled" by the court hearing the competency issue. (18 RT 1793.)

Defense counsel countered that it did not matter whether the experts

were called by the defense or prosecution at the 1368 hearing, the evidence could not be used at appellant's guilt phase trial. (18 RT 1793-1794.) The defense conceded, however, that the prosecution could use the testimony of experts at the 1368 proceeding to impeach the testimony of the expert at the guilt phase. (18 RT 1798.) The judge asked the parties to further brief the issue and said there would be another hearing before he ruled on the motion. (18 RT 1800.)

A second hearing on the motion to preclude admission of evidence from the 1368 process in the guilt and penalty phases of the trial occurred on October 2, 1996. In that hearing, appellant's counsel reversed his position that materials from the 1368 hearing could be used for impeachment. At this second hearing, the trial judge stated that the prosecutor had conceded that she could not introduce evidence from the 1368 hearing in her case-in-chief. The judge, however, opined that there were exceptions to the rule precluding the admission of evidence from the 1368 proceedings:

> ....if the defense does produce the witnesses and the issues as discussed during the 1368, the prosecution will not be precluded from seeing [sic] 1368 evidence or evidence that was brought in at the 1368 hearing to properly and fully cross-examine the witness.

(19 RT 1873.)

Later in the second hearing, the trial judge asked whether the information about appellant's hospitalizations in Harbor View would have been found via inevitable discovery. (19 RT 1878.) Further, the judge found that if the defense were to use an expert from the competency proceeding, the prosecution would be allowed to cross-examine that expert on matters which were disclosed in the 1368 proceeding. (19 RT 1881-1882.) Defense counsel objected to this finding, quoting the following language from the decision in *People v. Harris* (1987) 192 Cal.App. 3d 943:

> We consciously hold the statements made by the defendant during the course of a competency examination may not be used for impeachment purposes at any proceeding other than those conducted pursuant to Title 10, Chapter 6 of the Penal Code.

(*Id.* at p. 949.) The trial judge rejected this argument and ruled that the prosecutor could "fully cross-examine" Dr. Cerbone. (19 RT 1882.)

B. The Cross-Examination of Dr. Cerbone at the Guilt Phase

During the cross-examination at the guilt phase trial, the prosecutor questioned Dr. Cerbone about his competency report from March of 1996 and his testimony at appellant's 1368 hearing. (29 RT 2771.) Defense counsel objected and asked to approach the bench, but the trial judge rejected these requests. (29 RT 2771.) The prosecutor continued her cross-examination and asked Dr. Cerbone about defendant's alleged threat "to cut off the staff's [sic] head" when he was hospitalized at Harbor View. (29 RT 2772.) Defense counsel objected to this provocative "question," and the trial judge ordered an in-chambers hearing. The trial judge then chastised the defense for offering evidence on the "ultimate issue."[55](29 RT 2773.) After this hearing, the judge allowed the prosecutor to question Dr. Cerbone about his report and about appellant's records at Harbor View. (29 RT 2775-2778.) This cross-examination resulted in the disclosure of a great deal of highly prejudicial evidence.

C. The Trial Judge Erred in Allowing this Cross-Examination

The trial judge erred in allowing the prosecutor to question Dr. Cerbone about a report that he had prepared for appellant's competency

---

[55] According to the trial judge, the "ultimate issue" was whether appellant was suffering from a mental disease or defect at the time of the crimes. (29 RT 2773.)

proceedings as well as testimony in those proceedings. In addition, it was error to allow the prosecutor to question Dr. Cerbone about the reports and testimony of other mental health experts who testified at appellant's competency hearing.

The trial counsel argued, and the trial judge agreed, that the decisions in *Tarantino v. Superior Court, supra*, 48 Cal.App.3d 465 and *People v. Arcega* (1982) 32 Cal.3d 504 governed this issue of what evidence from competency proceedings could be introduced subsequently at the guilt phase of a trial. In *Tarantino , supra*, the Court of Appeal found that a psychiatrist appointed to examine a defendant for competency to stand trial could not testify later on the question of the defendant's sanity. Because a defendant may not invoke his right against compelled self-incrimination in an examination for competency, "neither the statements of [the defendant] to the psychiatrists appointed under section 1369 nor the fruits of such statements may be used in trial of the issue of [the defendant's] guilt, under either the plea of not guilty or that of not guilty by reason of insanity." (*Id.* at p. 470.) Such judicially declared immunity was

> reasonably to be implied from the code provisions. The purpose of [an] inquiry [into competency] is not to determine guilt or innocence. It has no relation to the plea of not guilty by reason of insanity. Rather, the sole purpose ... is the humanitarian desire to assure that one who is mentally unable to defend himself not be tried upon a criminal charge. This purpose is entirely unrelated to any element of guilt, and there is no indication of any legislative intent that any result of this inquiry into a wholly collateral matter be used in determining the issue of guilt.... Both humanitarian and practical considerations call for a judicially declared immunity.

(*Id.* at p. 469.)

This Court adopted this judicially declared rule of immunity in *People v. Arcega, supra*. The *Arcega* decision expressly rejected the prosecution's

argument that Tarantino was not correctly decided; it stated that the rule of immunity

> is necessary to ensure that an accused is not convicted by use of his own statements made at a court-compelled examination. The rule also fosters honesty and lack of restraint on the accused's part at the examination and thus promotes accuracy in the psychiatric evaluation. Hence, the rule protects both an accused's privilege against self-incrimination and the public policy of not trying persons who are mentally incompetent.

(*People v. Arcega, supra*, 32 Cal. 3d at p. 522.) The Arcega decision also described the federal constitutional dimension to the rule prohibiting a psychiatrist from testifying to statements made in a mental competency examination. This Court observed:

> Not only was the admission of the testimony of [the examining psychiatrist] a violation of state law, but as a recent United States Supreme Court decision establishes, it violated the federal Constitution as well. (*Estelle v. Smith* (1981) 451 U.S. 454.) In that case, the high court ruled that the Fifth Amendment privilege against self-incrimination is generally applicable to custodial mental competency examinations, and specifically discussed the provision of immunity for statements made during such examinations. (*Estelle v. Smith, supra*, 451 U.S. at pp. 466-469.) The court ruled that a state may not introduce at the penalty phase of a capital case, evidence of statements made by an accused at a custodial mental competency examination unless the accused has been informed of and has waived his *Miranda* rights. In the absence of a valid waiver, the statements could only be used at the hearing on competency.

(*People v. Arcega, supra*, 32 Cal.3d at p. 523, fns. omitted.)

In the recent decision, *People v. Pokovich* (2006) 39 Cal.4th 1240, this Court addressed the question of whether evidence from the defendant's competency hearing could be used to impeach him at his subsequent trial. The Court determined that it could not. In Pokovich, the Court found that although evidence from a 1368 proceeding is not per se inadmissible at trial

as "compelled" testimony under the United State Supreme Court's rationale in *New Jersey v. Portash* (1979) 440 U.S. 450, it is inadmissible as a matter of policy. That is, the Court balanced the policy interest in deterring and exposing perjury against the policy interest in preserving and enhancing the reliability of mental competence evaluations, and found the latter to be more important. (*People v. Pokovich, supra*, 39 Cal.4th at p. 1251.)

The Court noted that the policy against subjecting a mentally incompetent defendant to trial has "ancient and venerable" origins in constitutional, statutory and common law. (*People v. Pokovich, supra*, 39 Cal.4th at p. 1251.) A rule allowing the impeachment of a defendant with statements made in connection with a mental competency examination would undermine the mental expert's ability to assess a defendant's mental competency because the the defendant would likely be unwilling to freely discuss the case and might even refuse to speak at all. (*Id.* at p. 1252.) The *Pokovich* decision concluded that, after weighing the competing interests discussed above,

> . . .the impairment of the mental competency evaluation process if impeachment is permitted outweighs the speculative risk to the truth-seeking function of the criminal trial if impeachment is denied. Accordingly. . .the Fifth Amendment's privilege against self-incrimination prohibits the prosecution from using at trial, for the purpose of impeachment, statements a defendant has made during a court-ordered mental competency examination.

(*Id.* at p. 1253.)

The facts of the instant case are not perfectly congruent with those in Pokovich, supra, as appellant did not testify at either the guilt or penalty phases of his trial and, therefore, unlike Mr. Pokovich, he was not impeached by his prior statements. Instead, the impeachment in this case involved a mental health expert who testified at both the competency hearing

and the guilt phase trial. This factual difference does not make the analysis of the Pokovich decision inapplicable.

This conclusion is supported by another recently decided case, *In re Hernandez* (2006) 143 Cal.App.4th 459, involving the use of evidence derived from a competency trial for impeachment of expert witnesses at the guilt trial. In that case, trial counsel failed to object when the prosecutor called, at the sanity phase of Hernandez's trial, three mental health experts who had been involved in Hernandez's competency trial. Their testimony provided highly prejudicial evidence about Hernandez's alleged malingering, but his trial attorney failed to object to the use of these experts under *Tarentino*, *supra*, and *Arcega*, *supra*. In his petition for habeas corpus, Hernandez claimed that this failure constituted ineffective assistance of counsel. His trial attorney submitted an affidavit acknowledging that he was not aware of the *Tarentino* and *Arcega* decisions; therefore, he did not have a tactical reason for not challenging the prosecution's use of evidence from the competency proceedings in Hernandez's sanity trial.

In granting Mr. Hernandez's habeas petition, the Court of Appeal discussed why the challenged testimony violated his Fifth Amendment rights as well as state law. (*In re Hernandez*, *supra*, 143 Cal.App.4th at p. 471.) In addition, the Court found that the defense's use of the testimony of Dr. D'Angelo, a mental health expert who also had been involved in Hernandez's competency proceedings, was improper. The Court observed:

> His [D'Angelo's] testimony at the sanity phase was consequently inadmissible, and it was not universally helpful to the defense. . . under cross-examination, D'Angelo became argumentative and non-responsive. The court sustained several of the prosecutor's objections on both grounds. D'Angelo admitted he did not review pertinent records, and he made several references to the inadmissible competency evaluation. At one point the prosecutor asked, 'Isn't it true that when you talked to the petitioner about the crime, that you

> also had the opinion that you didn't know where his mental illness stopped and where his lying began?' D'Angelo replied: 'That was during the competency evlaution, I had difficulty with that, yes.' The prosecutor also elicited statements about the crime through D'Angelo's testimony. . . .Thus, the testimony of petitioner's own expert witness was both inadmissible and prejudicial.

(*In re Hernandez, supra*, at pp. 474-475.)

Under the analysis and holdings of both the Pokovich and the Hernandez decisions,[56] the trial judge in this case erred in ruling that the prosecutor could cross-examine appellant's expert, Dr. Cerbone, using evidence developed during the competency proceedings. As the following discussion will show, this error was not harmless.

D. Appellant was Prejudiced by the Failure to Exclude Evidence from his Competency Proceedings at his Guilt Phase Trial

As noted above, in her cross-examination of Dr. Cerbone, the prosecutor asked questions about his testimony at the competency hearing and a report which he prepared in connection with that hearing. Over the objections of trial counsel, the prosecutor asked Dr. Cerbone about inconsistencies between his March 1996 reports and his testimony at appellant's competency hearing and at trial. (29 RT 2771.) She focused in on Dr. Cerbone's competency hearing testimony about appellant's "long-standing antisocial personality disorder," which he had not mentioned in his direct examination at the guilt phase trial. (29 RT 2771.) She asked Dr. Cerbone about a statement that appellant allegedly made to a staff member at Harbor View that he would cut off the person's head. (29 RT 2772.) The prosecutor asked Cerbone another question about this alleged statement, "I

---

[56] See also *Tarentino v. Superior Court, supra*, and *People v. Arcega, supra.*

will kill you, rip off your head and stuff it down your neck." (29 RT 2775.) Later in the cross-examination, the prosecutor asked Cerbone about another alleged statement of appellant to a staff member at Harbor View, where he said a "bitch, cunt, whore, suck my dick." (29 RT 2776.) In the context of the cross-examination of Dr. Cerbone, it is clear that the prosecutor was cherry-picking inflammatory statements out of the Harbor View records to ask rhetorical questions specifically designed to paint appellant in the most unfavorable light.

The prosecutor then used the Harbor View records to get before the jury her claim that appellant "was kicked out of another academy, another drug treatment academy, Phoenix Academy for threats and physical violence." (29 RT 2777.) She continued to ask unduly prejudicial questions of marginal relevance about evidence which had been developed as part of the competency proceedings. For example, she questioned Cerbone about a report prepared by Dr. Macspiedan, another psychologist who had testified at appellant's competency hearing. She did this under the guise that Cerbone had reviewed Macspeiden's report in preparation for his testimony at appellant's guilt phase trial. (29 RT 2778-2780.) The prosecutor used this tactic to put into evidence Macspeiden's finding, stated in a report, that appellant was not psychotic. (29 RT 2780.) She repeated this tactic, questioning Cerbone about the reports submitted by Dr. Michel, another mental health expert appointed to evaluate appellant's competency to stand trial. (29 RT 2783-2784.) In that process, the prosecutor argued with Cerbone about the meaning of malingering, as the term was used in Michel's report. (29 RT 2784-2785.)

On re-direct examination, trial counsel was forced, by the improper cross-examination, to ask Dr. Cerbone about his report and testimony at the

competency proceedings. (29 RT 2791-2797.)

The trial judge improperly allowed the prosecutor to cross-examine Dr. Cerbone about evidence which was developed as part of the proceedings to determine whether appellant was competent to stand trial. This error resulted in exposing the jury to unduly prejudicial evidence from the competency proceedings which, in turn, undermined appellant's defense that his long-standing and serious mental illness had impaired his ability to form the mental state necessary to convict him of first degree murder. Moreover, this cross- examination allowed the prosecutor to make her case that appellant was not mentally ill at all but rather an evil person. Without this improper use of evidence from the competency proceedings, the prosecutor would not have been able to question Dr. Cerbone about his previous testimony and report. Further, this improper use of materials from the competency proceedings allowed the prosecutor to present at the guilt phase highly unfavorable evidence about appellant's alleged antisocial personality disorder, graphic details of his threats to staff during his hospitalization at Harbor View and claims of other mental health professionals that appellant was faking his mental illness.

The record in this case shows the prosecution cannot meet its burden under *Chapman v. California* [57] (1967) 386 U.S. 18, 24, to prove that the error in allowing the prosecutor to use evidence from appellant's competency proceedings was harmless beyond a reasonable doubt. As detailed ante, the prosecutor used the evidence from the competency proceedings to paint a very negative picture of appellant. Appellant was 16

---

[57] In *People v. Pokovich, supra,* 39 Cal.4th 1240, this Court found that the *Chapman* standard governs harmless error analysis in case where the trial judge allowed improper admission of evidence from the competency hearing into the guilt phase trial. (*Id.* at p. 1255.)

years old when he was involuntarily committed to Harbor View with very serious drug problems. In her cross-examination of Dr. Cerbone, the prosecutor focused on the ugliest incidents contained in appellant's Harbor View records, such as his threatening language to various staff members. The prosecutor's purposes in doing so was to minimize appellant's serious mental problems and recast him as an evil person, the theme replayed by the prosecution throughout appellant's trial.

During her closing argument at the guilt phase, the prosecutor cited the testimony of Dr. Cerbone and the mental evaluation done by Dr. Macspeiden to support her claim that appellant did not suffer from psychosis but from an anti-social personality disorder, which she equated with being a criminal. (30 RT 2977-2978.) Dr. Macspeiden did not even testify at the guilt phase, but the prosecutor was allowed to cross-examine Dr. Cerbone about Macspeiden's evaluation which was offered into evidence at appellant's competency proceeding.

Given the prosecutor's exploitation of evidence from the competency proceedings, there is no basis for concluding that the jury's verdicts were surely unattributable to this error. (*Chapman*, *supra*, 386 U.S. at p. 24). Accordingly, appellant's convictions and death sentence must be reversed.

*****

VI.

THE TRIAL JUDGE ERRED IN REFUSING TO INSTRUCT THE JURY ON THE ELEMENTS OF TRESPASS

Defense counsel requested that the trial judge give an instruction on trespass as a lesser related offense of the burglary charge. (28 RT 2712.) Counsel explained that the trespass instruction was crucial to the defense theory of the homicide in this case; that is, that when appellant initially entered Mrs. Dixon's house, he did not have the intent to steal or to commit any felony. Counsel stated:

> . . . the entry into the house itself, we have argued, could be found not to be a burglary based upon all of the evidence and that there is also evidence now before the court that it is a possibility, a reasonable possibility that the heart attack that is the cause of death could have been instigated by the fear alone of the defendant's unauthorized presence in that house when the sisters first encountered or saw Mr. Taylor, and as the surviving sister testified, was frightened to death. Given the time sequence of the heart attack, following the initial fright and the fact that the victim who died of the heart attack was observed by the next-door neighbor to run out the front door yelling for help, that the stress induced by that could have caused the death, that this is a basis for a reasonable doubt that the rape in any way contributed to the death, that the – all of the physiological processes that resulted in death were underway and were irrevocable and irreversible prior to the defendant ever taking the victim into the bedroom for a rape. Under those circumstances, it would [be] a death – a homicide caused by a life-threatening act which did not constitute a felony.

(28 RT 2713.)

Therefore, the defense request for a trespass instruction was vital to its ability to put its theory of the murder before the jury. Without the instruction, the defense could not argue to the jury that the defendant's initial entry into the victim's house was not a burglary but a trespass, and,

therefore, Mrs. Dixon's death did not amount to first degree felony murder.

The refusal to give a jury instruction crucial to the defense theory of the case violates both state law and federal constitutional law. In *People v. Gutierrez* (2002) 28 Cal.4th 1083, this Court concluded that, at a defendant's request, the trial court must give the jury an instruction that pinpoints the defendant's theory of the case, when there is substantial evidence that supports the theory. (*Id.* at p. 1142, citing *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) In addition, a criminal defendant has a federal constitutional right to adequate instructions on the defense theory of the case. (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739; *United States v. Mason* (9th Cir. 1990) 902 F.2d 1434, 1438 ["A defendant is entitled to have the judge instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence"].) Refusing to instruct on the defense theory of the case, when adequate evidence supports that theory, and actively preventing defense counsel from arguing that theory to the jury may "violate[ ][a] defendant's fundamental right to ... present a defense, and ... relieve [ ] the prosecution of its burden to prove its case beyond a reasonable doubt." (*Conde v. Henry, supra*, 198 F.3d at p. 739.)

An instruction on the defense theory of trespass was required in this case because a reasonable interpretation of the evidence is that when appellant first entered Mrs. Dixon's house, he did not have an intent to steal or to commit any other felony. Her sister testified that when they first saw him in the living room, he said his name, closed the front door and then sat down "for a minute" between her and Mrs. Dixon. (24 RT 2262-2263.) He did not grab Mrs. Dixon until she got up from her seat and asked her sister to call 911. (24 RT 2263.) These facts are subject to different interpretations; certainly, the prosecutor was not entitled to a finding by the trial court that,

as a matter of law, this initial entry necessarily constituted a burglary.

Indeed, in the course of the trial, the prosecutor offered a theory that the burglary in the case really occurred when appellant took Mrs. Dixon from one room in the house to another room. During her closing argument at the guilt phase, the prosecutor argued:

> . . .Let's say for some reason you don't think that the initial entry into Mrs. Dixon's house was done with the intent to steal or rape or, you know, commit oral copulation, but you recall when the defendant grabbed Mrs. Dixon and took her into the bedroom. So when –remember, in this location when she was sitting in this green chair, standing up when he grabbed her and takes her into the bedroom, this is a separate bedroom, a room. . . .Now, that is a burglary.

(30 RT 2961-2962.) In addition, the prosecutor sought and obtained a jury instruction based on this theory of burglary—taking Mrs. Dixon from one room into another room with the intent to rape and to commit oral copulation. (4 CT 995.)[58] Given this argument by the prosecutor and the corresponding instruction regarding this theory of the burglary (as quoted in footnote 2, ante), appellant was entitled to an instruction on trespass; an instruction that was crucial to the defense theory of the case. The trial court's ruling on this issue violated the principal that there must be "absolute impartiality as between the People and defendant in the matter of instructions..." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial *(Green v. Bock*

---

[58] This instruction, entitled " Burglary–Further Defined," stated: "The intent to rape need not be in the mind of the defendant at the time of initial entry into the structure, if he subsequently forms the intent and enters a room within the structure."

Laundry Machine Co. (1989) 490 U.S. 504, 510), and an arbitrary distinction between litigants also deprives the defendant of equal protection of the law. *(Lindsay v. Normet* (1972) 405 U.S. 56, 77.)

Appellant acknowledges that this Court has rejected this argument in its decision in *People v. Birks* (1998) 19 Cal.4th 108, 136, where it held that "a criminal defendant has [no] entitlement to instructions on lesser offenses which are not necessarily included in the charge." Further, the Court held that trial courts cannot instruct juries on related, but not included, offenses without the prosecutor's consent. (Ibid.) Appellant respectfully requests the Court to reconsider its ruling that a defendant is not entitled, upon his request, for jury instructions regarding a lesser related offense when such an instruction is crucial to his defense. It is fundamentally unfair to deny a defendant jury instructions on his theory of the case where there is substantial evidence in the record to support that theory, which happens to amount to a lesser related, rather than a lesser included, offense. (See *Green v. Bock Laundry Machine Co., supra*, 490 U.S. at p. 77.)

In *Conde v. Henry, supra*, the petitioner, who had been charged with kidnaping for the purposes of robbery, had requested a jury instruction on simple kidnaping, arguing that it was his "theory of defense." The trial court rejected his request, and the Ninth Circuit reversed, holding that "it is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case" and that it was error to deny defendant's request for an instruction on simple kidnaping where such instruction was supported by the evidence. (*Conde v. Henry, supra*, 198 F. 3d at p. 739.) Appellant asks the Court to adopt the finding of the *Conde v. Henry* decision that a criminal defendant has a federal constitutional right to adequate instructions on the defense theory of the case, including instructions on a

lesser related offense.

In the instant case, there was sufficient evidence to support the defense theory that the initial entry into the house was a trespass rather than a burglary and that the "fright" caused by the initial intrusion set in motion Mrs. Dixon's cardiac arrest which resulted in her death.[59] The Ninth Circuit Court of Appeals has found that per se reversal is required when a trial court fails to instruct on the defendant's theory of the case. (*Conde v. Henry*, *supra*, 198 F.3d at pp. 740 - 741.) Moreover, "[t]he right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error." (*United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201.)

This instructional error deprived appellant of a fair opportunity to present his defense. "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.) In *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1099, the Ninth Circuit found that under clearly established Supreme Court law, "the state court's failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense. This is so because the right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." The Supreme Court has held that it "presumes that jurors, conscious of the gravity of their task, attend closely [to] the particular

---

[59] It is important to remember that Mrs. Hayes, who was sitting with her sister at the time appellant first appeared, testified that they both were "scared to death" when they first saw the strange man in the house. (24 RT 2299.)

language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9.) The arguments of counsel are insufficient to cure the failure to instruct. As the Supreme Court explained in *Boyde v. California* (1990) 494 U.S. 370, 384: "[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, . . . and are likely viewed as the statements of advocates; the latter [the Supreme Court has] often recognized, are viewed as definitive and binding statements of the law." This case law demonstrates that in presenting a defense it is insufficient to rely on the arguments of counsel; adequate instructions to the jury are necessary.

The error rose to the level of federal constitutional error by denying appellant his due process rights: (1) to instructions on the theory of the case (*United States v. Sotelo-Murillo* (9th Cir. 1989) 887 F.2d 176, 180 [a criminal defendant's right to an instruction on his theory of the case "implicates fundamental constitutional guarantee"]; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201 [criminal defendant's right to have the jury instructed on his theory of the case is "basic to a fair trial"]); (2) to a fair opportunity to defend against the state's accusations (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294 ["The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"]); and (3) to fundamental fairness in the process by which the jury determined his penalty (*Albright v. Oliver* (1994) 510 U.S. 266, 283 (conc. opn. of Kennedy, J.) [due process "ensure[s] fundamental fairness in the determination of guilt at trial"]; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564 ["the Due Process Clause

guarantees the fundamental elements of fairness in a criminal trial"].)

A. Reversal is Required

This error requires reversal. "The right to have a jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that the failure to instruct where there is evidence to support the instruction can never be considered harmless error." (*United States v. Escobar de Bright, supra*, 742 F.2d at p. 1201, quoting *Chapman v. California, supra*, 386 U.S. at p. 23.) The trial court's failure to instruct on trespass, which was central to appellant's theory of the case, is reversible per se.

Reversal is also required under the harmless error analysis for federal constitutional error. Under *Chapman*, "[t]he question to be asked is whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction." (*Chapman v. California, supra*, 386 U.S. at p. 23, citing *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87.) Reversal is required unless the reviewing court concludes "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.) The essential inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

The failure to instruct on trespass, which was a crucial part of the defense theory that the murder in this case was not a first degree felony murder, cannot be considered harmless.

*****

VII.

THE TRIAL JUDGE ERRED IN FAILING TO INSTRUCT THE JURY REGARDING THE OFFENSE OF SECOND DEGREE MURDER

A. The Trial Record Concerning These Jury Instructions

Count 1 of the Amended Information in this case charged:

> On and between June 23, 1995 and June 24, 1995 Brandon Arnae Taylor did willfully and unlawfully murder Rosa Mae Dixon, a human being, in violation of Penal Code Section 187(a).

(4 CT 907.)

The trial judge delivered only one instruction, CALJIC No. 8.21 (First Degree Felony Murder) regarding the homicide alleged in Count 1. It stated:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission of or attempted commission of the felony crime of Rape and/or Burglary and/or Forcible Oral Copulation, or as a direct causal result of the felony crime of Rape and/or Burglary and/or Forcible Oral Copulation is murder of the first degree when the perpetrator had the specific intent to commit such crime.
>
> The specific intent to commit the Rape and/or Burglary and/or Forcible Oral Copulation and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

(5 CT 979.)

Appellant requested an instruction on second degree murder as a lesser included offense of first degree felony murder as well as an

instruction on trespass as a lesser related offense of burglary.[60] (28 RT 2712.) In support of these requests, defense counsel argued:

> We are requesting that these instructions be given on the ground that there is a basis for the jury to have reasonable doubt that the defendant had any specific intent whatsoever when the defendant first entered the premises in question. That evidence is in the record and will be made more amply in the record after the defense case is in, and I have the record in its entirety cited for that. That in the event that the defendant had no specific intent, the entry into that building was not a burglary which the jury could then find, although the jury could as the prosecutor has pointed out, find a subsequent burglary by the defendant entering a particular room, the bedroom with a specific intent. But the entry into the house itself, we have argued, could be found not to be a burglary based upon all of the evidence and that there is also evidence now before the court that it is a possibility, a reasonable possibility that the heart attack that is the cause of death could have been instigated by the fear alone of the defendant's unauthorized presence in that house when the sisters first encountered or saw Mr. Taylor, and as the surviving sister testified, was frightened to death.
>
> Given the time sequence of the heart attack, following the initial fright and the fact that the victim who died of the heart attack was observed by the next-door neighbor to run out the front door yelling for help, that the stress induced by that could have caused the death, that this is a basis for a reasonable doubt that the rape in any way contributed to the death, that the—all of the physiological processes that resulted in death were underway and were irrevocable and irreversible prior to the defendant ever taking the victim into the bedroom for a rape.
>
> Under those circumstances, it would be a death – a homicide caused by a life-threatening act which did not constitute a felony.
>
> Now, on this basis we are asking both that the trespass instruction as an LRO as burglary for the initial burglary, or the initial alleged burglary or entry, and an LIO of second degree homicide on the basis of a death caused by the life-threatening but non-felonious act.

---

[60] Argument VI *ante* addresses the failure of the trial court to grant appellant's request for a jury instruction on trespass.

(28 RT 2712-2714.)

The trial judge rejected this request, stating:

> I am going to deny this packet of instructions [submitted by appellant]. I am not going to instruct this jury on a LRO of trespass as far as burglary is concerned, and I am not going to instruct this jury as an LRO or LIO of first degree and give them an instruction on second degree murder. I have to look at the evidence as it is presented. Now, I am rejecting this packet [of proposed instructions] at this time. That's not to say that after I hear defense evidence or rebuttal evidence or whatever, that I may not reconsider it. But as the evidence sits right now, this is a felony murder in any stretch of the imagination as far as the interpretation of the facts are concerned. I appreciate the arguments that have been made by the defense but in this court's opinion the evidence is absolutely overwhelming to reject that possible consideration and therefore I do not feel the facts in this case, the evidence support that in any way, shape or form. So therefore, I am rejecting these instructions.

(28 RT 2715.)

After the close of evidence in the guilt phase of this case, appellant's trial attorneys renewed their requests for jury instructions on trespass and second degree murder. (30 RT 2919.) Again the trial judge rejected this request, stating:

> The court has reviewed the evidence as has been presented by the defense and I see no reason to change my previous decision in this case, and your motion to include those instructions as far as trespass, that will be denied. Second degree murder, also I will not be giving instructions on that. This is a felony murder case.

(30 RT 2919-2920.)

The trial court's failure to give the requested instructions was error.

B. The Trial Judge's Refusal to Give The Requested Instruction on Second Degree Murder as a Lesser Included Offense of First Degree Murder Violated Appellant's Rights Under State Law and Under the State and Federal Constitutions

The trial court's refusal to give the requested instructions deprived appellant of his rights to present a defense, to due process and a fair trial, to have the jury determine each material issue, to have the prosecution establish beyond a reasonable doubt every elemental fact necessary to establish the offense, to have a reliable determination of guilt and penalty, and to a properly instructed jury. (U.S. Const. amends. V, VI, VIII, & XIV; Cal. Const. art 1, §§ 1, 7, 15, 16, & 17; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 703-04; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Mathews v. United States* (1988) 485 U.S. 58, 63; *Carter v. Kentucky (*1981) 450 U.S. 288, 302; *Duncan v. Louisiana* (1968) 391 U.S. 145, 152.)

1. State Law Concerning Lesser Included Offense Instructions

A defendant has a state constitutional due process right to instructions on a lesser included offense where the evidence raises "a question as to whether all the elements of the charged offense were present." (*People v. Valdez* (2004) 32 Cal.4th 73, 115, quoting *People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Sedeno* (1974) 10 Cal.3d 703, 715.) The necessity for instructions on lesser included offenses is based on the defendant's constitutional right to have the jury determine every material issue presented by the evidence. (*People v. Rankeesoon* (1985) 39 Cal.3d 346, 351; *People v. Geiger* (1984) 35 Cal. 3d 510, 520.) It serves the policy of preventing the jury from being faced with an all-or-nothing choice where the prosecution has no legitimate interest in

obtaining a greater conviction than that established by the evidence, and the defendant does not have a right to complete acquittal if the evidence establishes he committed the lesser offense. (*Sedeno*, at p. 716; *People v. St. Martin* (1970) 1 Cal.3d 524, 533 ["Our courts are not gambling halls but forums for the discovery of truth."].) The jury must be allowed to "'consider the full range of possible verdicts – not limited by the strategy, ignorance, or mistakes of the parties,' so as to 'ensure that the verdict is no harsher or more lenient than the evidence merits.'" (*People v. Breverman, supra*, 19 Cal.4th at p.160, citing *People v. Wickersham, supra*, 32 Cal.3d at p. 324.) The rule requiring lesser included instructions is "to assure, in the interest of justice, the most accurate possible verdict encompassed by the charge and supported by the evidence." (*Id.* at p. 160.)

The instruction is required only if there is evidence that would justify a conviction of such a lesser offense. (*People v. Hardy* (1992) 2 Cal.4th 86, 184, quoting *People v. Cooper* (1991) 53 Cal.3d 771, 827.) In making the determination whether to instruct on a lesser included offense the "trial court should **not** .... measure the substantiality of the evidence by undertaking to weigh the credibility of witnesses, a task exclusively relegated to the jury." (*People v. Flannel* (1979) 25 Cal.3d 668, 684, emphasis added.) "[T]he fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon." (*Ibid.*, quoting *People v. Carmen* (1951) 36 Cal.2d 768, 773.) Any doubts about whether the evidence is sufficient to warrant the instructions are resolved in favor of the defendant. (*Id. at* p. 685; *People v. Cleaves* (1991) 229 Cal.App.3d 367, 372.) Indeed, even if the evidence in support of the instruction is "incredible," the reviewing court must proceed on the hypothesis that it is entirely true. (*People v. Burnhan* (1986) 176

Cal.App.3d 1134, 1143.) [61]

A lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. (*People v. Hagen* (1998) 19 Cal.4th 652, 667; *People v. Lohbauer* (1981) 29 Cal.3d 364, 368-369.) Under the crime definition test, the court must determine whether the perpetrator can commit the greater including offense without necessarily committing the lesser included offense as a matter of law in view of the elements. (See, e.g., *People v. Birks* (1998) 19 Cal.4th 108, 117.) Under the accusatory pleading test, the court must determine whether the perpetrator can commit the greater offense without necessarily committing the lesser included offense as a matter of fact in view of the allegations.[62] (*Ibid.*)

The recent decision of the California Court of Appeal, *People v. Anderson* (2006) 141 Cal.App.4th 430, demonstrates that instructions on second degree murder are necessary even in cases where the prosecutor

---

[61] See also *People v. Modesto* (1963) 59 Cal.2d 722, 729, where this Court stated, "'The fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon.'" (*Id.*, quoting *People v. Carmen* (1951) 36 Cal.2d 768, 772-773.) The fact that evidence may be incredible, or is not of a character to inspire belief, does not authorize the refusal of an instruction based thereon, for that is a question within the exclusive province of the jury. (*People v. Flannel, supra,* 25 Cal.3d at p. 684.)

[62] As established in Argument VIII, *post*, the Amended Information in this case actually charged appellant with second degree murder rather than with first degree murder.

sought a conviction for first degree felony murder. *In Anderson, supra*, the Court of Appeal analyzed the appellant's claim that the trial judge had erred in failing to instruct on both second degree murder and voluntary manslaughter under the accusatory pleading test, referred to previously in this argument. The Court found that because the indictment in the Anderson case did not charge felony murder, the defendant was entitled to instructions on second degree murder and voluntary manslaughter as lesser included crimes of first degree murder because the scope of the sua sponte duty to instruct is determined by the charge contained in the accusatory pleading itself. (*Id.* at p. 445, citing *People v. Birks, supra*, 19 Cal.4th at p. 119.)

In *People v. Anderson, supra*, 141 Cal.App.4th 430, the amended information charged Ms. Anderson and her co-defendant as follows:

> The District Attorney....hereby accuses [co-defendant Gonzales and Anderson] of a Felony, to wit: MURDER, a violation of section 187 (a) of the PENAL CODE of California, in that between October 11, 2001 and October 12, 2001...said defendant(s) did unlawfully, and with malice aforethought, murder BARRY GONZALES, a human being.

(*Ibid.*)

After the close of evidence at Ms. Anderson's trial, the prosecutor added a charge of felony murder against her. (*Ibid.*) The Court of Appeal nonetheless found that the trial judge should have given instructions on second degree murder and voluntary manslaughter because "this amendment [adding a charge of felony murder against Anderson] should not be permitted to alter the expectations created by the original information." (*Ibid.*)

In the instant case, the informations filed did not allege that appellant

had committed first degree felony murder. Rather, they simply charged him with first degree murder pursuant to Penal Code section 187. For example, the amended information, filed on October 2, 1996, alleged the following:

> COUNT-MURDER
>
> On and between June 23, 1995 and June 24, 1995 BRANDON ARNAE TAYLOR did willfully and unlawfully murder ROSA MAE DIXON, a human being, in violation of PENAL CODE SECTION 187 (a).

(4 CT 907.)

Under the analysis found in *People v. Anderson, supra*, the allegation regarding the charge of first degree murder in this case did not allege felony murder, and, therefore, the trial judge should have instructed, as requested by the defense, the jury regarding second degree murder as a lesser-included offense.

Second degree murder is necessarily included within first degree murder in the statutory scheme. (*People v. Cooper* (1991) 53 Cal.3d 771, 827.) Penal Code section 187 defines murder as "the unlawful killing of a human being ... with malice aforethought." The degrees of murder are set forth in section 189, which states in pertinent part, that "(a)ll murder which is ... committed in the perpetration of, or attempt to perpetrate, ...[various felonies] ..., is murder in the first degree. All other kinds of murders are of the second degree..

2. State Law Concerning Instructions on the Theory of the Defense

Defense counsel must request appropriate instructions which will advise the jury of the defendant's theory of the case. (*People v. Sedeno, supra*, 225 Cal.3d at p. 717 n.7.) Similarly, assuming that the instruction

offered by defense counsel is a correct statement of law, the trial court must give the instruction. (*People v. Wright* (1988) 45 Cal.3d 1126, 1137.) If the defense requests an instruction on a particular defense or a lesser included offense, an instruction must be given so long as there is substantial evidence in support of the defense or lesser included crime. (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 324.)

3. Federal Law Concerning Lesser Included Offense Instructions

Due process of law and reliable guilt determination safeguards guaranteed by the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution require that the jury be instructed on a lesser offense when warranted by the evidence at trial. (See, e.g., *Hopper v. Evans* (1982) 456 U.S. 605, 611.) [63]

The death penalty differs from any other kind of punishment. (See, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357.) In light of this qualitative difference, the Supreme Court has repeatedly recognized the "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340; accord *Lockett v. Ohio* (1978) 438 U.S. 586, 604 ["the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"].) Consequently, in capital cases, federal due process and the Eighth Amendment also guarantee the right to instructions on lesser-included offenses supported by the evidence. (*Beck v.*

---

[63] In *Hopper v. Evans, supra*, the Court noted that "our holding in [*Beck*] was that the jury must be permitted to consider a verdict of guilt of a noncapital offense in every case in which the evidence would have supported such a verdict."

Alabama (1980) 447 U.S. 625, 637-638.)

In *Beck v. Alabama*, *supra*, the United States Supreme Court held unconstitutional a state statute that prohibited lesser offense instructions in capital cases, when lesser offenses to the charged crime existed under state law and such instructions were generally given in noncapital cases. As stated in *Spaziano v. Florida* (1984) 468 U.S. 447, 455, and as stated again in *Schad v. Arizona* (1991) 501 U.S. 624, 646-647, the goal of the *Beck* rule "is to eliminate the distortion of the fact-finding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 629). Because the jury in this case was not provided with a non-capital third option between first degree felony murder [with three felony murder special circumstances] and outright acquittal, appellant's rights to due process of law, fair trial, and to a reliable guilt determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated by this instructional error..

The failure to instruct on the lesser included offense makes it likely that "'the jury ... resolve[d] its doubts in favor of conviction.'" *(People v. Beck, supra*, 447 U.S. at p. 634, quoting *Keeble v. United States* (1973) 412 U.S. 205, 208.) The failure to give a "third" option inevitably enhances the risk of an unwarranted conviction. This "kind of risk cannot be tolerated in a case where a defendant's life is at stake." (*Keeble*, *supra*, at p. 208.) Giving the jury the opportunity to convict on a lesser offense, when such a conviction is supported by the evidence, ensures that the jury will give the defendant the full benefit of the reasonable doubt standard. (*Beck*, *supra*, at pp. 637-638.) This "third option" must be for an offense that is supported by the evidence. (*Arizona v. Schad*, *supra*, 501 U.S. at pp. 646-647; *Hopper*

v. Evans, *supra*, 456 U.S. at p. 611 [due process requires that the instruction be given when the evidence warrants the instruction].)

C. The Failure to Give These Requested Instructions on the Defense Theory of the Case Violated Appellant's Constitutional Right to Due Process and Right to a Jury Trial

The trial judge's refusal to give the requested instruction on second degree murder offended due process and the Sixth Amendment right to jury trial on the additional ground that it deprived appellant of his "well established" entitlement "to adequate instructions on the defense theory of the case. [Citations.]" (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739; see also *Mathews v. United States*, 485 U.S. 58, 63 (1988), *Stevenson v. United States* (1896) 162 U.S. 313 ["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."] *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1071, 1098-1099; *McNeil v. Middleton* (9th Cir. 2003) 344 F.3d 988, 996-997 That principle applies equally to a "defense theory" that would support a verdict on a lesser offense. (*Conde*, at pp. 739-740.) Thus, in the *McNeil* decision, defective instructions on imperfect self-defense violated the right to instructions on the defense theory. (*McNeil*, at pp. 996-998.) A complete denial of instructions on the theory of the defense, as occurred in this case, represents a more serious constitutional infringement.

A criminal defendant is constitutionally entitled to present "all relevant evidence of significant probative value in his favor ..." (*People v. Marshall* (1996) 13 Cal.4th 799, 836; see *Washington v. Texas* (1967) 388 U.S. 14, 19; *Davis v. Alaska* (1974) 415 U.S. 308, 316.) The failure to instruct on the defense theory encompassed by the defendant's evidence

undermines the constitutional rights which allow the evidence to be presented to the jury. (See, e.g., *United States v. Hicks* (4th Cir. 1984) 748 F.2d 854, 857-858 [rights to trial by jury and due process abridged by failure to instruct on defense theory of the case which dilutes the jury's consideration of the issues and directs a verdict against the defendant].) "[A] criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in proof, no matter how tenuous the defense may appear to the trial court." (*United States v. Dove* (2d Cir. 1990) 916 F.2d 41, 47.) In ruling that the second degree murder and trespass instructions were not required, the trial judge stated that he did not find the evidence offered by the defense to support this theory to be credible. However, as noted above, the issue is not whether the testimony was believed by the trial court, but whether the question of second degree murder should have been submitted to the jury. (*People v. Edwards* (1985) 39 Cal.3d 107, 116; *People v. Ceja* (1994) 26 Cal.App.4th 78, 85.) It is a jury's task, not the trial court's, "... to determine whether it will accept all, none, or some of the evidence in support of the prosecution's case; the same is true for evidence in support of the defense case." (*People v. Valdez* (2004) 32 Cal.4th 73, 142-143 (dis.opn. of Chin, J.), citing *People v. Jeter* (1964) 60 Cal.2d 671, 675-676.) The jury, not the trial court, must weigh and independently assess the evidence. (*People v. Jeter*, *supra*, 60 Cal.2d at pp. 675-676.)

Thus, the issue here is whether the jury-in assessing and weighing the evidence independently-could have reasonably concluded that defendant committed second degree murder, rather than first degree felony murder. Unless the evidence shows as a matter of law that the jury could only have convicted appellant of first degree felony murder, the jury should have

been instructed on the lesser included offense of second degree murder. (*People v. Jeter*, *supra*, 60 Cal.2d at 675; *People v. Lessard* (1962) 58 Cal.2d 447, 453 [lesser included instructions on murder not required where murder not disputed and the only issue offered by the defendant was identity].) It is only "under these circumstances, that a trial court is justified in withdrawing the question of degree 'from the jury' and instructing it that the defendant is either not guilty, or is guilty of murder. (*People v. Valdez*, *supra*, 32 Cal.4th at 143 (dis. opn. of Chin, J.) [second degree murder instruction required because evidence did not point indisputably to first degree felony murder].) In this case, as shown above, the evidence does not "point indisputably" to first degree felony murder. Here, there was sufficient evidence, if believed by the jury, which could have warranted a conviction of second degree murder.

D. Because Appellant did Introduce Sufficient Evidence [64] to Support his Theory of Second Degree Murder, the Trial Judge was Required to Give the Requested Instruction

The defense submitted evidence in support of the theory that Mrs. Dixon's cardiac arrest, identified as the cause of her death, started when appellant first appeared in her house. Mrs. Betty Hayes, Dixon's sister, testified that they were sitting in the living room, talking, when appellant appeared before them, introduced himself and sat down on a corner of the couch. (24 RT 2262.) Mrs. Hayes testified that both she and Mrs. Dixon

---

[64] The definition of sufficient evidence, or substantial evidence, is different in this context. Unlike an appellate court, the jury is not required to view the evidence in the light most favorable to the prosecution. Instead, each juror is free to assess and independently weigh the evidence. The issue presented by this case is whether the jury could have reasonably found that the killing of Mrs. Dixon was a second degree murder rather than a first degree felony murder.

were "scared to death" by the appearance of this stranger. (24 RT 2262.) Appellant contended that the fright caused by this initial encounter led to Mrs. Dixon suffering cardiac arrest and ultimately her death. (28 RT 2713.)

Dr. Mark Super did the autopsy on Mrs. Dixon's body and testified on behalf of the prosecution, opining that the cause of death was a cardiac arrest following a sexual assault. (26 RT 2535.) The defense offered its own expert on the cause of death, Dr. Paul Wolf, a pathologist and Director of Autopsy at the V.A. Medical Center in La Jolla, California. (29 RT 2842.) Dr. Wolf examined Mrs. Dixon's medical records, the autopsy report, various other documents associated with her final hours at the hospital as well as the tissue (from the lung, heart and other organs) slides prepared by the San Diego Medical Examiner's office as part of Mrs. Dixon's autopsy. (29 RT 2845-2847.)

Dr. Wolf testified that the tissue samples and other records revealed that Mrs. Dixon had significant, pre-existing arteriosclerosis at the time of her death. (29 RT 2853.) He also testified that there was significant blockage in her main coronary artery. (29 RT 2854.) After examining the lung and heart tissue as well as photographs of her arteries and of her heart, Dr. Wolf determined that Mrs. Dixon's lungs and heart were compromised by diabetes, clogged arteries and high blood pressure. (29 RT 2854-2856, 2862-2863.) Dr. Wolf also testified that Mrs. Dixon's records indicated that she had pre-existing heart disease, as demonstrated by scarring found throughout the organ. (29 RT 2872-2873.)

Dr. Wolf explained how sudden fear can cause both cardiac arrest and respiratory failure. (29 RT 2864.) He concluded that the fright experienced by Mrs. Dixon when she first saw appellant in her house played a "large part" in the cardiac arrest which eventually killed her. (29 RT

2881.) Dr. Wolf did acknowledge, however, that the pain which occurred as a result of the sexual attack also could have contributed to the cardiac arrest. (29 RT 2881.)

This evidence was sufficient to allow the defense to argue that the fright caused by appellant's sudden appearance in the Dixon house caused Mrs. Dixon's already compromised heart to begin the process leading to cardiac arrest and eventually to her death. As trial counsel explained to the trial judge, the defense wanted to argue to the jury that when appellant entered the Dixon house, he was merely trespassing because at the time of entry he did not intend to commit a felony. Similarly, his sudden appearance "scared" Mrs. Dixon "to death," as her sister testified. That is, the initial shock and fear she experienced at that point inexorably led to the eventual cardiac arrest that killed her. Under that theory and under the evidence, appellant was entitled to the instruction on second degree murder, CALJIC No. 8.31,[65] which he requested. The trial judge improperly denied the request for this instruction based on his personal rejection of both the theory and the evidence offered to support the theory. (28 RT 2715, 30 RT 2919-2920.)

---

[65] This instruction, entitled "Second Degree Murder – Killing Resulting From Unlawful Act Dangerous to Life, states: Murder of the second degree is [also] the unlawful killing of a human being when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. When the killing is the direct result of such an act, it is not necessary to establish that the defendant intended that his act would result in the death of a human being.

E. The Erroneous Failure to Instruct on the Defense Theory of the Case Requires that Appellant's Convictions Must be Reversed

Failure to instruct on the defendant's theory of the case is reversible per se under federal law. (*Mathews v. United States* (1988) 485 U.S. 58, 63, citing *Stevenson v. United States* (1896) 162 U.S. 313 ["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."]; see *Keeble v. United States* (1973) 412 U.S. 205, 213; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1198, quoting *United States v. Winn* (9th Cir. 1978) 577 F.2d 86, 90 ["A defendant is entitled to an instruction concerning his theory of the case if it is supported by law and has some foundation in the evidence"].) The United States Supreme Court has suggested that per se reversal is required when an error "vitiates all the jury's findings." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281.) Stated otherwise, per se reversal is compelled when the consequences of an error "are necessarily unquantifiable ..." (*Id.* at p. 282; accord *Neder v. United States* (1999) 527 U.S. 1, 10-11.)

Since it is impossible to know whether a jury would have accepted a defense, such as the second degree murder theory posited by the defense in this case, the effect of this error is "necessarily unquantifiable." (See *Conde v. Henry*, *supra*, 198 F.3d at pp. 740-741 [structural error found where the defense was precluded from presenting its "theory of the case"]; *United States v. Sarno* (9th Cir. 1995) 73 F.3d 1470, 148 ["failure to instruct a jury upon a legally and factually cognizable defense is not subject to harmless error analysis"].) As the court of appeals stated in *United States v. Escobar De Bright* (9th Cir. 1984) 742 F.2d 1196:

The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error. Jurors are required to apply the law as it is explained to them in the instructions they are given by the trial judge. They are not free to conjure up the law for themselves. Thus, a failure to instruct the jury regarding the defendant's theory of the case precludes the jury from considering the defendant's defense to the charges against him. Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal.

(*Id.* at pp.1201-1202; see also *People v. Spearman* (1979) 25 Cal.3d 107, 119 [Reversal required where errors "deprive a litigant of the opportunity to present his version of the case". . . "since there is no way of evaluating whether or not they affected the judgment."] [Citation omitted.]

Even assuming that this error was not reversible per se, because the denial of this instruction infringed due process and the right to a jury determination of all elements and defenses, federal constitutional principles must govern the prejudice analysis. (*Chapman v. California* (1967) 386 U.S. 18, 23-24.) The failure to give the requested instruction on second degree murder resulted in incomplete instructions on the elements of the charge of murder set forth in Count 1 of the Amended Information.

Defective instructions on the elements of an offense may be harmless where the omitted element was conceded or not reasonably susceptible to dispute. (*Neder v. United States* (1999) 527 U.S. 1, 17-20; *People v. Flood* (1998) 18 Cal.4th 470, 504-507.) But the Supreme Court has also admonished that "safeguarding the jury guarantee" requires a finding of prejudice where the error removes a material issue which is genuinely contested. As the Court noted in *Neder v. United States*, *supra*: "If ... the court cannot conclude beyond a reasonable doubt that the jury verdict

would have been the same absent the error – for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – it should not find the error harmless." (*Id.* at p. 1.) The *Neder* decision also confirms that the presence of substantial evidence that would permit a finding in favor of the defense inherently raises a reasonable doubt as to the error's effect and compels a finding of prejudice.

In this case, apart from a mental state defense, the sole theory of the defense at the guilt phase of appellant's trial was that Mrs. Dixon's cardiac arrest began when she was frightened by appellant's initial trespass into her house. Any assessment of the harmlessness vel non of the error of failing to instruct on trespass and second degree murder must be done in light of that fact.

For all of the foregoing reasons, this Court should reverse appellant's conviction of first degree murder. Reversal of the underlying murder charge necessarily vitiates the special circumstances, requiring the reversal of appellant's death sentence.

*****

VIII.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY REGARDING FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

At the conclusion of the guilt phase trial in this case, the judge instructed the jury that they could convict appellant of first degree murder, as alleged in Count 1 of the amended information, if he killed during the commission or attempted commission of the felony crimes of burglary and/or rape and and/or oral copulation. (30 RT 2936-2937; 5 CT 979.) The jury found appellant guilty of murder in the first degree. (5 CT 1093) The instruction on first degree felony murder was erroneous, and the resulting conviction of first degree murder must be reversed, because the information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder.[66]

Count 1 of the amended information alleged that "[o]n and between June 23, 1995 and June 24, 1995, BRANDON ARNAE TAYLOR did willfully and unlawfully murder ROSA MAE DIXON, a human being, in violation of PENAL CODE SECTION 187 (a)." (4 CT 907.) Both the statutory reference ("Penal Code Section 187(a)") and the description of the crime ("did willfully and unlawfully murder") establish that appellant was charged exclusively with second degree malice murder in violation of Penal

---

[66] Appellant is not contending that the information was defective. On the contrary, as explained hereafter, count 1 of the amended information was an entirely correct charge of second degree malice murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crime of first degree felony murder in violation of Penal Code section 189.

Code section 187, not with first degree murder in violation of Penal Code section 189.[67]

In 1995, the time period relevant to this case, Penal Code section 187, subdivision (a), the statute cited in the information, defined murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." (See also *People v. Hansen (*1994) 9 Cal.4th 300, 307 [second degree murder is malice murder without the additional elements (i.e. premeditation and deliberation) that would support a conviction of first degree murder].) Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.) [68]

---

[67] The amended information also alleged three special circumstances. (4 CT 908.) However, these allegations did not change the elements of the charged offense. "A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]" (*People v. Bright* (1996) 12 Cal. 4th 652, 661.)

[68] In 1995, when the murder at issue occurred, Penal Code section 189 provided in pertinent part:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, car jacking, robbery, burglary, mayhem, kidnaping, train wrecking, or any act punishable under Section 286, 288, 288a, or 289, or any murder which perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict

Because the information charged only second degree malice murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) which charges that specific offense. (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

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

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

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances

---

> death, is murder of the first degree. All other kinds of murders are of the second degree.

> of the particular case. As said in People v. Soto, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought' (Pen. Code, sec. 187). Murder, thus defined, includes murder in the first degree and murder in the second degree.[69] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

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

The *Witt* decision reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held, however, that Penal Code section 187 was not "the

---

[69] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in Penal Code section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in Penal Code section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony murder rule. A crime cannot both include another crime and be included within it.

statute defining" first degree felony murder. After an exhaustive review of statutory history and legislative intent, *the Dillon* court concluded that "[w]e are therefore required to construe [Penal Code] section 189 as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, emphasis added, fn. omitted.)

Moreover, in rejecting the claim that *People v. Dillon*, *supra*, 34 Cal.3d 441, requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord, *People v. Box* (2000) 23 Cal.3d 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

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

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

supra, 15 Cal.4th at p. 1344 [holding that second degree murder is a lesser offense included within first degree murder].) [70]

The greatest difference is between second degree malice murder and first degree felony murder. By the express terms of Penal Code section 187, second degree malice murder includes the element of malice (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the U.S. Supreme Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189 (*id.* at pp. 185-186, fns. 2 & 3) and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense." (*Id.* at p. 194, fn. 14).

Moreover, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the U. S. Supreme Court declared that, under the notice and jury trial guarantees of the Sixth Amendment and the due process guarantee of

---

[70] Justice Schauer emphasized this fact when, in the course of arguing for affirming the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements for conviction.* This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, 60 Cal.2d at pp. 502-503 (dis. opn. of Schauer, J.), original italics.)

the Fourteenth Amendment, "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, emphasis added, citation omitted.) [71]

The facts necessary to bring a killing within the first degree felony murder rule (commission or attempted commission of a felony listed in Penal Code section 189 together with the specific intent to commit that felony) are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder and special circumstances can apply, and the punishment can be life imprisonment without parole or death. (Pen. Code, § 190, subd. (a).) Therefore, those facts should have been charged in the information. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1027-1028, 1035 [holding prospectively that in capital cases aggravating factors must be submitted to grand jury and returned in the indictment].)

Permitting the jury to convict appellant of an uncharged crime, that is, first degree felony murder, violated his right to due process of law. (U.S. Const., XIV Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an

---

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

essential element of the crime alleged in the information. (U.S. Const., VI & XIV Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., VIII & XIV Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1027-1028, 1035.) Therefore, appellant's conviction for first degree murder must be reversed.

*****

IX.

THE TRIAL JUDGE ERRED IN FAILING TO INSTRUCT THE JURY THAT THEY MUST AGREE UNANIMOUSLY CONCERNING EACH ESSENTIAL FACT OF THE FIRST DEGREE FELONY MURDER CHARGE

Appellant was found guilty of first-degree murder by a jury that failed to unanimously find each and every element of the charges against him to be true beyond a reasonable doubt. The failure to require an unanimous jury verdict on the target crime underlying felony-murder violated appellant's rights to due process, a trial by jury, equal protection, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments and Article I of the California Constitution, resulting in a miscarriage of justice.

A. The Jury Must be Unanimous on the Theory of First-Degree Murder

The jury in this case was instructed as follows regarding the charge in Count 1 of the amended information:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission of or attempted commission of the felony crime of Rape and/or Burglary and/or Forcible Oral Copulation, or as a direct causal result of the felony crime of rape and/or burglary and/or forcible oral copulation is murder of the first degree when the perpetrator had the specific intent to commit such crime.
>
> The specific intent to commit the Rape and/or Burglary and/or Forcible Oral Copulation and the commission or attempted commission of such crime beyond a reasonable doubt.

(4 CT 979; 30 RT 2936-2967.)

The trial judge did not instruct the jurors in appellant's guilt phase that they must agree unanimously which of the target felonies – burglary,

rape, and/or oral copulation – formed the basis for their verdict that appellant had committed first degree murder, as charged in Count 1.[72]

During her closing argument at the guilt phase, the prosecutor argued the following regarding the murder charge:

> Count One in this case is charging murder in the first degree. And the murder in the first degree is based on that killing occurred in the commission of a burglary and /or the killing was committed in the commission of a burglary, and/or the killing was committed in the commission of an oral copulation, and you only have to have one of them to have murder in the first degree, any one. You can pick one and that is murder in the first degree.

(30 RT 2957; emphasis added.)

The verdict form used by the jury to state their guilty verdict on Count 1 did not require the jurors to explain the basis of their verdicts; that is, did they find that the victim's death resulted from appellant's commission of burglary, rape and/or oral copulation. (5 CT 1023.)

Given these instructions, the use of a general verdict form for Count 1 and the statements, quoted above, made by the prosecutor during her closing argument, the trial court allowed the jury to convict appellant without a unanimous jury finding that each element of felony-murder was true beyond a reasonable doubt. Without any unanimity instruction explaining that the jury must agree on which of the felonies charged resulted in the killing, the jurors were free to vote for conviction on Count 1 even though they may not have agreed on whether the killing occurred as a result of a burglary, a rape or a forcible oral copulation. This situation

---

[72] The amended information did not specify the theories of first-degree murder charged. It alleged only that appellant ". . .did willfully and unlawfully murder ROSA MAE DIXON, a human being, in violation of PENAL CODE SECTION187(a)." (4 CT 907.)

violated the bedrock principle that all elements of an offense must be found beyond a reasonable doubt by the trier of fact, (*Sandstrom v. Montana* (1979) 442 U.S. 510), by a unanimous jury. (See e.g., *Burch v. Louisiana* (1979) 441 U.S. 13, 139.)

Moreover, in California, a criminal defendant has a constitutional right to trial by a unanimous twelve person jury that has found every element of the crime alleged to be true beyond a reasonable doubt. (See Cal. Const, art. I § 16; see also *People v. Wheeler* (1978) 22 Cal.3d 258, 265; *People v. Collins* (1976) 17 Cal.3d 687, 693.) This fundamental State right is protected under the due process and equal protection clauses of the Fourteenth Amendment. (See generally *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Bush v. Gore* (2000) 531 U.S. 98; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295.)

The United States Supreme Court has emphasized the importance of the Sixth Amendment right to a jury trial in the context of factual findings that must be pled and determined beyond a reasonable doubt by a jury. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; emphasis added.) The Apprendi opinion was based on the due process requirement that each element of a crime be proven beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) It was also based on the Sixth Amendment, which requires a jury determination that ". . .the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."(*Apprendi v. New Jersey, supra*, 530 U.S. at pp. 476-477, fn. 3.) The Supreme Court held it unconstitutional for a State to increase a defendant's penalty based on a fact that was not properly found by the jury. (Id. at p. 490; *Blakely v. Washington* (2004) 542 U.S. 296, 306-310.) These principles were reemphasized and expanded in *Ring v. Arizona* (2002) 536

U.S. 584, 589. (See also, *United States v. Booker* (2005) 543 U.S. 220, 230-233.)

As discussed previously, the jurors in this case were instructed that they could find appellant guilty of first degree felony murder if they found that the victim's death resulted from the defendant's commission of burglary and/or rape and/or forcible oral copulation, but that they must also find a specific intent to commit any or all of those felonies. The specific intent to commit the underlying felony likewise has been characterized as an element of first degree felony murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258; id. at p. 1268 (conc. opn. of Kennard, J.).) Every element of the charges alleged by the State is an essential "fact" that subjects the defendant to a greater punishment. Accordingly, the requirements of Apprendi and its progeny must apply to the facts underlying the conviction, as well as to "sentencing"facts.

California courts have held that a unanimity instruction is required where "'the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.'"(*People v. Gonzales* (1983) 141 Cal.App.3d 786, 791; see *People v. Dellinger* (1984) 163 Cal.App.3d 284, 300- 302.) This Court has held that a unanimity instruction is not required where a single charged offense is submitted to the jury on alternative "legal theories" of culpability, i.e. first degree murder based on alternate theories of felony murder. This Court has held that it is sufficient that each juror is convinced beyond a reasonable doubt that the defendant committed the offense as "defined by statute." (*People v. Milan* (1973) 9 Cal.3d 185, 195.)

The "stated" distinction between "the act a defendant committed" and "legal theories of culpability" cannot subvert the right to an unanimous jury.

If two "theories"have different "elements," then they are simply, by definition, different crimes. As the U.S. Supreme Court has observed, "[c]alling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817.) The only way to determine if two crimes are the same is by comparing their elements. (See *Blockberger v. United States* (1932) 284 U.S. 299, 304.) [73] The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact that the other does not. (*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Having set forth the elements of felony murder based on three possible felonies, the State may not remove the burden of proving one of those elements from the prosecution without violating the defendant's rights. Despite this principle of constitutional law, each juror in the instant case was allowed to find different factual elements to be true under different "theories" presented by the State and still vote guilty for the first degree murder charge based on the felony-murder doctrine. The jury was never required to unanimously find beyond a reasonable doubt each element of the "crime" for which it found appellant guilty.

Appellant could have been convicted of three factually distinct offenses: burglary felony murder, rape felony-murder, and forcible oral copulation felony murder. Appellant was entitled to a unanimous jury verdict

---

[73] The elements of a crime also determine which facts must be proved to a jury beyond a reasonable doubt. (*Monge v. California* (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.); see *People v. Sakarias* (2000) 22 Cal.4th 596, 623.)

as to which of those different crimes he committed.[74]

In assessing the prejudice which resulted from the trial court's failure to instruct the jury in this case that they had to agree unanimously about what felonies appellant committed for which he could be convicted of first degree felony murder, it is not relevant that the jury also convicted appellant of burglary, rape and forcible oral copulation. First, the instructions regarding the separate counts of rape and oral copulation each reflected the fact that those two crimes are general intent crimes. (See the instructions at 1 CT 43-44; 5 CT 997.) As noted previously, however, in order to find first degree felony murder based on the commission of a rape or forcible oral copulation the jury had to find that appellant had a specific intent to commit rape and oral copulation.

While burglary is a special intent crime, unlike rape and forcible oral copulation, there were other problems with the instructions given in this case in light of the facts. The defense offered in this case was that at the time that appellant entered Mrs. Dixon's house, he did not have the intent to commit theft or any other felony. There was evidence supporting that theory in that when appellant first came into the living room, he introduced himself and then seated himself on the couch between Mrs. Dixon and her sister, Mrs.

---

[74] This Court has noted that, "in an appropriate case," the trial court may protect the record by requiring the jury to explain, in special findings, which of several alternate theories was accepted in support of a general verdict, but only where the defense requests such special findings. (*People v. Carter* (2003) 30 Cal.4th 1166, 1200-1201 [citing *People v. Arias, supra*, at p. 158].) The Supreme Court's holdings in the *Apprendi*, and *Blakely* opinions dictate that where alternate theories of an offense are based on differing elements, the trial court must sua sponte instruct the jury to return special verdicts indicating it has found all elements of one theory to be true beyond a reasonable doubt.

Hayes. Moreover, Mrs. Hayes said that this unexpected appearance of a strange man "frightened her to death." Appellant introduced the testimony of an expert, who stated that the cardiac arrest which ultimately killed Mrs. Dixon could have been set off by the fright of this initial encounter. The prosecutor posited the possible existence of two burglaries in this case; the first, when appellant entered the house, and the second, when he took Mrs. Dixon and Mrs. Hayes into the back bedroom where the rape and oral copulation took place. The trial judge instructed the jury using the regular CALJIC instruction regarding burglary (5 CT 994), but he also gave an additional burglary instruction which read: "The intent to rape need not be in the mind of the defendant at the time of the initial entry into the structure, if he subsequently forms the intent and enters a room within the structure." (5 CT 995.)

Therefore, although two possible burglaries were discussed in the closing arguments of both the prosecutor and of appellant's trial counsel and the jury received instructions allowing them to find two different burglaries, the verdict forms completed by the jurors did not clarify which burglary theory they had accepted and on which they based a unanimous verdict of guilt. (5 CT 1025.)[75] As noted previously, due process requires that all elements of an offense be found by a unanimous jury beyond a reasonable doubt. (*In re Winship, supra*, 397 U.S. at p. 364.) Under California law, the

---

[75] The verdict form on the burglary charge (Count 3 of the Amended Information) read as follows: We, the jury in the above entitled cause, find the defendant, BRANDON ARNAE TAYLOR, guilty of the crime of Burglary, in violation of Penal Code section 459, as charged in Count Three of the Amended Information, and fix the degree thereof as first degree. And we further find that said burglary was a burglary of an inhabited dwelling house, within the meaning of Penal Code section. 460. (CT 1025.)

intended acts underlying a burglary-murder are "elements" that must be proven beyond a reasonable doubt. This Court has held that:

> where the evidence permits an inference that the defendant at the time of entry intended to commit one or more felonies and also an inference that his intent was merely to commit one or more misdemeanors or acts not punishable as crimes, the court must define "felony' and must instruct the jury which acts, among those which the jury could infer the defendant intended to commit, amount to felonies.

(*People v. Failla* (1966) 64 Cal.2d 560, 564.) Accordingly, trial courts have a duty to define the so-called target offenses and instruct on their elements. (E.g., *People v. Williams* (1975) 13 Cal.3d 559, 563; *People v. May* (1989) 213 Cal.App.3d 118, 129; *People v. Smith* (1978) 78 Cal.App.3d 698, 708-711.) Instruction on the elements of a target offense is so essential that this Court has held that the trial court, on its own initiative, must give instructions to the jury identifying and defining the target offense(s) that the defendant allegedly intended to commit upon entry into the building. (*People v. Prettyman* (1996) 14 Cal.4th 248, 268.)

The jury in this case was instructed as required by the cases cited above but was not instructed that it must unanimously find beyond a reasonable doubt that appellant had an intent to steal and/or an intent to rape when he entered the house and/or an intent to rape and commit forcible oral copulation when he took the two women into the back bedroom. Because the jury did not receive such a unanimity instruction and their verdict forms did reflect such a finding, this Court cannot conclude that the jury unanimously found appellant guilty of either or both of these burglaries. Consequently, this Court also cannot conclude that the jury properly found all facts essential for a first degree murder based on burglary-murder. The failure to require juror unanimity on the elements of first degree burglary felony murder violated appellant's Fifth, Sixth and Fourteenth Amendment

rights to due process, a jury trial, and the Eighth Amendment right to a fair and reliable penalty determination.

Because this is a capital case, there are additional requirements for a unanimous verdict on the first degree felony murder count. The purpose of the unanimity requirement is to insure the accuracy and reliability of the verdict. (*Brown v. Louisiana* (1980) 447 U.S. 277 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352.) There is a heightened need for reliability in the procedures leading to the conviction of a capital offense. (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama* (1980) 447 U.S. 625, 638) As the U.S. Supreme Court has explained: "The jury [cannot] function as circuit breaker in the State's machinery of justice if it [is] relegated to making a determination that the defendant at some point did something wrong." (*Blakely v. Washington*, supra, 542 U.S. at p. 306.) "The Framers would not have thought it too much to demand that, before depriving a man [] of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbors.'" (*Id.*, 542 U.S. at p. 307, quoting 4 Blackstone, Commentaries, at 343; see also *United States v. Booker*, *supra*, 543 U.S. at p. 230.) Appellant was not provided this required "unanimous suffrage" before he was deprived of his liberty.

The trial court, by failing to instruct the jury that it had to agree unanimously on which felonies underlay appellant's guilt of first degree felony murder rested, committed constitutional error. Because the jurors were not required to reach unanimous agreement on each and every element of first degree felony murder, there is no valid jury verdict on which harmless error analysis can operate. The failure to instruct was a structural

error and therefore reversal of the entire judgment is required. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

******

X.

THE TRIAL JUDGE'S ERRONEOUS INSTRUCTIONS REGARDING THE THREE FELONY SPECIAL CIRCUMSTANCES REQUIRE REVERSAL OF THOSE FINDINGS AND THE DEATH SENTENCE

The three special circumstances alleged in this case were burglary felony murder, rape felony murder and oral copulation felony murder. (4 CT 908.) The trial judge gave modified CALJIC instructions defining the special circumstances, including CALJIC No. 8.80 [76] (5 CT 982-983; 30 RT 2938-2939) and CALJIC No. 8.81.17. (5 CT 986-988; 30 RT 2941-2942.) The truncated version of CALJIC No. 8.81.17 given in this case left out a key part of each of these three felony murder special circumstances. These omissions amounted to prejudicial error of constitutional dimensions, requiring reversal of the special circumstance findings and the resultant death sentence.

A. The Version of CALJIC No. 8.81.17 Given Was Incomplete

The trial judge in this case gave the following instruction regarding Rape-Felony-Murder Special Circumstance:

> To find that the special circumstance, referred to in these instructions as murder in the commission of RAPE is true, it must be proved:
>
> 1. The murder was committed while the defendant was engaged in the commission or attempted commission of a rape. The crime of rape is defined elsewhere in these instructions.

(5 CT 986; 30 RT 2941.)

The same instruction was used to define the burglary and oral copulation

---

[76] The version of CALJIC No. 8.80 given in this case did not contain any language that would have cured the deficiencies of the CALJIC No. 8.81.17 instruction discussed in this argument.

special circumstances, except the word "rape" was replaced with the words "burglary" and "forcible oral copulation," accordingly. (5 CT 987-988; 30 RT 2941-2942.)

The complete version of CALJIC No. 8.81.17 (1991 Rev.), which was in effect at the time of the trial in this case, stated:

> To find the special circumstance, referred to in these instructions as murder in the commission of _____, is true, it must be proved:
> [1a. The murder was committed while [the] [a] defendant was [engaged in] in the [commission] [or] [attempted commission] of a _____;]
> [or] [and]
> [1b. The murder was committed during the immediate flight after the [[commission] [attempted commission] of a ___ [by the defendant] [to which [[the] [a] defendant was an accomplice]; and]
> [2. The murder was committed in order to carry out or advance the commission of the crime of _____ or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the [attempted] _____ was merely incidental to the commission of the murder.]

Comparing this complete version of CALJIC No. 8.81.17 with the version given to the jury in this case, quoted ante, it is apparent that paragraph 2, instructing that the murder had to be committed in order to advance the commission of the felony or to facilitate the perpetrator's escape or to avoid detection was omitted from the instruction actually given to the jury in this case.

CALJIC No. 8.81.17 was amended in 1991, by placing the word "and" between the two parts to ensure that the jury understood this requirement. The portion of CALJIC No. 8.81.17 which requires a finding that the killing was to advance, facilitate the escape from or avoid detection of the underlying felony distinguishes the special circumstance of felony

murder from first degree felony murder.[77] The latter requires only that the killing occur during a commission or attempted commission of certain felonies. (*People v. York* (1992) 11 Cal.App.4th 1506, 1510-1511.)

A felony-murder special circumstance cannot be found true unless the killing both (1) occurred while the defendant was engaged in the commission of the felony, and (2) was committed in order to advance the commission of the felony, to facilitate escape, or to avoid detection. (*People v. Green* (1980) 27 Cal.3d 1, 59-62; *People v. Thompson* (1980) 27 Cal.3d 303, 321-325.) As stated in *People v. Adams* (2004) 115 Cal.App.4th 243, "proof of the special circumstances had two elements," one of which is, "...the murder was committed in order to carry out or advance the commission of the [primary offense]."(*Id.* at p. 259, fn. 4; emphasis added; accord *Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1476 ["advance an independent felonious purpose" is an "element...of constitutional necessity."])

In *People v. Majors* (1998) 18 Cal.4th 385, and *People v. Williams* (1994) 30 Cal.App.4th 1758, this Court and the California Court of Appeal held that the giving of CALJIC No. 8.81.17 in the disjunctive, rather than in the conjunctive, constituted error. (*People v. Majors*, *supra*, 18 Cal.4th at p. 409; *People v. Williams*, *supra*, 30 Cal.App.4th at p. 1762.) In the instant case, the error was even more egregious because the instruction simply omitted any reference to a requirement that the murder must have been committed to facilitate the commission of the three felonies alleged.

---

[77] Appellant requested a modified version of CALJIC No. 8.80.1 which required the prosecution to prove, inter alia: "The murder was committed in order to carry out or advance the commission of the crimes of burglary/rape/oral copulation/ robbery. . ." (4 CT 937.) This request was denied.

Even assuming arguendo that "advance the commission"is not an "element" of the special circumstance, it is certainly an important principle of law openly and closely associated with the facts of this case and upon which instruction was required. (*People v. Estrada* (1995) 11 Cal.4th 568, 574 ["In a criminal case, a trial court has a duty to instruct the jury on the general principles of law relevant to the issues raised by the evidence... The general principles of law governing the case are those principles connected with the evidence and which are necessary for the jury's understanding of the case, " [internal quotations omitted]; *People v. Garrison* (1989) 47 Cal.3d 746, 791 ["advance the commission" instruction not simply "clarifying" where "...evidence raises...issue with respect to the special circumstances law..."]; *People v. Ratliff* (1986) 41 Cal.3d 675, 694 ["doubts as to the sufficiency of the evidence to warrant an instruction should be resolved in favor of the accused."].)

In *People v. Majors*, *supra*, this Court found that the trial court erred in giving CALJIC No. 8.81.17 in the disjunctive, but the Court also concluded that this error was harmless because the jury received the correct instruction in written form. The prosecutor emphasized the temporal element of the robbery-murder special circumstance; the verdict forms stated that the jury found the murder to have been committed during a robbery. (Id., p. 410.)

None of those factors can save the error committed by the trial judge in this case. First, the written instructions (5 CT 986-988) submitted to the jury were the same as those read to the jury. (30 RT 2941-2942.) Further, the verdict forms used in this case did not establish that the jury made any finding on the special circumstances that appellant had committed the murder to advance, facilitate the escape from or avoid detection of the

underlying felonies. Like the jury instructions at issue here, these verdict forms referred only to the murder being committed while the defendant was engaged in the commission or attempted commission of the felony.[78] Accordingly, none of the factors that persuaded this Court in *People v. Majors*, *supra*, that the error was harmless are present in this case.

Appellant acknowledges that the majority decision in *People v. Valdez* (2004) 32 Cal.4th 73 is contrary to the argument made here regarding the necessity that a trial judge include the second paragraph of CALJIC No. 8.81.17. *In Valdez*, this Court rejected the appellant's argument that the failure to include language to the effect that the murder was committed to carry out or advance the commission of the [specific felony] to facilitate the escape therefrom or to avoid detection, constituted reversible error. (*Id.* at pp. 113-114.)

Appellant urges this Court to reconsider its holding on this issue in the *Valdez* case and adopt the reasoning of the dissenting opinion of Justice Chin in that case on the issue of an incomplete instruction on a felony-murder special circumstance. As Justice Chin pointed out:

> In instructing the jury on the robbery-murder special-circumstance allegation, the trial court gave an incomplete version of CALJIC No. 8.81.17, which essentially mirrored the first degree felony-murder instructions: "The murder was committed while the defendant was engaged in the commission of a robbery." Omitted from the special circumstance instruction was the following language: "The murder was committed in order to carry out or advance the commission of the [robbery] or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the [robbery] was merely incidental to the commission of the murder." Thus, the jury was not told that, to find

---

[78] The exact language of the verdict forms is quoted in Section C, *post,* which discusses why the verdict forms were also defective and violated appellant's federal constitutional rights.

> the special circumstance allegation true, it must find defendant killed for the purpose of robbery. To make matters worse, the prosecutor told the jury during argument that there was no difference between the first degree felony-murder charge and the robbery - murder special - circumstance allegation.

(Id. at pp. 146-147.) Therefore, as Justice Chin noted, once the jury in the *Valdez* case found the defendant guilty of first degree felony murder, it was inevitable that the jury would also find the felony-murder special circumstance true since the felony murder and felony special circumstances "essentially duplicated each other." (*Id.* at p. 147.)

In this case, as in the *Valdez* case, this duplication of the instructions was exacerbated by the fact that the homicide instructions were limited to first degree felony murder as well as the fact that the prosecutor argued to the jury that there was no difference between first degree felony murder and the felony special circumstances. The prosecutor stated: "Count 1 also has special circumstances. Special circumstances are basically the same as the murder thus charged." (30 RT 2959.) Further, in the instant case, as in the *Valdez* case, the instructions on the homicide alleged in Count 1 were "all or nothing" because there were no instructions on lesser included offenses.

B. This Instructional Error Violated Appellant's Constitutional Rights and Resulted in Prejudice

When an instruction omits a necessary element of a special circumstance, constitutional error has occurred. (*Walton v. Arizona* (1990) 497 U.S. 639, 653; *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1321.) A reviewing court is not free to assume that the jurors inferred the existence of the missing element, because it is presumed that the jurors carefully followed the instructions given to them. (*Wade v. Calderon*, *supra*, 29 F.3d at p. 1321.) A "[c]apital defendant[ ]...[is] entitled to a jury determination of

any fact on which the legislature conditions an increase in [his] maximum punishment." (*Ring v. Arizona* (2002) 536 U.S. 584, 589; accord, *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476-477.) "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 v. Arizona*, *supra*, 536 U.S. at p. 602.) In *People v. Prieto* (2003) 30 Cal.4th 225, 256, this Court acknowledged that, under the Sixth and Eighth Amendments, a capital defendant has the right to have the jury determine the existence of all of the elements of a special circumstance. The failure to give the critical "advance the commission" instruction violated appellant's rights, as discussed in *Ring*, because the jury was not called upon to determine all the elements of the special circumstances beyond a reasonable doubt. That is, because of the truncated version of CALJIC No. 8.81.17 given to the jury in this case, the facts necessary to support the special allegations were not submitted to the jurors and consequently were not found true by them.

Here, the effect of the error was to permit the jury to find appellant eligible for the death penalty without having to make any finding that the murder was committed to advance the commission of rape, burglary and/or forcible oral copulation, or to facilitate his escape or to help him avoid detection for participation in those felonies. Error of this type is reversible unless it can be demonstrated beyond a reasonable doubt that the error did not contribute to the death verdict. (*Neder v. United States* (1999) 527 U.S. 1, 9-10; *Wade v. Calderon*, *supra*, 29 F.3d at pp. 1321-1329.)

The prejudice created by the omission of the crucial second paragraph of CALJIC No. 8.81.17 was exacerbated by statements made by the prosecutor in her closing argument to the jury. As discussed ante, the

prosecutor equated the first degree felony murder with the special circumstances of a murder to facilitate rape, burglary and/or forcible oral copulation:

> Count One also has special circumstances. Special circumstances are basically the same as the murder thus charged. It follows the same pattern that the murder was committed in the commission of a rape, that the murder was committed during the commission – oh, the murder was committed while the defendant was engaged in the commission of a rape. The murder occurred while the defendant was engaged in the commission of a burglary. Well, there is no issue that the killing of this human being took place during the commission, while they [sic] were engaged in the commission of a rape. There is no question that the acts that constitute the killing took place while the burglary was still continuing. There is no question that the murder, the acts constituting the killing took place while engaged in the commission of oral copulation. We know that. Remember now, these crimes don't have to actually cause the killing, but the person has to be engaged in that and the killing occurred, the person dies, and this case you have a little beyond that, you actually have the felonies themselves causing the killing. You have beyond what is needed but basically you have a dangerous situation. If you are engaged in the commission of these felonies and a killing, somebody is murdered and there is murder, you are guilty of these special circumstances. There is just no – I mean, there is no out on these. They are very simple.

(30 RT 2959-2960, emphasis added.)

This argument by the prosecutor, as well as the instructions, failed to delineate any distinction between a first degree felony murder that does not qualify the offender for the death penalty and the special circumstance defined in Penal Code section 190.2, subdivision (a)(17)(i) which does. Nothing was mentioned concerning a requirement that the murder had to have been committed to facilitate the burglary, rape and/or oral copulation in order for the special circumstance to apply. This failure constituted a violation of appellant's rights under the Eighth Amendment of the United

States Constitution which requires that a special circumstance "must genuinely narrow the class of persons eligible for the death penalty, and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 877, fn. omitted.) [79]

Because the trial judge instructed the jury only on felony murder as a basis for finding first degree murder and did not give any lesser-included homicide instructions and because of the incomplete jury instructions given on the three felony special circumstances alleged in this case, it was virtually inevitable that the jury would find the special circumstance true.

C. The Incomplete Special Circumstance Verdict Forms, Omitting the "Advance the Commission" Language,

---

[79] Other state courts have found that broad felony-murder provisions in death penalty statutes violate the narrowing requirement. For example, the Tennessee Supreme Court held:

> We have determined that in light of the broad definition of felony murder and the duplicating language of the felony murder aggravating circumstance, *no narrowing occurs* under Tennessee's first-degree murder statute. We hold that, when the defendant is convicted of first-degree murder solely on the basis of felony murder, the [felony-murder] aggravating circumstance [] *does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution*, and Article I, § 16 of the Tennessee Constitution.

(*State v. Middlebrooks* (1992) 840 S.W.2d 317, 346, emphasis added.)

Subsequently, the Tennessee statute was modified requiring the felony murder aggravator applied only to murderers who "knowingly" participated in the underlying felony. (Tenn.Code Ann. § 39-13- 204(i)(7).) See also Justice Chin's dissenting opinion in *People v. Valdez* (2004) 32 Cal.4th 73, 147, discussed in Section A, *ante*.)

Also Require Reversal

As noted in Section A, *ante*, the burglary, rape and oral copulation special circumstances verdict forms wholly omitted the language that the murder must have advanced the commission of the charged felonies which is requisite to any felony special circumstance finding. The three special circumstance verdict forms read as follows:

> We, the jury in the above entitled cause, find the special circumstance that the murder of ROSA MAE DIXON was committed by defendant BRANDON ARNAE TAYLOR while the defendant was engaged in the commission or attempted commission of the crime of Burglary in the first degree, in violation of Penal Code sections 459/460, with the true meaning of Penal Code section 190(a)(17), to be true.

(5 CT 1028.) [80]

Appellant submits that the omission, from the special circumstance verdict forms, of the requisite element "The murder was committed in order to carry out or advance the commission of the crime of [robbery, rape or oral copulation]" was reversible federal constitutional error.

In *People v. Mack* (Ill. 1995) 658 N.E.2d 437, the Illinois Supreme Court vacated a death judgment where one of the requisite aggravating factors-that the defendant possessed a particular mental state-had been omitted from the eligibility-stage verdict form. The court first found that appellate counsel was constitutionally ineffective for not raising the issue on appeal (*id.* at pp. 441-442), and then rejected the State's substantive arguments (*id.* at pp. 442-444). Specifically, the court concluded that the

---

[80] There were two other identical verdict forms dealing with the rape and forcible oral copulation special circumstances allegations, except they referred to those two crimes and their Penal Code section numbers. (5 CT 1029-1030.)

fact that the jury was instructed on the requisite mental state and that this requirement was emphasized by the prosecutor in closing argument did not cure the defect, because of "the possibility of juror confusion." (*Id.* at p. 442.) The court further found the State's argument "misguided since the primary issue in this case is not how the jury was *instructed*, but what the jury found." (*Ibid.*, emphasis added.) Additionally, although a general verdict of guilt or in the manner and form as charged in the indictment is normally deemed sufficient to sustain such a verdict, "where the verdict purports to set out the elements of the offense as specific findings, it must do so completely or be held insufficient." (*Id.* at p. 443.) Since the verdict form in Mack "attempted to set forth a statutory aggravating factor, but failed to do so completely and omitted an essential element[,] [t]he verdict cannot withstand scrutiny. . . ." (658 N.E.2d at p. 444.)

Finally, although noting that the State did not argue that an insufficient verdict could be deemed harmless based on the strength of the evidence, the *Mack* court found that "the availability of a harmless error analysis in this setting is doubtful at best [since] [r]eview under the harmless error rule presupposes an actual verdict." (*People v. Mack*, *supra*, 658 N.E.3d at p. 444; emphasis in the original.)

The situation in the instant case is even more egregious than in *Mack* because here the jurors were not even properly instructed on the element missing from the verdict forms (See Section A, *ante*.) Thus, it is not necessary to engage in the analysis employed in *Mack*, where the court deemed it important to emphasize that "[p]roper jury instructions do not necessarily cure an improper verdict." (*People v. Mack*, *supra*, 658 N.E.2d at p. 442.) Appellant's jury was given both erroneous and independently prejudicial special-circumstance instructions and verdict forms which

omitted the same requisite element upon which they had been so confusingly instructed. In short, there is no principled way to conclude that appellant's jury ever found that the "advance the commission" requirement had been met; or that they in fact properly found any of the three alleged special circumstances to be true. At the very least, from the interplay of the incomplete verdict forms and erroneous instructions, "a reasonable juror could well have believed" (*Penry v. Johnson* (2001) 532 U.S. 782, 804) that the "advance the commission" element was not required for a special circumstance finding.

Further, even if a general verdict is normally considered sufficient with respect to a special circumstance allegation (see, e.g., *People v. Jones* (2003) 29 Cal.4th 1229, 1259), because the verdict forms expressly set out one element of the special circumstances but omitted a clearly requisite element, "[t]he verdict[s] cannot withstand scrutiny." (*People v. Mack*, *supra*, 658 N.E.2d at p. 444; *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *In re Barnett* (2003) 31 Cal.4th 466, 472; *Tamalini v. Stewart* (9th Cir. 2001) 249 F.3d 895, 902.) Especially is this so because the instructions themselves cannot guarantee that the jury considered, much less found, that requisite element. The incomplete special circumstance verdict forms therefore denied appellant his rights to equal protection (U.S. Const., Amend. XIV) and due process. (U.S. Const., Amends. V, VI, XIV.)

Appellant submits that the analysis of the Illinois Supreme Court in the *Mack* decision is well-reasoned and persuasive and should be followed and applied by this Court, not only as to the error itself but also as to its prejudice analysis. There was in fact no valid special circumstance verdict in the instant case, and therefore there can be no appropriate harmless-error analysis. (*People v. Mack*, *supra*, 658 N.W.2d at p. 444; compare *People v.*

Jones, *supra*, 29 Cal.4th at pp. 1259-1260.) The error here–verdict forms which effectively resulted in meaningless actual special circumstance verdicts–constituted a "structural defect affecting the framework in which the trial proceeds." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 311.) The proper inquiry in this situation is "whether the . . . verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered–no matter how inescapable the findings to support that verdict might be–would violate the jury-trial guarantee." (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279, emphasis in the original [where constitutionally defective instruction on definition of reasonable doubt vitiated the jury's verdicts, the harmless-error rule did not apply]; see *Mack*, *supra*, 658 N.W.2d at p. 444.)

But even if harmless-error analysis is appropriate here, the prosecution cannot conceivably establish beyond a reasonable doubt that the error in the special circumstance verdict forms did not contribute to the corresponding verdicts. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.) This is especially true given the related instructional error discussed ante. All three special circumstance findings must therefore be reversed.

D. Conclusion

The "advance the commission" portion of CALJIC No. 8.81.17 should have been given sua sponte in this case. That language also should have been included in the special circumstances verdict forms. Any doubts as to the sufficiency of the evidence to warrant an instruction should be resolved in favor of the accused. (*People v. Ratliff* (1986) 41 Cal.3d 675, 694.) Moreover, appellant did not have the burden to prove his innocence of the special circumstances; he did not have to present any evidence to prove that the burglary, rape or oral copulation were not committed to advance the

murder. "The People must prevail on their own evidence, not on a vacuum created by rejection of a defense." (*People v. Samarjian* (1966) 240 Cal.App.2d 13, 18.)

These errors in instructions and in the special circumstances verdict forms were prejudicial. "[T]he Due Process Clause 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 U.S. 358, 364; *Apprendi v. New Jersey* (2000) 530 U.S. 466.) Similarly, California law requires that "the trial court must instruct on the general principles of law relevant to the issues raised by the evidence." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) The special circumstance determinations in this case must be set aside because the instructional error resulted in the jury not being fully apprised of the elements necessary for a special circumstance finding and deprived appellant of his right to a jury determination of the truth of all the elements of the special circumstance, in violation of the Sixth and Fourteenth Amendments of the United States Constitution and article I, sections 7, 16, and 17, of the California Constitution.

Because the error permitted the jury to find appellant both death-eligible and death-worthy on the basis of less culpable conduct than the statute requires (Pen. Code, §190.3, subd. (a); see *People v. Green, supra*, 27 Cal.2d at pp. 59-62), it also distorted the penalty determination process, thereby depriving appellant of his rights under the Eighth and Fourteenth Amendments to a fair, reliable and non-arbitrary penalty determination. (See *Sochor v. Florida* (1992) 504 U.S. 527, 532.)

Under the instruction given here and the verdict forms used, there is a reasonable likelihood that the jury applied the given but incomplete and

erroneous instruction in a way that violated the Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) Appellant's rights to due process, a fair trial, a jury trial, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated.

"It is one thing for an appellate court to determine that a verdict was or was not affected by error. It is quite another for an appellate court to become in effect a second jury to determine whether the defendant is guilty." (R. Traynor (1970) *The Riddle of Harmless Error* 21.) For the court to delineate when the failure to submit an element of a criminal offense to a jury triggers harmless error review is tantamount to a declaration of which elements of a criminal offense are appropriate for submission to a jury. This Court should adhere to the statement in *People v. Kobrin* (1995) 11 Cal.4th 416, 426-429, that all elements of a criminal offense require submission to a jury and accept the logical corollary that directing a verdict on an element denies that right and, because of the importance of that right, requires reversal.

The prosecution cannot show that these errors were harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 86 U.S. at p. 24.) There is a reasonable likelihood that the jury applied the incomplete and erroneous special circumstances instructions and verdict forms in a way that violated the Constitution and that this error affected the verdicts in this case. (*Estelle v. McGuire, supra*, 502 U.S. at p.72.) Appellant's convictions and death sentence should therefore be reversed.

*****

XI.

THE CUMULATIVE EFFECT OF A SERIES OF INSTRUCTIONAL ERRORS WAS PREJUDICIAL AND VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, TRIAL BY JURY, AND RELIABLE VERDICTS, REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

The trial court instructed the jury with CALJIC Nos. 2.02, 2.03, 2.22, 2.27, 2.51 and 2.52. (5 CT 954- 956, 960-964; 28 RT 2927-2928, 2930-2931.) As discussed below, these instructions violated appellant's constitutional rights to due process (U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., Amends. VI & XIV; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, § 17). (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

Appellant recognizes that this Court has previously rejected these claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.) Nevertheless, he raises them here in order for this Court to reconsider those decisions and in order to raise the claims in subsequent proceedings.

A. The Court Erred in Instructing the Jurors With CALJIC No. 2.03 and CALJIC No. 2.52 That They Could Consider his "False Statements" and his Flight as Evidence of his Consciousness of Guilt

Officer Robert Gassman testified that on June 23, 1995, at about 9:39 p.m., he and his partner, Officer Frank Caropreso, responded to a call about a crime in progress at Rosa Mae Dixon's house. Because they saw police

cars already parked in the street at the front of the house, they drove into the alley behind it. (24 RT 2343-2344.) While they were in the alley, Officer Gassman heard some noise and then saw a man, whom he identified as appellant, on top of the fence. The officer told appellant to stop; he and Carapreso pulled appellant off the fence and handcuffed him. (24 RT 2346-2347.) When asked what he was doing, appellant said he thought the house (referring to Mrs. Dixon's house) was vacant and denied that he lived in one of the houses in the alley. (24 RT 2349.) Appellant also said that his friend, whom he identified as a white male named John Hall, had just raped an old woman inside the house. (25 RT 2432-2433.)

At the conclusion of the guilt phase and over defense objection, the trial court instructed the jury that it could consider any false statements by appellant as evidence of his consciousness of guilt. (5 CT 956; 28 RT 2928.) The trial court also instructed the jurors that they could consider appellant's "flight" from Mrs. Dixon's house, into the backyard and over the fence, as demonstrating consciousness of guilt.[81] (5 CT 964; 28 RT 2931.) CALJIC

---

[81] Although appellant's trial counsel did not object to the flight instruction, this issue is cognizable on appeal. With regard to CALJIC No. 2.52, Penal Code section 1127c and case law require that the trial court give an instruction on flight when the evidence warrants such an instruction, and this Court has held that under these circumstances error is preserved even in the absence of an objection. (See *People v. Bradford* (1997) 14 Cal.4th 1005, 1055; *People v. Visciotti* (1992) 2 Cal.4th 1, 60.) Moreover, instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (Pen. Code, §§ 1259 & 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal. 4th 279, 312.) Merely acceding to an erroneous instruction does not constitute invited error, nor must a defendant request modification or amplification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

No. 2.03 referred to false statements and read as follows:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(5 CT 956; 28 RT 2928.)

CALJIC No. 2.52 referred to flight and read as follows:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

(5 CT 964; 28 RT 2931.)

During closing argument at the guilt phase of the trial, the prosecutor highlighted this conversation between appellant and Officers Gassman and Carapreso. She noted that appellant told them that he thought the house was vacant and that his friend had just raped an old lady inside and had left before the police got there. (30 RT 2972.)

CALJIC No. 2.03 permitted the jury to use appellant's statements to Officer Gassman as evidence "to show his consciousness of guilt and therefore his guilt" while CALJIC No. 2.52 permitted the jury to use his "flight" over Mrs. Dixon's backyard fence for a similar purpose. (*Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1841.) Although this Court has upheld these instructions in other cases (see, e.g., *People v. Jackson, supra,* 13 Cal.4th at pp. 1223-1224), it should reconsider its previous opinions.

1. CALJIC Nos. 2.03 and 2.52 Should not Have Been Given Here Because They Were Impermissibly Argumentative

A trial court must refuse to deliver any instructions which are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) Such an instruction presents the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See generally *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly single out and bring into prominence before the jury isolated facts favorable to one party, thereby, in effect, "intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those which "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]." (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions which "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and should be refused. (*Ibid*).

Judged by this standard, the consciousness of guilt instructions given in this case were impermissibly argumentative. Structurally, they are almost identical to instructions found to be impermissibly argumentative in other cases. (See *People v. Mincey*, *supra*, 2 Cal.4th 408, 437, fn. 5 [instruction advising the jury that if it found certain facts, it could consider that evidence for a particular purpose argumentative and properly denied].)

In *People v. Bacigalupo* (1991) 1 Cal.4th 103, 128, this Court approved CALJIC No. 2.03 on the ground that it "properly advised the jury of inferences that could rationally be drawn from the evidence." Yet, what

this Court deemed "proper" when the rational inference was one adverse to the defendant, this Court has deemed improper when the inference was one adverse to the prosecution. (See *People v. Wright*, *supra*, 45 Cal.3d at p. 1137.)

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness of guilt instructions based on an analogy to *People v. Mincey*, *supra*, 2 Cal.4th 408, holding that Mincey was "inapposite for it involved no consciousness of guilt instruction," but rather a proposed defense instruction which "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense. [Citation omitted].'" However, the holding in *Nakahara* does not explain why two instructions that are identical in structure should be analyzed differently, or why instructions that highlight the prosecution's version of the facts are permissible while ones highlighting the defendant's version are not.

Based on the language in the decisions in *Nakahara*, *Mincey*, and the cases cited by *Mincey*, the only apparent reason why this Court sees a distinction between CALJIC No. 2.03 and the requested instructions which were rejected in those cases is that the rejected instructions directed the jury to specific pieces of evidence, whereas CALJIC No. 2.03 is a more general instruction. Thus, it must be this Court's view that CALJIC No. 2.03 addresses a theory, whereas the improper defense instructions were too narrow to address a theory. (See, e.g., *People v. Wright*, *supra*, 45 Cal.3d at p. 1137 [defense instruction argumentative because it improperly implies certain conclusions from specified evidence].)

Consequently, the thread of acceptability upon which this instruction hangs is that it does not direct the jury's attention to a specific statement

which the prosecution is asserting is false, but rather it sets up the general theory and then lets the prosecution fill in the blanks during argument. Theoretically, this extremely fine line is one that can probably be drawn, but in practice it does not withstand scrutiny.

From voir dire on, trial judges tell the jurors in criminal trials that they are the judges of the facts, the judge is the person who determines the law that is applicable to the case, and the jurors are to accept the law as provided by the judge. CALJIC No. 1.00, the initial instruction given to most juries, including the jury in this case (5 CT 947-948), before deliberations states that the judge will provide the law that is applicable to the case. Therefore, a rational juror would assume that every instruction provided by the court relates to a factor that is significant to the determination of guilt.

Here, the jury was told that a deliberately false or misleading statement by the defendant is a fact that shows a consciousness of guilt. It is true that the jury is instructed that they must find there to be such a statement in order to use it against the defendant, but that qualifier also existed in the defense instructions condemned by this Court. Similarly, the judge instructed the jurors in this case that they could consider appellant's "flight" after the crime as consciousness of guilt. Apparently, this Court believes the difference between these "consciousness-of-guilt" instructions and the instructions condemned in the *Mincey* line of cases is that it is acceptable for the court to point out this is an issue to be addressed, and then let the prosecutor argue that what the court meant was that if you believe the defendant made a false statement when he said_____ [fill in the blank], then this can be used to show a consciousness of guilt. This distinction seems to elevate form over substance.

Moreover, the distinction is not sufficient to meet the requirement that there be "absolute impartiality as between the People and defendant in the defendant in the matter of instructions .... (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon* (1973) 412 U.S. 470, 474), and an arbitrary distinction between litigants also deprives the defendant of equal protection of the law. (*Lindsay v. Normet* (1972) 405 U.S. 56, 77.)

To ensure fairness and equal treatment, this Court should reconsider its decisions finding California's consciousness-of-guilt instructions to not be argumentative. Except for the party benefited by the instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at p. 713; *People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 123 [CALJIC No. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]), and a defense instruction held to be argumentative because it "improperly implie[d] certain conclusions from specified evidence." (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137.)

Another rationale offered by this Court to uphold the consciousness-of-guilt instructions in *People v. Kelly* (1992) 1 Cal.4th. 495, 531-532, and in several subsequent cases (e.g., *People v. Arias* (1996) 13 Cal.4th 92, 142), is equally flawed. In the *Kelly* decision, the Court focused on the allegedly protective nature of the consciousness-of-guilt instructions, noting that they tell the jury that consciousness-of-guilt evidence is not sufficient by itself to prove guilt. Based on that fact, this Court concluded: "If the court tells the

jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly*, *supra*, 1 Cal.4th at p. 532.)

In a more recent decision, this Court has appeared to abandon the rationale set forth in *Kelly*, supra, that consciousness-of-guilt instructions are protective or neutral. In *People v. Seaton* (2001) 26 Cal.4th, 598, 673, the Court held that failing to give such instructions was harmless error because those instructions "would have benefitted the prosecution, not the defense." However, the *Seaton* decision does not go far enough in considering the full impact of the instruction. Not only does the instruction benefit the prosecution, it lessens the prosecution's burden of proof and thus violates the due process clause of the United States Constitution. (*In re Winship* (1970) 397 U.S. 358, 364.) The constitutional violation lies in the fact that while the instruction says that consciousness-of-guilt evidence is not sufficient by itself to prove guilt, it does not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt. It thus permits the jury to seize on one isolated piece of evidence and use that in combination with the consciousness-of-guilt evidence to conclude that the defendant is guilty. This constitutes an unconstitutional lessening of the burden of proof.

Finding that a consciousness-of-guilt instruction based on flight unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming recently held that giving such an instruction will always be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, the Wyoming court joined a number of other state courts that have found similar flaws in the flight instruction. Courts in at least eight other states have held that flight instructions should not be given because they

unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].)[82]

The reasoning of two of those cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court

---

[82] Other state courts also have held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant discussion. (See, e.g., *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

cited a prior case disapproving a flight instruction (*id.* at p. 748), and extended the reasoning of that case to cover all similar consciousness of guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745 [holding that the reasons for disapproving flight instructions also applied to an instruction on the defendant's false statements].)

The argumentative consciousness-of-guilt instructions given in this case invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution, placing the trial court's imprimatur on the prosecution's theory of the case and lessening the prosecution's burden of proof. The instruction therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., Amends V & XIV; Cal. Const., art. I, §§ 7 & 15), his right to be acquitted unless found guilty beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., Amends. VI & XIV; Cal. Const., art. I, § 16), and his right to a fair and reliable capital trial. (U.S. Const., Amends. VIII & XIV; Cal. Const., art. I, § 17.)

2. CALJIC No. 2.03 and 2.52 Also Allowed the Jury to Draw Irrational Permissive Inferences

The consciousness-of-guilt instructions given here were also constitutionally defective because they embodied an improper permissive inference. Those instructions permitted the jury to infer one fact, such as appellant's consciousness of guilt, from other facts, i.e., that he allegedly

made false statements, and he fled from the Dixon house. (See *People v. Ashmus* (1991) 54 Cal.3d. 932, 977.) An instruction which embodies a permissive inference can intrude improperly upon a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence and to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (en banc).) A passing reference to the need to "consider all evidence will not cure this defect." (*United States v. Warren*, *supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid*; see also id. at p. 900 (conc. opn. of Rymer, J.) ["inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury."].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 926.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences–not just presumptions–be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) The rational connection required is not merely a logical or reasonable one, but rather a connection that is "more likely than not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 [noting that

the Constitution requires "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend.'"].) This test is applied to judge the inference as it operates under the facts of a specific case. (*Ulster County Court v. Allen*, *supra*, at pp. 157, 162-163.)

Here, the consciousness-of-guilt evidence was relevant to whether appellant committed the charged homicides. (*People v. Anderson* (1968) 70 Cal.2d 15, 32-33.) The irrational inference permitted by these instructions concerned appellant's mental state at the time he committed those crimes-namely, whether he committed them with the requisite mens rea. The improper instructions permitted the jury to use the consciousness of guilt evidence to infer not only that appellant killed Mrs. Dixon but that he did so while harboring the mental state required for first degree felony murder.

Although consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is not probative of his state of mind immediately prior to or during the killing. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 32.) As this Court explained,

> evidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.

(*Id.* at p. 33.)

Appellant's actions after the crimes, upon which the consciousness-of-guilt inference was based, were simply not probative of whether he harbored the necessary mental state for first degree murder. There was no rational connection between appellant's false statements and his flight and the mens rea required for first degree murder with three felony murder special circumstances.

This Court has previously rejected the claim that the consciousness-of-guilt instructions permit irrational inferences concerning the defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 666-667 [CALJIC Nos. 2.03 & 2.06].) However, appellant respectfully asks this Court to reconsider and overrule these holdings, and to hold that delivering the consciousness-of-guilt instructions given in this case was reversible constitutional error.

The foundation for these rulings is the opinion in *People v. Crandell* (1988) 46 Cal.3d 833, 871, which noted that the consciousness of guilt instructions do not specifically mention mental state and concluded that:

> A reasonable juror would understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged."

However, for three reasons, *Crandell's* analysis is mistaken, and inapplicable in this case. First, consciousness-of-guilt instructions do not speak of "consciousness of some wrongdoing;" but of "consciousness of guilt," and *Crandell* does not explain why jurors would interpret such instructions to mean something they do not say. Elsewhere in the standard instructions the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g., 14 CT 3839 [CALJIC No. 2.90, stating that the defendant is entitled to a verdict of not guilty "in case of a reasonable doubt whether his [] guilt is satisfactorily shown"].) It would be a violation of due process if the jury could reasonably interpret that instruction to mean that appellant was entitled to a verdict of not guilty only if the jury had a reasonable doubt

as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship* (1970) 397 U.S. 358, 364; see *Jackson v. Virginia* (1979) 443 U.S. 307, 323-324.)

Second, although the consciousness-of-guilt instructions do not specifically mention the defendant's mental state, they similarly do not specifically exclude it from the purview of permitted inferences, or otherwise hint that there are any applicable limits on the jury's use of the evidence. On the contrary, the instructions suggest that the scope of the permitted inferences is very broad since they expressly advise the jurors that the "weight and significance" of the consciousness-of-guilt evidence, "if any, are matters for your" determination.

Third, this Court has itself drawn the very inference that Crandell asserts no reasonable juror would make. In *People v. Hayes* (1990) 52 Cal.3d 577, this Court reviewed the evidence of defendant's mental state at the time of the killing, expressly relying on consciousness-of-guilt evidence among other facts, to find an intent to rob. (*Id.* at p. 608.) Since this Court considered consciousness-of-guilt evidence in finding substantial evidence that a defendant killed with intent to rob, it should acknowledge that lay jurors might do the same.

Because the consciousness-of-guilt instructions permitted the jury to draw an irrational inference of guilt against appellant, its provision undermined the reasonable doubt requirement and denied appellant a fair trial and due process of law. (U.S. Const., Amends. VI & XIV; Cal. Const., art. I, §§ 7 & 15.) The instruction also violated appellant's right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., Amends. VI & XIV; Cal. Const., art. I, § 16), and, by reducing the reliability of the jury's

determination and creating the risk that the jury would make erroneous factual determinations, violated appellant's right to a fair and reliable capital trial (U.S. Const., Amends. VIII & XIV; Cal. Const., art. I, § 17).

Because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution can demonstrate beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California, supra,* 386 U.S. at p. 24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [Chapman standard applied to combined impact of state and federal constitutional errors]; and *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

Given the fact that the defense put on a strong case showing that appellant did not have the necessary mental state to be guilty of the crimes alleged as well as the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under *Chapman.*

*****

XII.

THE JURY INSTRUCTION ON REASONABLE DOUBT, CALJIC No. 2.90, WAS CONSTITUTIONALLY DEFECTIVE

The trial judge delivered the following reasonable doubt instruction (CALJIC No. 2.90) to the jury in this case:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(5 CT 971; 29 RT 2933-2934.) The judgment should be reversed because the definitions of reasonable doubt and the burden of proof in this instruction was constitutionally deficient in a number of ways.[83]

A. The Instruction Erroneously Implied That Reasonable Doubt Requires the Jurors to Articulate Reason for Their Doubt

"In state criminal trials, the Due Process Clause of the Fourteenth Amendment '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.' [Citations.]" (*Cage v. Louisiana* (1990) 498 U.S. 39, 39-40 (1990); see also *In re Winship* (1970) 397 U.S. 358, 364. The

---

[83] There was no objection to the instruction below. However, the issue on appeal is not waived. Instructional errors which affect the defendant's fundamental rights are reversible without objection at trial. (Pen. Code, § 1259.)

reasonable-doubt standard "plays a vital role in the American scheme of criminal procedure." (*In re Winship, supra*, 397 U.S. at p. 363; see also *Cage v. Louisiana, supra,* 498 U.S. at p. 40.) "Among other things, 'it is a prime instrument for reducing the risk of convictions resting on factual error.' [Citation.]" (*Id.* at p. 40.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia* (1979) 443 U.S. 307, 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship, supra,* 397 U.S. at p. 363), and at the heart of the right to trial by jury. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 278 ["the jury verdict required by the Sixth Amendment is [one] of guilty beyond a reasonable doubt"].)

An essential conceptual underpinning of the presumption of innocence is that the accused bears no burden of proof whatsoever. It is not the obligation of the accused to "raise" or "create" any specified threshold of doubt. (See *In re Winship, supra*, 397 U.S. at p. 363; see also *People v. Loggins* (1972) 23 Cal.App.3d 597, 601-604.) Nor is the jury required to "find" any particular degree or amount of doubt before it may acquit. (*In re Winship, supra*, 397 U.S. at p. 364.) Rather, the jurors must acquit under all circumstances unless they find that the prosecution has proven every fact essential to conviction beyond a reasonable doubt. (*Ibid.*)

It is therefore constitutionally erroneous to require expressly that the jurors articulate concrete reasons for their doubt. (*People v. Antommarchi* (N.Y. 1992) 604 N.E.2d 95, 98; see also *Siberry v. State* (Ind. 1893) 33 N.E. 681, 685.) When jurors are required to articulate reasons for acquitting, "[t]he burden . . . is thus cast on the defendant, whereas it is on the state to

make out a case excluding all reasonable doubt." (*State v. Cohen* (Iowa 1899) 78 N.W. 857, 858.) In short, "jurors are not bound to give reasons to others for the conclusion reached. [Citations]" (*Ibid.*)

Moreover, the essence of reasonable doubt is a failure of proof: "It is the want of information and knowledge that creates the doubt." (*Siberry v. State, supra*, 33 N.E. at p. 688.) Such "want of knowledge" is not necessarily capable of expression as an affirmative or logical "reason" for the doubt which is felt. This would require the juror to "prove a negative;" therefore, such an instruction unconstitutionally misstates the burden of proof. "It is the lack of information and knowledge satisfying the members of the jury of the guilt of the accused, with that degree of certainty required by the law, which constitutes a reasonable doubt, and if jurors are not satisfied of the guilt of the accused with such degree of certainty as the law requires, they must acquit, whether they are able to give a reason why they are not satisfied to that degree of certainty or not." (*Id.*, at p.689.)

In the present case, although the jurors were not expressly instructed that they must articulate reason and logic for their doubt, the instructional language implied as much. By requiring more than "mere possible or imaginary doubt" the instruction suggested to the jurors that the reason and logic for their doubt should first be articulated and then evaluated against the "mere possible or imaginary" standard. As reasonably interpreted by the jurors (*Estelle v. McGuire* (1991) 502 U.S. 62), the instructions required an articulation of their doubts before such doubts could be considered sufficient to acquit.

B. CALJIC No. 2.90 Unconstitutionally Instructed the Jury That a Possible Doubt Is Not a Reasonable Doubt

Part of the definition of reasonable doubt given to appellant's jury

was: "Reasonable doubt is defined as follows: it is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (5 CT 971; 29 RT 2933-2934.)

The language admonishing the jury that "reasonable doubt... is not a mere possible doubt..." was unconstitutional because it failed to adequately limit the scope of possible doubt. Unlike an imaginary doubt, a possible doubt may be based on fact. When driving on a two-lane road a reasonable drivers will not pass on a blind curve because it is "possible" that a car may be coming in the other lane. Cautious investors regularly give up higher returns and opt for the lower return of an insured bank account because it is "possible" they may lose principal in a more lucrative but riskier investment. In other words, merely because a doubt is only possible does not make it unreasonable or insignificant. The question of reasonable doubt should be measured by reasonable reliance rather than possibility. If the doubt is sufficient to cause a juror to reasonably rely on it in making important decisions then the doubt is reasonable, even if it is merely possible. (See, e.g., *Victor v. Nebraska* (1994) 511 U.S. 1, 20-21 [hesitate to act language "gives a commonsense benchmark for just how substantial such a [reasonable] doubt must be"].)

This formulation of reasonable doubt was approved in *United States v. Wilson* (1914) 232 U.S. 563, 570, and has since been endorsed by a number of state and federal courts. (See, e.g., *Holland v. United States* (1954) 348 U.S. 121,140; *Hilbish v. State* (Alaska App. 1995) 891 P.2d 841, 850-51.) The federal circuit courts of appeals that provide for definition of

reasonable doubt as well as many states use the Wilson hesitation concept. For example, the Eighth Circuit clarifies the "possible doubt" by relating it to the notion of reliance: a reasonable doubt is a doubt based upon reason and common sense and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. (8th Circuit Model Jury Instructions - Criminal 3.11 (2000) [Reasonable Doubt]; see also Kevin F. O'Malley, Jay E. Grenig & William C. Lee, Federal Jury Practice and Instructions (West, 5th ed. 2000) § 12:10 [*Presumption Of Innocence, Burden Of Proof, And Reasonable Doubt*].) [84]

---

[84] Other jurisdictions employ similar definitions. (See e.g., Pennsylvania Suggested Standard Criminal Jury Instructions, Pa. SSJI (Crim) 7.01 ¶ 3, sent. 2 [Presumption Of Innocence: Burden Of Proof; Reasonable Doubt] (Pennsylvania Bar Institute, PBI Press); South Carolina Criminal Jury Instructions 1-14 [Reasonable Doubt Charge] (South Carolina Bar, 1995); W. Scott Carpenter, & Paul J.McClung, McClung's Texas Criminal Jury Charges, § 1 (II)(B)(2) ¶ 4 [proper.chg] (James Publishing, 2000); Criminal Jury Instructions For The District of Columbia, Instr. 2.09, [Reasonable Doubt] (Bar Association of the District of Columbia, 4th ed. 1993); South Dakota Pattern Jury Instructions - *Criminal*, SDCL 1-6-2 & 1-6-3 (Reasonable Doubt (Alternates 1 & 2)) (2000 State Bar of South Dakota); Alaska Pattern Criminal Jury *Instructions* (Alaska Bar Association, 1987) 1.52 [Presumption Of Innocence, Burden Of Proof Beyond A Reasonable Doubt]; Arkansas Model Jury Instructions - Criminal, AMCI 2d 110 [Introductory Instructions-Reasonable Doubt] (Lexis, 2d ed. 1997); Colorado Jury Instructions (West 1983) COLJI - Crim 3:04 [Presumption Of Innocence-Burden Of Proof Generally-Reasonable Doubt]; Connecticut Selected Jury Instructions - *Criminal* 2.8 (The Commission on Official Legal Publications Judicial Branch, 3rd ed. 1996) [General Jury Instructions - Reasonable Doubt] Criminal Jury Instructions]; Idaho Criminal Jury

Alternatively, reasonable doubt "does not mean a captious or speculative doubt, or a doubt from mere whim, caprice, or groundless conjecture." (*Siberry v. State*, *supra*, 33 N.E. at p. 689.) However, in the present case reasonable doubt was not so defined. Instead, the jury was admonished that a doubt is not reasonable if it is "merely possible." Such a definition unconstitutionally permitted the jurors to reject a doubt as unreasonable even if they would reasonably have relied on a similar degree of doubt in their own important affairs.

Moreover, by stating that "merely possible" doubt was unreasonable, the instruction unconstitutionally implied some obligation on the part of the accused to raise a probable doubt as to his or her guilt. It is unconstitutional to require the accused to assume any burden of proof as to reasonable doubt. (*In re Winship*, *supra*, 397 U.S. at p. 364.)

C. The Instruction Was Deficient and Misleading Because the Instruction Failed to Affirmatively Instruct That the Defense Had No Obligation to Present or Refute Evidence

The instructional language which defined and explained the presumption of innocence was the first paragraph of CALJIC No. 2.90 which stated: "A defendant in a criminal action is presumed to be innocent

---

Instructions (Idaho Law Foundation, Inc., 1995) ICJI 103A [Reasonable Doubt (Alternative)]; Maryland Criminal Pattern Jury Instructions (Micpel, 1999) MPJI-Cr 1.04 [Reasonable Doubt]; New *Mexico Uniform Jury Inst*ructions - *Criminal* (Lexis 1998) UJI Criminal 14-5060 [Presumption Of Innocence; Reasonable Doubt; Burden Of Proof]; Instructions for Virginia & West Virginia (Lexis 4th ed. 1996), 24-401 [Reasonable Doubt Defined Generally]; Wisconsin Jury *Instructions - Criminal* (University of Wisconsin Law School, 2000) WIS-JI-Criminal 140 [Burden Of Proof And Presumption Of Innocence]; 6th Circuit Pattern Jury Instructions - Criminal (1991) 1.03 [Presumption Of Innocence, Burden Of Proof, Reasonable Doubt].)

until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the prosecution the burden of proving him guilty beyond a reasonable doubt." (5 CT 771; 29 RT 2933-2934.) The instruction omitted one of the most fundamental underpinnings of the presumption of innocence, i.e., that the accused need not present any evidence for the jury to have a reasonable doubt. This omission, in light of other instructions, erroneously conveyed the impression that the evidence presented by the defense must raise a reasonable doubt.

The essence of the presumption of innocence is that the defense bears no obligation to present evidence, to refute the prosecution evidence or to prove or to disprove any fact. (*In re Winship*, *supra*, 397 U.S. at p. 364; see *People v. Hill* (1998) 17 Cal.4th 800, 831 ["...to the extent [the prosecution] was claiming there must be some affirmative evidence demonstrating a reasonable doubt, she was mistaken as to the law, for the jury may simply not be persuaded by the prosecution's evidence..."]; see also *State v. Miller* (W. Va. 1996) 476 S.E.2d 535, 557 [if requested court must instruct that defendant has no obligation to offer evidence]; *United States v. Maccini* (lst Cir. 1983) 721 F.2d 840, 843; Federal Judicial Center, Pattern Criminal Jury Instructions, 22 (1988) ["[A] defendant has an absolute right not to ... offer evidence."].)

As the judge told the jury in the Maccini decision:

> I take this occasion to state to the jury one of the fundamental principles of American jurisprudence, which is that the burden is upon the [prosecution] in a criminal case to prove every essential element of every alleged offense beyond a reasonable doubt. That is, the burden is upon the [prosecution] to prove guilt beyond a reasonable doubt. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or to produce any evidence. There's no

> burden on [defendant] to produce any evidence. In every case, and I have no doubt in this case as well, the defendant will be presenting evidence by way of cross-examination of [prosecution] witnesses. The defendant relies upon evidence elicited by cross-examination. So that the opportunity that [defendant] will have, as the defendant in every case has, to bring out certain facts by way of cross-examination and by way of argument and analysis to the jury, does not in any way imply a necessity on the part of the defendant to produce any evidence. That's fundamental. There is no need of the defendant to produce any evidence. There is no need in law for him to take advantage of the opportunity. He doesn't have to put a single question on cross-examination if counsel decides not to do so. The bottom line is that the burden is on the [prosecution] to prove guilt beyond a reasonable doubt. There is no burden on the defendant to prove his innocence, and there's no burden on the defendant to come forward with a single item of evidence or testimony.

(*United States v. Maccina*, *supra*, 721 F.2d at p. 843.)

An instruction explaining that the defendant has no obligation to produce evidence is especially important in cases where the defense does present affirmative evidence – in this case, a mental state defense – because the jurors will be naturally inclined to view their duty as deciding whether the defense evidence has proven or disproven the facts in issue.

D. The Instruction Was Constitutionally Deficient Because it Failed to Explain That Appellant's Attempt to Refute Prosecution Evidence Did Not Shift the Burden of Proof

Not only did the jury instructions fail to explain that appellant had no obligation to present affirmative evidence, they erroneously failed to explain that appellant's presentation of evidence did not alter the burden. The prosecution's burden of proof is not satisfied merely by the rejection or disbelief of the defense evidence. "[D]isbelief of a witness does not establish

that the contrary is true, only that the witness is not credible. [Citations]." (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 704.) In other words, "rejection of testimony 'does not create affirmative evidence to the contrary of that which is discarded.' [Citation]." (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343; see also *Nishikawa v. Dulles* (1958) 356 U.S. 129, 137 ["disbelief of petitioner's story... [cannot] fill the evidentiary gap in the Government's case"]; *Moore v. Chesapeake & O.R. Co.* (1951) 340 U.S. 573, 576 [disbelief of a witness will "not supply a want of proof"]; *Mandelbaum v. United States* (2d Cir. 1958) 251 F.2d 748,752 ["the disbelief of a witness does not necessarily establish an affirmative case"]; *People v. Goodchild* (Mich. 1976) 242 N.W.2d 465, 469-70 ["mere disbelief in a witness's testimony does not justify a conclusion that the opposite is true without other sufficient evidence supporting that conclusion"].)

Accordingly, when the prosecution has failed to present sufficient credible evidence to meet its burden of proof, the jury should not be permitted to use its disbelief of the defendant's testimony or other defense evidence to conclude that the prosecution's burden has been met. The failure to adequately inform the jury concerning this principle violated appellant's federal constitutional rights to trial by jury and due process by allowing the jury to convict appellant even though the prosecution did not meet its burden of proving him guilty beyond a reasonable doubt. (U.S. Const., amends. VI & XIV.)

E. The Jurors Should Have Been Told That A Conflict In The Evidence And / Or A Lack Of Evidence Could Leave Them With A Reasonable Doubt As To Guilt

CALJIC No. 2.90 was incomplete and misleading because it failed to

expressly inform the jury that reasonable doubt could be based on a conflict in the evidence and/or a lack of evidence. (See Georgia Suggested Pattern Jury Instructions-Criminal Cases (Carl Vinson Institute of Government, University of Georgia, 2d ed. 2000) part 2 (D) p. 7 [Instruction D].) This is so because two equally probable conflicting inferences do not overcome a burden of proof. When conflicting inferences are equally probable or, in other words, when the evidence is in equipoise, "the party with the burden of proof loses." (*Simmons v. Blodgett* (9th Cir. 1997) 110 F.3d 39, 41-42; see also *Rexall v. Nihill* (9th Cir. 1960) 276 F.2d 637, 644; *Reliance Ins. v. McGrath* (N.D. Cal. 1987) 671 F.Supp. 669, 675; *Estate of Obernolte* (1979) 91 Cal.App.3d 124, 129 ["Equal probability does not satisfy a burden of proof..."].)

F. CALJIC No. 2.90 Failed To Inform The Jury That The Presumption of Innocence Continues Throughout The Entire Trial, Including Deliberations

It is well established that the presumption of innocence continues throughout the entire trial and applies to every stage, including deliberations. (See *Clarke v. Commonwealth* (Va. 1932) 166 S.E. 541, 545-46; see also *State v. Goff* (W. Va. 1980) 272 S.E.2d 457, 463 [the burden never shifts to the defendant].) It is improper, therefore, to give the jury the impression that the presumption of innocence continues until the jury, in its discretion, decides that it should end. (See *United States v. Payne* (9th Cir. 1990) 944 F.2d 1458, 1462-63; see also *People v. Johnson* (Ill. App. Ct. 1972) 281 N.E.2d 451, 453; *People v. Attard* (N.Y. App. Div. 1973) 346 N.Y.S.2d 851; *State v. Tharp* (Wash. App. 1980) 616 P.2d 693, 700; Washington Pattern Jury Instructions-Criminal (West, 2d ed. 1994) WPIC 1.01 [Advance Oral Instruction-Introductory)] [the words "during your deliberations" were inserted into this instruction "to avoid any suggestion that the presumption

could be overcome before all the evidence is in].") CALJIC No. 2.90, as given in the present case, was deficient because it did not assure that the jury would not shift the burden to the defense at some point prior to completing its deliberations.

G. CALJIC No. 2.90 Improperly Described the Prosecution's Burden as Continuing "Until" the Contrary Is Proved

The judge used CALJIC No. 2.90 to instruct the jury, in pertinent part, as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved..." (5 CT 971; 29 RT 2933-2934.) Use of the term "until" in this instruction lessened the prosecution's burden of proof. Use of the word "until" is less clear and definitive than "unless." That is, "until" implies that the proof will be forthcoming, while "unless" implies that sufficient proof might not ever be presented. In apparent recognition of how use of the term "until" fails to comport with In re Winship and thus risks misleading the jurors, other standard pattern instructions throughout the nation use "unless" or "unless and until." (See, e.g., Idaho Criminal Jury Instructions ICJI No. 1501 ["unless"]; Oklahoma Uniform Jury Instruction, Crim. (2d ed.) No. 1 [same]; *State v. Hutchinson* (Tenn. 1994) 898 S.W.2d 161, 172 [same]; Criminal Jury Instructions--New York CJI (New York) (lst Ed. 1983) No. 3.05 ["unless and until"]; Ky. Rev. Stat. § 532.025 [same]; Criminal Jury Instructions For The District of Columbia (Bar Association of the District of Columbia, 4th ed. 1993) Instr. 1.03 [same]; Uniform Criminal Jury Instructions (Oregon) No. 1006 [same]; 1st Circuit Model Instructions, Criminal No. 1.01 [same]; 8th Circuit Model

Instructions, Criminal No. 1.01 [same].)[85]

Therefore, the instruction in the present case was deficient because it implied that the prosecution would meet its burden. Moreover, the instruction also failed to assure that the presumption of innocence would remain in place throughout the trial and during deliberations.

H. The Errors Violated The Federal and State Constitutions

For all of the foregoing reasons CALJIC No. 2.90 failed to properly instruct the jury on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt, and this failure violated appellant's state and federal constitutional rights to due process and to a fair trial by jury. (U.S. Const. Amends. VI & XIV; Cal. Const., art. I, §§ 1, 7, 15, 16 & 17; *In re Winship*, *supra*, 397 U.S. 358, 364; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-282; *Neder v. United States* (1999) 527 U.S. 1, 15; *Cage v. Louisiana*, *supra*, 498 U.S. 39, 40; and *Jackson v. Virginia* (1979) 443 U.S. 307, 318.)

Moreover, the error also violated the Due Process and Cruel and

---

[85] Alternatively, one commentator has recommended that the jury be more directly instructed on this point as follows: "The law presumes the defendant to be innocent of all the charges against him. I therefore instruct you that the defendant is to be presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt." (Leonard B. Sand, et al., 1 Modern Federal Jury Instructions (1994), Form 4-1.) Another alternative is the following instruction from *United States v. Walker* (7th Cir. 1993) 9 F.3d 1245: "The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty."(*Id.* at p. 1250)

Unusual Punishment clauses of the Fourteenth and Eighth Amendments of the United States Constitution which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (*Beck v. Alabama* (1980) 447 U.S. 625, 627-646); see also *Kyles v. Whitley*, (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785.) Further, this error denied appellant his state-created right to proper instruction on the burden of proof under the Evidence Code in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (Cal. Evid. Code §§ 500-02; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804.)

I. The Judgment Should Be Reversed

The giving of an instruction which dilutes the standard of proof for conviction is reversible error per se. Any error in defining reasonable doubt for a jury cannot be deemed harmless because the error goes to the very heart of the system of criminal trials and deprives the criminal defendant of the right to be convicted only upon a finding by the jury of guilt beyond a reasonable doubt as correctly defined. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) This Court has reached a similar conclusion. (*People v. Vann* (1974) 12 Cal.3d 220, 225-26.) Moreover, because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution can demonstrate beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

Given the fact that the defense put on a strong case showing that appellant did not have the necessary mental state to be guilty of the crimes alleged as well as the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under *Chapman*.

*****

XIII.

OTHER INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

As previously discussed, 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 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood [them] to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

In this case, not only was the reasonable doubt instruction itself defective, but the trial court here gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant based on a lesser standard than is constitutionally required.

A. The Instruction on Circumstantial Evidence Undermined the Requirement of Proof Beyond a Reasonable Doubt.

The jury was instructed with CALJIC No. 2.02 that if one interpretation of the evidence regarding mental state "appears to be reasonable, you must accept [it] and reject the unreasonable" interpretation. (5 CT 955; 9 RT 2927-2928.) Thus, that instruction informed the jurors, in effect, that if appellant reasonably appeared to be guilty, they were to find him guilty as charged of first degree murder even if they entertained some doubt as to whether he had the required mens rea. The instruction

undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., Amend 14; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., Amends. 6 & 14; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

First, the instruction not only allowed but compelled the jury to find appellant guilty of first degree murder and to find the three special circumstances to be true based on a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra,* 397 U.S. at p. 364.) The instruction directed the jury to find appellant guilty and the special circumstances true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (5 CT 955.) However, an interpretation that appears reasonable is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" necessary for proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278, emphasis added ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instruction improperly required conviction and findings of fact necessary to a conviction on a degree of proof less than the constitutionally required one.

Second, the circumstantial evidence instruction was constitutionally infirm because it required the jury to draw an incriminatory inference when such an inference appeared "reasonable." In this way, the instruction created

an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted it by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314, fn. omitted.) Mandatory presumptions, even ones that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, the instruction plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you must accept the reasonable interpretation and reject the unreasonable." (5 CT 955.) In *People v. Roder*, *supra*, 33 Cal.3d 491, this Court invalidated an instruction which required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. (*Id.* at p. 504.) Accordingly, this Court should invalidate the instructions given in this case, which required the jury to presume all elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The instruction had the effect of reversing the burden of proof, since it required the jury to find appellant guilty of first degree murder as charged unless he came forward with evidence explaining the incriminatory evidence regarding appellant's mental state put forward by the prosecution. The erroneous instruction was prejudicial with regard to guilt in that it required the jury to convict appellant if he "reasonably appeared" guilty of first degree murder, even if the jurors still entertained a reasonable doubt of his

guilt. This is the equivalent of allowing the jury to convict appellant because he likely was guilty, rather than because they believed him guilty of first degree murder beyond a reasonable doubt.

The focus of the circumstantial evidence instruction on the reasonableness of evidentiary inferences also prejudiced appellant in another way – by suggesting that appellant was required to present, at the very least, a "reasonable" defense to the prosecution case. Of course, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.)

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find appellant guilty of first degree murder on a standard which was less than the Constitution requires.

B. The Provision of CALJIC Nos. 2.22, 2.27 and 2.51 Also Vitiated the Reasonable Doubt Standard

The trial court gave four other standard instructions which magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diluted the constitutionally mandated reasonable doubt standard–CALJIC Nos. 2.22 (weighing conflicting testimony), 2.27 (sufficiency of testimony of one witness), 2.51 (motive), and 2.52 (flight after crime). (14 CT 3828-3831, 3849-3850; 9 RT 1237-1238, 1244.) Each of those instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, and vitiated the constitutional prohibition against the conviction of a capital

defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Cage v. Louisiana*, *supra*, 498 U.S. at pp. 39-40; *In re Winship*, *supra*, 397 U.S. at p. 364.) [86]

The jury was instructed with former CALJIC No. 2.51 (5th ed.) as follows:

> Motive is not an element of the crimes 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.

(5 CT 963; 28 RT 2930.) This instruction allowed the jury to determine guilt based on the presence of alleged motive alone and shifted the burden of proof to appellant to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 , 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

The motive instruction stood out from another standard evidentiary instruction, CALJIC No. 2.03, which expressly admonished the jury that a wilfully false or deliberately misleading statement was "not sufficient by

---

[86] Although defense counsel failed to object to these instructions, appellant's claims are still reviewable on appeal. (See fn. 1, *supra*, which is incorporated by reference here.)

itself to prove guilt." The motive instruction thus appeared to include an intentional omission allowing the jury to determine guilt based on motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase inclusio unius est exclusio alterius could mislead a reasonable juror as to the scope of an instruction].)

This Court has recognized that differing standards in instructions create erroneous implications:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

(*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error]. Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt. This instruction conflicted with other instructions regarding criminal intent for finding premeditated murder by suggesting to the jurors that they need not find that premeditation in order to convict appellant of first degree murder or, in turn, to find true a multiple murder special circumstance. Even though a reasonable juror could have understood the contradictory instructions to

require such specific intent, there is simply no way of knowing whether any, much less all 12, of the jurors so concluded. (See, e.g., *Francis v. Franklin*, *supra*, 471 U.S. at p. 322.)

CALJIC No. 2.22 provided as follows:

> You are not bound to decide an 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 appeals to your mind with more convincing force. 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.

(5 CT 959; 28 RT 2928.)

That instruction specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing. Thus, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence standard." The Winship requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (5 CT 962; 28 RT 2930), was similarly flawed. That instruction erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required

to raise a reasonable doubt about the prosecution's case and cannot be required to establish or prove any "fact."

Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally mandated standard under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." In the face of so many instructions permitting conviction upon a lesser showing, no reasonable juror could have been expected to understand that he or she could not find appellant guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in Section A of this argument.

C. The Court Should Reconsider its Prior Rulings Upholding the Defective Instructions

Although each of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.01, 2.02, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [circumstantial evidence instructions].) While recognizing the shortcomings of some of those instructions, this Court has consistently concluded that the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt, and

that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings, supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale–that the flawed instructions are "saved" by the language of CALJIC No. 2.90–requires reconsideration. (See *People v. Crittenden, supra*, 9 Cal.4th at p. 144.) An instruction which dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction defining proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin, supra*, 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as they were given in this case, explicitly told the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

D. Reversal is Required

Because the erroneous circumstantial evidence instruction required conviction on a standard of proof less than proof beyond a reasonable doubt, its delivery was a structural error which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) At the very least, because all of the instructions violated appellant's federal constitutional rights, reversal is required unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

Because there was substantial question about the intent of appellant when he entered the Dixon house on January 23, 1995, the jury instruction on circumstantial evidence and how it was to be considered were crucial to the jury's determination of guilt. Similarly, the need for strict adherence by the jury to the reasonable doubt burden of proof was crucial. These instructions distorted the jury's consideration and use of circumstantial evidence and diluted the reasonable doubt requirement, thus casting doubt on the reliability of the jury's findings.

Further, CALJIC No. 2.51 permitted the prosecution to establish only motive for the jury to conclude that appellant was guilty. The instruction allowed the jury to convict appellant on the motive evidence alone and this error, alone or considered in conjunction with all the other instructional errors set forth in this brief, requires reversal of appellant's conviction.

The dilution of the reasonable-doubt requirement by the guilt - phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) The instructions also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].) Accordingly, appellant's conviction and death sentence must be reversed.

*****

XIV.

THE PROSECUTOR IMPERMISSIBLY BURDENED APPELLANT'S RIGHT TO REMAIN SILENT BY COMMENTING ON APPELLANT'S DECISION NOT TO TESTIFY

In this case, the prosecutor committed serious misconduct in her closing argument at the guilt phase by improperly commenting upon appellant's decision not to testify at trial. The Fifth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, forbids comment by the prosecution on the defendant's silence at any phase of the trial. (*Griffin v. California* (1965) 380 U.S. 609, 615.) Such impermissible comment is also a violation of the defendant's right to the presumption of innocence and fair trial secured by due process of law (U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 and 15) and, in a capital case, a violation of his right to fair and reliable guilt and penalty determinations. (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, § 17.)

Although Griffin involved explicit references to the failure of the defendant to take the stand (*Griffin v. California*, *supra*, 380 U.S. at p. 615), this Court has recognized that "[t]he rulings of the courts should not be so esoteric that a judgment must turn on the superficial difference between this prosecutor's phraseology and that found improper in Griffin." (*People v. Modesto* (1967) 66 Cal.2d 695, 711, overruled on other grounds in *Maine v. Superior Court* (1968) 68 Cal.2d 375, 383, fn. 8.). The *Modesto* court noted that the impermissible comment in *Griffin* was not "'a magical incantation, the slightest deviation from which will break the spell.'" (*Ibid.*) Instead, the comments must be evaluated in terms of their net effect upon the jury. (*Ibid.*)

"'Griffin forbids either direct or indirect comment upon the failure of the defendant to take the witness stand.' [Citation.]" (*People v. Miranda* (1987) 44 Cal.3d 57, 112.) Thus, although the prosecutor can comment on the state of the evidence and the failure of the defense to call logical witnesses (ibid.), it is Griffin error for the prosecutor to make remarks that are "manifestly intended to call attention to the defendant's failure to testify" or are "of such a character that the jury would naturally and necessarily take [them] to be a comment on the failure to testify." (*Lincoln v. Sun* (9th Cir. 1987) 807 F.2d 805, 809; *United States v. Cotnam* (7th Cir. 1996) 88 F.3d 487, 497.)

Improper comments can take many forms. For example, it is Griffin error for a prosecutor to state that certain evidence is uncontradicted when that evidence could not be contradicted by anyone other than the defendant testifying on his own behalf (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339; *United States v. Cotnam*, *supra*, 88 F.3d at p. 497) or to refer to the absence of evidence that only the defendant's testimony could provide (*People v. Murtishaw* (1981) 29 Cal.3d 733, 757 and fn. 19; *Williams v. Lane* (7th Cir. 1987) 826 F.2d 654, 665). Similarly, it is Griffin error to argue that the defendant did not tell his side of the story (*Griffin v. California*, *supra*, 380 U.S. at p. 615) or to refer to the defendant "sitting--just sitting" in the courtroom (*People v. Modesto*, *supra*, 66 Cal.2d at p. 711).

In *People v. Medina* (1974) 41 Cal.App.3d 438, the prosecutor referred to the fact that there were five percipient witnesses to what happened and noted that three of them testified and "'were subjected to cross-examination which is a pretty sharp test of truth, and they subjected themselves to cross-examination.'" (41 Cal.App.3d at p. 457.) The Court of

Appeal observed that "[t]he other two possible witnesses left unaccounted for could not have been anyone other than defendants." (*Ibid.*) The prosecutor then argued that testimony of the three who actually testified was unrefuted, "'And they were up there on that stand. They were put under oath. They were subject to perjury. . . .'" (*Ibid.*) The appellate court found that this argument, which effectively urged the jury to believe the three accomplice witnesses because the defendants did not take the stand and subject themselves to cross-examination and to prosecution for perjury, was Griffin error. (*Ibid.*)

A. The *Griffin* Error in this Case

In this case, the defense did not dispute that appellant was the perpetrator. Rather, it disputed whether appellant had the mental state necessary to be found guilty of the charges and what constituted the precipitating event which ultimately resulted in the cardiac arrest which caused Mrs. Dixon's death. During his closing argument at the guilt phase, appellant's counsel argued that the evidence did not support a finding that at the time appellant entered the house that he had a specific intent to commit robbery, rape or oral copulation. (30 RT 2996.) Defense counsel also argued that it was appellant's sudden and surprising appearance in her house, which set into motion the fright and stress which ultimately caused Mrs. Dixon to go into cardiac arrest. (30 RT 2997.)

In her second closing argument in rebuttal at the guilt phase, the prosecutor argued that the defense theory of the case was ridiculous. Focusing on defense counsel's statement during closing argument that at the time appellant entered the house, "he may have been up to no good," the prosecutor argued:

> . . . so when counsel admits that when he entered he was up to no good, what are those reasonable choices of up to no good? What is it

> that you can do at someone else's house at night that is up to no good that would not constitute theft or a felony?

(30 RT 3001.)

After ridiculing the defense argument about the inadequacy of the evidence establishing the mental state necessary for a burglary, the prosecutor stated:

> Who took this stand and gave a reasonable explanation as to another reason that the defendant may have there?

(30 RT 3001.) Defense counsel objected to this comment, but the trial judge overruled the objection. (30 RT 3001.)

While the above-quoted remark was not a direct statement about the appellant's failure to testify, certainly the reference clearly pointed to the defendant as the person who had not taken the stand to provide an explanation for why he entered Mrs. Dixon's house. As discussed previously, this Court has thoroughly condemned both "direct [and] indirect comment[s] upon the failure to take the witness stand." (*People v. Medina*, *supra*, 44 Cal.2d at p. 112.) The prosecutor's rhetorical question to the jury about "who took the stand" constituted clear *Griffin* error, which was objected to by the defense and allowed to go unchallenged in the jurors' eyes by the trial judge's overruling of the objection.

B. The Prejudice Caused by this Error Requires Reversal

For all of the foregoing reasons, the prosecutor's argument included *Griffin* error by focusing the jury's attention upon appellant's exercise of his Fifth Amendment right to remain silent. The prosecutor's conduct thus denied appellant his rights to a fair trial, due process of law and reliable determination of his guilt on all counts of which he was convicted and on the special circumstances. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const.,

art. I, §§ 15, 16, 17; see *Estelle v. McGuire*, *supra*, 502 U.S. 62, 67-68 [recognizing "fundamental fairness" standard but finding no due process violation].)

Moreover, the prosecutor's argument also violated the Eighth Amendment. The qualitatively different character of the death penalty from all other punishments necessitates a corresponding increase in the need for reliability at both the guilt and penalty phases of a capital trial. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 637 [guilt phase]; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 357-358 [penalty phase].) Since appellant's death sentence relies on an unreliable guilt verdict, and the death verdict was not surely unattributable to the prosecutor's misconduct in argument to the jury in the guilt phase (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279), the death sentence was obtained in violation of appellant's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi* (1980) 486 U.S. 578, 590; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Caldwell v. Mississippi* (1985) 473 U.S.320, 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.) Because the prosecutor's statement during closing argument to the jury at the guilt phase denied appellant's federal constitutional rights, reversal is mandated unless respondent can establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

The nature and extent of prejudice caused by the prosecutor's improper comment about appellant's failure to testify is highlighted by the role of the prosecutor herself, a figure jurors are likely to regard "as unprejudiced, impartial and nonpartisan, and [whose] statements are apt to have great influence." (*People v. Perez* (1962) 58 Cal.2d 229, 247, disapproved on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 34.). That it came in the prosecutor's second closing argument, with no opportunity for the defense to respond, enhanced its likely prejudicial impact.

That the prosecutor thought it important enough to her case to make such an improper argument suggests that she was concerned that the defense theory could succeed and that making this improper argument could advance her case in the jurors' eyes. In any case, because the prosecutor committed such misconduct in argument for the purpose of influencing the jury's verdict, respondent should not now try to claim that this error had no effect. The improper argument influenced the jury's determination of a critical issue in the case–appellant's intent.

The trial judge denied the objection and thus failed to give any admonition or curative instruction addressing the prosecutor's commission of *Griffin* error. While the trial court did eventually instruct the jury in terms of CALJIC No. 1.02 that "statements made by the attorneys during the trial are not evidence" (5 CT 950; 28 RT 2925), such an instruction, delivered with the other routine instructions for evaluating the evidence presented at trial, with nothing directly linking it to the misleading and improper argument made by the prosecutor, could not cure the error. (See *United States v. Carter* (6th Cir. 2001) 236 F.3d 777, 787-788 [prosecutor's misconduct in argument to jury not cured by instruction akin to CALJIC No.

1.02 where it is not given at the time of the improper comments, but with other routine instructions prior to deliberations].) It is extremely unlikely that generalized instructions could counteract the unconstitutional and prejudicial nature of the argument made by the prosecutor. (See also *United States v. Kerr* (9th Cir.1992) 981 F.2d 1050, 1053-1054 [prosecutor's improper vouching for government witness not cured by general instructions which neither mentioned the specific misconduct nor were given immediately after harm done].)

Given all of the foregoing factors, the prosecution cannot carry its burden of establishing that the prosecutor's improper and misleading comment on appellant's failure to testify, and the absence of any action by the trial court to protect appellant from the prejudice resulting from that statement, was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

Accordingly, this Court should reverse appellant's convictions, the special circumstances, and the death judgement.

*****

XV.

DURING THE SELECTION OF THE SECOND JURY, THE TRIAL JUDGE ERRED WHEN HE INCLUDED PINPOINT QUESTIONS IN THE JUROR QUESTIONNAIRE BASED ON STATEMENTS MADE BY THE TWO JURORS WHO REFUSED TO VOTE FOR DEATH DURING THE FIRST PENALTY TRIAL

"The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice rendered." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 155.) Historically, trial by jury has always been one of the central rights of the Anglo-American system, firmly rooted in our democratic traditions. (See *Powers v. Ohio* (1991) 499 U.S. 400, 412; *Walton v. Arizona* (1990) 497 U.S. 639, 675 (dis.opn of Stevens, J.)

Jury selection procedures must therefore assure the selection of impartial jurors. (See *People v. Crowe* (1973) 8 Cal.3d 815, 828.) Abuse of the selection process can be devastating to the fairness of the trial: "The influence of the voir dire process may persist through the whole course of the trial proceedings." (*Powers, supra*, 499 U.S. at p. 414.) As the following discussion will show, questions on the juror questionnaire used to select the second jury in this case violated appellant's rights to a fair and impartial jury and to a fundamentally fair trial.

A. The Proceedings in the Trial Court

Before the selection of the second jury to hear the penalty retrial of appellant, the prosecutor filed a motion requesting that the trial judge inquire during voir dire whether prospective jurors would require intent to kill to impose the death penalty. (6 CT 1402-1408.)

At a subsequent hearing on this motion, the trial judge described his understanding of the motivation behind the prosecution's motion:

> . . . So based upon, I could only assume, the conversation with the jurors in the last case which I think we could put on the record that Mr. Owen was there and Ms. Bolden was there and Ms. Stephan was there, and I think I was also present when they were talking to the jurors, that the final count was 10 voted in favor of death, two voted life without the possibility of parole. And the two that voted life without possibility of parole stated that although they felt strongly that this-that the death penalty should be imposed, they felt that they could not impose the death penalty unless they saw something in the evidence that showed an intent to kill on behalf-on part of Mr. Taylor. And that's the basis, I assume, for people's motion to inquire as to the perspective [sic] jurors as to whether or not they would require that, even though the law says that that is not necessary.

(38 RT 3650-3651.) Therefore, according to the trial judge, the prosecutor wanted to be able to question the prospective jurors for the penalty retrial about their willingness to vote for a death sentence in a case involving the particular facts of appellant's case. Moreover, this request was based specifically on information learned during a post-trial meeting with the first jury, which was unable to agree on the appropriate punishment for appellant.

In the written motion, the prosecution argued, citing *Wainwright v. Witt* (1985) 469 U.S. 412, 424, that it was entitled to question prospective jurors about whether they could consider the death penalty even if the defendant did not intend to kill the victim because the question went to the juror's ability to follow the law. (6 CT 1403-1404.) The prosecutor further argued that since California law allows for the imposition of the death penalty in case where the actual killer is charged with a felony murder special circumstance even though there was no intent to kill, a juror who could not impose death on such a defendant should be excused for cause.

(6 CT 1404.)

Relying principally upon this Court's decision in *People v. Pinholster* (1992) 1 Cal.4th 865, the prosecutor asserted that it is proper to ask prospective jurors hypothetical questions which mirror the facts of the case. (6 CT 1407.) During the hearing on this motion, the prosecutor stated:

> . . . So that the question really is whether they would consider imposing the death penalty in a case like this. I mean, that's the point. It is not whether they can do the death penalty when 200 people are killed, but whether in a felony murder case without-arguably without an intent to kill, whether they can consider imposing the death penalty, fairly and consciously consider it and not have a block where they definitely could not do it, they could not consider it. I mean, I think it is in the framing of the question. The question is not asking them to prejudge the facts in this very case, but rather getting them into the area, understanding that felony murder does not require it and giving them hypotheticals that are not like our situation but hypotheticals. For example, guy goes into a shop, the gun accidentally goes off. You know, any kind of hypothetical that we are actually-where they actually understand what we are talking about. If we just say felony murder, felony murder special, they are not going to understand the area and they are not going to understand their own view of what we are asking them to do.

(38 RT 3653.)

Defense counsel filed two documents in opposition to this request by the prosecution. First, the defense disputed the State's interpretation of the Pinholster opinion, stating that the decision merely ". . .reaffirmed the rule that inquiry during the death-qualification process should remain focused on 'juror attitudes toward the death penalty in the abstract, and should not be used to seek a prejudgment of the facts to be presented at trial.'" (6 CT 1439-1440.)

Second, appellant argued that both the United States Supreme Court and this Court have held that, according to the dictates of the Fifth, Sixth, Eighth and Fourteenth Amendments, voir dire concerning the death penalty

must be limited to determining whether a prospective juror harbors such conscientious or religious scruples about capital punishment in the abstract that his/her views would prevent or substantially impair the performance of his/her duties as a juror in accordance with the court's instructions and his/her oath. (6 CT 1440.)

Third, appellant challenged the prosecution's assertion in its motion that the trial judge should question the prospective jurors regarding their ability to consider the death penalty in a case where there was no intent to kill because

> [a]t a minimum, such information, relevant as a challenge for cause, is relevant to exercise of an educated preemptory [sic] challenge."

(People's motion, 6 CT 1406.) As the defense pointed out, this position by the prosecution contradicts the express dictates of Proposition 115 and Code of Civil Procedure section 223 that "[e]xamination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause."

During the hearing on the motion, defense counsel further argued that including the questioning proposed by the prosecutor would result in a jury selection process that produces a "super death-qualifying [sic] jury." (38 RT 3660.) Counsel also urged that if the trial judge decided to mention the issue of intent to kill during voir dire it should be done in the form of an instruction rather than a question. (38 RT 3661-3662.)

While the trial judge did not announce a ruling on the prosecution's motion during that hearing, he ultimately included a series of questions on the issue in the juror questionnaire. The questions were as follows:

> 85. The law in California says that when a person is engaged in the commission of certain felony crimes such as burglary, rape, and oral copulation, and a death results, then he can be convicted of first degree murder. This is called a felony murder case. Also in such a felony murder case if the person

is the actual killer, he may be subject to the death penalty even though he did not have the intent to kill a person. That is, the death can be unintentional or accidental.

A. Do you have any views, attitudes, principles or religious reasons about capital punishment that would prevent or substantially impair your ability to follow the law in regards to capital punishment as far as the felony murder rule is concerned
Yes____ No____
If yes, please explain:

B. Would you be able to consider imposing the death penalty in a felony murder case in which a defendant did not intend to kill the victim?
Yes____ No____
Please explain:

C. Would you automatically vote for the sentence of life without the possibility of parole in a felony murder case in which the defendant did not intend to kill the victim?
Yes____ No____
If yes, please explain:

D. Would you automatically vote for the sentence of death in a felony murder case in which a defendant did not intend to kill the victim?
Yes____ No____
If yes, please explain:

(17 CT 3555-3556.)

B. These Questions Violated Appellant's Sixth Amendment Right to a Fair and Impartial Jury

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, the United States Supreme Court found that the Sixth Amendment right to a fair and impartial jury in a capital case is violated when a juror is excused for cause unless the juror made it "unmistakenly clear" that he or she would "automatically vote

against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case," or that "his attitude toward the death penalty would prevent [him] from making an impartial decision as to the defendant's guilt." (*Id.* at p. 522, fn. 21, emphasis in the original.)

In a later decision, the Court explained that Witherspoon and its progeny, "establish the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Adams v. Texas* (1980) 448 U.S. 38, 45.)

The decision in *Wainwright v. Witt* (1985) 469 U.S. 412, 423, reaffirmed the principles set forth in both the *Witherspoon* and *Adams* cases; that is, jurors may be dismissed for cause only if their views prevent or substantially impair the performance of their duties.[87] The only substantive change made by *Witt* was that a juror no longer has to maintain an "automatic" position against or in favor of the death penalty to warrant dismissal. Instead, it is enough if his or her pre-existing views would prevent or substantially impair the "performance of [his or her] duties." (*Witt, supra*, 469 U.S. at p. 424.) The Supreme Court has continued to insist that "the State's power to exclude for cause jurors from capital juries does

---

[87] These decisions were concerned with limiting the circumstances under which an individual who opposed the death penalty could properly be excluded from sitting on a capital jury. (See, e.g., *Adams v. Texas, supra*, 448 U.S. at pp. 47-48 [*"Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude..."].) The Supreme Court has held that the State bears the burden to prove that a prospective juror meets the criteria for dismissal. (*Wainright v. Witt, supra,* 469 U.S. at p. 423.)

not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital schemes by not following their oaths.'" (*Gray v. Mississippi* (1987) 481 U.S. 648, 658, quoting *Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.)

What is clear is that the Supreme Court has never condoned the kind of inquiry, as was used in this case, into how a juror might vote on particular facts of a specific case during death qualification. Indeed, this Court has observed

> The Witherspoon-Witt [citations omitted] voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract, to determine if any, because of opposition to the death penalty, would "vote against the death penalty without regard to the evidence produced at trial."

(*People v. Clark* (1990) 50 Cal.3d 583, 597;emphasis added.)

People v. Pinholster, supra, the case upon which the prosecutor in the trial court primarily relied, does not support the State's request to pose the case-specific questions. Pinholster merely held that the trial court did not commit reversible error in allowing the prosecutor to ask some fact specific hypothetical questions of individuals during sequestered voir dire under the principles of *Hovey v. Superior Court*:

> . . . because these questions occurred during the sequestered portion of voir dire, the jurors only heard the questions once, and were not 'bombarded with the questions and instructions directed at all the other panel members.

(*People v. Pinholster*, *supra*, 1 Cal.4th at pp. 915-916.) Moreover, it has long been the rule that "counsel may not use voir dire for the purpose of instructing, educating, cajoling or prejudicing the jury." (*People v. Balderas* (1985) 41 Cal.3d 144, 182.)

The questions in the juror questionnaire, quoted supra, violated the *Witherspoon/*Witt rule, which restricts the death qualification of prospective jurors to questions about their abstract views about capital punishment, because the questions also sought to have these jurors prejudge the case before them.

These questions about felony murder and the intent to kill improperly skewed the selection of the second jury in this case. As defense counsel argued in the trial court, these questions were designed to seat "super-death-qualified" jurors who could not only impose the death penalty in the abstract, but who would be inclined to do so under the specific facts and legal issues presented by the case they were being asked to decide.

The selection process used in this case corrupted the jury, making it "uncommonly willing to condemn a man to death." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 521.) The questions requested by the prosecutor and ultimately submitted by the trial court to the prospective jurors in the juror questionnaire amounted to improper indoctrination of the jury. Before any evidence was heard and before the jury was even sworn in, the prosecutor was able to select a jury ready to sentence appellant to death. "The duty to examine prospective jurors and to select a fair and impartial jury is a duty imposed on the court." (*People v. Mattson* (1990) 50 Cal.3d 826, 845.) The trial court breeched this duty by allowing and contributing to a jury selection process that predisposed jurors to a death verdict in the very case before them. The improper method corrupted the entire venire, resulting in a situation where: "[t]he composition of the trier of fact itself is called in question, and the irregularity ... pervade[d] all the proceedings that follow[ed]." (*Powers v. Ohio*, *supra*, 499 U.S. at p. 427.)

C. The Error of Including These Improper Questions Defies Harmless Error Analysis

In this case, the improper questions in the juror questionnaire which, in effect, skewed the selection process in favor of jurors who would vote for death under the particulars facts of this case, inevitably corrupted the integrity of the entire voir dire process. This error constituted a "defect affecting the framework within which the trial proceeds" that is not subject to harmless error analysis. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *People v. Flood* (1998) 18 Cal.4th 470, 500; *People v. Sarazzawski* (1945) 27 Cal.2d 7, 18- 19.) Appellant, therefore, is entitled to an automatic reversal of his death sentence because he was not "sentenced to death by a jury impaneled in compliance with the Fourteenth Amendment." (*Morgan v. Illinois* (1992) 504 U.S.719, 739)

D. The Record Discloses That the Inclusion of This Question Allowed the Prosecutor to Eliminate all Prospective Jurors Who Might Have an Open Mind to the Question of Whether it is Appropriate to Execute a Person who did not Intend to Kill

The record in this case shows that the prosecutor peremptorily challenged all prospective jurors who had given ambiguous answers to the question of whether they would be able to consider imposing the death penalty in a felony murder case in which a defendant did not intend to kill the victim.[88] For example, James Hastings, a 61-year-old retired probation officer, checked "yes" to the question, but added the comment: "My

---

[88] There were some prospective jurors who answered "no" to this question who were eliminated from the jury either by stipulation of the parties or because the defense peremptorily struck them. However, none of the jurors actually selected to sit on the second penalty phase jury had expressed any hesitation about executing a defendant who lacked an intent to kill.

decision would depend on all of the circumstances involved. Voting for the death penalty would be more difficult in such a case." (21 CT 4564.) The prosecution struck Mr. Hastings. (40 RT 3861.) Jeanette Noakes, a 70-year-old retired secretary, checked "no" to the question and noted: "Need to know all the facts." (20 CT 4368.) The prosecution struck Ms. Noakes. (40 RT 3913.) Roland Lindeman, a 44-year-old Lutheran pastor, also checked "no" to the question and commented: "I believe there may be some extreme cases in which the intent to kill is not the issue as much as the disrespect for life is." (22 CT 4984.) The prosecution struck Mr. Lindeman from the jury. (40 RT 3864.)

Under California law, there is never a situation where a juror must impose the death penalty, it is only an option which may be exercised when the juror determines that the aggravating circumstances substantially outweigh mitigating circumstances. (CALJIC No. 8.88.) Moreover, each juror is free to assign whatever weight he or she deems appropriate to the various factors being considered. (*Ibid.*) While none of the prospective jurors described above were willing to commit ahead of time to imposing a death sentence in this particular case, they all continuously maintained that they agreed with having a death penalty and would be willing to impose it if they concluded that the circumstances warranted it. That is precisely what is required of a juror in a capital case.

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

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 446, quoting *Lockhart v. McCree* (1986) 476 U.S. 162, 176.) In appellant's case, none of the three prospective

jurors described above, Mr. Hastings, Ms. Noakes or Mr. Lindeman, who were peremptorily struck by the prosecution, were philosophically opposed to the death penalty, or even against applying it under the right circumstances. In their questionnaires, each showed a willingness to consider the circumstances of the case in making a determination whether to vote for death or for life without the possibility of parole.

The erroneous excusal of even one juror is grounds for automatic reversal of the death penalty; here there were ten. (*Gray v. Mississippi* (1987) 481 U.S. 648, 666-668; *People v. Ashmus* (1991) 54 Cal.3d 932, 962.) Reversal of the death penalty is required.

*****

XVI.

THE TRIAL JUDGE'S FAILURE TO LIMIT VICTIM IMPACT EVIDENCE VIOLATED APPELLANT'S RIGHTS TO A FAIR AND RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS

The trial judge admitted improper and unduly prejudicial victim impact evidence which exceeded the limitations on such evidence as set forth in *Payne v. Tennessee* (1991) 501 U.S. 808, 830. This error requires the reversal of appellant's death sentence because it violated appellant's rights to a fair penalty trial and to a reliable penalty verdict in violation of the Eighth and Fourteenth Amendments of the United States Constitution, and article I, sections 15 and 17 of the California Constitution.

A. Factual Background

As noted previously, there were two penalty trials in this case because the first jury could not reach a verdict as to penalty. Defense counsel filed "A Motion to Exclude or Limit Victim Impact Evidence" on September 25, 1996. (4 CT 863-876.) In that motion, appellant argued, inter alia, that the Supreme Court's decision in *Payne*, *supra*, as well as this Court's decision in *People v. Edwards* (1991) 54 Cal.3d 787, 835-836, limited the scope and type of victim impact evidence that would be admissible. (4 CT 867-869.) Further, the motion asserted that the victim impact evidence proposed by the prosecution in this case was not limited to the specific harm caused by the crime and focused too much attention on the victim's background and life history. (4 CT 872.)

The defense also argued that the *Payne* and *Edwards* decisions found that victim impact evidence should be restricted to evidence of the effects of the murder which were either known or reasonably apparent to the defendant at the time of the crime. Because the evidence showed that there was no

intent to kill in this case, the defense urged, ". . . there are no obviously foreseeable consequences that a typical murderer should realize." (4 CT 871-872.) The defense also argued that the proposed victim impact evidence was cumulative as well as highly inflammatory since the prosecution planned to call numerous members of Mrs. Dixon's family. (4 CT 874-875.)

The trial judge essentially denied the motion, finding that Mrs. Dixon's family members could testify about the effects of her death on them as individuals but not their opinions about the appropriate penalty for appellant. (31 RT 3063.) The judge also stated that these witnesses could describe how her violent death had affected society. (31 RT 3063.) Defense counsel objected that they shouldn't be allowed to "go into the past history of Mrs. Dixon." (31 RT 3063.) The trial judge disagreed. (31 RT 3063-3064.)

Before the commencement of the penalty retrial, the parties stipulated that all previous written motions as well as the responses and rulings on those motions would be incorporated into the record of the retrial. (8 CT 1714; 37 RT 3636.) The parties agreed that this meant that as far as court rulings, "everything stands as is unless you want to argue otherwise." (37 RT 3636.) No other motions regarding victim impact evidence were submitted before or during the penalty retrial. (8 CT 1717.)

B. The Legal Standards

In *Booth v. Maryland* (1987) 482 U.S. 496, the United States Supreme Court held that the Eighth Amendment prohibited a capital sentencing jury from considering victim impact evidence. At issue in that case were two types of victim impact evidence: 1) the personal characteristics of the victims and the impact of the crimes on their families; and 2) the family members' opinions and characterizations of the defendant

and his crimes, and their view of the appropriate sentence. (Id. at pp. 507-510.)

In *Payne v. Tennessee* (1991) 501 U.S. 808, the Court partially overruled the *Booth* holding. The Court held "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 827.) The Court did note that its holding encompassed only the first category of victim impact evidence addressed in *Booth*, not the second category of evidence relating to the family members' views on the appropriate punishment or characterizations of the defendant and his crimes. (*Id.* at p. 830, fn. 2.) Following *Payne*, *in People v. Edwards* (1991) 54 Cal.3d 787, this Court held that although victim impact is not expressly enumerated as a statutory aggravating factor, such evidence is generally admissible as a circumstance of the crime under section 190.3, factor (a). (*Id.* at p. 833.)

This Court later noted that "[t]his holding was not without limits, however, and 'only encompasses evidence that logically shows the harm caused by the defendant.' [Citation.]" (*People v. Brown* (2004) 33 Cal.4th 382, 396, italics added; accord *Payne v. Tennessee*, *supra*, 501 U.S. at p. 819 [victim impact limited to "harm caused by" defendant]; *People v. Harris* (2005) 37 Cal.4th 310, 352; *People v. Edwards*, *supra*, 54 Cal.3d at p. 835.) Moreover, the use of victim impact evidence is limited by the fundamental principle that penalty determinations must be based on reason rather than emotion or vengeance. (See, e.g., *Gardner v. Florida* (1977) 430 U.S. 349, 358 ["it is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"]; *People v. Haskett* (1982) 30 Cal.3d 841, 864 [in every capital

case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason"]; *Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 712-713 [punishment is "not to exact revenge on behalf of an individual victim"].) In addition, as this Court and other courts have recognized, that part of the *Booth* decision prohibiting consideration of the family members' views on the appropriate sentence survived *Payne.* (See, e.g., *People v. Pollock* (2004) 32 Cal.4th 1153, 1180; *People v. Smith* (2003) 30 Cal.4th 581, 622; *Hain v. Gibson* (10th Cir. 2002) 287 F.3d 1224, 1239, and authorities cited therein.)

This Court noted *in Edwards* that it was not finding that there are no limitations on victim impact evidence: "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne*." (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 835-836.) Since *Edwards*, this Court has said little about the boundaries of appropriate victim impact evidence.[89]

---

[89] In his dissent in *People v. Bacigalupo*, (1993) 6 Cal.4th 457, 492, fn. 2, Justice Mosk noted that this Court's expansive extension of the "circumstances of the crime" lacked specificity:

> It is manifest that this aggravating factor as construed in *Edwards* is vague under the Eighth Amendment. Could a jury-or anyone, for that matter- divine therefrom just what it was required to find in order to impose the death penalty? True, it might believe it must ascertain whether something "surrounded" the crime "materially, morally, or logically." But whether something "surrounds" a crime "materially, morally, or logically" is theoretically indeterminate and practically meaningless. Indeed, it might reach matters such as whether the capital defendant [or victim] - like defendant here - had been born in the Southern Hemisphere under the astrological sign of Libra.

"'It is the general rule that the language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts.' [Citations.]" (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 734-735.) Therefore, to determine the scope of the victim impact evidence permitted by *Payne v. Tennessee*, *supra*, 501 U.S. 808, the facts before the Court in that case are critical.

Payne involved a single victim impact witness who testified about how the murder of a mother and her two-year-old daughter had affected the woman's three -year-old son who was present at the scene of the crime, and suffered serious injuries in the attack himself. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 811-812.) The boy's grandmother testified that he cried for his mother and sister, that he worried about his sister, and that he could not seem to understand why his mother did not come home. (*Id.* at pp. 814-815.)

To be consistent with the facts and holding of Payne, the admission of victim impact evidence must be attended by appropriate safeguards to minimize its prejudicial effect, and confine its influence to the provision of information that is legitimately relevant to the capital sentencing decision. Three such safeguards apply to the nature of the evidence itself. First, victim impact evidence should be limited to testimony from a single witness, like the grandmother's testimony *in Payne*. The New Jersey Supreme Court has imposed this limitation by judicial decision. (*State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180) In *Muhammad*, the Supreme Court of New Jersey explained the reason for the limitation:

> The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the

---

(*Ibid.*)

> victim impact evidence to unduly prejudice the jury against the defendant. Thus, absent special circumstances, we expect that the victim impact testimony of one survivor will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness.

(*State v. Muhammad, supra*, 678 A.2d at p. 180.) In Illinois, this limitation on victim impact evidence is imposed by statute. (725 ILCS 120/3(a)(3); see *People v. Richardson* (Ill. 2001) 751 N.E.2d 1104, 1106-1107.)

Second, victim impact evidence should be limited to testimony describing the effect of the murder on a family member present at the scene during or immediately after the crime. Third, victim impact evidence should be restricted to testimony concerning those effects of the murder which were either known or reasonably apparent to the defendant at the time he committed the crime, or properly introduced to prove the charges at the guilt phase of the trial. These limitations are consistent with *Payne,* where the victim impact evidence described the effect of the crime on the victims' son and brother who was present at the scene of the crime. Given the boy's presence at the scene, and the fact that he was critically injured during the attack, it was reasonable to assume that the defendant must have realized that the boy would likely experience great grief and suffering.

In addition to comporting with *Payne*, these limitations are necessary to make the admission of victim impact evidence consistent with the plain language of California's death penalty statutes, and to avoid expanding the scope of the aggravating circumstances set out in those statutes to the degree that they be rendered unconstitutionally vague. In California, aggravating evidence is admissible only when relevant to one of the statutory factors. (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776.) Victim impact evidence is

admitted on the theory that it is relevant to factor (a) of section 190.3, which permits the sentencer to consider the "circumstances of the offense." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835.)

However, to be relevant to the circumstances of the offense, the evidence must show circumstances that "materially, morally, or logically" surround the crime. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833.) The only victim impact evidence meeting that standard is evidence about (1) "the immediate injurious impact of the capital murder" (*People v. Montiel* (1993) 5 Cal.4th 877, 935); (2) the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital crimes; and (3) facts of the crime which were disclosed by the evidence properly received during the guilt phase (*People v. Fierro* (1991) 1 Cal.4th 173, 264-265 (conc. and dis. opn. of Kennard, J.)).

C. The Victim Impact Evidence Admitted in this Case Exceeded the Constitutional Bounds set Forth in the *Payne* Decision

The evidence presented here exceeded the limitations of *Payne v. Tennessee, supra*. First, as noted previously, the *Payne* decision did not disturb that portion of the holding in *Booth v. Maryland* (1987) 482 U.S. 496, that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, fn.2.) In this case, several of the family members who testified did offer their opinions about the crime and appellant. For example, one of Mrs. Dixon's great grand-daughters told the jury that her grandmother died "the most painful agonizing death anybody could die from, and there is no healing of that in me." She also described her grandmother as being "tortured [ ] to death." (43 RT 4295.) One of Mrs. Dixon's daughters

testified about her feelings about appellant: "We are so completely, utterly, bitterly angry at that idiot." She also described the crime: ". . .this dear little lady that never really hurt anybody died in pain and terror and humiliation in a puddle of blood in the safety of her own home." (43 RT 4317.) One granddaughter also testified that she believed that Mrs. Dixon had been tortured, degraded and humiliated. (44 RT 4388.) Another of Mrs. Dixon's daughters described her mother's death as a "slaughter." (43 RT 4311.) Under the principles set forth in both the Booth decision and the Payne decision, all of this testimony constituted improper victim impact evidence.

The victim impact evidence in this case exceeded the bounds set in the Payne decision in other respects. While the victim impact evidence in Payne consisted of the testimony of one witness, in this case the prosecutor called six members of Mrs. Dixon's family to testify as victim impact witnesses.[90] In addition, two other prosecution witnesses, Eric Kirkpatrick and Emmanuel Francouis, testified about how her death had affected the wider community.

Moreover, the evidence given by the victim's family members was highly emotional. Derrick Haynes, the 13-year-old great-grandson of Mrs. Dixon, testified about his relationship with her. He described her as his "best friend." (43 RT 4290.) Derrick said he saw her almost every weekend, and he could talk to her about all of his problems, including the fact that he doesn't know his father. Derrick was very upset because his grandmother

---

[90] Only one of these witnesses testimony fell within the parameters of *Payne*: Mrs. Betty Hayes, the victim's sister. She was actually present during the crime and testified about how witnessing this incident and coming to terms with her sister's death had affected her. (41 RT 3972-3973.)

"died a real painful death." (43 RT 4291.) Using a photograph, Court Exhibit 3, Derrick described the party the family had to celebrate Mrs. Dixon's 80th birthday about a month before she died. (43 RT 4292.) When pressed to describe the impact his grandmother's violent death had on him, Derrick testified that he thought about her every night, had trouble sleeping and sometimes woke up crying in the middle of the night. (43 RT 4292-4293.)

Derrick's mother, Sandra Quillin, testified about the effect of her grandmother's death on her. She also described Mrs. Dixon as her best friend. (43 RT 4294.) Ms. Quillin testified that she had been a drug addict and that her grandmother had supported her through those difficult times. (43 RT 4294.) When asked about the impact Mrs. Dixon's death had on her, Ms. Quillen said it caused her to lose her business and a long-term relationship and made it harder to raise her son. (43 RT 4295.) Ms. Quillin described Mrs. Dixon's death as the 'most painful agonizing death anybody could die from." (43 RT 4295.) Because of the awful way her grandmother died, Quillin said "there is no healing from that." (43 RT 4295.)

Doris Homik, a daughter of Mrs. Dixon, also testified. The prosecutor asked Ms. Homik to describe "the value of Mrs. Dixon's life for the community." (43 RT 4305.) According to her daughter, Mrs. Dixon worked for many years on the election board, was a room mother during her children's elementary school years and also helped with Brownies and Job's Daughters when her daughters were growing up. Later in her life, Mrs. Dixon was a "volunteer grandma" with the Jefferson Child Development Center and also volunteered with the senior adult services. (43 RT 4306.)

Ms. Homik also testified that her mother was the "hub" of all family activities. She described the effect of her mother's death on her friends and

neighbors:

> this is a dear friend of theirs who was taken from them in the most violent manner that they could imagine, and I think it is something that elderly women live in fear of. It is like that's the ultimate violation of their dignity or their independence.

(43 RT 4307.)

Finally, Ms. Homik said that her mother's violent death had "devastated four generations of a very close family." She testified that the health of all members of her family had been adversely affected. The fact that her mother was sexually assaulted in her home was unspeakable, unforgiveable, and the "absolutely worst thing possible." (43 RT 4308.) Ms. Homik, who has multiple sclerosis, said the violent death of her mother had made her even sicker. (43 RT 4308-4309.) Ms. Homik said there could be no closure for her and other people in the family because Mrs. Dixon had not died of natural causes. (43 RT 4309.)

Bonnie Dixon, another daughter of Mrs. Dixon, also testified. She said her mother had lived in her house for about 45 years and had volunteered for about 12 years at the Jefferson School, an elementary school not far from her house. (43 RT 4311-4312.) Ms. Dixon also discussed a selection of photographs, marked as Court Exhibit 100, showing Mrs. Dixon's volunteer work. One photograph showed some of the children at Jefferson School with whom she worked. (43 RT 4313.) There were also photos of Mrs. Dixon working at adult senior services. (43 RT 4313-4314.) Ms. Dixon also testified that her mother was always helping neighbors who were in need. (43 RT 4314.)

She was asked to identify the people in a family photograph, marked as Court Exhibit 98, which Ms. Dixon described as having been taken "in mom's house in better days." When asked what impact her mother's death

had had on her, Ms. Dixon stated:

> I think I probably speak for everybody in the grand circle. Family, close friends, we are so completely, utterly, bitterly angry at that idiot. We are very confused. We are dealing with a murder in the family and a dreadful murder in the family. We are dealing with social problems and ethical problems that we never dreamed of. We are still two years later dealing with legal problems involved. We are–it is the best word I can think of is heart broken. We know this dear little lady that never really hurt anybody died in pain and terror and humiliation in a puddle of blood in the safety of her own home. How do you get around that? It never ends. It never goes away. It is there.

(43 RT 4317.)

Jana Homik, Mrs. Dixon's youngest grandchild, testified that she had called her grandmother "Precious." She spent a lot of time with her when she was growing up and "absolutely adored her." (44 RT 4383.) Ms. Homik said that after her friends met her grandmother, they would also call her "grandma" because she was so easy to talk to. (44 RT 4384.) As a gift for Mrs. Dixon's 80th birthday, Ms. Homik and her mother had planned a vacation in New York City in September. (44 RT 4385.) In addition to making the reservations and buying tickets for the trip, she gave her grandmother a guidebook. After Mrs. Dixon's death, they found the guidebook; its condition showed that she had planned the whole trip. (44 RT 4386.)

Ms. Homik also testified about how her grandmother's violent death had adversely affected her. She described her clinical depression, her insomnia, her social withdrawal and her great sadness. (44 RT 4386-4387.) Ms. Homik said it was not the fact that her grandmother had died, but the manner in which she died. (44 RT 4387.) She told the jury:

> This is a woman who was tortured and degraded, in fear for her life, in fear for her sister's life. The fact that the last ten minutes of her

> life are filled with terror and humiliation, I don't see any way around that. I don't see any peace for myself or for my family. . . This is something that is going to haunt me until the day I die. . . The person I am now is hollow inside. . .

(44 RT 4388.)

In addition to this highly emotionally-charged testimony by family members, the prosecution asked Eric Kirkpatrick, Mrs. Dixon's neighbor, to tell the jury how her death had affected him. (42 RT 4119-4120.) Emmanuel Francouis testified about Mrs. Dixon's volunteer work at the Child Development Center of the San Diego Unified School District. He knew her for about a year and a half before her death, although she had been volunteering there for many years. (44 RT 4334.) She volunteered once a week at the Center; she played games with the children, watched them draw or joined in other activities with them. (44 RT 4331.) When asked about her health, Mr. Francouis opined that "she was always energetic and always on the ball with everything." (44 RT 4332.)

On Mrs. Dixon's 80th birthday, the children from the Center walked to her house to give her a large card, decorated with their names and their artwork. This card, marked as Court Exhibit 102, was shown to the jury. (44 RT 4334-4335.) She invited them in, and they sang happy birthday to her. (44 RT 4332.) They called her "Grandma Mae." (44 RT 4334.) When asked what effect Mrs. Dixon's violent death had on the children and staff of the Center, Francouis testified that some of the children had known her for years; that many of them cried and were sad. (44 RT 4334.)

The above description of the victim impact evidence demonstrates that the trial judge did not impose any of the Payne limitations in this case. First, there were eight witnesses instead of one. Second, only one of those witnesses, Mrs. Hayes, had actually been present during the crime. Only she

testified about how being present had affected her.

Third, most of the victim impact evidence in this case was information which appellant could not have possibly known about at the time of the crime. Certainly, he could not have known the personal histories and characteristics of the various family members who testified nor could he have known the particular reactions these people would have to Mrs. Dixon's violent death. For example, appellant could not have known that Mrs. Dixon's granddaughter Sandra Quillen once had been a drug addict and that Mrs. Dixon's violent death could cause her to lose her business as well as a long-term relationship. Nor could he have known that one of Mrs. Dixon's daughters, Doris Homik, had multiple sclerosis and that her disease would worsen as a result of her mother's death. Similarly, he could not have known that Mrs. Dixon had served for many years as a school volunteer and that her death would make the children with whom she worked cry. Nor could he have known that Mrs. Dixon's daughter and grand-daughter had planned to take her to New York City to celebrate her 80th birthday.

When making the life or death sentencing decision, the penalty phase jury in a capital case should be given clear and objective standards providing specific and detailed guidance. (See *Lewis v. Jeffers* (1990) 497 U.S. 764, 774-776.) Things that happen after the crime–such as a granddaughter's loss of a business and relationship, or the weight gain of another granddaughter suffering from clinical depression–do not fall within any reasonable common sense definition of the phrase "circumstances of the crime."

The admission of this improper victim impact evidence violated appellant's right to a fair and reliable penalty determination and denied him due process by rendering the penalty trial fundamentally unfair. (U.S. Const., Amends. VIII & XIV; Cal.Const., art. I, sections 7, 15 & 17; *Payne v.*

Tennessee, *supra*, 501 U.S. at pp. 824-825.)

Certainly, the extensive victim impact evidence presented in this case prejudiced appellant. Six members of Mrs. Dixon's family gave detailed testimony about what a wonderful woman she was and how her violent death had traumatized all of them. Not only did they testify about how much they missed her but they told the jury that because of the way she died, they would never heal and their lives would be forever changed for the worse. Through some of these witnesses, the prosecution introduced pictures of Mrs. Dixon with her family and with the various groups with whom she did volunteer work. The prosecutor even introduced into evidence a birthday card that the children at the Jefferson Elementary School had made for Mrs. Dixon for her 80th birthday. It is undisputable that so much highly emotional evidence about Mrs. Dixon and her family was instrumental in helping the prosecutor to persuade the jury to sentence appellant to death. Under these circumstances, there is a reasonable possibility that consideration of this victim impact evidence affected the verdict (*People v. Brown*, *supra*, 46 Cal.3d at p. 447), and such evidence cannot be considered harmless beyond a reasonable doubt as not contributing to the sentence rendered. (*Chapman v. California*, *supra*, 386 at p. 24.) In addition, the death penalty decision in this case was a close one as the first jury deadlocked 10 to 2, resulting in a penalty phase mistrial. (38 RT 3611.) Moreover, the mitigation evidence offered at the penalty retrial was more extensive than that presented in the first trial. Given these facts, this Court should reverse appellant's death sentence.

*****

XVII.

APPELLANT'S DEATH JUDGEMENT SHOULD BE REVERSED BECAUSE ADMISSION AND USE OF EVIDENCE OF PRIOR UNADJUDICATED CRIMINAL ACTIVITY VIOLATED HIS CONSTITUTIONAL RIGHTS

A. Introduction

The prosecution's initial statement of proposed evidence in aggravation was filed on June 5, 1996. (2 CT 452.) It contained claims of six incidents alleging the use or attempted use of force or violence or the express or implied threat to use force or violence. (2 CT 452-453.) These incidents were offered as aggravating evidence pursuant to Penal Code section 190.3, subdivision (b) ("factor (b) evidence"). On October 2, 1996, the State filed another Notice of Evidence in Aggravation Pursuant to Penal Code Section 190.3; this document identified, for the first time another such incident, appellant's alleged forcible sodomy and oral copulation of Jason Labonte. (4 CT 918-912.)

Appellant opposed the introduction of this factor (b) evidence in several motions: a "Motion to Exclude Evidence of Aggravation in the Penalty Phase" with a supporting Memorandum of Points and Authorities (2 CT 404-431) and a "Motion to Strike the Notice of Evidence Aggravation and for a More Specific Notice to be Filed by the Prosecution" with a supporting memorandum. (2 CT 450-468.) In those documents, defense counsel argued, inter alia, that the factor (b) evidence which the prosecutor said she planned to introduce should be stricken because it violated appellant's federal constitutional rights to due process, equal protection of the law, to adequate notice of aggravating evidence, and to a fair and reliable verdict in a death penalty case as required the Fifth, Sixth, Eighth and

Fourteenth Amendments of the United States Constitution as well as rights secured by the California Constitution. (2 CT 407-411, 2 CT 450.)

B. The Erroneous Admission of Evidence of Three Alleged Prior Unadjudicated Incidents of Criminal Activity under Section 190.3, Factor (b), Violated Appellant's Constitutional Rights under the Sixth, Eighth and Fourteenth Amendments

Section 190.3, factor (b), requires the jury to consider in aggravation "the presence or absence of criminal activity by the defendant other than the crimes for which the defendant has been tried in the present proceedings which involve the use or attempted use of force or violence or the expressed or implied threat to use force or violence." (§ 190.3, factor (b).)

Admission of evidence concerning three alleged prior unadjudicated crimes violated appellant's rights to due process and a reliable determination of penalty under the Eighth and Fourteenth Amendments. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276.) Admission of this evidence also denied appellant his rights to a fair trial by an impartial and unanimous jury, to effective assistance of counsel, and to effective confrontation of witnesses, under the Sixth and Fourteenth Amendments, and to equal protection of the law under the Fourteenth Amendment. An instruction expressly permitting the jury to consider such evidence in aggravation violates these same constitutional rights.

Factor (b), as written and as interpreted by this Court, is an open-ended aggravating factor that fosters arbitrary and capricious application of the death penalty and thus violates the Eighth Amendment requirement that the procedures used to impose the death penalty must make a rational distinction "'between those individuals for whom death is an appropriate

sanction and those for whom it is not.'" (*Parker v. Dugger* (1991) 498 U.S. 308, 321, quoting *Spaziano v. Florida* (1984) 468 U.S. 447, 460.)

This Court has interpreted factor (b) in such an overly-broad fashion that it cannot withstand constitutional scrutiny. Although the United States Supreme Court has repeatedly concluded that the procedural protections afforded a capital defendant must be more rigorous than those provided non - capital defendants (see *Ake v. Oklahoma* (1985) 470 U.S. 68, 87 (conc. opn. of Burger, C.J.); *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118 (conc. opn. of O'Connor, J.); *Lockett v. Ohio* (1978) 438 U.S. 586, 605-606), this Court has turned this mandate on its head, singling out capital defendants for less procedural protection than is afforded other criminal defendants. For example, this Court has ruled that: in order to consider evidence under factor (b), it is not necessary for all 12 jurors to unanimously agree on the presence of the unadjudicated criminal activity beyond a reasonable doubt (see *People v. Caro* (1988) 46 Cal.3d 1035, 1057); the jury may consider criminal violence which has occurred "at any time in the defendant's life," without regard to the statute of limitations (*People v. Heishman* (1988) 45 Cal.3d 147, 192); and the trial court is not required to enumerate the other crimes the jury should consider, or to instruct on the elements of those crimes. (*People v. Hardy* (1992) 2 Cal.4th 86, 205-207.) This Court has also ruled that juvenile conduct is admissible under factor (b) (*People v. Burton* (1989) 48 Cal.3d 843, 862), as are offenses dismissed pursuant to a plea bargain. (*People v. Lewis* (2001) 25 Cal.4th 610, 658-659.) In sum, this Court has indeed treated death differently, by lowering rather than heightening the reliability requirements in a manner that cannot be countenanced under the federal Constitution.

In addition, the use of the same jury for the penalty phase adjudication of other crimes evidence deprives a defendant of an impartial and unbiased jury and undermines the reliability of any determination of guilt, in violation of the Sixth, Eighth and Fourteenth Amendments. Under the California capital-sentencing statute, a juror may consider evidence of violent criminal activity in aggravation only if he or she concludes that the prosecution has proven a criminal offense beyond a reasonable doubt. (*People v. Davenport* (1985) 41 Cal.3d 247, 280-281.) As to such an offense, the defendant is entitled to the presumption of innocence (see *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 585), and the jurors must give the determination whether such an offense has been proved the exact same level of deliberation and impartiality as would have been required of them in a separate criminal trial; when a state provides for capital sentencing by a jury, the Due Process Clause of the Fourteenth Amendment requires that jury to be impartial.[91] (Cf. *Groppi v. Wisconsin* (1971) 400 U.S. 505, 508-509 (1971) [where state procedures deprive a defendant of an impartial jury, the subsequent conviction cannot stand]; *Irvin v. Dowd* (1961) 366 U.S. 717, 721-722; *Donovan v. Davis* (4th Cir. 1977) 558 F.2d 201, 202.)

In appellant's case, the jurors charged with making an impartial, and therefore reliable, assessment of appellant's guilt of the previously unadjudicated offenses were the same jurors who had just convicted him of capital murder. It would seem self-evident that a jury which already has

---

[91] The United States Supreme Court has consistently held that a capital-sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (See *Caspari v. Bohlen* (1994) 510 U.S. 383, 393; *Strickland v Washington* (1984) 466 U.S. 668, 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 446.) Similarly, due process protections apply to a capital-sentencing proceeding. (See, e.g., *Gardner v. Florida* (1977) 430 U.S. 349, 358.)

unanimously found a defendant guilty of capital murder cannot be impartial in considering whether similar but unrelated violent crimes have been proved beyond a reasonable doubt. (See *People v. Frierson* (1985) 39 Cal.3d 803, 821-822 (conc. opn. of Bird, C.J.).)

A finding of guilt by such a biased fact-finder clearly could not be tolerated in other circumstances. "[I]t violates the Sixth Amendment guarantee of an impartial jury to use a juror who sat in a previous case in which the same defendant was convicted of a similar offense, at least if the cases are proximate in time." (*Virgin Islands v. Parrott* (3rd Cir. 1977) 551 F.2d 553, 554, relying, inter alia, on *Leonard v. United States* (1964) 378 U.S. 544 [jury panel will be disqualified even if it is inadvertently exposed to the fact that the defendant was previously convicted in a related case].)

Independent of its effect on the impartiality of the jury, the use of the same jury at both the guilt and penalty phases of the trial forced appellant to make impossible and unconstitutional choices during jury selection. Voir dire constitutes a significant part of a criminal trial. (*Pointer v. United States* (1894) 151 U.S. 396, 408-409; *Lewis v. United States* (1892) 146 U.S. 370, 376.) The ability to probe potential jurors regarding their prejudices is an essential aspect of a trial by an impartial jury. (*Dyer v. Calderon* (9th Cir.1998) 151 F.3d 970, 973, and citations therein.) In this case, counsel for appellant did not question potential jurors during jury selection about the unadjudicated crimes introduced at the penalty phase. Such evidence was not admissible during the guilt phase of the trial, and questioning the potential jurors about other violent crimes unquestionably would have tainted the impartiality of the jury that was impaneled. Counsel could not adequately examine potential jurors during voir dire as to their biases and potential prejudices with respect to the prior unadjudicated crimes without

forfeiting appellant's constitutional right not to have such subjects brought before the jurors. Requiring appellant to choose between these two constitutional rights violated his rights to assistance of counsel, a fair trial before an impartial jury, and a reliable and non-arbitrary penalty determination, in violation of the Sixth, Eighth and Fourteenth Amendments.

Further, because California does not allow the use of unadjudicated offenses in non-capital sentencing,[92] the use of this evidence in a capital proceeding violated appellant's equal protection rights under the Fourteenth Amendment. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) It also violated appellant's Fourteenth Amendment right to due process because the state applies its law in an irrational and unfair manner. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.) Finally, the failure to require jury unanimity with respect to such unadjudicated conduct not only exacerbated this defect, but itself violated appellant's Sixth, Eighth and Fourteenth Amendment rights to due process, a jury trial, and a reliable determination of penalty.

A series of recent decisions by the United States Supreme Court clearly indicates that the existence of any aggravating factors relied upon to

---

[92] There is one exception to this rule which involves what is known as a *Harvey* waiver. In *People v. Harvey* (1979) 25 Cal.3d 754, this Court held that a sentencing court may not consider the circumstances of a dismissed count in sentencing a defendant, unless he has expressly agreed otherwise. "Implicit in ... a plea bargain ... is the understanding (in the absence of any contrary agreement) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count." (*Id.* at p. 758. If a defendant signs a *Harvey* waiver, the sentencing court can consider the dismissed charges in determining an appropriate disposition. (See, e.g., *People v. Ozkan* (2004) 124 Cal.App.4th 1072, 1078.)

impose a death sentence must be found beyond a reasonable doubt by a unanimous jury. (See, e.g., *Ring v. Arizona* (2002) 536 U.S. 584, 609.) Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity in aggravation, such alleged criminal activity would have to be found beyond a reasonable doubt by a unanimous jury. Although the jury in appellant's case was instructed that the prosecutor had the burden of proving the other crimes evidence beyond a reasonable doubt, the jury was not instructed on the need for a unanimous finding, nor is such an instruction required under California's capital sentencing scheme. The jury's consideration of this evidence thus violated appellant's rights to due process of law, to trial by jury, and to a reliable capital-sentencing determination, in violation of the Sixth, Eighth and Fourteenth Amendments.

1. The Three Incidents of Alleged Prior Criminal Activity Which were Improperly Admitted

a. The Jason Labonte Incident

(1) The Proceedings in the Trial Court

The original notice of aggravation filed on June 5, 1996, by the prosecution did not mention this allegation of forcible sodomizing and oral copulation involving Jason Labonte. Not until October October 2, 1996, did the State file a Notice of Evidence in Aggravation Pursuant to Penal Code Section 190.3 which identified, for the first time, the defendant's alleged forcible sodomy and oral copulation of Jason Labonte as aggravating evidence to be introduced at the penalty phase of appellant's trial. (4 CT 918-912.) Just before the commencement of the first penalty phase trial, defense counsel Richard Siref objected to the State's "plan to introduce evidence of an assault, basically the nature of a sexual assault, by [appellant] when he was 13 years old against an individual named Jason Labonte." (32

RT 3069.) Counsel further pointed out the defense was not given notice about this alleged incident until after it had filed its motions to strike the evidence in aggravation. (32 RT 3070.) Counsel then asked to renew his previously filed written motions and points and authorities to strike the aggravating evidence, incorporating them by reference in support of an objection to the proposed testimony of Jason Labonte. (32 RT 3070.) The trial judge overruled this objection, finding the incident to be proper aggravating evidence. (32 RT 3070.)

A review of the record in this case shows that the prosecutor relied heavily on the alleged incident with Jason Labonte to make her case for a death judgement against appellant. During her opening argument to the jury at the penalty re trial, the prosecutor stated:

> You will also hear that the defendant grew up with a young man who was three years and a half years younger by the name of Jason Labonte and you will hear from him. He's coming in from out of state to testify before you. Jason Labonte was the son of a woman who was living with the defendant's mother, meaning the defendant and this other boy's mother had a relationship together, and they were living together and Jason Labonte was much smaller than the defendant and also younger and considered him a brother. He had been with him since Jason was three years old. When Jason was eight or nine years old, the defendant would have been 13 or 14 at that time. [93] He one day when they were alone at home, the defendant brought out a knife and made the defendant [sic] orally copulate him and then made him bend down on a pillow and put his head there so if he screamed in pain, the pillow would muffle the sounds and sodomized the boy.

(41 RT 3952-3953.)

(2) The Testimony of Jason Labonte

---

[93] The prosecutor's math is incorrect. If Jason were eight, then defendant would have been eleven and a half years old. If he were nine years old, appellant would have been twelve and a half years old.

At the penalty retrial in this case, Jason Labonte testified that he was born on October 25, 1976, and was about three and a half years younger than appellant. (44 RT 4351-4352.) Labonte and his mother, Carol, lived with appellant and his mother for about eight years, from the time Labonte was three years old. (44 RT 4352.) He testified that once during that time period, appellant "raped" and "molested" him. He was about eight years old, and defendant was about twelve or thirteen years old. (44 RT 4353.) According to Labonte, one day after school, when he and appellant were alone in the house, Brandon asked him to masturbate him and give him a "blow job." When he refused, appellant got a little steak knife and forced Labonte to orally copulate him, and then appellant inserted his penis in Labonte's buttocks. (44 RT 4353.) Labonte was sobbing and crying; it caused him both physical and emotional pain. (44 RT 4354-4355.) Appellant then made him write a note describing the incident and promising to never tell anyone. (44 RT 4355.)

Subsequently, he and Brandon never talked about the incident, and their relationship went on as before. Brandon was nice to him. (44 RT 4356.) At some point later, Labonte told his mother about the incident, and she told appellant's mother. (44 RT 4357.) They did nothing about it. (44 RT 4357.) He has kept the incident to himself, except for talking to his wife and his mother about it. After he was subpoenaed to testify at this trial, he decided to tell the prosecutor since he was going to have to testify under oath. (44 RT 4358-4359.)

On cross-examination, Labonte agreed that he had smoked marijuana with appellant while they were growing up and that his mother had on occasion accused him of stealing her marijuana. (44 RT 4459.) He also acknowledged that there were times when his mother had accused him of

lying. (44 RT 4459.) He could not explain why she did not take him to a doctor once he had told her about the molestation. (44 RT 4360.) Labonte didn't know if her failure to do anything about the incident meant that she did not believe him. (44 RT 4360.)

(3) Prosecutor's Closing Argument About the Labonte Allegations

In her closing argument at the penalty re-trial, the prosecutor relied heavily on the Labonte incident to make some highly inflammatory remarks. She brought up the incident first by speculating about why appellant did not have any felony convictions, which would have constituted aggravating evidence under section 190.3, subdivision (c). The prosecutor stated:

> This [felony convictions] is not [sic] existent in this case. As you know, you heard about prior violence by the defendant, but the defendant has been very good at getting away with things. He hasn't – even the case where he sodomized and orally copulated Jason Labonte. If it wasn't [sic] for this trial he would have gotten away with it. No one would have known about that. He is very good at getting away with things.

(48 RT 5046.)

Later in her argument, the prosecutor invoked Jason's name again when asking the jury to consider why appellant's sister did not testify on his behalf:

> Where is the defendant's sister? How come she didn't tell you she lived with the defendant. How come we didn't hear from her? . . .Is she in the same category as Jason Labonte, I don't know. But we didn't hear from somebody who knew who could have told us something.

(48 RT 5067.)

During her closing argument, the prosecutor also used Jason as a foil to undercut appellant's mitigating evidence regarding his background. She stated:

> . . . the testimony of one witness, if believed, is sufficient for proof of that fact. You saw Jason Labonte. What possible motive do you think a 20-year old young man has to come in and tell you about this terribly embarrassing humiliating experience? There is no reason. There is no reason that he would want to make something like this up. Please think about it and think about the fact that he told somebody when he as a kid, but the defendant as usual denied it and he got away with it because all his mother did was check him, didn't take him to the doctor, didn't do anything with him. If anybody should have a k factor [the general mitigating evidence provision of section 190.3] for being abused for having an excuse to do something bad, that will be Jason Labonte, but he didn't go out and do something like this. He was raised in the same household, stayed in the same job for three years. He has a kid. He is supporting a wife, a family. That's proof that you don't get to out [sic] and use the abuse excuse.

(48 RT 5075-5076.)

Finally, the prosecutor drew parallels between what allegedly happened to Jason Labonte and the facts of the capital case:

> So this incident of terrorizing a boy [Jason] that is much smaller than him. I mean, what a beginning and what an end. What a beginning. He starts off with a child and what [an] end, he ends with an 80-year-old woman. What happened in between there that the defendant got away, I have no idea. But it is incredible to me that at 13 or so years old the defendant does something this serious and gets away with it, making - at knife point, sodomizing a boy that's three and a half years younger than him, making him orally copulate him, a memory that stays with him. You saw his face. It is embarrassing. It is humiliating. He has gone on to try and survive and then 10 years later he has done it to an 80 - year - old woman, but she didn't survive. It is just - it is just an amazing pattern. It is the same pattern of degrading, humiliating and the fact that he makes him write a letter about it shows you it is not about just sex, it is about some control, power, degradation, making him write about it.

(48 RT 5077.)

(4) The Trial Court Erred In Admitting Uncharged Juvenile Behavior As An Aggravating Factor During The Penalty Phase

The criminal conduct alleged by Jason Labonte occurred when appellant was between 11 ½ and 13 years old. Evidence of such juvenile misconduct is insufficiently relevant or reliable to be considered by a penalty phase jury in a capital case, because such misconduct cannot serve as a sufficient basis for concluding that the death penalty would be appropriate to serve society's legitimate interests. Accordingly, the admission of this evidence violated the Eighth and Fourteenth Amendments.

The United States Supreme Court has identified the "social purposes" served by the imposition of capital punishment to be "'retribution and deterrence of capital crimes by prospective offenders . . . '" (*Atkins v. Virgina* (2002) 536 U.S. 304, 319, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 183.) Unless the imposition of the death penalty serves one or both of those purposes it constitutes cruel and unusual punishment. (*Coker v. Georgia* (1977) 433 U.S. 584, 592.) Because juveniles, particularly those 13 years of age or younger, lack maturity and self-control, it violates the Eighth Amendment to allow the jury to use evidence of the defendant's juvenile misconduct as a basis for imposing the death penalty.

In *Simmons v. Roper* (2005) 543 U.S. 551, 574-574, the United States Supreme Court held that because of the great differences in maturity and judgment between adults and minors the death penalty is a disproportionate penalty for offenders under the age of 18. Even prior to *Simmons*, the high court had recognized that "youth is more than a chronological fact. It is a time and condition of life when a person may be susceptible to influence and

to psychological damage." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 115.) In *Johnson v. Texas* (1993) 509 U.S. 350, the high court observed that "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." (*Id.* at p. 367 [recognizing that a sentencer in a capital case must be allowed to consider the mitigating qualities of youth in the course of its deliberations over the appropriate penalty]; see *Thompson v. Oklahoma* (1988) 487 U.S. 815, 834-835 [because juveniles are "more vulnerable, more impulsive, and less self-disciplined than adults . . . less culpability should attach to a crime committed by a juvenile than to a similar crime committed by an adult"].) In light of those well-understood differences between minors and adults it is inconsistent with the Eighth Amendment to use evidence of juvenile misconduct as aggravating evidence in the penalty phase of a capital trial.

Moreover, evidence of juvenile misconduct is insufficiently reliable to be considered in the penalty phase of a capital trial because jurors cannot readily differentiate which acts of juvenile criminality actually demonstrate the degree of heightened culpability required to support the imposition of a death sentence. (See *Simmons v. Roper*, *supra*, 543 U.S. at p. 573.) "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." (*Ibid.*)

The consideration as aggravation in the penalty phase of this capital trial of appellant's "impetuous and ill-considered actions" as a minor, acts that occurred when he was particularly "susceptible to influence and psychological damage" (*Johnson v. Texas*, *supra*, 509 U.S. at p. 367), was in

direct conflict with federal constitutional guarantees of due process, the prohibition against cruel and unusual punishment, and the constitutionally-based heightened need for reliability of capital trials and sentencing procedures. (U.S. Const., V, VI, VIII & XIV Amends.)

Appellant recognizes that this Court has declared that "nothing in the 1977 or 1978 [death penalty statutes] indicates an intent to exclude violent criminal misconduct while a juvenile as an aggravating factor." (*People v. Lucky* (1988) 45 Cal.3d 259, 295.) Appellant respectfully submits that the Lucky analysis is flawed, and should be reconsidered in light of the analysis of *Roper v. Simmons*, *supra*, regarding the execution of individuals who were younger than 18 at the time of the murder.

(5) The Trial Judge Erred In Failing to Instruct on the Elements of the Crimes Allegedly Committed by Appellant in the Incident Involving Jason Labonte

The trial court gave the following instruction at the penalty retrial regarding the alleged incident involving Jason Labonte as an aggravating factor under Penal Code section 190.3, subdivision (b):

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts or activity which involved the express or implied use of force or violence, or the threat of force or violence: 1) Defendant's forcible sodomy and oral copulation of Jason Labonte . . . .
>
> Before a juror may consider any of such criminal act or activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal act or activity. A juror may not consider any evidence of any other criminal act or activity as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(7 CT 1588.)

The trial judge should have instructed the jury on the elements of the crimes of forcible sodomy and oral copulation.

Although this Court has held that a trial court has no sua sponte duty to instruct on the elements of "other crimes" introduced as aggravating circumstances under Penal Code section 190.3 (b) ("factor (b) evidence") (*People v. Davenport* (1985) 41 Cal.3d 247, 281-282), the Court should reconsider this holding. It is highly irrational to require a reasonable doubt standard without similarly requiring a trial court to instruct sua sponte on the elements of any alleged crime offered as an aggravating circumstance under section 190.3(b). Without that requirement there is no real opportunity to apply the reasonable doubt standard and this critically important protection loses all meaning. Without an instruction describing the elements of the alleged crime, no rational jury can find the existence of all the elements of the alleged crime are established beyond a reasonable doubt. (*People v. Boyd*, *supra*, 38 Cal.3d at p. 778.)

Another reason for this Court to reconsider its position that a trial court does not have a sua sponte duty to instruct on the elements of unadjudicated crimes, offered pursuant to factor (b), is the recent case law of the United States Supreme Court concerning the application of the reasonable doubt requirement. In a series of decisions, *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) 542 U.S. 296, the United States Supreme Court has held that any fact increasing the maximum penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt.
In the Ring decision, the Supreme Court held that aggravating factors under Arizona's capital sentencing scheme operated as "'the functional equivalent

of an element of a greater offense'" which under the Sixth Amendment must be found by a jury. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494, fn. 19.) As stated in *Apprendi, supra*, "the relevant inquiry is not one of form, but of effect-does the required finding expose the defendant to a greater punishment than thatauthorized by the jury's finding." (Id. at p. 494.)

Like the aggravating factors under Arizona's capital sentencing scheme, factor (b) evidence, under the California death penalty statute, exposes the defendant to a greater punishment than that authorized by the jury's guilt finding. That is, without the additional finding of at least one aggravating factor, a defendant cannot be sentenced to death in California.[94] Under *Apprendi*, *Ring*, and *Blakely*, that factor is subject to the reasonable doubt standard.

While California purports to require a beyond-a-reasonable-doubt standard of proof in relation to factor (b) evidence, the standard is not properly applied if, as in appellant's case, the jury is not instructed on the elements of the crime that must be established. As stated *in Apprendi*, *supra*, the reasonable doubt standard, which protects a defendant's rights to due process and a fair jury trial (see *In re Winship*, *supra*, 397 U.S. at p. 364), means that a defendant is entitled to a jury determination of every element of the crime beyond a reasonable doubt. (*Apprendi v. New Jersey*,

---

[94] In *People v. Cox* (2003) 30 Cal.4th 916, 972, this Court found *Apprendi* and *Ring* inapplicable to the finding required in California that aggravation outweighs mitigation, a finding that the Court described as a "free weighing" of the totality of the circumstances without any burden of proof. Whatever the merits of the *Cox* decision on that point, it did not decide the issue presented here: that the reasonable doubt standard applicable to the determination of factor (b) evidence requires the jury to find every element of the alleged crime.

supra, 530 U.S. at p. 477; *United States v. Gaudin* (1995) 515 U.S. 506, 510.) Where a jury does not receive any instructions on any of the elements, the reasonable doubt standard cannot be applied validly and any resulting finding is invalid. As Justice Antonin Scalia noted in his opinion in *Blakely v. Washington* (2004) 542 U.S. 296, "*Apprendi* held [that] every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." (*Id.* at p. 313.)

The failure of the trial court to instruct on the elements of the crimes of forcible sodomy and oral copulation rendered this incident invalid as aggravating evidence. "The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense." (*Carella v. California* (1989) 491 U.S. 263, 265 [citations omitted].) Even assuming that the trial judge did not err in admitting the evidence regarding the alleged Labonte incident, the instructional errors resulted in an unreliable penalty determination in violation of the Eighth Amendment.

b. The Incident Involving Sheriff's Deputies in the County Jail

The prosecution also offered as factor (b) evidence an "incident" between appellant and some sheriff's deputies at the San Diego County Jail. In the original statement of evidence in aggravation, the prosecutor alleged, inter alia, that she intended to introduce:

> All evidence, facts underlying, statements of witnesses and the defendant relating to the defendant's use or attempted use of force or violence or the express or implied threat to use force or violence on Sheriff's Deputies on March 3, 1996.

(2 CT 452.)

At the penalty retrial, three sheriff's deputies testified regarding an incident where they were involved in an "extraction" of appellant from his cell at the San Diego County Jail where he was incarcerated before and during his trial in this case. Deputy Sheriff Brian Perry testified that on the evening of March 9, 1996, he was instructed by his sergeant to move appellant from his x-cell to a more secure unit, module 5-A. (42 RT 4232-4233.) After being told about the move, appellant objected, stating that Perry did not have the authority to move him and that he needed to talk to his lawyer. (42 RT 4233.)

Because of appellant's refusal to leave his cell, the sergeant ordered Perry and five other deputies to remove appellant forcibly with the use of a nova shield [95] and pepper spray. (42 RT 4233-4234.) According to Deputy Perry, appellant did come out his cell, with his legal folder under his arm and then faced the wall across from his cell. As the deputies moved appellant's arms back to handcuff him, he started cursing the officers. The deputies could no longer hold him, and appellant then charged them with his arms over his head. (42 RT 4234-4235.) Appellant then ran about 500 feet until the deputies subdued him. (42 RT 4235.) Deputy Perry conceded that appellant could not have gotten out of the jail because all of the doors to the outside were controlled by officers. (42 RT 4237-4239.)

Deputy Sheriff Juan Lozoya also testified about this incident. At the time he was working as a jail training officer. His duties included training all new deputies regarding the operations of the jail. (42 RT 4246.) He was one of the deputies who was involved in the extraction and transfer of the

---

[95] A nova shield is plastic, about 3 by 1½ feet in size and emits an electrical charge. (42 RT 4244.)

appellant. He used the nova shield to try to pin appellant against the wall. After appellant ran down the hallway, Officer Lozoya was the first to catch up and finally subdue him. (42 RT 4248.) Appellant was then put in a G - cell, which the jail uses for disciplining inmates. (42 RT 4249.) Later, Lozoya served appellant notice that he was being charged with violating the rules of the jail. (42 RT 4250.)

Sergeant Craig Walker also testified about the extraction incident, described above. He conducted the disciplinary hearing regarding appellant's part in the jail extraction on March 9, 1996. (42 RT 4258.) At that hearing, appellant explained that he had not cooperated with the deputies because they did not give him any reason why he had to move. (2 CT 4262.)

The only jury instruction regarding this "incident" given at the penalty retrial stated:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts or activity which involved the express or implied use of force or violence, or the threat of force or violence: . . .3) defendant's incident involving sheriff's deputies on March 3, 1996 in the County Jail.

(7 CT 1588.)

(1) This Evidence did not Qualify Under Factor (b)

This Court has consistently held that evidence of other criminal activity introduced in the penalty phase pursuant to . . . section 190.3, subdivision (b), must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute. (*People v. Jurado* (2006) 38 Cal.4th 72, 142-143, quoting *People v. Phillips* (1985) 41 Cal.3d 29, 72; see also *People v. Grant* (1988) 45 Cal.3d 829, 850.)

"[A] threat of violence which is not in itself a violation of a penal

statute is not admissible under factor (b)." (*People v. Pensinger* (1991) 52 Cal.3d 899, 1259; *People v. Boyd* (1985) 38 Cal.3d 762, 776.) In analyzing factor (b) in *People v. Phillips*, *supra*, this Court said, "The only reasonable interpretation is that the statute limits admissibility to evidence that demonstrates the commission of an actual crime, a requirement easily verified under the definitional guidelines established by legislative bodies in this and other jurisdictions." (*Id.*, 41 Cal 3d at p. 776.)

In appellant's case, in seeking admission of the disputed evidence, the prosecution made no effort to tie the jail incident to a violation of any particular penal statute. This deficiency alone should have prohibited introduction of the disputed evidence relating to jail incidents.

Over thirty-five years ago, this Court stated that "[i]t is now settled that a defendant during the penalty phase of a trial is entitled to an instruction to the effect that the jury may consider evidence of other crimes only when the commission of such other crimes is proved beyond a reasonable doubt. [Citations.]" (*People v. Stanworth* (1969) 71 Cal.2d 820, 840.) *Stanworth* makes clear that such an instruction is "vital to a proper consideration of the evidence, and the court should so instruct sua sponte." (Id. at p. 841; *People v. Polk* (1965) 63 Cal.2d 443, 452; see *also People v. Robertson* (1982) 33 Cal.3d 21, 53.) This Court adopted the reasonable doubt standard for other crimes evidence presented in a capital case because of "the overriding importance of 'other crimes' evidence to the jury's life-or-death determination." (*Id.* at p. 54.)

Where the prosecution fails to specify a violation of a particular penal statute, as here, the reasonable doubt instruction becomes meaningless. That is, the jury is unable to determine beyond a reasonable doubt if the prosecution has established the commission of an actual crime. As this

Court instructed in *Robertson*, "the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty. The reasonable doubt instruction required by the *Polk-Stanworth* line of cases can then be directly addressed to these designated other crimes, and the jury should be instructed not to consider any additional other crimes in fixing the penalty." (*People v. Robertson, supra*, 33 Cal.3d at p. 55, fn. 19.)

Instead of following these long-established directives, the prosecution in this case failed to allege which actual statutory crime or crimes appellant committed during the jail incident described above. Once defense counsel challenged the evidence in various pretrial motions, the prosecutor, as the proponent of the aggravating evidence, had the burden of notifying the court of the evidence as to each element of the criminal activity at issue. (See *People v. Phillips, supra*, 41 Cal.3d at p. 72, fn. 25; Evid. Code, § 403.) The prosecution failed to meet this burden; thus, the evidence should have been excluded.

(2) The Jury Instruction Given Regarding the Jail Incident was Inadequate and Improper

The trial court compounded the evidentiary error of improperly admitting the evidence relating to jail incident by giving an inadequate and improper instruction:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts or activity which involved the express or implied use of force or violence, or the threat of force or violence: . . .3) defendant's incident involving sheriff's deputies on March 3, 1996 in the County Jail.

(7 CT 1588.)

This instruction failed to specify any alleged violations of particular criminal statutes or even identify generically what crime appellant supposedly had committed. As this Court instructed in *Robertson*, "the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty. The reasonable doubt instruction required by the Polk - *Stanworth* line of cases can then be directly addressed to these designated other crimes, and the jury should be instructed not to consider any additional other crimes in fixing the penalty." *(People v. Robertson, supra,* 33 Cal.3d at p. 55, fn. 19.) A mere reference to an "incident" is obviously wholly inadequate.

As a result, the jury in this case did not receive any instruction on the law supposedly violated. Without an instruction performing the minimal task of informing the jury on the applicable law on the particular charge or allegation, a defendant's due process right to a jury determination "is little more than a matter of constitutional theory." (*Cole v. Young* (7th Cir. 1987) 817 F.2d 412, 425.) The instruction in appellant's case provided no law relating to a particular penal violation to which the jury could make a valid and reliable determination as to whether the evidence established beyond a reasonable doubt that appellant had committed that violation. Under these circumstances, the reasonable doubt standard becomes impossible to apply.

When the jury is never told what criminal offense the defendant has supposedly committed, "the matter is in effect taken out of its hands entirely" and "[t]he result is the same as if the trial court had directed a verdict, which would be constitutionally impermissible." (*Ibid.*) Here, the defective instruction left the jury applying the reasonable doubt standard to an unspecified crime. This Court has recognized that "the reasonable doubt

standard ensures reliability of factor (b) evidence. (*People v. Balderas* (1985) 41 Cal.3d 144, 205, fn. 32.) The failure to specify a crime allegedly violated, nullified the reasonable doubt standard and rendered the evidence here unreliable.

The disputed instruction failed to identify a crime or to specify the elements of such alleged criminal violation. Although this Court has held that a trial court has no sua sponte duty to instruct on the elements of "other crimes" (*People v. Davenport* (1985) 41 Cal.3d 247, 281-282), that holding must be reconsidered.

As discussed previously in this argument in the section concerning the faulty jury instruction on the Jason Labonte factor (b) evidence, it is highly irrational to require a reasonable doubt standard without similarly requiring a trial court to instruct sua sponte on the elements of the alleged crime. Without that requirement there is no real opportunity to apply the reasonable doubt standard and this critically important protection loses all meaning. No rational jury can find all the elements of the alleged crime are established beyond a reasonable doubt without instruction on those elements. (*People v. Boyd*, *supra*, 38 Cal.3d at p. 778.)

While California purports to already require that standard of proof in relation to factor (b) evidence, the standard is not properly applied if, as in appellant's case, the jury is not instructed on the elements of the crime that must be established. As stated *in Apprendi*, the reasonable doubt standard that protects a defendant's rights to due process and a fair jury trial (see *In re Winship*, *supra*, 397 U.S. at p. 364), means that a defendant is entitled to a jury determination of every element of the crime beyond a reasonable doubt. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 477; *United States v. Gaudin*, *supra*, 515 U.S. at p. 510.) Where a jury receives no instructions on any of

the elements, the reasonable doubt standard cannot be applied validly and any resulting finding is invalid.

The failure of the trial court to specify particular criminal violations as well as the failure to instruct on the elements of such alleged crimes, rendered the aggravating evidence invalid. Thus, even assuming proper admission of the challenged evidence, the instructional errors resulted in an unreliable penalty determination.

c. The Incident Involving Officer Cherski

The prosecutor also offered, as another alleged factor (b) aggravator, testimony about an encounter between appellant and a San Diego police officer on August 11, 1994. Officer John Cherski testified that on that date he was working a special plain-clothes detail in downtown San Diego. (42 RT 4264.) Cherski testified that on that day, appellant was with a group of workers from the urban renewal project who were cleaning up the sidewalk. (42 RT 4265.) According to Cherski, appellant walked past him, stopped and began staring at him. When Cherski made eye contact, appellant asked him what he was staring at. (42 RT 4265.) Cherski testified that appellant then made a "threat of violence" when he said, "That's good for you. I will fuck you up." Cherski then showed appellant his badge and arrested him. (42 RT 4266.)

On cross-examination, Officer Cherski agreed that because he was in plain clothes, appellant could not have known that he was a police officer until he showed him his badge. He also agreed that after he identified himself and told appellant that he was going to arrest him, appellant was fully cooperative. (42 RT 4268.)

The only jury instruction regarding this "incident" given at the penalty retrial stated:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts or activity which involved the express or implied use of force or violence, or the threat of force or violence: . . .3) defendant's express or implied threat to use force or violence on Officer Cherski on August 11, 1994.

(7 CT 1588.)

(1) This Evidence did not Qualify Under Factor (b)

As noted previously in the section of this argument dealing with the alleged incident occurring in the San Diego County Jail, this encounter between appellant and Officer Cherski does not qualify as "criminal activity" for purposes of Penal Code section 190.3, subdivision (b). This Court has consistently held "that evidence of other criminal activity introduced in the penalty phase pursuant to . . . section 190.3, subdivision (b), must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute." (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72; *People v. Pensinger*, *supra*, 52 Cal.3d at p. 1259; *People v. Grant*, *supra*, 45 Cal.3d at p. 850.)

This incident with Officer Cherski amounted to nothing more than a non-specific future threat. This Court observed in the *Pensinger* case that "[a] threat of violence which is not in itself a violation of a penal statute is not admissible under factor (b)." (*People v. Pensinger*, *supra*, 52 Cal.3d at p. 1259; see also *People v. Boyd*, *supra*, 38 Cal.3d at p. 776.) In analyzing factor (b) in *People v. Phillips*, *supra*, this Court said, "The only reasonable interpretation is that the statute limits admissibility to evidence that demonstrates the commission of an actual crime, a requirement easily verified under the definitional guidelines established by legislative bodies in this and other jurisdictions." (*Id.*, at p. 776.)

Neither the trial judge nor the prosecutor identified what criminal behavior this incident involved other than a "threat of violence." There was no citation to an offense in the Penal Code nor were there any instructions about the elements of the offense supposedly committed by appellant.[96] Accordingly, it was error for the trial court to allow the testimony of Officer Cherski and to fail to identify the alleged crime committed and to give appropriate jury instructions regarding the elements of such crime.

C. The Improper Use of Evidence of These Three Alleged "Criminal Activities" Prejudiced Appellant in His Penalty Retrial

This Court must determine whether the jury's consideration of these invalid aggravating factors as part of the weighing process constituted harmless error. (See Sochor v. Florida, supra, 504 U.S. at p. 532.) Adding an invalid aggravating factor to "death's side of the scale," may render the penalty determination unreliable in violation of the Eighth Amendment. (See *Stringer v. Black* (1992) 503 U.S. 222, 232.)

Such unreliablity is particularly likely when the improperly considered factors relate to other crimes evidence, a type of evidence which this Court long ago recognized "may have a particularly damaging impact on the jury's determination whether the defendant should be executed." (*People v. Polk*, *supra*, 63 Cal.2d at p. 450; *People v. Robertson*, *supra*, 33 Cal.3d at p. 54.)

In appellant's case, the prosecutor used the improper evidence to

---

[96] The most logical "crimes" that this evidence might constitute are Assault (Penal Code section 240) or Criminal Threat (Penal Code section 422); however, a review of the statutory language of these two offenses makes clear that the prosecution would have had great difficulty establishing their elements. That fact may explain why appellant was never charged for either of these incidents.

persuade the jury to issue a death verdict. As detailed above, the prosecutor relied heavily on factor (b) evidence in her closing arguments to urge the jury to vote for a death sentence for appellant. She used the alleged sodomy and oral copulation of Jason Labonte to portray appellant as a monstrous individual. She argued that the incident showed that appellant, even as a young adolescent, was evil. The prosecutor also claimed that he did not have any felony convictions because, as demonstrated by the Labonte incident, he must have "gotten away" with other speculative, unspecified crimes. (48 RT 5045-5046.) Further, she argued that his assault of Jason should be compared with his assault of Mrs. Dixon. (48 RT 5077.) She also used Jason Labonte, who lived in the same household as appellant for about eight years, as a reason why the jury should reject evidence of appellant's difficult home life as mitigating. That is, since Jason didn't grow up to be accused and convicted of murder, certainly the jury shouldn't accept appellant's so-called "abuse excuse." (48 RT 5075-5076.)

In her closing arguments at the penalty retrial, the prosecutor also mentioned the incidents involving the deputies at the county jail and appellant's encounter with Officer Cherski. For example, in the course of making the argument that appellant is a psychopath–that he is nice when he wants to be and violent when he wants to be–she stated:

> Mr. Taylor doesn't do anything that he doesn't want to do. That is his life. And when he did this crime, it is exactly what he wanted to do. Now, again, do you see how that's contrary. At the same time that he's nice to the Goots [defense witnesses], he is mean to the street people and we have the Cherski incident, in August of 1994. Again, within the same period of time where he is babysitting their [the Goots] child, Mr. Nice getting free meals, working whatever that club. That's the–they think this person is not an officer and saying I am going to fuck you up, he is threatening him just because they look at each other.

(48 RT 5065.)

In describing what she called appellant's penchant for degrading and humiliating others, the prosecutor mentioned both the incident in the county jail and the confrontation with Officer Cherski:

> . . .The assault on the sheriff's deputies, Perry and Lozoya, March 9, 1996. Mr. Taylor is in the system and he wants things to go his way. He is used to things going his way. He likes his x-cell, he has his own TV. He has his own bathroom. He gets to take showers every day. He doesn't have to share. . . So when they try to move him, he wasn't going to have it because Mr. Taylor wants things his own way. How does somebody in this system facing murder charges continue to commit crimes is incredible. And then for the violent threats on Officer Cherski which occurred on August 11th, 1994, when he told him he will fuck him up just by looking at him.

(48 RT 5078.)

It is apparent that the prosecutor used the evidence of these three incidents to persuade the jury to vote to sentence appellant to death. This evidence, which should not have been admitted and for which the jury received inadequate instructions, was very vital to the prosecutor's efforts to portray appellant as an evil monster who should die. Under these circumstances, there is a reasonable possibility that consideration of these aggravating factors affected the verdict (*People v. Brown*, *supra*, 46 Cal.3d at p. 447), and it cannot be considered harmless beyond a reasonable doubt as not contributing to the sentence rendered. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) In addition, the death penalty decision in this case was a close one as the first jury deadlocked 10 to 2 on the issue of penalty, necessitating a re-trial. Given these facts, this Court should reverse appellant's death sentence.

*****

XVIII.

THE TRIAL COURT'S IMPROPER ADMISSION OF A SHOCKING AND GRAPHIC PHOTOGRAPH OF THE VICTIM SERVED NO PURPOSE OTHER THAN TO INFLAME THE JURYAND REQUIRES REVERSAL OF THE DEATH SENTENCE

A trial court should not receive into evidence photographs that are "relevant only on what . . . is a nonissue," or "largely cumulative of expert and lay testimony" or "unduly gruesome." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1137.) Here, the trial court should have excluded a photograph of the victim's vaginal area at the penalty retrial as unduly inflammatory, prejudicial, cumulative and irrelevant to any disputed issue of fact at issue during that re-trial. Admission of this photograph denied appellant his rights to due process, a fair trial, and a reliable determination of guilt and the appropriate penalty, in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and their state equivalents as guaranteed by article I, sections 15, 16 and 17 of the California Constitution. Accordingly, appellant's death sentence must be reversed.

A. Factual Background

Before the penalty retrial, appellant filed a motion requesting that the trial court exclude a particularly inflammatory and irrelevant photograph from the second penalty trial. (6 CT 1387-1388.) [97] This photo, which was

---

[97] In the motion, the defense alleged the following grounds for the motion: the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 13, 15, 16, 17 and 27 of the California Constitution. (6 CT 1388.) The Memorandum of Points and Authorities in support of the Motion also alleged that the photograph should been excluded under Evidence Code section 352 because its relevance, if any, was outweighed by the prejudicial and inflammatory effect its

admitted into evidence at the first trial as Exhibit 8, showed the vagina and thighs of the victim. (6 CT 1389.) In a declaration in support of the motion to exclude, defense counsel Cynthia Bolden stated inter alia that:

> A close perusal of the subject photograph reveals an orangish-red coloration of the subject area inconsistent with the alleged gross bloody discharge which was the basis for the admission of the same as a heinous crime and thus an aggravating factor. To the contrary however, the substance appears to be betadine, an antiseptic cleansing solution, or a like compound.

(6 CT 1389.) This declaration also pointed out that when this photograph was introduced at the original trial, the prosecution failed to lay an evidentiary foundation for the date, place and time of the taking of the photograph. (6 CT 1389.) The timing of the photograph was crucial since the victim had been handled by the police, paramedics, physicians, a SART ("Sexual Assault Response Team") nurse, and the coroner. (6 CT 1389.) Moreover, the coroner's report mentions that Mrs. Dixon had a urethral catheter, which often is used in conjunction with betadine. (6 CT 1389.)

Defense counsel also pointed out in the supporting Memorandum of Points and Authorities ("Memorandum") that the prosecution had misrepresented the nature of the photograph when the issue first arose before the original trial. (6 CT 1391-1393.) The prosecution stated in the earlier filing that this photo, among others offered by the State, was taken at the crime scene. (3 CT 666.) In this Memorandum, defense counsel further argued:

> Photographic evidence relevant to the circumstances of the offense include the autopsy photographs showing the actual tears in the wall of the vagina which are free of distortion by betadine and accurately reflect the state of the victim's vagina at the time of the completion of

---

admission would have. (6 CT 1393.)

> the rape. The bloody, betadined thighs photograph is relevant only to the question of what is done to a rape victim in the hospital, arguably a remote circumstance of the offense. But this question would seem clearly to both confuse and mislead the jury and to be outweighed by prejudicial, inflammatory effect and should therefore be excluded under California Evidence Code section 352.

(6 CT 1393.)

At the first trial, although appellant initially had opposed the admission of any of the autopsy photographs of the vagina, he eventually withdrew this blanket objection and offered to agree to one or two of those photos if the court would prohibit the use of the "distorted bloody thighs photo." (6 CT 1393.) The Memorandum also pointed out that one of the initial justifications offered by the State for using this photograph at the guilt phase of the first trial was to prove appellant's guilt for first degree felony murder based on rape as well to prove the element of intentional infliction of great bodily injury under the "one strike" rape law. (6 CT 1391.) The defense argued that in the penalty retrial, the cause of death was no longer an issue. (6 CT 1391.) While the "circumstances of the crime" would still be relevant at the second penalty trial, the photograph was not since it was taken some hours after the offense and after the SART examination. The prosecution would still be able to demonstrate the circumstances of the case using the autopsy photographs which showed the actual tears to the wall of the vagina and

> which are free of distortion by betadine and accurately reflect the state of the victim's vagina at the time of the completion of the rape. The bloody, betadined thighs photograph is relevant only to the question of what is done to a rape victim in the hospital, arguably a remote circumstance of the offense.

(6 CT 1393.)

There was a hearing on this motion [98] prior to the selection of the jury for the penalty retrial. The trial judge expressed great impatience with this motion. His first statement revealed his opposition to the defense:

> There is the picture, the picture of the vaginal area of the victim. I have a picture of it but I don't know what number it is. Let's assume it is 8 and the evidence at the trial was that picture was the way the vaginal area looked at the scene, that is the way the vaginal area of the victim looked immediately when she arrived at the hospital, that the red substance in or about that area was blood and that there was no mention of the possibility of that being some type of a sterilizing solution that's used in an emergency room. That's the status of the evidence.

(38 RT 3667.) Mr. Owen, appellant's other trial counsel at the second penalty trial, disagreed with this assessment, stating that the photo was not taken at the scene. The judge cut off Mr. Owen's explanation, and Ms. Bolden attempted to explain the basis for the defense concern about the timing of the taking of the disputed photograph. She pointed out that Dr. Ritter saw Mrs. Dixon at the hospital before the SART nurse saw her. Dr. Ritter's report, which was Exhibit 1 to the written motion regarding the photograph, stated that after he spread Mrs. Dixon's legs apart, he saw only a small amount of blood that appeared to be coming from her vagina. (38 RT 3668; 6 CT 1396.) Dr. Ritter's report also explained that he was waiting for the SART nurse to come; therefore, the SART nurse's observation that Mrs. Dixon was bleeding profusely from her vagina came after Dr. Ritter's examination of her. Because Dr. Ritter's examination occurred closer to the

---

[98] Appellant also submitted an additional pleading, entitled Defense Response to the People's Opposition to Motion in Limine to Exclude Evidence from Penalty Phase of Defendant's Trial, further stating the bases for excluding this photograph from appellant's penalty retrial. (7 CT 1517-1520.)

time of the rape, it is more relevant how much blood he saw than what the SART nurse claimed to have seen some three hours after the incident. (38 RT 3668-3669.) Counsel argued:

> . . .the real issue is the timing of the subject photograph based on Dr. Ritter's report indicates [sic] that what Dr. Ritter saw when she was brought to the hospital and what the SART nurse [saw] sometime subsequent to 12:30 [a.m.] are two different things. My client cannot be responsible for what the SART nurse saw, it is a gross misrepresentation.

(38 RT 3669.)

Although Ms. Bolden argued that the timing of the photograph was the most important reason why it should be excluded, the trial judge focused instead on her assertion that some of the reddish and/or orangish color on the victim's thighs in the disputed photograph might be betadine rather than blood. The trial judge excoriated Ms. Bolden on this point:

> I just want to say this: I don't appreciate attorneys coming in here and making assertions where they don't have any evidence to back it up. You are sitting here taking a look and this and saying, oh, my gosh, this is lighter than blood. We are dealing with a photograph, polaroid, which is not as perfect as we like and nothing in this photograph to show that this is a substance other than blood, especially when you look at the evidence and the people that viewed it that says it was blood. I will tell, you better not be pulling that in trial. If you pull that in trial you will have a real empty pocket. It is called good faith, Ms. Bolden.

(38 RT 3671.) After the judge further charged that defense counsel had no evidence to support her claims, defense counsel countered that she had already produced such evidence, including Mrs. Dixon's medical records from the hospital which showed that five doctors had seen Mrs. Dixon before Ms. Kinsey did, and none of them reported seeing profuse bleeding. (38 RT 3672.)

The trial judge cut off any other more discussion by Ms. Bolden, denied the motion [99] and then launched into yet another attack on her:

> Just caution you, I find your approach of [sic] this motion a little offensive, Ms. Bolden, and caution you to be very careful during this trial with me. You never had a trial with me and you better find out about how I handle attorneys during trials because I do not allow as much latitude as other judges do.

(38 RT 3673.) When defense counsel asked respectfully to be allowed to respond, the judge refused her request to finish her argument regarding the motion. (38 RT 3673.)

The issue with the photograph came up again later in the trial because the prosecutor wished to substitute one photograph for another and wanted to introduce the photograph through one of her witnesses, Dr. Diggs. She argued:

> You honor for the record the picture of the victim's vagina was admitted. It had a tape in the middle. I anticipate from the pretrial motions that there will be an issue that Dr. Gabaeff [an emergency room physician hired as a defense expert] is testifying and things that counsel have said that there will be an issue as to whether that [the photograph] actually represents the condition of the victim, the bloody vagina of the victim or whether it is solutions that were used or interference by the SART team or something to that – in that respect. The actual polaroid photograph, the smaller version without the tape in the middle is a much better representation of the victim's condition because it shows how the blood is much darker where the opening of the vagina is than it is as it gets closer to the legs. So I think it is a much more accurate depiction of the position of the victim and could remove some potential issues that I am anticipating the defense making.

(42 RT 4179-4180.)

---

[99] The motion to exclude the use of Court Exhibit #8 at the penalty retrial was denied. (8 CT 1717.) This photograph was later admitted at the penalty re-trial as Exhibit #141. (8 CT 1724.)

Defense counsel agreed that the smaller photograph was more accurate, but he did not want it to be introduced until the SART nurse testified. (42 RT 4180.) The trial judge, however, took the side of the prosecutor and once again rebuked the defense attorneys concerning their view of this photograph and their theory of how to present the defense at the penalty retrial:

> You have, in my opinion, no good faith to believe that the substance that is on the vagina and thighs of the victim, in this case is something other than blood and I think if you go into cross - examination in that area, you are just trying to go someplace that you really shouldn't be going, and I have already told you if you have some type of a good faith belief, if you have some type of evidence, that's fine.

(42 RT 4181.)

The trial judge went further on behalf of the State's position:

> So what I will do here is I am going to allow the deputy district attorney to go right ahead and do it and feel what she feels [sic] important to put on. This is the penalty phase and go ahead and put on what you want to put on. And the photo that has been changed by the court will be removed and you can use the actual photo. That's what you want to do. Go right ahead. I am doing this because, in this court's opinion, the district attorney – the defense is going to attack or throw up some issues that will require you to bring this person [Dr. Diggs] back and I just don't think it is fair to him or the system, you know as a whole to allow this.

(42 RT 4181.)

The photograph was introduced during the direct examination of Dr. Diggs. (42 RT 4191-4192.)

B. The Trial Court Failed to Weigh the Relevance of the Photograph Against the Prejudice Attendant to Its Admission

As noted previously, appellant challenged the admission of the disputed photograph under Evidence Code section 352 as well as under the

provisions of the United States and California Constitutions. When proposed testimony is subject to an objection grounded in section 352, the trial court's scrutiny must involve a thorough weighing of the probative value of the testimony and an assessment of its potential to prejudice the jury. (*People v. Jackson* (1971) 18 Cal.App.3d 504, 509 [". . . a trial judge must alertly supervise proceedings in his court, curbing when necessary over - zealous advocates and, in his rulings on evidence strike a 'careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption.' (citation.)"] .) "That balancing process requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in section 352 for exclusion." (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291.)

A trial court which performs this balance appropriately will only be overturned if the reviewing court determines that the "probative value of the photographs clearly is outweighed by their prejudicial effect." (*People v. Crittenden* (1995) 9 Cal.4th 83, 134.) Conversely, the failure of a trial court to perform the balancing required when an Evidence Code section 352 objection is made itself constitutes an abuse of discretion. (*People v. Green* (1980) 27 Cal.3d 1, 24 [abuse of discretion when judge responds to 352 objection simply by accepting evidence subject to a limiting instruction], overruled on other grounds in *People v Martinez* (1998) 20 Cal.4th 225 and *People v. Hall* (1986) 41 Cal.3d 826.) Similarly, a trial court which refuses or fails to weigh these factors in a manner sufficiently clear to alert a reviewing court abuses its discretion. (*People v. Frank* (1985) 38 Cal.3d 711, 732; *People v. Green, supra*, 27 Cal.3d at p. 25.) Only when the trial

judge has performed this function openly and on the record will reviewing courts be able to assess the trial court's actions. As this Court observed:

> The reason for th[is] rule is to furnish the appellate courts with the record necessary for meaningful review of any ensuing claim of abuse of discretion [and] to ensure that the ruling on the motion "be the product of a mature and careful reflection on the part of the judge . . . ."

(People v. Green, supra, 27 Cal.3d at p. 25.)

In this case, the trial judge failed to exercise his discretion appropriately in evaluating both the relevance of this photograph and the potential for undue prejudice which its admission would produce. The record, as shown by the colloquy, quoted above, between the trial judge and defense counsel establishes that the judge did not discuss the most important issues raised by the defense motion to exclude the photograph. He completely failed to even mention a primary contention of the defense motion, i.e., that the photograph was taken by the SART nurse after the victim had been handled by numerous people and after Dr. Ritter had reported that he saw "a small amount of bleeding that appeared to be coming from the vagina." (6 CT 1396.)

Instead of discussing the merits vel non of the motion, the trial judge expressed his displeasure with the defense. He focused almost exclusively on the question of whether the photograph depicted blood or a mixture of blood and betadine on the victim rather than on the defense's primary contention that the timing of the taking of the photograph made it irrelevant to the issues before the penalty retrial jury. The statements made by the trial judge show that he never even considered the issue of whether the probative value of the evidence outweighed its prejudicial effect. By failing to undertake the required task of balancing the probative value of the evidence

against its potential prejudicial effect, the trial judge abused his discretion.

C. Even if It Is Determined that the Trial Court Sufficiently Weighed the Prejudice Against the Probative Value, the Decision to Admit the Photograph Was Error, an Abuse of Discretion, a Violation of Evidence Code Section 352 and a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the Federal Constitution

Should this Court determine that the trial judge did engage in a balancing process, an examination of the record demonstrates that any probative value the photograph might possess "clearly is outweighed by [its] prejudicial effect." (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 134.)

Prejudicial evidence under Evidence Code section 352 is evidence that uniquely tends to evoke an emotional bias against a party, while having only slight probative value regarding the issues in the case. (*People v. Scheid* (1997) 16 Cal.4th 1, 19; *People v. Crittenden* (1995) 9 Cal.4th 83, 134.) Graphic items of evidence "always are disturbing[]" (*People v. Crittenden*; *supra*, 9 Cal.4th at p. 134, citing *People v. Hendricks* (1987) 43 Cal.3d 584, 594.

The determination of the probative value of evidence is inextricably bound to the issue of whether the evidence is relevant because there is no statutory definition of the word "probative," and thus one must assume that the term is to be understood by its common usage: something is probative if it serves to prove something else. (Webster's 10th New Collegiate Dictionary (1993) p. 928.) This Court has adopted inferentially this definition but tied its application to the use of the term "relevant" in Evidence Code section 210. (See *People v. Alcala* (1992) 4 Cal.4th 742, 797.)

Even assuming that as a general rule photographs depicting the manner in which a victim was injured are relevant to the determination of

malice, aggravation and penalty (see *People v. Farnham* (2002) 28 Cal.4th 107, 185-186), this Court has never held that this automatically qualifies photographs for admission at a capital trial. To the contrary, this Court has observed that trial courts should be alert to how gruesome photographs play on a jury's emotions, especially in a capital trial. (*People v. Weaver* (2001) 26 Cal.4th 876, 934 [considering whether admission of gruesome photographs denied appellant a fair penalty phase determination].) Even in those cases which uphold the admission of photographs that seemingly relate only to the circumstances of the offense at issue, the photographs usually derive their probative value from the fact that they are able to uniquely demonstrate some aspect of the crime warranting consideration that cannot be demonstrated in another manner. (See, e.g., *People v. Thompson* (1990) 50 Cal.3d 134, 182 [manner in which 12-year-old victim was hogtied was "indescribable in mere words"].)

At the penalty phase retrial in this case, the disputed photograph had no probative value to the only issue before the jury: whether, given the mitigating and aggravating evidence presented, appellant should be sentenced to death or to life without the possibility of parole.

There are a number of scholarly articles discussing research done concerning how jurors are affected by exposure to graphic and unpleasant photographs. Various studies have recognized that graphic photographs have the power to arouse jurors' emotions: "Juries are comprised of ordinary people who are likely to be dramatically affected by viewing graphic or gruesome photographs." (Rubenstein, *A Picture Is Worth a Thousand Words–The Use of Graphic Photographs as Evidence in Massachusetts Murder Trials* (2001) 6 Suffolk J. Trial & Appellate Advoc. 197; see *Douglas et al., The Impact of Graphic Photographic Evidence on*

Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial? (1997) 21 Law & Hum. Behav. 485, 491 - 492 [documenting jurors' emotional reactions to viewing graphic photographs of murder victim]; Kelley, *Addressing Juror Stress: A Trial Judge's Perspective (1994)* 43 Drake L.Rev. 97, 104 [recounting jurors' post-traumatic stress symptoms experienced after viewing graphic photos of murder victim].)

Studies also show that graphic photographs influence the verdicts that juries return. (Miller & Mauet, *The Psychology of Jury Persuasion (1999)* 22 Am. J. Trial Advoc. 549, 563 [juries which viewed autopsy photographs during medical examiner's testimony were more likely to vote to convict defendant than those not shown photographs]; Douglas et al., *supra*, 21 Law & Hum. Behav. at p. 492 - 494 [same].) If a jury is more likely to render a guilty verdict when shown autopsy photographs than it would be if not shown the photographs, it seems logical that a penalty phase jury would be more likely to return a death verdict when shown such photographs than it would be if not shown the photographs.

Logic supports this conclusion because jurors' decisions at the penalty phase are far more discretionary and less constrained by law than their decisions at the guilt phase. (See *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044 ["The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts"].) Thus, a jury's death-sentencing discretion at the penalty phase is much more likely to be affected by evidentiary items such as inflammatory photographs. Viewing graphic photographs of victims' corpses creates a strong emotional reaction in almost any person, thus making it likely that the reaction will be so strong that it will cause a juror to minimize or ignore other evidence presented on the ultimate

question of whether the defendant should live or die.

The belief that the introduction of gruesome photographs causes jurors to ignore other evidence is supported by empirical study. It has been demonstrated that after viewing graphic photographs, jurors tend to prematurely reach a determination that the defendant should be sentenced to death. (Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making* (1999) 83 Cornell L.Rev 1476, 1497-1499 [noting jurors said autopsy photographs played prominent role in shaping death-sentencing decision that was reached prior to the conclusion of the trial].)

As reflected by the studies cited above, it is likely that the jurors at appellant's second penalty trial were greatly affected by the disputed photograph and may have shut their minds to the defense evidence and decided to sentence appellant to death.

The erroneous admission of the photograph requires reversal of appellant's death sentence. We know from the empirical data from the studies cited above, that this particular type of evidence has an impact on jurors that virtually precludes serious consideration of the defense evidence. For this reason, it is a reasonably possibility that appellant would not have been sentenced to death if the jury had not seen this highly inflammatory photograph. (*See People v. Brown* (1988) 46 Cal.2d 432, 447.)

The admission of these photographs also infringed the Fifth, Sixth, Eighth, and Fourteenth Amendment rights of appellant, as well as his rights guaranteed by article I, sections 7, 15, 17, and 24 of the California Constitution, to a fair trial and a reliable capital sentencing proceeding. Although as a general rule violations of state evidentiary principles do not implicate the federal and state constitutions, in this case the admission of the

photograph prevented appellant from getting a fair penalty retrial and thus violated his constitutional rights. (See *Lisenba v. California* (1941) 314 U.S. 219, 228 [recognizing state court's admission of prosecution evidence that infuses trial with unfairness would violate defendant's right to due process of law].)

"In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.) Admitting a photograph as graphic as the one at issue in this case under circumstances where it had little probative value to the determination of the appropriate sentence resulted in a fundamentally unfair trial.

Moreover, the admission of the photograph violated appellant's right to a reliable capital-sentencing determination. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [requiring heightened reliability for capital-sentencing determination].) "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) The admission of the photograph evoked very negative emotions, thus improperly affecting the deliberations and verdict of the jury in appellant's penalty re-trial.

As discussed above, there is a great danger that when exposed to a photograph like the one at issue here, jurors will foreclose consideration of other evidence and render their verdict based upon the emotional impact of the photograph. One likely result of the admission of this evidence is that the jurors did not consider defense evidence offered in mitigation, thus violating the Eighth Amendment. (See *Hitchcock v. Dugger* (1987) 481 U.S.

393, 398-399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114.)

In the present case, in order to offset the trial court's constitutional error in admitting this photograph at appellant's retrial, the State must show that its admission was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) To meet this burden, the State must demonstrate two things: (1) that the introduction of the photograph did not improperly affect the way the jurors approached the decision of whether to sentence appellant to life without the possibility of parole or to death and (2) that the jurors would have rendered a verdict of death had this photograph not been admitted. The first must be shown in order to overcome the likelihood that the photograph so affected the jurors that they disregarded other evidence, and the second is necessary because if the jury would not have returned a death verdict without the introduction of the photograph then the error obviously affected the verdict.

And since a death verdict is never required or preordained by the state of the evidence (see *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 301 [holding Eighth Amendment precludes automatic imposition of death penalty for first - degree murder]), this is an especially difficult burden for the State to bear. The facts of this case hardly render a death verdict an inevitability, as was demonstrated by the fact that the first jury in this case could not reach a verdict regarding sentence. Further, the prosecutor virtually conceded that appellant did not intend to kill Mrs. Dixon. The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. Under these circumstances, the State cannot demonstrate beyond a reasonable doubt that

admission of the photograph was harmless error. Appellant's sentence of death should be reversed.

*****

XIX.

APPELLANT'S DEATH SENTENCE SHOULD BE REVERSED BECAUSE THE TRIAL JUDGE FAILED TO GIVE A COMPLETE REASONABLE DOUBT INSTRUCTION AT THE PENALTY PHASE RE-TRIAL

As noted previously, the first penalty phase trial ended in a mistrial. Therefore, a new jury was impaneled to hear the penalty phase evidence. At the penalty retrial, the trial judge failed to give a complete version of CALJIC No. 2.90, the reasonable doubt instruction. The court delivered the following truncated version of No. 2.90:

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(7 CT 1589.) This version of No. 2.90 omitted the first paragraph of the instruction which states that the defendant is presumed innocent and that the prosecution bears the burden of proving that defendant is guilty beyond a reasonable doubt.

This omission was particularly egregious because the prosecutor relied on alleged and uncharged "other crimes,"offered pursuant to Penal Code section 190.3, subdivision (b),[100] as aggravating evidence in order to

---

[100] The trial judge delivered another instruction specifically addressing the section 190.3, subdivision (b) evidence presented in this case. The only reference to reasonable doubt in the version of CALJIC No. 8.87 given in this case was: "Before a juror may consider any of such criminal act or activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal act or activity." (7 CT 1588.) There is no mention of either presumption of innocence or burden of proof in this instruction.

persuade the jury to vote for death. Appellant was entitled to a presumption of innocence on those other crimes allegations offered under Penal Code section 190.3, subdivision (b). The presumption of innocence is a basic component of a fair trial. (*Estelle v. Williams* (1991) 425 U.S. 501, 503.)

This omission was exacerbated by the failure to instruct that the prosecution bore the burden of proving appellant was guilty of any these crimes beyond a reasonable doubt. The prosecution must establish that appellant was guilty of these alleged crimes beyond a reasonable doubt, and the jury should be so instructed. (*People v. Davenport* (1985) 41 Cal.3d 247, 280.) Under California law, Evidence Code section 502,[101] the trial judge has a duty to instruct on the burden of proof. These omissions left the jury in the penalty retrial without adequate guidance on fundamental principles of law.

The defective nature of the reasonable doubt instruction in this case amounts to constitutional error which is structural in nature, meaning that appellant need not prove that the error resulted in prejudice. (*Sullivan v. Lousiana* (1993) 506 U.S. 275, 281-282.) In this case, the jury made findings about alleged uncharged crimes without proper guidance on the burden of proof and presumption of innocence. Such findings were thus invalid, rendering the death sentence unreliable.

Even if the reversible per se standard does not apply, reversal is

---

[101] Section 502 states:

> The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether the burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. (Stats.196, c. 299, section 2, operative Jan. 1, 1967.)

required because the failure to give a complete reasonable doubt instruction prejudiced appellant at the penalty phase retrial. As recognized by this Court in *People v. Davenport, supra*, 41 Cal.3d at p. 280, errors concerning the reasonable doubt instruction and other crimes aggravating evidence are "especially serious because that type of evidence 'may have a particularly damaging impact on the jury's determination whether the defendant should be executed.'" (Ibid., quoting *People v. Robertson* (1982) 33 Cal.3d 21, 54.) This was particularly true in this case because of the especially sensational nature of one of the alleged crimes, a sodomy and oral copulation of Jason Labonte when he was about eight years old.

The prejudice caused by the inadequate reasonable doubt instruction was exacerbated by what the trial judge said in his pre-instructions at the penalty re-trial. In the course of those preinstructions, the judge told the jurors the following about the penalty phase:

> ...in this type of a proceeding, there are many rules of evidence that don't apply because, remember, we are not talking about guilty beyond a reasonable doubt. Many hearsay rules don't apply. So many rules of evidence don't apply in this proceeding, so the rules are much more relaxed than they ordinarily are. So you will be getting much more in this type of proceeding than you normally would. Those that have been on juries before, you know, put all evidence – rules out that you learned out of your minds, put it out of your mind. Giving you a whole new set at this time.

(40 RT 3931-3932; emphasis added.) While this is an incorrect statement of the law regarding the applicability of the rules of evidence in the penalty phase, the more important error was that the judge specifically instructed the jury that they would not be dealing with "guilty beyond a reasonable doubt." In fact, as to the evidence offered pursuant to section 190.3, subdivision (b), the jury is not supposed to consider such evidence unless the prosecution proves the defendant is guilty of the crimes beyond a reasonable doubt. This

misleading statement by the trial judge in his pre-instructions to the jury, taken together with the inadequate reasonable doubt instruction given at the conclusion of the evidence, combined to make it likely that not all jurors in the penalty retrial would have voted to sentence appellant to death if they had received adequate and correct instructions.

In this case, findings critical to the penalty determination were made without adequate guidance on the crucial issues of reasonable doubt, presumption of innocence and burden of proof. There is a reasonable likelihood that at least some of the jurors accepted certain aggravation evidence because of the inadequate reasonable doubt instruction. Under these circumstances, appellant was deprived of his federal constitutional right to a jury fully instructed on the applicable legal principles and prejudice from that error is likely. Even assuming that the failure to properly instruct the jury about presumption of innocence and the State's burden of proof is not structural error, there is a reasonable possibility that these instructional errors contributed to the penalty verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 448.) Confidence in the reliability of the death sentence in this case is sufficiently undermined that reversal is required.

*****

XX.

APPELLANT'S RETRIAL AFTER THE ORIGINAL JURY FAILED TO REACH A PENALTY VERDICT VIOLATED HIS FEDERAL CONSTITUTIONAL RIGHTS

A. Introduction

At appellant's first trial, the jurors deliberated over four days on the issue of penalty. (8 CT 1707-1711.) On the afternoon of the fourth day, the trial court declared a mistrial, finding that the jury was hopelessly deadlocked on the question of sentence. (8 CT 1711.) In the penalty retrial, a second jury returned a death verdict against appellant after less than eight hours of deliberation. (8 CT 1736-1737.)

Allowing the penalty retrial under these circumstances constituted federal constitutional error. An overwhelming majority of the jurisdictions that allow the death penalty to be imposed do not permit the penalty phase to be retried after a jury has been unable to reach a unanimous verdict as to the penalty. As one of the few remaining jurisdictions that permits a penalty retrial following a hung jury, California's death penalty scheme is an anomaly and is contrary to the "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) The penalty retrial following the hung jury violated appellant's federal constitutional rights to a fair jury trial, reliable penalty determinations, freedom from cruel and unusual punishment, due process and equal protection as guaranteed by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution as well as state constitutional protections in article I, sections 1, 7, 15, 16, and 17 of the California Constitution.[102]

---

[102] Despite the lack of objection at trial on this ground, the California Supreme Court has consistently considered "as applied" challenges, such as

B. Standard of Review

Analysis of a claim that a death penalty scheme violates the cruel and unusual punishment prohibition of the Eighth Amendment involves two inquiries (1) "Objective indicia that reflect the public attitude toward a given sanction" (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 173), including the "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made" (*Enmund v. Florida* (1982) 458 U.S. 782, 788); (2) "informed by [these] objective factors to the maximum possible extent" (*Coker v. Georgia* (1977) 433 U.S. 584, 592), the Court "bring[s] its own judgment to bear on the matter" (*Enmund v. Florida*, *supra*, 458 U.S. at pp. 788-789) to determine whether the sanction "comports with the basic concept of human dignity at the core of the Amendment." (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 182.)

C. Analysis

The death penalty is barred altogether currently in 12 states[103] and in the District of Columbia and Puerto Rico. The death penalty is

---

this one, to California's death penalty scheme on their merits without requiring objection below. (*People v. Hernandez, supra,* 30 Cal.4th at p. 863; *People v. Seaton* (2001) 26 Cal.4th 598, 691; *People v. Davenport* (1995) 11 Cal.4th 1171, 1225; *People v. Garceau* (1993) 6 Cal.4th 140, 207; *People v. Roberts* (1992) 2 Cal.4th 271, 323.) A reviewing court also may consider on appeal a claim raising a pure question of law on undisputed facts. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118; *People v. Hines* (1997) 15 Cal.4th 997, 1061; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Wade v. Taggart* (1959) 51 Cal.2d 736, 742.)

[103] The death penalty is prohibited in the following jurisdictions: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. The death penalty is also prohibited in the District of Columbia and Puerto Rico. (See Death Penalty Information Center website at www.deathpenaltyinfo.org/article.php

authorized under federal law and in 38 state jurisdictions currently. However, In the vast majority of these jurisdictions, 28 of the 38 states, if the jury is unable to agree unanimously on a penalty phase verdict, there is no penalty retrial and the defendant is instead sentenced to life imprisonment or life imprisonment without possibility of parole (LWOP).[104] A penalty retrial following a hung jury is also prohibited under federal law.[105] Delaware has an unusual procedure which requires a unanimous jury finding of at least one aggravating circumstance or a life sentence results,[106]

---

[104] Ark. Stat. Ann. § 5-4-603(c) (1993); Col. Rev. Stat. § 18-1.3-1201(2)(b)(II)(d) (2003); Ga. Code Ann. § 17-10-31.1(c) (Supp. 1994); Id. Code § 19-2512(7)(c) (2003); Ill. Ann. Stat. ch. 720, § 5/9-1 (Smith-Hurd 1993); Kan. Stat. Ann. § 21-4624(e) (Supp 1994); La. Code Crim. Proc. Ann. art. 905.8 (West Supp. 1995); Md. Ann. Code art. 27, §§ 413(k)(2), 413(k)(7) (Supp. 1994); Miss. Code Ann. § 99-19-103 (1994); Mo. Ann. Stat. § 565.030(4) (Vernon Supp. 1995); NH Rev. Stat. Ann. § 630:5(IX) (Supp. 1994); Nev. Rev. Stat. § 175.556 (2003); NJ Stat. Ann. § 2C:11-3(c)(3)(c) (West Supp. 1995); NM Stat. Ann. § 31-20A-3 (1994); NY Crim. Proc. Law § 400.27(10) (WESTLAW 1995); NC Gen. Stat. § 15A-2000(b) (Supp. 1994); Ohio Rev. Code Ann. § 2929.03(D)(2) (Anderson 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West Supp. 1995); Or. Rev. Stat. §§ 163.150(1)(e), 163.150(1)(f), 163.150(2)(a) (2001); Pa. Stat. Ann. tit. 42, § 9711(c)(1)(v) (Purdon Supp. 1995); SC Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995); SD Codified Laws Ann. §23A-27A-4 (1988); Tenn. Code Ann. § 39-13-204(h) (1991); Tex. Crim. Proc. Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995); Utah Code Ann. § 76-3-207(4) (1995); Va. Code Ann. § 19.2-264.4 (1990); Wash. Rev. Code Ann. § 10.95.080(2) (Supp. 1995); Wyo. Stat. § 6-2-102(e) (Supp. 1994).

The New York and Kansas death penalty statutes were declared unconstitutional in 2004. (See www.deathpenaltyinfo.org/state/ [as of May 12, 2005].)

[105] 18 USCA § 3593(e) (West Supp. 1995); 21 USCA § 848(1) (West Supp. 1995).

[106] 11 Del. Code § 4209(d)(1) and (2) (2003).

although the judge makes the ultimate penalty determination otherwise. Similarly, Florida requires that the jury makes only a recommendation on sentencing but that the judge actually decides between life and death.[107] Montana also employs a procedure where the judge determines the penalty upon a jury finding of at least one aggravating factor.[108]

Formerly, California followed, under the 1977 death penalty statute, the more enlightened trend and prohibited a penalty retrial following a hung jury. (See *People v. Kimble* (1988) 44 Cal.3d 480, 511.)[109] However, under the harsher 1978 death penalty statute, California reverted to the minority group of states which permit such penalty re trials. (Pen. Code, §190.4, subd. (b).) This position is followed in only a few other jurisdictions.[110] Statutes in Connecticut and Kentucky are silent about the consequences of a hung jury in the penalty phase of a capital case, but case law suggests that penalty retrials are permissible. (*State v. Daniels* (Conn. 1988) 542 A.2d 306, 317; *State v. Ross* (Conn. 2004) 849 A.2d 648, 726, fn. 68; *Skaggs v. Commonwealth* (Ky. 1985) 694 S.W.2d 672, 682; *Dillard v. Commonwealth* (Ky. 1999) 995 S.W.2d 366, 374.)

Thus, of those jurisdictions that rely on jury determinations of penalty in a capital case, California stands with only six other states which permit penalty retrials following a hung jury. This shows that California is out-of-step with an emerging national consensus prohibiting penalty retrials

---

[107] Fla. Stat. Ann. § 921.141(2) and (3).

[108] Mont. Code Ann. § 46-18-305 (2003).

[109] See former Cal. Pen. Code, § 190.4, subd. (b).

[110] Ala. Code § 13-A-5-46(g) (2002); Ariz. Crim. Code § 13-703.01L (2002); Ind. Code § 35-50-2-9(f) (2002); Nev. Rev. Stat. 175.556 (2003).

following a hung jury.

This consensus is borne out of recognition that concern for fundamental fairness and human dignity require that a capital defendant should only be "forced to run the gauntlet once" on death. (*Green v. United States*, *supra*, 355 U.S. at p. 190.) Normally, "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause," (*Richardson v. United States* (1984) 486 U.S. 317, 324) and this general rule has been held applicable to capital case penalty proceedings. (*Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 108–110.) But most states allowing the death penalty have recognized that one penalty trial is enough. Even if double jeopardy does not apply, it is still indisputable that death is a penalty different from all others. (*Gregg v. Georgia, supra*, 428 U.S. at p. 188 (joint opinion of Stewart, Powell and Stephens, JJ.).) No capital defendant should be subject to repeated attempts by the State to sentence him to death "thereby subjecting him to embarrassment, expenses and ordeal and compelling him to live in a continuing state of anxiety and insecurity." (*United States v. Scott* (1978) 437 U.S. 82, 95.) Such penalty retrials also take a tremendous toll on the other trial participants – defense counsel, the prosecutors, the trial judge and court personnel, and the families and friends of the victims and defendants.

Compelling a capital defendant to endure the ordeal of a second full blown trial concerning whether he will live or die is constitutionally inconsistent with the "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, *supra*, 356 U.S. at p. 101.) Appellant's death penalty should be reversed.

*****

XXI.

THE TRIAL JUDGE DID NOT COMPLY WITH THE MANDATE OF PENAL CODE SECTION 190.9 THAT ALL PROCEEDINGS IN A CAPITAL CASE BE RECORDED BY A COURT REPORTER

Penal Code section 190.9 states in relevant part:

> In any case in which a death sentence may be imposed, all proceedings, conducted in the municipal and superior courts, 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.

As the following discussion will show, the trial judge allowed numerous proceedings in this case to go forward without a court reporter present.

A. The Off-the-Record Proceedings

1. Pre-trial Proceedings

On October 4, 1995, there was an unreported conference regarding the prosecutor's decision to seek the death penalty against appellant. (3 RT 303.

2. The Competency Proceedings

On March 13, 1996, there was an ex parte proceeding without a court reporter present. (8 CT 1642.) On April 3, 1996, the trial judge held a chambers conference meeting with the attorneys regarding the "procedures" involved with the upcoming Penal Code section 1368 competency hearing. This conference was not transcribed by a court reporter. (9 RT 677.) On April 8, 1996, the trial judge stated that he would go off-the-record to discuss what jury instructions he would give to the competency hearing jury. (10 RT 764.)

3. Pre-trial Proceedings

On October 2, 1996, during a hearing on in-limine motions regarding

the upcoming trial, the trial judge noted that earlier in the day he had an off-the-record chambers conference with the attorneys regarding procedures and scheduling. (19 RT 1860.) Later in that hearing, the trial judge noted that the parties earlier spoke off-the-record about the defense need to do additional investigation. (19 RT 1888.)

On October 11, 1996, there was an unreported meeting among the parties regarding a stipulation about the release of laboratory records to defense counsel for purposes of photocopying them. (8 CT 1672.) On October 25, 1996, the parties and the trial judge had another unreported conference regarding jury selection and scheduling. (8 CT 1675.)

On October 28, 1996, during jury selection, the trial judge stated that there was an "informal conference" off-the-record regarding completed jury questionnaires and, that as a result, fourteen venire panel members would be excused. (22 RT 1954.) Later in that same hearing, the Reporter's Transcript notes that there was an unreported side bar conference. (22 RT 1973.) On November 1, 1996, during the course of jury selection, the Reporter's Transcript notes that there was an off-the-record side bar conference. (23 RT 2084.) At the end of this hearing, the trial judge told the court reporter that he wanted to go off-the-record and then asked to go back on the record. (23 RT 2198-2199.)

4. The Guilt Phase

On November 5, 1996, during a discussion on which, if any, autopsy photographs should be admitted at the guilt phase, the trial judge stated that there had been an off - the - record hearing in chambers among the parties about these photographs. (25 RT 2371.) The Reporter's Transcript for that date shows that later in the proceedings, the trial judge asked for an off-the-record side bar conference with the attorneys. (25 RT 2490.)

On November 6, 1996, during the direct examination of Dr. Super, the pathologist who did the autopsy of Mrs. Dixon, the trial judge asked for an unreported side bar conference with the attorneys. (26 RT 2531.) Later that day, the trial judge asked for an unreported side bar conference with the attorneys. (26 RT 2659.)

On November 8, 1996, the trial judge stated that there had been an "informal jury instruction conference" which was not reported. (28 RT 2711.) During the rest of the hearing on this date, the trial judge referred several times to the off-the-record discussions about the guilt phase jury instructions. (28 RT 2719, 2721, 2722, 2723, 2725, 2730.)

On November 12, 1996, during the direct examination of a psychiatric expert, Dr. Cerbone, the trial judge requested an off-the-record side bar conference with the lawyers. (29 RT 2743.) Later in that same hearing, the trial judge referred to an "informal discussion" about the crucial issue of what the defense expert would be allowed to testify about; this discussion occurred off-the-record. (29 RT 2773.) During this hearing, the trial judge twice requested off-the-record side bar conferences with the lawyers. (29 RT 2826, 2913.)

On November 13, 1996, at the close of evidence in the guilt phase, the trial judge stated on the record that there had been another off-the-record "formal" jury instruction conference. (30 RT 2917.) Later in this hearing, the judge also noted that there was an off-the-record conference about the jury verdict forms. (30 RT 2919.) Defense counsel renewed their request for a "Tison" instruction; apparently this request was discussed previously during the unreported formal jury instruction conference. (30 RT 2920.) In that same hearing, after the judge directed the jurors to go into the jury room and begin deliberations, he asked for another off-the-record side bar

conference. (30 RT 3012.)

5. First Penalty Phase

During the course of the first penalty trial, there were a number of unreported side bar conferences requested by the trial judge. (33 RT 3172, 3299; 34 RT 3478; 35 RT 3566, 3573.) On November 20. 1996, while discussing the content and form of final arguments to the jury, the trial judge stated that there had been an unreported chambers conference among the parties about the arguments. (34 RT 3487-3489.)

The record also shows some confusion about whether there was a conference about the penalty phase jury instructions which was on the record or off the record. On November 21, 1996, the judge initially stated the instructional conference was on the record. (35 RT 3491.) However, defense counsel stated that he wanted to talk about one of the instructions, CALJIC No. 8.87, and the objections to this instruction were discussed in an off-the-record conference. (35 RT 3491.)

During the course of jury deliberations in the first penalty phase, the jurors sent the judge several notes. On November 21, 1996, the record shows that the attorneys and the trial met to discuss a jury note in an unreported conference; subsequently, the judge put information about that discussion on the record. (35 RT 3581.) On November 25, 1996, while the first penalty phase jury was still deliberating, the jury requested a read back of the testimony of Mrs. Hayes. The trial judge stated that the lawyers and he had discussed this request in an unreported meeting. (36 RT 3588.) The next day, November 26th, the jury sent out another note, and the judge stated that the attorneys and he had met earlier, in an unreported conference, to discuss the note. (36 RT 3594.) Later that day, when this jury announced that it was deadlocked and the parties had reconvened in the courtroom, the

judge requested an off-the-record side bar conference. (36 RT 3600.) There was yet another note from the deliberating jury requesting further clarification of the instructions. During the discussion of that note, the trial judge stated on the record that there had been an unreported meeting of the parties about this note. (36 RT 3603.)

6. The Second Penalty Phase

During a hearing on March 31, 1997, the trial judge discussed issues which he said had been discussed by the parties in a previous unreported conference. (38 RT 3640.) On April 28, 1997, while describing the jury selection process to prospective jurors, the judge asked for an unreported side bar conference. (39 RT 3775.) During the voir dire process for selection of this second jury, on May 2, 1997, the judge requested several unreported side bar meetings with the lawyers. (40 RT 3789, 3860, 3902.) During the presentation of the evidence at the second penalty phase trial, the trial judge requested more unreported meetings with the lawyers. (42 RT 4178, 4269.) On May 7, 1997, before the testimony of one of the victim impact witnesses, the judge again asked for an unreported meeting with the lawyers. (43 RT 4304.) There were off-the-record discussions about the jury instructions for the second penalty trial. (43 RT 4318, 4320-4322.) During the subsequent three days of testimony, the trial judge requested several off-the-record meetings with the lawyers. (44 RT 4362; 46 RT 4788; 47 RT 4864, 4940, 4963.) After defense counsel's closing argument, the trial judge requested another off-the-record side bar conference with the lawyers. (48 RT 5104.)

B. The Number of Unreported Proceedings in This Case as Well as the Crucial Nature of These Unreported Proceedings Require Reversal

The trial judge in this case did not comply with the clear dictates of

section 190.9. As enumerated ante, the record in this case shows that there were at least fifty-eight incidents of off-the-record proceedings during the course of the pre-trial and trial proceedings. More importantly, the latter involved some very crucial discussions. For example, all of the conferences about jury instructions at both phases of the trial and the penalty phase retrial were not reported. Similarly, there were four off-the-record conferences involving jury notes and requests.

In previous decisions, while this Court has refused to reverse judgments because the trial judge failed to comply with section 190.9, it also has acknowledged the mandatory nature of this statute. For example, in *People v. Freeman* (1995) 8 Cal.4th 450, the Court wrote:

> We emphasize the trial Court should meticulously comply with Penal Code section 190.9, and place all proceedings on the record. It can seem burdensome, as it apparently seemed to the Court and parties in this case, to discuss routine matters and conduct bench conferences on the record before a court reporter. But, in addition to assuring an adequate record for appellate review, . . . following that mandate can ultimately save much time and effort in preparing the appellate record. Here, two substantial record settlement proceedings in superior court were required, proceedings that would not have been necessary had Penal Code section 190.9 been followed. If the trial court had taken the necessary care, and conducted everything on the record, substantial delay, expense, and squandering of judicial resources could have been avoided.

(*Id.* at p. 511) This Court has refused, in effect, to enforce the provisions of Penal Code section 190.9. Instead of insisting that trial judges hew to the clear mandate of section 190.9, the Court has placed the burden on the criminal defendant to establish on appeal that the trial court's failure to assure that all proceedings were recorded by a court reporter prejudiced the defendant. (See, e.g., *People v. Freeman*, *supra*, 8 Cal.4th at p. 511; *People*

v. Scott (1997) 15 Cal.4th 1188, 1203-1204.)

Appellant urges the Court to reconsider its position. Not only does it effectively eviscerate the statute, it also defies logic. In effect, this Court has ruled repeatedly that trial judges are free to violate the provisions of section 190.9 as long as the appellant is unable to identify specifically the prejudice caused by the failure to comply with the statute. In order to show prejudice, however, the appellant must be able to reconstruct what happened during each off-the-record proceeding. More often than not, such reconstruction--at least accurate and complete reconstruction--is impossible because memories fade with time, and capital trials are unusually long and complicated. Indeed, these problems Inherent to capital proceedings, underlie the purpose of section 190.9. It is therefore both illogical and unfair to require appellant to show prejudice when it is the trial court which has made it virtually impossible to do so by failing to meet its obligations under section 190.9.

This case, where the record correction process did not begin until several years after the conclusion of the trial, is not unusual. [111] Despite many hours spent in informal discussion with trial counsel, appellant was not able to make any adequate reconstruction of off-the-record proceedings.[112] This case is typical.

Appellant urges the Court to take a page from the jurisprudence of the Pennsylvania Supreme Court. That court has developed a reversible per se rule on the use of biblical references by prosecutors in jury arguments in

---

[111] The motion to correct the record on appeal was filed on July 8, 2002. (35 CT 7618.)

[112] Appellant filed his first proposed settlement statements on June 13, 2003. (41 CT 8560.) The process of trying to settle the record lasted almost a year. On March 23, 2004, the amended stipulation and order regarding engrossed settlement of record was filed. (41 CT 8656.)CT 8656.)

death penalty cases. After many years of futile warnings to prosecutors to not to use these references, the Pennsylvania Supreme Court finally instituted a per se rule:

> In the past we have narrowly tolerated references to the Bible and have characterized such references as on the limits of "oratorical flair" and have cautioned that such references are a dangerous practice which we strongly discourage. We now admonish all prosecutors that reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.

(*Commonwealth v. Chambers* (Pa. 1992) 599 A.2d 630, 644 [citations omitted]; see also *Commonwealth v. Brown* (Pa. 1998) 711 A.2d 444, 457.)

Appellant recognizes, of course, that the prosecutorial misconduct which was the focus of the rule articulated in the Chambers decision is very different from the issue of trial courts' routine failure to follow the requirements of section 190.9. Nevertheless, as long as this Court does not sanction the trial courts for not following the requirements of section 190.9, a cavalier disregard of the statute by trial judges likely will continue. If such an important proceeding as the conference on jury instructions, for example, need not be recorded and may simply be "summarized," then section 190.9 truly has no meaning.

Not only did the failure to conduct all proceedings in this capital case before a court reporter violate the mandate of section 190.9, it violated appellant's rights to due process and to a fair trial under the Fourteenth Amendment. It also violated his rights to a state-created liberty interest under *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346 and his Eighth Amendment right to a reliable death penalty adjudication. The United States Supreme Court has held that meaningful appellate review requires an

adequate trial record. (See, e.g., *Rushen v. Spain* (1983) 464 U.S. 114, 118.) While it is true that this Court has held that the use of settled statements is a means of reconstructing missing trial records and meets the due process need for an adequate appellate record, the settled statements in this case do not meet this standard. First, there were many off-the-record proceeding, some 58 incidents. In the instant case, the amended stipulation and order regarding engrossed settlement of the record shows that neither the trial attorneys nor the trial judge had specific memories of what happened during the unrecorded proceedings in this case. (41 CT 8656-8660.) Even in those cases when the parties do claim to remember something about the unrecorded portions of the trial, there is no guarantee that such memories are accurate.

While appellant concedes that he cannot demonstrate specifically the prejudice he suffered as a result of the failure to comply with section 190.9, the fact that all of the discussions of proposed jury instructions took place off-the-record (28 RT 2711-2714, 2719, 2721-2723, 2725, 2730; 30 RT 2917, 2919-2920; 35 RT 3491; 43 RT 4318, 4320-4322) raises red flags, given the crucial importance of a properly instructed jury at both the guilt and penalty phases of a capital case. Although the trial judge purportedly made off-the-record recited for the record went on the record to putthe objections of the parties to certain of the instructions, those "summaries" were truncated and incomplete.

In addition, all discussions about the four jury notes sent out during the first penalty phase took place off-the-record. (35 RT 3581, 3588, 3594, 3603.) If trial judges feel free to conduct off-the-record conferences and proceedings on such crucial issues as jury instructions and jury notes, the mandate of section 190.9 that all proceedings in a capital case must be on the

record has been truly eviscerated. In effect, it has become a meaningless requirements, which trial judges routinely ignore. Appellant respectfully requests the Court to revisit and reexamine its requirement that the appellant bear the burden to show prejudice resulting from such flagrant violations of section 190.9.

*****

XXII.

THE PROCESS USED IN CALIFORNIA FOR DEATH - QUALIFICATION OF JURIES IS UNCONSTITUTIONAL

The death-qualification procedure used in California to select juries in capital cases is unconstitutional. "A 'death-qualified' jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and oath." (*Buchanan v. Kentucky* (1987) 483 U.S. 402, 408, fn. 6 [internal citations and quotations omitted].) Death-qualification in California, in general and as applied in this case, violates the Fifth, Sixth, Eighth and Fourteenth Amendments as well as article I of the California Constitution, sections 7, 15, 16 and 17.

A. The Record in this Case

Several motions concerning the jury selection process, filed by defense counsel before both the first and second trials in this case, argued that the death-qualification procedure resulted in juries which were more likely to convict as well as more likely to vote for the death penalty rather than for a sentence of life without the possibility of parole. At the first trial, in requesting individual voir dire pursuant to *the Hovey* decision,[113] the defense described how the death-qualification process skews which jurors are chosen to serve. (2 CT 252-256.) Citing two articles by Dr. Craig Haney about the biasing effect of the death-qualification process, defense counsel argued that such process results in juries which are more prone to convict and to sentence the defendant to death. (2 CT 253-255)

---

[113] *Hovey v. Superior Court* (1980) 28 Cal.3d 1. This decision is discussed in detail *ante*.

As discussed in Argument XV *ante*, before the penalty phase retrial in this case, the prosecutor filed a motion requesting that the trial judge ask during voir dire whether prospective jurors would require that the State prove that defendant had an intent to kill before they would impose the death penalty. (6 CT 1402-1408.) In its opposition to this motion, the defense argued:

> They [the prosecutors] are instead asking the Court to seat what would have to be termed, super-death-qualified jurors – jurors who not only can impose the death penalty in the abstract, but who have expressed a willingness to do so under the specific facts and legal issues presented by the case actually before them. This the law does not permit. This is not death-qualification in the abstract.

(6 CT 1447.) In a supplemental memorandum in opposition, the defense also observed: "We still end up either excusing jurors who do not fit any proper definition of a challenge for cause, unfairly creating a doubly-death-qualified jury skewed in favor of the prosecution. . ." (7 CT 1555.) Defense counsel further argued at the hearing on the prosecution's motion: ". . .what [the prosecutor] is asking the court to pre-screen for an even more death qualified, what I was calling the super death qualifying jury." (38 RT 3660.)

Given this record, the question of whether the death-qualification process was improper, unfair and unconstitutional was before the trial judge in this case at the time of jury selection in both the first trial and the penalty phase retrial. The trial judge denied these defense motions and arguments.

B. The Death Qualification System and State and Federal Legal Precedents

Death qualification inquires "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*People v. Ashmus* (1991) 54 Cal. 3d 932, 961 - 962 citing *Wainwright v. Witt* (1985) 469 U.S. 41, 424 and *Adams v.*

Texas (1980) 448 U.S. 38, 45.) If a juror's ability to perform his or her duties is substantially impaired under this standard, he or she is subject to dismissal for cause. This Court has held that the only question that a trial court needs to resolve during death-qualification is "whether any prospective juror has such conscientious or religious scruples about capital punishment, in the abstract, that his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*People v. Mattson* (1990) 50 Cal. 3d 826, 845.)

This test focuses on the abstract, conscientious, or religious scruples of prospective jurors, not case specific considerations. (*People v. Pinholster* (1992) 1 Cal. 4th 865, 918.) A scruple is "an ethical consideration or principle that inhibits action." (Merriam-Webster's Collegiate Dictionary (1995) 10th Edition, p. 1281.) Accordingly, the "views" that matter here are, ultimately, moral ones. (*People v. Mattson*, *supra*, 50 Cal. 3d at p. 846.) In California capital cases, death-qualification revolves around a juror's ability to perform his or her duties under the state death penalty law. Under section 190.3, a juror's duty at the penalty phase is to "determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole." The jury is required to take into account a number of listed sentencing factors (Pen. Code, §190.3, factors (a)-(k)) in determining sentence.

A jury is authorized to "leave or impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole." (Penal Code Section 190.3) Only this general

guidance to consider and weigh the evidence is provided. Jurors are not told which factors in the section 190.3 list are aggravating and which are mitigating.

This Court has identified three "moral and sympathetic judgments" which jurors must determine at the penalty phase of a capital case in California. First, they must determine if evidence has been presented which supports any of the factors listed in Penal Code section 190.3. Second, they must decide whether, based on its moral context, that factor is aggravating or mitigating . Finally, they must determine the weight to be given each factor. At each stage, the jury makes moral determinations. A jury's "moral and sympathetic judgment" is not limited to the section 190.3 mitigating factors. It must determine "any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death," (*People v. Easley* (1983) 34 Cal. 3d 858, 879, fn. 10, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604), whether or not related to the offense for which he is on trial. (CALJIC No. 8.85, 7 CT 1586-1587.)

The jury's duty at the penalty phase in California is quite different from its duty at the guilt phase. Guilt phase juries find facts and apply the law to those facts. This Court has held that, unlike the guilt phase determination, the penalty phase determination in California is "'inherently moral and normative, not factual.'" (*People v. Prieto* (2003) 30 Cal. 4th 226, 263 quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 779; see also *People v. Box* (2000) 23 Cal.4th 1153, 1216.) [114] "Unlike the guilt determination,

---

[114] This Court has regularly described a jury's duty at the penalty phase in California as "moral" and "normative." (See, e.g., *People v. Maury* (2003) 30 Cal.4th 342, 440; *People v. Hughes* (2002) 27 Cal.4th 287, 394; *People v. Weaver* (2001) 26 Cal.4th 876, 985; *People v. Anderson* (2001) 25 Cal.4th 543, 589 and 591-592; *People v. Jenkins* (2000) 22 Cal.4th 900,

where appeals to the jury's passions are inappropriate, in making the penalty decision, the jury must make a moral assessment of all the relevant facts as they reflect on its decision." (*People v. Smith* (2003) 30 Cal. 4th 581, 634; *People v. Padilla* (1995) 11 Cal.4th 891, 956-957; *People v. Haskett* (1982) 30 Cal.3d 841, 863.)

This Court has held: "A penalty phase jury performs an essentially normative task. As the representative of the community at large, the jury applies its own moral standards to the aggravating and mitigating evidence to determine if death or life is the appropriate penalty for that particular offense and offender." (*People v. Mendoza* (2000) 24 Cal.4th 130, 192.) The jury instruction given in this case informed the jurors: "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (CALJIC No. 8.88; 7 CT 1609.)

There is a serious, underlying problem in the death-qualification process in California. On the one hand, a potential juror will be removed for cause if his/her moral views will substantially impair his/her duty. On the other hand, a juror in a death penalty case in California must make a "moral and normative" judgment, and by law is required to make "moral and sympathetic" determinations.

In California, neither the Legislature nor the electorate has ever enacted a statute requiring or governing death-qualification process of penalty phase jurors. The statute governing jury selection in criminal cases actually forecloses death qualification. Code of Civil Procedure §229, subd. (h) states:

1053-1054; *People v. Bemore* (2000) 22 Cal.4th 809, 859; *People v. Sakarias* (2000) 22 Cal.4th 596, 639.)

> challenge for implied bias may be taken for one or more of the following causes, and for no other:
>
> . . .
>
> (h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve.

(*Ibid.*; emphasis added.)

Therefore, Code of Civil Procedure 229, sub (h) allows the removal of jurors in death penalty cases only when their views on the death penalty would affect their guilt phase determination; therefore, the statute is designed to prevent jury nullification at the guilt phase.

No other reason for removing a juror is authorized under this statute. Nonetheless, this Court has provided a "judicial gloss" to the statute that, contrary to its express language, allows the removal of jurors whose views would affect their penalty determination. (See *Hovey v. Superior Court* (1980) 28 Cal. 3d 1, 9, fn. 7, *9.)*

In Witherspoon v. Illinois (1968) 391 U.S. 510, 522, the United States Supreme Court approved the death-qualification process in capital cases. Under Witherspoon, a juror could be excused for cause if he or she would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case," or "his attitude toward the death penalty would prevent [him] from making an impartial decision as to the defendant's guilt." (Ibid. emphasis in original.) These standards were refined in *Adams v. Texas* (1980) 448 U.S. 38, 45 and then clarified further in *Wainwright v. Witt* (1985) 469 U.S. 412, which allows for removal of a juror whose ability to perform his duties are "substantially impaired."

While the "substantially impaired" test may be proper in the context where the jury has its typical role of finding facts, this Court has found it improper for a California penalty phase jury:

> It is not simply a finding of facts which resolves the penalty decision, but the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty.

(*People v. Brown* (1985) 40 Cal 3d 512, 539-540; citations, quotations, and footnotes omitted.) In *People v. Prieto* (2003) 30 Cal.4th 226, 263, this Court noted that a California death penalty jury does not make a narrow factual determination, like the typical jury alluded to in Witt's traditional test, but instead it makes a broad "moral and normative" determination. (*People v. Snow* (2003) 30 Cal. 4th 43.)

In *Wainwirght v. Witt, supra*, 469 U.S. at pp. 421-422, the Supreme Court supplanted the Witherspoon standard, finding that sentencing juries "could no longer be invested with such [unlimited] discretion [as was the case in Witherspoon]," and "that many capital sentencing juries are now asked specific questions, often factual, the answers to which will determine whether death is the appropriate penalty." The Supreme Court adopted a test that was in "in accord with traditional reasons for excluding jurors" in non-death penalty cases. (*Wainwright v. Witt, supra*, 469 U.S. at p. 423.)

In Morgan v. Illinois (1992) 504 U.S. 719, the United States Supreme Court found that, in order to sit on a death penalty jury, a prospective juror must not automatically impose the death penalty and must be willing to consider a life sentence. The Court held that jurors who would "be unalterably in favor of, or opposed to, the death penalty in every case . . . by definition are ones who cannot perform their duties in accordance with

law." (*Id.* at p. 735.) So, "juror[s] who will automatically vote for the death penalty in every case" must be disqualified from service, because their presence on the jury would violate "the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment." (*Id.* at p. 729.)

C. The Central Role of the Jury in Determining the Evolving Standards of Decency Applicable in Death Penalty Cases

In Witherspoon, the Supreme Court noted that the jury was "given broad discretion to decide whether or not death is 'the proper penalty' in a given case." (*Witherspoon v. Illinois, supra*, 391 U.S. at p. 519.) Under California law, a death penalty jury is given a comparable freedom to decide what an "appropriate" penalty is in an individual case. As this Court stated:

> [T]he focus of the penalty selection phase of a capital trial is more normative and less factual than the guilt phase. The penalty jury's principal task is the moral endeavor of deciding whether the death sentence should be imposed on a defendant who has already been determined to be "death eligible" . . . In such a penalty selection undertaking . . . The gist of defendant's argument – that the trial court's penalty phase instructions failed to guide the jury in reaching a penalty decision, allowing it "complete discretion" – is correct. It is not a mechanical finding of facts that resolves the penalty decision, but the jury's moral assessment of those facts as they reflect on whether defendant should be put to death.

(*People v. Musselwhite* (1998) 17 Cal. 4th 1216, 1267 [citations and quotations omitted].)

In *Hovey v. Superior Court* (1980) 28 Cal. 3d 1, 73, fn. 122, this Court noted that the jury in Witherspoon had "unguided and unchecked" discretion and that Furman had held that such discretion was unconstitutional. This Court also stated in the *Hovey* decision that, although it was not addressing the constitutionality of the California death penalty

scheme, "it cannot be gainsaid that a capital jury in this state exercises considerable discretion in identifying and weighing the circumstances in aggravation and mitigation which it is directed by statute to consider." (*Ibid.*, emphasis added.) Since a California death penalty jury is given the same kind of broad discretion as delineated in the decision in Witherspoon, supra, the Witt test is not applicable to the California death penalty scheme.

In Witt, supra, the Supreme Court determined that "Witherspoon is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment." (*Wainwright v. Witt, supra*, 469 U.S. 412, 423.) This statement is incorrect.[115] Moreover,

> one of the most important functions any jury can perform in making [the death penalty] selection is to maintain a link between contemporary community values and the penal system – a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."

(*Witherspoon v. Illinois, supra*, 391 U.S. 510, 520, fn 15 quoting *Trop v. Dulles* (1958) 356 U.S. 86, 101.)

The "evolving standards of decency" language of the *Trop* decision is

---

[115] The Court in *Witt* was incorrect in labeling *Witherspoon* as a Sixth Amendment case. While the Supreme Court stated at one point that the "jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." (*Witherspoon v. Illinois, supra*, 391 U.S. at p. 518), this Court has opined that the "precise constitutional basis for [the *Witherspoon*] holding is not entirely certain." (*Hovey v. Superior Court, supra*, 28 Cal. 3d at p.11, fn. 17 [noting that although *Witherspoon* did mention the "impartial jury" requirement of the Sixth Amendment, "this interpretation does not withstand scrutiny" since that right did not yet apply to the States].) This Court stated that it appeared that *Witherspoon* involved "due process, as seen through the filter of Sixth Amendment values." (*Ibid.*)

a cornerstone of Eighth Amendment death penalty jurisprudence. Under the Eighth Amendment, the Supreme Court determines whether a punishment is cruel and unusual, i.e., whether the evolving standards of decency have reached the point where society deems the punishment to be cruel and unusual.

The Supreme Court has held repeatedly that one of the best sources of objective information on such evolving standards are verdicts of jurors who have the responsibility of deciding whether to impose the punishment. (See, e.g., *Furman v. Georgia* (1972) 408 U.S. 238, 278-279, and 299 (conc. opn. of J. Brennan); Id. at pp. 439-442 (J. Powell, C.J. Burger, J. Blackmun, and J. Rehnquist dis. opns.).) The process of analyzing jury determinations as evidence of the "evolving standards of decency" is one of the few, long-standing, and consistent areas of Supreme Court death penalty jurisprudence. In fact, three Supreme Court justices recently wrote separately to emphasize the beliefs that the actions of sentencing juries, along with legislative judgments, are the sole reliable factors in the "evolving standards" analysis. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 322 - 325 and 328 (dis. opns. of C.J. Rehnquist, J. Scalia, and J. Thomas).) Chief Justice Rehnquist wrote:

> Our opinions have also recognized that data concerning the actions of sentencing juries, though entitled to less weight than legislative judgments, "'is a significant and reliable index of contemporary values,'" *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion) (quoting *Gregg*, supra, at 181), because of the jury's intimate involvement in the case and its function of "'maintaining a link between contemporary community values and the penal system,'" Gregg, supra, at 181 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519, n. 15 (1968)). In *Coker*, 433 U.S. at 596-597, for example, we credited data showing that "at least 9 out of 10" juries in Georgia did not impose the death sentence for rape convictions. And in *Enmund v. Florida*, 458 U.S. 782, 793-794 (1982), where evidence of the current legislative judgment was not as "compelling" as that in *Coker* (but more so than that here), we were persuaded by "overwhelming

> [evidence] that American juries . . . repudiated imposition of the death penalty" for a defendant who neither took life nor attempted or intended to take life. In my view, these two sources – the work product of legislatures and sentencing jury determinations – ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.

(*Id.* at pp. 323-324.) This opinion by Chief Justice Rehnquist confirms the crucial role death penalty juries have in providing the data needed by the courts to assess "evolving standards of decency."

Since juries represent community values,[116] their penalty verdicts inform the judicial determination of the evolving standards. As this Court has stated: "A penalty jury can speak for the community only insofar as the pool of jurors from which it is drawn represents the full range of relevant community attitudes." (*Hovey v. Superior Court, supra*, 28 Cal. 3d at p. 73.) Nonetheless, in California, potential jurors are removed from serving on death penalty juries because of their views on the death penalty. The death

---

[116] This view of the death penalty jury correlates with this Court's view that death penalty juries in California make a "moral and normative" decision. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1229-1230 [a penalty phase jury "performs a normative function, *applying the values of the community* to the decision after considering the circumstances of the offense and character and record of the defendant"(italics added)]; *People v. Karis* (1988) 46 Cal.3d 612, 639-640; see also *People v. Mendoza* (2000) 24 Cal.4th 130, 192 [referring to the penalty phase jury as "the representative of the community at large"]; and *People v. Allen* (1986) 42 Cal.3d 1222, 1287 [referring to the penalty phase jury as "the community's representative"].)

qualification process, which disqualifies certain members of the community, breaks the essential link between community values and the penal system. By excluding certain community members from penalty deliberations, their community values will never be represented in jury sentencing determinations, "the indicators" by which the courts ascertain contemporary standards of decency.

"Evolving standards of decency" are constantly changing. (Compare *Penry v. Lynaugh* (1989) 492 U.S. 302 [holding that society had yet to evolve to the point where executing the mentally retarded is unconstitutional] and *Atkins v. Virginia* (2002) 536 U.S. 304 [holding that society has evolved to the point where executing the mentally retarded is unconstitutional].) In order to assess the changing standards, the courts must have accurate and representative data of sentencing values. Death qualification skews the data provided by jury sentencing determinations and thus renders it impossible for the courts to fairly assess evolving standards concerning the constitutionality of the death penalty. Thus, the death qualification process violates principles of due process under the Fourteenth Amendment.

Death qualification results in an unconstitutional death penalty scheme. Based on statute, jury instructions, and this Court's opinions, the current "substantially impairs" test is irrational and violates the Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution. Death qualification in California is contrary to long-standing jurisprudence that death penalty juries represent the values of the community and that this function is crucial to provide information from which the courts discern evolving standards of decency.

D. Current Empirical Studies Prove That Death-Qualification Is Unconstitutional

In Hovey, supra, 28 Cal.3d 1, and *People v. Fields* (1983) 35 Cal.3d 329, this Court began to examine the vast body of research concerning the problems caused by death qualification. Based on the statistical evidence presented in those cases, this Court concluded that California's death qualification process in jury selection did not violate the Sixth Amendment right to an impartial guilt phase jury. Similarly, in *Lockhart v. McCree* (1986) 476 U.S. 162, 165, the United States Supreme Court relied on available statistical data and rejected a claim that death-qualification violated a defendant's Sixth and Fourteenth Amendment rights to have guilt or innocence determined by an impartial jury selected from a representative cross-section of the community. (*Id.* at p.167.)

The questions about statistical evidence arising in Hovey and Fields have been now resolved. New evidence establishes that the factual basis on which Lockhart rests is no longer valid, and that its decision was based on faulty science and improper logic. The questions raised in these cases must be reevaluated in light of the new evidence.

As one expert opined, the most telling aspect of the scientific data on death qualification is that it now consistently points to the conclusion that deathqualification results in a jury that is prone to convict and vote for death. (Seltzer et al., *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example* (1986) 29 How. L.J. 571, 573 (hereafter "Seltzer et al.") Accordingly, death-qualification in California is unconstitutional under the Sixth, Eighth and Fourteenth Amendments and article 1, sections 7, 15, 16 and 17 of the California Constitution.

1. The "*Hovey* Problem" Has Been Solved

In the *Hovey* case, this Court generally accepted the vast research condemning death qualification, although it found one flaw in the scientific data available at the time. The "*Hovey* problem" was that the studies did not take into account the fact that California also excluded automatic death penalty jurors via "life qualification." (*Hovey v. Superior Court, supra*, 28 Cal.3d at pp. 18-19.)

This problem has been solved and the opinion in *Hovey* must be taken to its full conclusion. Death qualification of "guilt phase includables" renders the jury biased in favor of a guilt verdict and inhibits the purpose and functioning of the jury. (*Hovey v. Superior Court, supra*, 28 Cal. 3d at pp. 18-19.) This Court now should find that the death-qualification process in California violates the Sixth Amendment and Fourteenth Amendments guarantee of trial by an impartial jury and due process, and article I, sections 7, 15, 16 and 17 of the California Constitution.

After *Hovey*, a study was conducted that specifically addressed the *Hovey* problem. (Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure* (1984) 78 J. American Statistical Assn. 544.) The article reviewed two studies presented in Hovey, the 1984 Fitzgerald and Ellsworth study and the 1984 Cowan, Thompson, and Ellsworth study. (Id. at pp. 545-546.) Professor Kadane's conclusion was that excluding the "always or never" group, i.e., the automatic death and automatic life jurors, results in a "distinct and substantial anti-defense bias" at the guilt phase. (*Id.* at p. 551.)

Professor Kadane conducted additional research using data unavailable at the time of Hovey. (See Kadane, *After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors* (1984) 8 Law & Human Behavior 115 (hereafter Kadane, *After Hovey*).) This study, "as

requested by the *Hovey* Court," proved that "the procedure of death qualification biases the jury pool against the defense. (*Id.* at p. 119.) Thus, the conclusion was a direct and specific answer to the *Hovey* problem. More recent studies have reached the same result. (See, e.g., Seltzer et al., supra.)

Two years later, social scientists studied the attitudes about the death penalty of jurors actually called to serve in capital trials. (Luginbuhl & Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials* (1988) 12 Law & Human Behavior 263 (hereafter Luginbuhl & Middendorf).) The study's findings took account of the automatic death jurors as required by *Hovey*. Its findings were critical of death qualification and reinforced many of the studies that the Hovey decision had discussed. (*Id.* at pp. 276-278.)

A more recent study updated the past research on death qualification based on numerous changes in society and the law, including the increase in support for the death penalty and the Supreme Court's decision in *Morgan v. Illinois* (1992) 504 U.S. 719, which required "life-qualification," or the removal of the automatic death jurors. (See Haney, et al.,"*Modern" Death Qualification: New Data on Its Biasing Effects* (1994) 18 Law & Human Behavior 619, 619-622.) The Haney study was "likely the most detailed statewide survey on Californians' death penalty attitudes ever done." (*Id.* at pp. 623, 625.) It found that: "Death-qualified juries remain significantly different from those that sit in any other kind of criminal case." (*Id.* at p. 631.)

Even more recently, empirical studies of actual jurors from actual capital cases show that many jurors who had been screened to serve as capital jurors under the Witt standard, and who were thus death-qualified, and "who had decided a real capital defendant's fate, approached their task

believing that the death penalty is the only appropriate penalty for many of the kinds of murder commonly tried as capital offenses." (Bowers, W. & Foglia, W. *Still Singularly Agonizing: The Law's Failure to Purge Arbitrariness from Capital Sentencing* (2003) 39 Crim. Law. Bull. 51, 62 (hereafter Bowers & Foglia).) Studies of California jurors showed that a substantial minority, and sometimes a majority of jurors, believed that the only appropriate punishment for the defendant in their case was death. (Bowers & Foglia, supra, at p. 63; Blume, J., Eisenberg, T. & Garvey, S. *Beyond Repair? America's Death Penalty* (Stephen P. Garvey ed., 2003) pp.150-153; Dillehay, R.C. and Sandy, M.R., *Life Under Wainwright v. Witt: Juror Dispositions and Death Qualification* (1996) 20 L. & Hum. Behv. 147, pp.159-160.)

These studies are the type of research that this Court sought in the Hovey opinion, which establishes that death qualification, even when "life qualification" also occurs, violates the Sixth Amendment and Fourteenth Amendments and article I, sections 7, 15, 16 and 17 of the California Constitution.

2. The Factual Basis of Lockhart is No Longer Sound

The *Lockhart* opinion has been criticized for its analysis of both the data and the law related to death-qualification. (See, e.g., Smith, *Due Process Education for the Jury: Overcoming the Bias of Death-Qualified Juries* (1989) 18 Sw. U. L. Rev. 493, 528 (hereafter "Smith") [The Court's analyses in *Lockhart* were "characterized by unstated premises, fallacious argumentation and assumptions that are unexplained or undefended"]; Thompson, *Death Qualification After Wainwright v. Witt and Lockhart v. McCree* (1989) 13 Law & Human Behavior 185, 202 (hereafter Thompson) [The *Lockhart* opinion is "poorly reasoned and unconvincing both in its

analysis of the social science evidence and its analysis of the legal issue of jury impartiality"]; Byrne, Lockhart v. McCree: *Conviction-Proneness and the Constitutionality of Death-Qualified Juries* (1986) 36 Cath. U. L. Rev. 287, 318 (hereafter Byrne) [The opinion was a "fragmented judicial analysis," representing an "uncommon situation where the Court allows financial considerations to outweigh an individual's fundamental constitutional right to an impartial and representative jury"].)

Scholars have criticized the Court's handling of the social science data relied upon in *Lockhart*. (See generally Moar, *Death-Qualified Juries in Capital Cases: The Supreme Court's Decision in Lockhart v. McCree* (1988) 19 Colum. Hum. Rts. L. Rev. 369, 374 (hereafter "Moar") [detailing criticism of the Court's analysis of the scientific data]; see also Bersoff & Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research* (1995) 2 U. Chi. L. Sch. Roundtable 279; Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology* (1990) 66 Ind L.J. 137.)

In this case, this Court should not defer to the general holdings in *Lockhart* in deciding the federal issues at stake in this case. Because the "constitutional facts" upon which *Lockhart* was based are no longer correct, the Supreme Court's holding is no longer controlling under the federal Constitution. (*United States v. Carolene Products* (1938) 304 U.S. 144, 153.) Accordingly, this Court needs to review the new data and re-evaluate this issue.

Lockhart also does not control the issues raised under the California Constitution. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352-354.) As Professor Smith observed:

> *Lockhart* lacks both persuasive force and rhetorical validity, and should not serve as a guide for state legislatures and judiciaries

> examining their own capital jury selection methods. Courts which have chosen to follow the ruling (if not the rationale) of *Lockhart* should adopt appropriate remedial measures to overcome the improper and unfair jury selection methods that the case condones.

(*Smith, supra*, 18 Sw. U. L. Rev. at p. 499.) This Court should continue the path it began in Hovey and find death- qualification unconstitutional under the California Constitution.

a. Misinterpretation of the Scientific Data

Despite the fact that the studies presented in *Lockhart* were carried out in a "manner appropriate and acceptable to social or behavioral scientists," the United States Supreme Court categorically dismissed them. (*Smith, supra*, 18 Sw. U. L. Rev. at p. 537.) This improper scientific assessment was both key and fatal to Lockhart's holding. Moreover, because the Supreme Court did not look at the studies as a whole body of data, it ignored the studies' powerful cumulative effect. (*Ibid.*) When the Supreme Court found a "'flaw' in a study, or a group of studies, [the Supreme Court] dismissed it from further consideration, never considering that alternative hypotheses left open by shortcomings in studies of one type might be ruled out by studies of another type." (Thompson, *supra*, 13 Law & Human Behavior at p. 195.) The Court dismissed any study that it deemed less than definitive. (*Ibid.*) Professor Thompson also observed: "The Court's adamant refusal to acknowledge the strength of the evidence before it casts grave doubts upon its ultimate holding in Lockhart." (*Ibid.*) As another researcher concluded:

> The fact that the Supreme Court can misrepresent and grossly misinterpret the findings in this study renders the Court's interpretation of all the empirical evidence before it in [*Lockhart v.*] *McCree* suspect. Social science research cannot provide answers with absolute certainty. We will never know precisely how many convicted defendants in death penalty cases would have been

> acquitted if death-qualification did not take place prior to the guilt-innocence stage.

(Seltzer et al., *supra*, 29 How. L.J. at p. 590.)

The Supreme Court "erred in its rejection of the empirical evidence." (Moar, *supra*, 19 Colum. Hum. Rts. L. Rev. at p. 396.) "Although there are valid criticisms of some of the Witherspoon studies and the potential effects studies, none of their independent weaknesses appear to justify the Court's rejection of the studies' significance for *McCree's* claim that the death - qualification procedure tends to produce guilt-prone juries." (*Moar, supra*, 19 Colum. Hum. Rts. L. Rev. at p. 382.)

In the *Lockhart* case, the Supreme Court was presented with over fifteen years of scholarly research on death qualification using a "wide variety of stimuli, subjects, methodologies, and statistical analyses." (*Id.* at pp. 386-387.) From both a scientific and a legal perspective, "[g]iven the seriousness of the constitutional issues involved [] and the extent and unanimity of the empirical evidence, it is hard to justify [the Court's] superficial analysis and rejection of the social science research." (*Id.* at p. 387.) The *Lockhart* decision "ignored the evidence which indicates that a death-qualified jury, composed of individuals with pro-prosecution attitudes, is more likely to decide against criminal defendants than a typical jury which sits in all noncapital cases." (Byrne, *supra*, 36 Cath. U. L. Rev. at p. 315.) In deciding this issue, the Court should not rely upon the United States Supreme Court's analysis of the statistics.

b. Incorrect Legal Observations

The Supreme Court in *Witherspoon* had all but accepted that, once the "fragmentary" scientific data on the effect of death-qualification on the guilt phase was solidified, the Court would act to prevent impartial guilt phase

juries. "It seemed only inadequate proof of 'death-qualified' juror bias caused the court to uphold Witherspoon's guilty verdict." (Smith, *supra*, 18 Sw. U.L.Rev. at p. 518.) This Court should not follow this faulty lead, but should instead continue on its own path, as laid out by Hovey, both in construing and applying the federal and state Constitutions properly. "The Court's holding in Lockhart infers that the Constitution does not guarantee the capital defendant an 'impartial jury' in the true meaning of the phrase, but merely a jury that is capable of imposing the death penalty if requested to do so by the prosecution." (Peters, *Constitutional Law: Does "Death Qualification" Spell Death for the Capital Defendant's Constitutional Right to an Impartial Jury*? (1987) 26 Washburn L.J. 382, 395.) This is not the meaning of impartiality, under either the federal or the state Constitutions, discussed in Hovey, nor is it the proper one.

c. The Scientific Evidence

1. Post-Lockhart Data Regarding Effects on the Guilt Phase Jury

All scientific research on the issue shows that death qualification results in juries that are more prone to convict. (Moar, *supra*, 19 Colum. Hum. Rts. L. Rev. at pp. 382-383.) "It is most impressive that every study, either directly or indirectly, suggests that the death - qualification procedure tends to produce conviction-prone juries." (Id. at p. 395.) "In fact, there are no competent empirical studies which reach contrary conclusions." (Seltzer et al., *supra*, 29 How. L. J. at p. 581.)

On the whole, the major studies since 1978 "conclusively demonstrate that death-qualified juries are conviction-prone, biased in favor of the prosecution, and underrepresentative of the communities from which they are drawn." (*Id.* at p. 577.) This study found that excluded jurors were less

conviction-prone than those who survived death qualification. (*Id.* at pp. 603-604.) According to Professor Seltzer, his study "combined with the body of empirical data on death qualification, conclusively shows that the removal for cause of Witherspoon excludables results in a petit jury that is prone to convict and underrepresentative of the community from which it is drawn." (*Id.* at p. 607.)

2. Post-Lockhart Penalty Phase Jury Studies

Studies have consistently demonstrated that death qualification drastically affects the penalty determination. "[C]apital juries do not now fully represent the community; they are more likely to accept prosecution evidence than defense evidence and are more likely to believe in harsh measures for criminals than is the population as a whole." (Smith, *supra*,18 Sw. U.L.Rev. at p. 509; see also Allen et al., *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-analysis* (1998) 22 Law & Hum. Behav. 715, 725 [finding that a death -qualified jury is more likely to choose the death penalty].)

Following the *Lockhart* decision, further studies of jurors' views of aggravating and mitigating circumstances were done to determine if any relationship existed between belief in the death penalty and a juror's attitude toward aggravating and mitigating evidence. (Luginbuhl & Middendorf, *supra*, 12 Law & Hum. Behav. at pp. 263, 267.) The result turned on its head a general principle offered to support death - qualification; that is, the principle that potential jurors who oppose the death penalty will not be able to consider aggravating evidence properly and thus cannot obey their oaths. This research shows that the opposite is true.

The study found that, for purposes of their perception of aggravating evidence, those who opposed the death penalty did not differ from those who

supported the death penalty. (*Id.* at p. 270.) However, there was a "strong relationship between opposition to the death penalty and one's consideration of mitigating circumstances." (*Ibid.*) As the degree of opposition to the death penalty increased, the consideration of mitigation evidence increased. (*Ibid.*) The researchers concluded that: "while most people can understand and accept that there are some circumstances that make a particular murder 'worse' and merit harsher punishment for the defendant, only those with strong opposition to the death penalty are willing to consider favorable evidence (or facts) that supports statutory or non-statutory mitigating circumstances and that points toward a more merciful sentence." (*Id.* at p. 271.) Death penalty opponents can consider aggravating evidence, but death penalty proponents have difficulty considering mitigating evidence. This result is especially disturbing since there is a constitutional right to have sentencing jurors consider mitigation,[117] but no such equivalent right for

---

[117] The United States Constitution guarantees to defendants who are facing a death sentence jurors who will consider a wide - range of mitigation evidence offered by the defendant. To assure its constitutionality, the death penalty decision must be tailored to the particular individual. (*Gregg* v. *Georgia* (1976) 428 U.S. 153, 203.) Because of the tailoring requirement, a qualified death penalty juror must be open to weighing a defendant's background and character as "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse." (*Penry v. Lynaugh* (2001) 492 U.S. 302, 319.) Accordingly, jurors must be able to consider mitigating evidence even if it does not relate "specifically to the defendant's culpability for the crime he committed." (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4.) Capital jurors are free to assess the appropriate weight to be given mitigation, but they are not allowed to give it "no weight at all by excluding such evidence from consideration." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 115.) In other words, they must consider any evidence in mitigation that might call for a sentence of life rather than death. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.)

aggravation.

A second study by Professors Luginbuhl and Middendorf verified these results when the proper legal standards for exclusion were used, including the exclusion of automatic death penalty jurors as required by Hovey.[118] (*Id.* at pp. 271-272.) The study also demonstrated that death qualification results in jurors who may not be able to consider non-statutory mitigating circumstances. (*Id.* at p. 277.) Importantly, the researchers opined that these general attitudes will influence the jurors' final determination of the death penalty. (*Id.* at pp. 277-279 [explaining individual schema and juror's behavior].) The researchers found that a death-qualified jury "may well be more likely to impose a penalty of death" since they are oriented toward accepting aggravating circumstances and rejecting mitigating circumstances. (*Id.* at p. 279.)

3. Data Regarding the Impact of Death Qualification on Jurors' Race, Gender, and Religion

The Supreme Court in *Lockhart* did not address whether death qualification had an negative impact on the racial, gender, and religious composition of juries. This Court acknowledged in *People v. Fields, supra*, that these issues are of constitutional dimension and required more research. Such research is now available, and it compels a finding that death-qualification has an adverse effect on these important classes.

---

[118] This study addresses the criticisms voiced in prior case law. Not only does it address the evidence as to the effect of death-qualification on the penalty phase, but used actual jurors, which was purportedly an issue for the Supreme Court in *Lockhart*. It also addressed the automatic death penalty jurors of the "*Hovey* problem." This study also removed "nullifiers" from its analysis, which was another potential issue noted by *Lockhart*. (See *Id.* at p. 274.)

Numerous studies have shown that "proportionately more blacks than whites and more women than men are against the death penalty." (Moar, *supra*, 19 Colum. Hum. Rts. L. Rev. at p. 386.) Death qualification "tends to eliminate proportionately more blacks than whites and more women than men from capital juries," adversely affecting two distinctive groups under a fair cross-section analysis. (*Id.* at p. 388.) Death qualification has a "detrimental effect on the representation of blacks and women on capital juries." (*Id.* at p. 396.)

Professor Seltzer also found that "the process of death-qualification results in juries which under-represent blacks." (Seltzer et al., *supra*, 29 How. L.J. at p. 604.) Professors Luginbuhl and Middendorf found that there is significant correlation between attitudes about the death penalty and the gender, race, age, and educational backgrounds of jurors. (Luginbuhl & Middendorf, *supra*, 12 Law & Hum. Behav. at p. 269.)

4. Prosecutorial Misuse of Death-Qualification

Research has shown that a "prosecutor can increase the chances of getting a conviction by putting the defendant's life at issue." (Thompson, supra, 13 Law & Human Behavior at p. 199, citing Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data* (1984) 8 Law & Hum. Beh. 7, 13.) Some prosecutors have acknowledged that death-qualification skews the jury and that they use this unconstitutional practice to their advantage in obtaining conviction-prone juries. (See Garvey, *The Overproduction of Death* (2000) 100 Colum. L. Rev. 2030, 2097 & fn,163, quoting Rosenberg *Deadliest* D.A. (1995) N.Y. Times Magazine (July 16, 1995) at p. 42.) [119] The prosecutors use this voir dire practice to

---

[119] The Rosenberg article quotes "various former and current Pennsylvania prosecutors explaining the Philadelphia district attorney's practice of

eliminate the segment of the jury pool which is most likely to be critical of police and forensic testimony and most likely to discount the "beyond a reasonable doubt" standard. (*Ibid.*)

In the Lockhart decision, the Supreme Court declined to consider the prosecutorial motives underlying death qualification because the petitioner had not argued that death qualification was instituted as a means "for the State to arbitrarily skew the composition of capital - case juries." (*Lockhart v. McCree, supra*, 476 U.S. at p. 176.) The dissent in Lockhart predicted that "[t]he State's mere announcement that it intends to seek the death penalty if the defendant is found guilty of a capital offense will, under today's decision, give the prosecution license to empanel a jury especially likely to return that very verdict." (*Lockhart v. McCree, supra*, 476 U.S. at p. 185 (dis. opn of Marshall, J., Brennan, J., & Stevens, J.)

The prosecutor's use of death qualification in this case violated appellant's Sixth, Eighth and Fourteenth Amendment rights and his rights

---

seeking the death penalty in nearly all murder cases as self-consciously designed to give prosecutors 'a permanent thumb on the scale' enabling them to 'use everything you can' to win, including . . . "'everyone who's ever prosecuted a murder case wants a death-qualified jury,' because of the 'perception... that minorities tend to say much more often that they are opposed to the death penalty,' so that '[a] lot of Latinos and blacks will be [stricken from capital juries as a result of] these [death qualification] questions.'"(Rosenberg *Deadliest D.A.*, N.Y. Times Magazine (July 16, 1995) at p. 42.) Also an article appearing in the New York Times observed: "The ability to screen jurors may invite prosecutorial gamesmanship, tempting prosecutors to charge cases as capital crimes solely to produce a "friendlier" jury. In his 1986 dissent [in *Lockhart*], Justice Marshall noted that it was all but impossible to prove that a prosecutor had engaged in this sort of 'tactical ruse.' Though facts suggesting the tactic have been present in at least a half-dozen cases, no court has overturned a conviction on this ground." (Liptak, *Facing a Jury of (Some of) One's Peers*, New York Times, July 20, 2003, Section 4.)

under article I, sections 7, 15, 16, and 17 of the California Constitution.

E. Death-Qualification in California Violates the Eighth Amendment

Death-qualification skews the jury so that it is more conviction-prone and more likely to vote for a death sentence. Non-capital defendants do not face such skewed juries. This result is unacceptable under the Eighth Amendment and article I, sections 7, 15, 16 and 17 of the California Constitution.

The Eighth Amendment requires "heightened reliability" in capital cases because "death is different." [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plurality opinion).)

Since death qualification results in a jury more likely to choose a death sentence, it cannot survive the "heightened reliability" requirement. The Supreme Court has recognized the same principle when it comes to guilt determinations.

In California, instead of the "utmost care" and "heightened reliability," capital defendants face juries that are not allowed in any other type of case. Death qualification only targets capital defendants. Consequently, capital defendants are tried by juries at both the guilt and penalty phases that are far less "impartial" than juries provided to defendants in any other kind of cases.

Accordingly, the death-qualification process violates the "heightened

reliability" requirement of due process and the Eighth Amendment because it is utterly "cruel and unusual" to put a human being on trial for his life yet systemically force him to face a jury that is prone to convict and condemn him to die by excluding all of the jurors who would be open to the defense evidence. Since appellant faced such a death-qualified jury, his convictions, the special circumstance findings against him, and his death penalty must be reversed.

F. The Process of Death-Qualification is Unconstitutional

Even if this Court does not condemn death qualification in principle, the process of death qualification in California courts nevertheless is unconstitutional. The Supreme Court did not reach this issue in *Lockhart.* *In Hovey*, this Court reviewed the evidence on this issue and generally accepted it, although the decision only addressed some of the problems presented by the evidence. In the *Fields* decision, this Court improperly allowed more specific death qualification voir dire, which exacerbated the problems of the process.

"The voir dire phase of the trial represents the 'jurors' first introduction to the substantive factual and legal issues in a case.' The influence of the voir dire process may persist through the whole course of the trial proceedings." (*Powers v. Ohio* (1991) 499 U.S. 400, 412, quoting *Gomez v. United States* (1989) 490 U.S. 858, 874.].) As detailed in the *Hovey* decision and in recent studies, death - qualification voir dire indoctrinates jurors to a pro-conviction and pro - death view. The result is that potential jurors with particular views on guilt and the penalty are removed from the panel.

The very process of death qualification in this case influenced the deliberative process and the mind set of the jurors concerning their

responsibilities and duties. The process of death qualification voir dire in California violates the Sixth and Fourteenth Amendments and article I, sections 7, 15, 16 and 17 of the California Constitution. Any verdict reached by a jury chosen in this manner cannot stand since the use of a jury whose views are skewed and biased constitutes a structural error.

G. Death Qualification Violates the Right to a Jury Trial

In *Taylor v. Lousiana* (1975) 419 U.S. 522, 530-531, the Supreme Court identified three purposes underlying the Sixth Amendment right to a jury trial, and death-qualification defeats all three.

First, "the purpose of a jury is to guard against the exercise of arbitrary power – to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." (*Taylor v. Louisiana, supra*, 419 U.S. at pp. 530-531.) Death qualification fails to guard against "the exercise of arbitrary power." Potential jurors who tend to question the prosecution, and would thus keep their power in check, are the very people excluded from the jury via death qualification.

Death qualification makes the "common sense judgment of the community" unavailable. The evidence now shows that a death-qualified jury fails to represent the judgment of the excluded community members. Death-qualification also removes the constitutionally required "hedge against the overzealous or mistaken prosecutor" or "biased response of a judge." (*Taylor v. Louisiana, supra*, 419 U.S. at pp. 530-531.) Evidence shows that prosecutors intentionally use death- qualification to remove potential jurors so that there is no "hedge" to prevent their overzealousness.

The second purpose of the jury trial is to preserve public confidence. "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." (*Taylor v. Louisiana, supra*, 419 U.S. at p. 531.) Death qualification fails to preserve confidence in the system and discourages community participation. (See, e.g, Moller, *Death-Qualified Juries Are the 'Conscience of the Community'*? L.A. Daily Journal, (May 31, 1988) p. 4, Col. 3 [noting the "Orwellian doublespeak" of referring to a death qualified jury as the "conscience of the community"];"(Smith, *supra*, 18 Sw. U.L.Rev. at p. 499 ["the irony of trusting the life or death decision to that segment of the population least likely to show mercy is apparent..]; Liptak, *Facing a Jury of (Some of) One's Peers* New York Times (July 20, 2003), Section 4.)

The third purpose is to implement the belief that "sharing in the administration of justice is a phase of civic responsibility." (*Taylor v. Lousiana, supra*, 419 U.S. at p. 532.) The exclusion of a segment of the community from jury duty sends a message that the administration of justice is not a responsibility shared equally by all citizens.

Finally, because death-qualification undermines the purposes of the Sixth Amendment right to a jury trial, excluding individuals with views against the death penalty from petit juries also violates the fair cross-section requirement and the Equal Protection Clause. "We think it obvious that the concept of "distinctiveness" must be linked to the [three] purposes of the fair-cross-section requirement." (*Lockhart v. McCree, supra*, 476 U.S. at p. 175.) For these reasons, death-qualification violates the Sixth and Fourteenth Amendments of the United States Constitution as well as article I, sections 7, 15, 16 and 17 of the California Constitution.

H. The Prosecutor's Use of Death Qualification via Peremptory Challenges was Unconstitutional [120]

The prosecutor's use of peremptory challenges to systematically exclude jurors with reservations about capital punishment denied appellant his constitutional rights. After all jurors who declared they could not impose a death sentence were excused, various prospective jurors remained who had reservations about the death penalty, but who were not excludable under *Witherspoon* and *Witt*. These prospective jurors stated that they could vote for the death penalty in an appropriate case. (*Gray v. Mississippi* (1987) 481 U.S. 648, 667-668.)

When these jurors was called to the jury box, the prosecution systematically used a peremptory challenge to exclude them.[121] The prosecutor's actions denied appellant his federal and state constitutional rights to due process, equal protection, an impartial jury, a jury drawn from a fair cross-section of the community and a reliable determination of guilt and sentence under the Fifth, Sixth, Eighth and Fourteenth Amendments and related provisions of Article I, sections 7, 15, 16 and 17 of the California

---

[120] The prosecutor peremptorily challenged James Hastings, a 61-year-old retired probation officer. He said he supported the death penalty (21 CT 4563), but in answer to question 85 about whether he could consider the death penalty in a felony murder case where a defendant did not intend to kill the victim, he wrote "yes" and then explained: "My decision would depend on all of the circumstances involved. Voting for the death penalty would be difficult in such a case." (21 CT 4564.)

[121] For example, during jury selection for the penalty phase re-trial, the prosecutor peremptorily challenged the following prospective jurors who had expressed some hesitation about imposing the death sentence: (1) James Hastings (40 RT 3861); (2) Susan Felkner (40 RT 3862); (3) Ronald C. Lindeman (40 RT 3864); (4) Kris Loving (40 RT 3860) and (5) Leif Fearn (40 RT 3911).

Constitution.

The peremptory exclusion of these jurors prejudiced appellant's rights at the guilt phase for the same reasons as the "death ualification" of the jury. Unlike death qualification through for-cause challenges, which excludes from the jury only those whom the trial court determines would be unable to follow their oath at the penalty phase, the elimination of these jurors through peremptory challenge involves the exclusion of persons whose ability to follow their oath and instructions at the penalty phase is unaffected by their reservations about capital punishment. Even assuming their exclusion was harmless at the guilt phase, reversal of the death judgment is required nonetheless. (See, e.g., *Gregg v. Georgia, supra*, 428 U.S. at p. 188; *Lockett v. Ohio, supra*, 438 U.S. at p. 604.) The prosecution "stacked the deck" in favor of death by exercising its peremptory challenges to remove these jurors. The exclusion of these jurors while including death penalty supporters and abstainers, resulted in a "jury uncommonly willing to condemn a man to die." (*Witherspoon v. Illinois, supra*, 391 U.S. at pp. 521, 523.)

The prosecutor shares responsibility with the trial court to preserve a defendant's right to a representative jury and can only exercise peremptory challenges for legitimate purposes. Since the State is forbidden from excusing a class of jurors for cause based on their death penalty skepticism, those views are not a proper basis for a peremptory challenge. The State has no legitimate interest in the removal of jurors who can follow their oaths, but who may also be skeptical about the death penalty. A jury stripped of the significant community viewpoint that these prospective jurors provide is not ideally suited to the purpose and functioning of a jury in a criminal trial. (*Ballew v. Georgia, supra*, 435 U.S. at pp. 239-242.) Even if these jurors do

not constitute a cognizable class for purposes of analysis of the Sixth Amendment's representative cross-section of the community issue (*Lockhart v. McCree, supra*, 476 U.S. at pp.174-177), they constitute a distinct group for purposes of ensuring both the reliability of a capital sentencing decision and the need for the jury to reflect the various views of the wider community. (*Witherspoon v. Illinois, supra*, 391 U.S. at p. 519.)

In Gray v. Mississippi, supra, the Supreme Court held the wrongful exclusion for cause of a prospective juror who was a death penalty skeptic constituted reversible error. The plurality opinion emphasized the potential prejudice to a capital defendant when death penalty skeptics are systematically excluded from a jury by peremptory challenges. (*Gray v. Mississippi, supra*, 481 U.S. at pp. 667-668.) The systematic, peremptory exclusion of death penalty skeptics in appellant's case requires reversal of the penalty verdict.

I. Errors in Death-Qualifying The Penalty Jury Requires Reversal of the Guilt Verdicts As Well

In *Witherspoon v. Illinois, supra*, 391 U.S. 510, the Supreme Court identified three separate problems regarding death-qualification. First, death qualification can be so extreme as to make the jury biased at the penalty phase. Second, death qualification that is so extreme may also make the jury biased at the guilt phase. Third, even death qualification that is not so extreme biases the jury at the guilt phase.

The first issue is the one that formed the basis for the limits on death-qualification *in Witherspoon*. The second and third issues were left open by Witherspoon for more studies. However, it appears that courts have erroneously compounded these issues. (See, e.g., *Hovey v. Superior Court, supra*, 28 Cal.3d at pp. 11-12; footnotes omitted [summarizing *Witherspoon*

and discussing the two issues as if they were identical]; see also *People v. Fields, supra*, 35 Cal.3d at p. 344.)

This melding of issues is incorrect. The second issue is whether death qualification that did not meet the proper standard for removal of penalty phase jurors was improper at the guilt phase. (*Witherspoon v. Illinois, supra*, 391 U.S. at pp. 516-518.) In *Witherspoon*, the Court held that because the evidence on this second issue was not yet developed, it only would reverse the penalty phase. (*Id.* at pp. 516-518, 522, fn. 21.) The third issue is whether, assuming the State properly death-qualified the jury for purposes of the penalty phase, it was proper for such death-qualification to also exclude potential jurors from the guilt phase. (*Id.* at pp. 521, fn. 19.) This was the issue involving the "guilt phase includables" discussed in the *Lockhart* and *Hovey* decisions.

This Court has routinely asserted that Witherspoon error as to the penalty phase jury requires the reversal of the penalty but not the guilt verdicts. (See, e.g., *People v. Ashmus* (1991) 54 Cal. 3d 932, 962.) The United States Supreme Court has not addressed this issue. This Court should find that error as to the death qualification of the penalty phase jury requires reversal of the guilt phase as well.

Since the evidence shows that a death-qualified jury is conviction-prone and different from a typical jury, this Court should reconsider the conclusion that *Witherspoon* error requires only penalty reversal. The State's only conceivable legitimate interest in death qualification is at the penalty phase. If it committed error in achieving this interest, then it has no interest in death-qualifying the guilt phase jury. Since the prosecution did death-qualify the jury in this case, appellant improperly faced a biased guilt phase jury. Moreover, an error resulting in a biased jury cannot be harmless.

When this Court finds error as to the penalty phase jury's death qualification, it must also reverse appellant's guilt phase convictions.

J. Conclusion

Death qualification in California is irrational and unconstitutional. It prevents citizens from performing as jurors in capital cases based on their "moral and normative" beliefs despite the fact that the law specifically requires capital jurors to make "moral and normative" decisions. These citizens' voices are eliminated from the data that the courts rely on to determine whether a particular punishment offends evolving standards of decency under the Eighth Amendment. To make matters worse, California allows some case-specific death qualification;[122] one of the effects of this process is to remove jurors who would be highly favorable to specific mitigation evidence in violation of the Eighth Amendment.

The death qualification procedure in California also violates the equal protection and due process clauses of the Fourteenth Amendment. To their detriment, capital defendants receive vastly different juries at the guilt phase in comparison with other defendants. In addition, since death - qualification results in juries who are more likely to convict and to choose the death sentence, capital defendants' guilt and penalty determinations are not made with the heightened reliability required by the Eighth Amendment.

---

[122] See Argument XV, *ante*, which discusses the improper use of specific questions in the juror questionnaire used during the juror selection proceedings for the penalty retrial. These questions asked prospective jurors whether they could impose the death penalty even if they believed that appellant had not intended to kill. As defense counsel argued in the trial court, these questions were designed to seat "super-death-qualified" jurors who could not only impose the death penalty in the abstract, but who would be inclined to do so under the specific facts and legal issues presented by the case they were being asked to decide.

The scientific data demonstrates that death qualified juries are far more conviction - prone and death-prone than any other juries. The data shows that minorities, women, and religious people are disproportionately removed from sitting on juries via death qualification in violation of the Sixth and Fourteenth Amendments. Moreover, as was true in this case, prosecutors regularly use the death qualification process to achieve these results. The very process of death qualification skews capital juries to such a degree that they can no longer be said to be impartial and fully representative of the community.

All of these errors were present in the instant case. From beginning to end, death qualification violated appellant's rights. Even before trial commenced in this case, defense counsel objected to the death qualification process, arguing that it resulted in a conviction-prone jury which was also more likely to vote for death. (2 CT 252-256.) After his first penalty trial resulted in a hung jury, appellant renewed his objection to the death qualification process. In particular, defense counsel opposed the prosecution's effort to include a question in voir dire for the selection of the second penalty phase jury about whether prospective jurors could vote for death if they found that appellant had not intended to kill Mrs. Dixon. This was the very issue on which the jurors in the first penalty trial could not agree, thereby requiring a mistrial. The defense objected that the use of such a question would result in "excusing jurors who do not fit any proper definition of a challenge for cause, unfairly creating a doubly-death qualified jury skewed in favor of the prosecution. . ." (7 CT 1555.)

In this case, the process accomplished was what was expressly prohibited by the Supreme Court:

> In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die. It is,

> of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal "organized to convict." It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death.

(*Lockhart v. McCree, supra*, 476 U.S. at p. 179, quoting *Witherspoon v. Illinois* (1968) 391 U.S. 510, 520-521 (footnotes omitted). [internal citations omitted and emphasis added].)

Thus, death qualification in general and as applied in this particular case violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution. Since this error is comparable to other constitutional errors in the jury selection, it requires reversal of defendant's convictions and death sentence without inquiry into prejudice. (See, e.g., *Davis v. Georgia* (1976) 429 U.S. 122, 123 [improper challenges for cause]; *People v. Stewart* (2004) 33 Cal.4th 425, 454; *Turner v. Murray* (1986) 476 U.S. 28, 37 [failure to question prospective jurors about race in a capital case involving interracial violence].) Appellant's convictions and death sentence accordingly must be reversed.

*****

XXIII.

APPELLANT'S DEATH SENTENCE, BASED ON FELONY MURDER SIMPLICITER, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND VIOLATES INTERNATIONAL LAW

On June 20, 1997, defense counsel filed, pursuant to Penal Code sections 190.4, subsection (d), 1181 (7) and 1385, a motion to reduce appellant's death sentence to life without possibility of parole. (39 CT 8487-8499.) In the memorandum of points and authorities in support thereof, defense counsel argued that the only aggravating circumstances of the offense was the undeniable vulnerability of the 80-year-old victim and the evidence of "victim impact." (39 CT 8493.) As counsel further stated, the evidence showed that this was a forcible sexual assault which did not involve the use of a weapon, torture, beating or strangulation. (39 CT 8493.) In short, there was no evidence establishing that appellant intended to kill Mrs. Dixon or to harm her beyond the sexual assault itself.

Appellant was subject to the death penalty based on three felony special circumstances: rape, burglary and oral copulation. Under California law, a defendant convicted of a murder during the commission or attempted commission of a felony may be executed even if the killing was unintentional or accidental. The lack of any requirement that the prosecution prove that an actual killer had a culpable state of mind with regard to the murder before a death sentence may be imposed violates the proportionality requirement of the Eighth Amendment as well as international human rights law governing use of the death penalty.

A. California Authorizes the Imposition of the Death Penalty Upon a Person who Kills During the Commission of a Felony Without Regard to his or her State of Mind at the Time of the Killing

Appellant was found to be death-eligible solely because he was convicted of committing three felonies, burglary, rape and oral copulation, and that the victim died after the sexual assault. (See §§ 189, 190.2, subd. (a)(17)(i).) While normally the prosecution, to obtain a murder conviction, must prove that the defendant had the subjective mental state of malice (either express or implied), in the case of a killing resulting from the commission of any felony listed in § 189, the prosecution can convict a defendant of first degree felony murder without proof of any mens rea with regard to the murder.

> [F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.

(*People v. Dillon, supra*, 34 Cal.3d at p. 477.)

This rule is reflected in the standard jury instruction for felony murder:

CALJIC No. 8.21, which the judge read to the jury in this case:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during the commission or attempted commission of the crime] [as a direct causal result of _____] is murder of the first degree when the perpetrator had the specific intent to commit that crime.
>
> The specific intent to commit the Rape and/or Burglary and/or Forcible Oral Copulation and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

(5 CT 979; 30 RT 2937, emphasis added.)

Except in one rarely-occurring situation,[123] under this Court's interpretation of section 190.2, subdivision (a)(17), if the defendant is the actual killer in a felony murder, the defendant also is death-eligible under the felony murder special circumstance.[124] (See *People v. Hayes* (1990) 52 Cal.3d 577, 631-632 [the reach of the felony-murder special circumstances is as broad as the reach of felony murder and both apply to a killing "committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction.'"].) [125] The key case on the issue is *People v. Anderson* (1987) 43 Cal.3d 1104, where the Court held that under section 190.2, "intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved." (*Id.* at p. 1147.) The *Anderson* majority did not disagree with Justice Broussard's summary of the holding: "Now the majority . . . declare that in California a person can be executed for an accidental or negligent killing." (*Id.* at p. 1152 (dis. opn. of

---

[123] See *People v. Green* (1980) 27 Cal.3d 1, 61-62 (robbery-murder special circumstance does not apply if the robbery was only *incidental* to the murder).

[124] As a result of the decision in *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 154, which was reversed in *People v. Anderson*, *supra*, 43 Cal.3d 1104, this Court has required proof of the defendant's intent to kill as an element of the felony-murder special circumstance with regard to felony-murders committed during the period December 12, 1983 to October 13, 1987. This Court has held that *Carlos* has no application to prosecutions for murders occurring either before or after the *Carlos* window period. (*People v. Johnson* (1993) 6 Cal.4th 1, 44-45.)

[125] In fact, the robbery-murder special circumstance is even broader than the robbery felony-murder rule because it covers a species of implied malice murders, so-called "provocative act" murders. (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1080-1081.)

Broussard, J.).)

Since *Anderson*, in rejecting challenges to the various felony-murder special circumstances, this Court repeatedly has held that to seek the death penalty for a felony murder, the prosecution need not prove that the defendant had any mens rea as to the killing. For example, in *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1264, this Court rejected the defendant's argument that, to prove a felony-murder special circumstance, the prosecution was required to prove malice. In *People v. Earp* (1999) 20 Cal.4th 826, the defendant argued that the felony-murder special circumstance required proof that the defendant acted with "reckless disregard" and could not be applied to one who killed accidentally. This Court held that the defendant's argument was foreclosed by Anderson. (*Id.* at p. 905, fn.15.) In *People v. Smithey* (1999) 20 Cal.4th 936, 1016, this Court rejected the defendant's argument that there had to be a finding that he intended to kill the victim or, at a minimum, acted with reckless indifference to human life.[126]

In urging the jury to convict appellant of first degree murder under the felony murder rule, the prosecutor argued:

> There is no requirement of an intentional killing. There is no requirement that you intend to kill. In fact, the ruling is such that accidental killings that are completely not intended by you are still felony murders, murder in the first degree because we have decided, you know, our law has decided that these crimes are for rape, burglary, oral copulation, are so endangering for human life that if you do it and somebody dies, you do the felony, somebody dies, you are guilty of first degree murder. That's what our law has decided...

---

[126] Alternatively, this Court found that there was sufficient evidence that the defendant did act with reckless indifference to justify the death penalty. (*People v. Smithey, supra,* 20 Cal.4th at pp. 1016-1017.)

(30 RT 2957-2958.)

Addressing the three felony–murder (burglary, rape and oral copulation) special circumstances alleged in this case, the prosecutor argued that they were "basically the same as the murder thus charged," referring back to her remarks, quoted above, about first degree felony murder. (30 RT 2959.) The prosecutor stated:

> Count one also has special circumstances. . . It follows the same pattern that the murder thus committed in the commission of a rape, that the murder was committed during the commission–oh, the murder was committed while the defendant was engaged in the commission of a rape. The murder occurred while the defendant was engaged in the commission of a burglary. The murder occurred while the defendant was engaged in the commission of oral copulation.
>
> Well, there is no issue that the killing of this human being took place during the commission, while they were engaged in the commission of a rape. There is no question that the acts that constitute the killing took place while the burglary was still continuing.
>
> There is no question that the murder, the acts constituting the killing took place while engaged in the commission of oral copulation. We know that. Remember now, these crimes don't have to actually cause the killing, but the person has to be engaged in that and the killing occurred, the person dies, and this case you have a little beyond that, you actually have the felonies themselves causing the killing.
>
> You have beyond what is needed but basically you have a dangerous situation. If you are engaged in the commission of these felonies and a killing, somebody is murdered and there is murder, you are guilty of these special circumstances. There is just no–I mean, there is no out on these. They are very simple. Each one is separate and you will have a separate verdict form on them. . .

(30 CT 2959-2960.)

//
//

B. The Felony-Murder Special Circumstances Violate the Eighth Amendment's Proportionality Requirement and International Law Because They Permit Imposition of the Death Penalty Without Proof That the Defendant had a Culpable Mens Rea as to the Killing

In a series of cases beginning with Gregg v. Georgia, supra, 428 U.S. 153, the Supreme Court has recognized that the Eighth Amendment embodies a proportionality principle, and it has applied that principle to hold the death penalty unconstitutional in a variety of circumstances. (See *Coker v. Georgia* (1977) 433 U.S. 584 [death penalty for rape of an adult woman]; *Enmund v. Florida* (1982) 458 U.S. 782 [death penalty for getaway driver to a robbery felony–murder]; *Thompson v. Oklahoma* (1988) 487 U.S. 815 [death penalty for murder committed by defendant under 16 years old]; *Atkins v. Virginia* (2002) 536 U.S. 304 [death penalty for mentally retarded defendant].) In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Supreme Court has applied a two-part test, asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia, supra*, 428 U.S. at p. 183.)

The Supreme Court has addressed the proportionality of the death penalty for unintended felony murders in *Enmund v. Florida, supra*, 458 U.S. 782, and in *Tison v. Arizona* (1987) 481 U.S. 137. In *Enmund*, the Court held that the Eighth Amendment barred the imposition of the death penalty on the "getaway driver" to an armed robbery murder because he did not take life, attempt to take life, or intend to take life. (*Enmund, supra*, 458 U.S. at pp. 789-793.) In *Tison*, the Court addressed whether proof of

"intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty. Justice O'Connor, writing for the majority, held that it was not, and that the Eighth Amendment would be satisfied by proof that the defendant had acted with "reckless indifference to human life" and as a "major participant" in the underlying felony. (*Tison*, at p. 158.) Justice O'Connor explained the rationale of the holding as follows:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of all – the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional murders . . . . Enmund held that when "intent to kill" results in its logical though not inevitable consequence – the taking of human life – the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

(*Id.* at pp. 157-158.)

In choosing actual killers as examples of "reckless indifference" murderers whose culpability would satisfy the Eighth Amendment standard, Justice O'Connor eschewed any distinction between actual killers and accomplices. In fact, it was Justice Brennan's dissent which argued that

there should be a distinction for Eighth Amendment purposes between actual killers and accomplices and that the state should have to prove intent to kill in the case of accomplices (*Tison v. Arizona, supra*, at pp. 168-179 (dis. opn. of Brennan, J.), but that argument was rejected by the majority.

That Tison established a minimum mens rea for actual killers as well as accomplices was confirmed clearly in *Hopkins v. Reeves* (1998) 524 U.S. 88. In *Reeves*, a case involving an actual killer, the Court reversed the Eighth Circuit's ruling that the jury should have been instructed to determine whether the defendant satisfied the minimum mens rea required under E*nmund/Tison*, but held that such a finding had to be made at some point in the case:

> The Court of Appeals also erroneously relied upon our decisions in *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982) to support its holding. It reasoned that because those cases require proof of a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder, Nebraska could not refuse lesser included offense instructions on the ground that the only intent required for a felony-murder conviction is the intent to commit the underlying felony. In so doing, the Court of Appeals read *Tison* and *Enmund* as essentially requiring the States to alter their definitions of felony murder to include a mens rea requirement with respect to the killing. In *Cabana v. Bullock*, 474 U.S. 376 (1986), however, we rejected precisely such a reading and stated that "our ruling in *Enmund* does not concern the guilt or innocence of the defendant–it establishes no new elements of the crime of murder that must be found by the jury" and "does not affect the state's definition of any substantive offense." For this reason, we held that a State could comply with *Enmund's* requirement at sentencing or even on appeal. Accordingly *Tison* and *Enmund* do not affect the showing that a State must make at a defendant's trial for felony murder, so long as their requirement is satisfied at some point thereafter.

(*Reeves*, at p. 99, citations and fns. omitted; italics added.) [127]

Every lower federal court to consider the issue–both before and after *Reeves*–has read Tison to establish a minimum mens rea applicable to all defendants. (See *Lear v. Cowan* (7th Cir. 2000) 220 F.3d 825, 828; Pruett v. Norris (8th Cir. 1998) 153 F.3d 579, 591; *Reeves v. Hopkins* (8th Cir. 1996) 102 F.3d 977, 984-985, revd. on other grounds (1998) 524 U.S. 88; *Loving v. Hart* (C.A.A.F. 1998) 47 M.J. 438, 443; *Woratzeck v. Stewart* (9th Cir. 1996) 97 F.3d 329, 335; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1443, fn.9.[128] The *Loving* court explained its thinking as follows:

> As highlighted by Justice Scalia in the *Loving* oral argument, the phrase "actually killed" could include an accused who accidentally killed someone during commission of a felony, unless the term is limited to situations where the accused intended to kill or acted with reckless indifference to human life. We note that Justice White, who wrote the majority opinion in *Enmund* and joined the majority opinion in *Tison*, had earlier written separately *in Lockett v. Ohio*, 438 U.S. 586 (1978), expressing his view that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624. Without speculating on the views of the current membership of the Supreme Court, we conclude that when *Enmund* and *Tison* were decided, a majority of the Supreme Court was unwilling to affirm a death sentence for felony murder unless it was supported by a finding of culpability based on an intentional killing or substantial participation in a felony combined with reckless indifference to human life. Thus, we conclude that the phrase, "actually killed," as used in *Enmund* and *Tison,* must be construed to mean a person who intentionally kills, or

---

[127] See also *Graham v. Collins* (1993) 506 U.S. 461, 501 (conc. opn. of Stevens, J.) [stating that an accidental homicide, like the one in *Furman*, may no longer support a death sentence.]

[128] See also *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317, 345.

> substantially participates in a felony and exhibits reckless indifference to human life.

(*Loving*, at p. 443.)

Even were it not abundantly clear from the Supreme Court and lower federal court decisions that the Eighth Amendment requires a finding of intent to kill or reckless indifference to human life in order to impose the death penalty, the Court's two-part test for proportionality would dictate such a conclusion. In *Atkins v. Virginia, supra*, a recent proportionality decision, the Court emphasized that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Atkins v. Virginia, supra*, 536 U.S. at p. 312.) Of the 38 death penalty states, there are at most five states other than California-Florida, Georgia, Maryland, Mississippi and Nevada-where a defendant may be death-eligible for felony-murder simpliciter.[129] The position of Mississippi is not altogether clear because its supreme court recently stated:

> [T]o the extent that the capital murder statute allows the execution of felony murderers, they must be found to have intended that the killing take place or that lethal force be employed before they can become eligible for the death penalty, pursuant to *Enmund v. Florida*, 458 U.S. 782, 796 (1982).

---

[129] In Shatz & Rivkind, *The California Death Penalty: Requiem for Furman?* 72 N.Y.U. Law. Rev. 1283, 1319, fn.201 (1997), the authors list seven states other than California as authorizing the death penalty for felony murder *simpliciter*, but Montana, by statute (see Mont. Code Ann., §§ 45-5-102(1)(b), 46-18-303), and North Carolina, by court decision (see *State v. Gregory* (N.C. 1995) 459 S.E.2d 638, 665), now require a showing of some mens rea in addition to the felony murder in order to make a defendant death - eligible.

(*West v. State* (Miss. 1998) 725 So.2d 872, 895.)

And, in Nevada, felony murder simpliciter as a basis for death eligibility apparently is being reconsidered in the courts. (See *Leslie v. Warden* (Nev. 2002) 59 P.3d 440, 449 (conc. opn. of Maupin, J.).) That at least 44 states (32 death penalty states and 12 non-death penalty states) and the federal government[130] reject felony murder simpliciter as a basis for death eligibility reflects an even stronger "current legislative judgment" than the Court found sufficient in *Enmund* (41 states and the federal government) and *Atkins* (30 states and the federal government).

Although such legislative judgments constitute "the clearest and most reliable objective evidence of contemporary values" (*Atkins v. Virgina, supra*, 536 U.S. at p. 312), professional opinion as reflected in the Report of the Governor's Commission on Capital Punishment (Illinois)[131] and international opinion[132] also weigh against finding felony murder simpliciter a sufficient basis for death – eligibility. The most comprehensive recent study of a state's death penalty was conducted by the Governor's Commission on Capital Punishment in Illinois, and its conclusions reflect the current professional opinion about the administration of the death penalty. Even though Illinois's "course of a felony" eligibility

---

8. See 18 U.S.C. § 3591(a)(2).

[131] The Court has recognized that professional opinion should be considered in determining contemporary values. (*Atkins*, *supra*, 536 U.S. at p. 316, fn. 21.)

[132] The United States Supreme Court has regularly looked to the views of the world community to assist in determining contemporary values. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn.21; *Enmund v. Florida, supra*, 458 U.S. at pp. 796-797, fn. 22; *Coker v. Georgia, supra*, 433 U.S. at p. 596.)

factor is far narrower than California's special circumstance, requiring actual participation in the killing and intent to kill on the part of the defendant or knowledge that his acts created a strong probability of death or great bodily harm (720 ILCS 5/9-1(b)(6)(b)), the Commission recommended eliminating this factor. (Report of the Former Governor Ryan's Commission on Capital Punishment, April 15, 2002, at pp. 7-73,www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_04.pdf >.) The Commission stated in words which certainly apply to the California statute:

> Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. This eligibility factor is the one most likely subject to interpretation and discretionary decision-making. On balance, it was the view of Commission members supporting this recommendation that this eligibility factor swept too broadly and included too many different types of murders within its scope to serve the interests capital punishment is thought best to serve.
>
> A second reason for excluding the "course of a felony" eligibility factor is that it is the eligibility factor which has the greatest potential for disparities in sentencing dispositions. If the goal of the death penalty system is to reserve the most serious punishment for the most heinous of murders, this eligibility factor does not advance that goal.

(Id. at p. 72.)

With regard to international opinion, the Court observed in Enmund:

> "[T]he climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration which is "not irrelevant." *Coker v. Georgia*, 433 U.S. 584, 596, n. 10, (1977). It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.

(*Enmund*, at p. 796, fn. 22.)

International opinion has become even clearer since *Enmund*. Article 6 (2) of the International Covenant on Civil and Political Rights ("ICCPR"), to which the United States is a party, provides that the death penalty may only be imposed for the "most serious crimes." (ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at p. 52, U.N. Doc, A/6316 (1966), 999 U.N.T.S. 171, entered into force on March 23, 1976 and ratified by the United States on June 8, 1992.) The Human Rights Committee, the expert body created to interpret and apply the ICCPR, has observed that this phrase must be "read restrictively" because death is a "quite exceptional measure." (Human Rights Committee, General Comment 6(16), ¶ 7; see also American Convention on Human Rights, art. 4(2), Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996) ["In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes . . . ."].) In 1984, the Economic and Social Council of the United Nations further defined the "most serious crime" restriction in its *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*. (E.S.C. res. 1984/50; GA Res. 39/118.) The Safeguards, which were endorsed by the General Assembly, instruct that the death penalty may only be imposed for intentional crimes. (Ibid.)[133] The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary

---

[133] The *Safeguards* are a set of norms meant to guide the behavior of nations that continue to impose the death penalty. While the safeguards are not binding treaty obligations, they provide strong evidence of an international consensus on this point. "[D]eclaratory pronouncements [by international organizations] provide some evidence of what the states voting for it regard the law to be . . . and if adopted by consensus or virtual unanimity, are given substantial weight." (*Restatement (Third) of the Foreign Relations Law of the United States*, § 103 cmt. c.)

executions considers that the term "intentional" should be "equated to premeditation and should be understood as deliberate intention to kill." (*Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, U.N. Doc. CCPR/C/79/Add.85, November 19, 1997, ¶ 13.)

The imposition of the death penalty on a person who has killed negligently or accidentally is not only contrary to evolving standards of decency, but it fails to serve either of the penological purposes–retribution and deterrence of capital crimes by prospective offenders–identified by the Supreme Court. With regard to these purposes, "[u]nless the death penalty ... measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *(Enmund v. Florida, supra*, 458 U.S. at pp. 798-799, quoting *Coker v. Georgia, supra*, 433 U.S. at p. 592). With respect to retribution, the Supreme Court has made clear that retribution must be calibrated to the defendant's culpability which, in turn, depends on his mental state with regard to the crime. In *Enmund*, the Court said: "It is fundamental 'that causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (*Enmund*, at p. 798, quoting Hart, *Punishment and Responsibility* (1968) p. 162.) In *Tison*, the Court further explained:

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished. The ancient concept of malice aforethought was an early attempt to focus on mental state in order to distinguish those who deserved death from those who through "Benefit of ... Clergy" would be spared.

(*Tison v. Arizona, supra*, 481 U.S. at p. 156.) Plainly, treating negligent and accidental killers on a par with intentional and reckless–indifference killers ignores the wide difference in their level of culpability.

Nor does the death penalty for negligent and accidental killings serve any deterrent purpose. As the Court said in *Enmund*:

> [I]t seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act." *Gregg v. Georgia, supra*, 428 U.S., at 186, 96 S.Ct., at 2931 (fn. omitted).

(*Enmund*, at pp. 798-99; accord, *Atkins v. Virginia, supra*, 536 U.S. at p. 319.) The law simply cannot deter a person from causing a result he never intended and never foresaw.

Since imposition of the death penalty for a felony murder simpliciter clearly is contrary to the judgment of the overwhelming majority of the states, recent professional opinion and international norms, it does not comport with contemporary values. Moreover, because imposition of the death penalty for the felony murders involved in this case serves no penological purpose, it "is nothing more than the purposeless and needless imposition of pain and suffering." As interpreted and applied by this Court, the felony murder special circumstances alleged in this case are unconstitutional under the Eighth Amendment, and appellant's death sentence must be set aside.

Finally, California law making a defendant death-eligible for felony murder simpliciter violates international law. Article 6(2) of the ICCPR

restricts the death penalty to only the "most serious crimes," and the Safeguards, adopted by the United Nations General Assembly, restrict the death penalty to intentional crimes. This international law limitation applies domestically under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2; see Argument XXIX, *ante*, which is incorporated by reference here.) In light of the international law principles discussed previously, appellant's death sentence, predicated on his acts of rape and oral copulation without any proof that the murder was intentional, violates both the ICCPR and customary international law and, therefore, must be reversed.

*****

XXIV.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris, supra*, 586 F.2d at p. 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo, supra*, 416 U.S. at pp. 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Williams, supra*, 22 Cal.App.3d at pp. 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

There were errors at every stage of this case. Appellant's right to substitution of counsel at the competency phase was denied (see Argument I, *ante*) resulted, inter alia, in the denial of his right to a jury determination of his competency. The trial judge did not conduct adequate voir dire of prospective at both the guilt phase and at the penalty retrial. (See Arguments II and III, *ante*.) Similarly, the trial judge erroneously denied appellant's motions under *Batson v. Kentucky* (1986) 476 U.S. 79, 85, and

allowed the prosecution to use her peremptory challenges against prospective jurors for racial reasons. (See Argument IV, *ante*.) In addition, the trial judge refused to give the jury instructions crucial to the defense theory of the case. (See Arguments VI and VII, *ante*.) Moreover, numerous errors relating to the guilt phase instructions lessened the prosecution's burden of proof. (See Arguments VIII-XIII, *ante*.)

The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const. Amend. XIV; Cal. Const. art. I, §§ 7 & 15; *Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 643. His conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill, supra*, 17 Cal.4th at pp. 844-845 [reversal based on cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes, supra*, 52 Cal.3d at p. 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a

prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

There were also multiple errors at the second penalty phase trial, which resulted in a death sentence for appellant. The prosecution was allowed, over defense objections, to ask pinpoint questions on the juror questionnaire which were aimed at selecting jurors who would be especially predisposed to choose a death penalty over life without the possibility of parole. (See Argument XV, *ante*.) Further, the trial judge allowed into evidence improper evidence of uncharged misconduct, "victim impact" and highly prejudicial photographs. (See Arguments XVI-XVIII, *ante*.) The errors committed at the penalty phase of appellant's trial include numerous instructional errors that undermine the reliability of the death sentence. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina*, supra, 476 U.S. at p. 8; *Caldwell v. Mississippi, supra*, 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

XXV.

IF THE CONVICTION PURSUANT TO ANY COUNT IS REVERSED OR THE FINDING AS TO ANY SPECIAL CIRCUMSTANCE IS VACATED, THE PENALTY OF DEATH MUST BE REVERSED AND THE CASE REMANDED FOR A NEW PENALTY PHASE TRIAL

The jury made its decision to impose a death judgment after learning that defendant had been convicted of first degree murder, forcible rape, forcible rape during the commission of a residential burglary, first degree burglary, forcible oral copulation, and first degree robbery committed in an inhabited dwelling. (8 CT 1690-1694.) The jury also found true three special circumstance allegations; that is, the homicide was committed during the course of a rape, a burglary, and an oral copulation. If this Court sets aside the convictions on any of the counts or the findings on any of the special circumstances, the entire matter must be remanded for a new sentencing determination. (See *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849 [court found prejudice, noting that three of the four special circumstances the jurors found to be true were invalidated on appeal].)

Penal Code section 190.3 codifies the factors that a jury may consider in determining whether death or life imprisonment without parole should be imposed in a given case. In accordance with this provision, appellant's penalty phase jury was instructed that it "shall" consider and be guided by the presence of enumerated factors, including, inter alia, "the circumstances of the crime of which the defendant was convicted." (7 CT 1586-1587.)

A reversal of any of the charges or allegations would significantly alter the landscape the jury was considering when making its determination

to assess death. The reliability of the death judgment would be severely undermined if it were allowed to stand despite the reversal of any of the counts or the vacating of any of the special circumstances. Accordingly, to meet the stringent standards imposed on a capital sentencing proceeding by the Eighth Amendment, as well as article I, section 17 of the California Constitution, appellant must be granted a new penalty trial, to enable the fact finder to consider the appropriateness of imposing death.

Moreover, in *Ring v. Arizona* (2002) 536 U.S. 584, 607, the United States Supreme Court applied the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, to capital sentencing procedures, and concluded that specific findings the legislature makes prerequisite to a death sentence must be made by a jury and proven beyond a reasonable doubt. In California, jurors must determine two critical facts at the penalty phase of trial: (1) whether one or more of the aggravating circumstances exists, and (2) if one or more aggravating circumstances exists, whether they outweigh the mitigating circumstances. If this Court reverses or reduces any of the convictions or special findings, the delicate calculus juries must undertake when weighing aggravating and mitigating circumstances is necessarily skewed, and there no longer remains a finding by the jury that the aggravating factors outweigh the mitigating evidence beyond a reasonable doubt.

Further, this Court cannot conduct a harmless error review regarding the death sentence without making findings that go beyond "'the facts reflected in the jury verdict alone.'" (See *Ring, supra*, 536 U.S. at p. 589 [quoting *Apprendi, supra*, 530 U.S. at p. 483].) Accordingly, because jury findings regarding the facts supporting an increased sentence is constitutionally required, a new jury determination that aggravating factors

outweigh mitigating factors and that death is the appropriate sentence must be made when any count or special circumstance is reversed or reduced.

*****

XXVI.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO INSTRUCT THE JURY ON ANY PENALTY PHASE BURDEN OF PROOF [134]

The California death penalty statute fails to provide any of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. As set forth elsewhere in this brief, juries do not have to make written findings or achieve unanimity as to aggravating circumstances. (See Argument XXX, *post.*) As discussed herein, juries do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is intercase proportionality review not required; it is not permitted. (See Argument XXIX, *post.*) 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. These omissions in the California

---

[134] In *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, this Court held that "[r]outine instructional and constitutional challenges," will be deemed "fairly presented" for the purposes of state and subsequent federal review so long as the appellant's brief: (1) identifies the claim in the context of the facts; (2) notes that the Court has rejected the same or a similar claim in a prior decision; and (3) asks the Court to reconsider that decision. However, in order to ensure that the federal courts deem these challenges fairly presented to the state courts and thus fully preserved for federal review, Capistrano submits more than the minimum briefing suggested in *Schmeck.*

capital-sentencing scheme, individually and collectively, run afoul of the Sixth, Eighth, and Fourteenth Amendments.

A. The Statute and Instructions Unconstitutionally Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor, That the Aggravating Factors Outweigh the Mitigating Factors, and That Death is the Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown* (1987) 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[135]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments.

This Court has consistently held 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 ...." (*People v. Fairbank* (1997)

---

[135] There are two exceptions to this lack of a burden of proof. The special circumstances (Pen. Code, § 190.2) and the aggravating factor of violent criminal activity (Pen. Code, § 190.3 subsection (b)) must be proved beyond a reasonable doubt. (See Arguments XXVIII and XXIX, *post.*)

16 Cal.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent*, supra, 43 Cal.3d at pp.773-774.) However, this Court's reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi, supra*, 530 U.S. at pp. 471 - 472, *Ring, supra*, 536 U.S. at p. 607, and *Blakely, supra*, 542 U.S. at pp. 300-313.

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in Apprendi required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi, supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id.* at pp. 471-472.) 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 pp. 478.)

In *Ring*, the Court applied Apprendi's principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring, supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Id. at p. 593.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi.*

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring, supra*, 536 U.S. at p. 609.) [136] The Court observed: "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. We hold that the Sixth Amendment applies to both." (*Id.*)

In *Blakely*, the Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and

---

[136] Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives–whether the statute calls them elements of the offense, sentencing factors, or Mary Jane–must be made by the jury beyond a reasonable doubt." (*Ring, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

compelling reasons." (*Blakely, supra*, 542 U.S. at p. 300.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, any fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (*Blakely, supra*, 542 U.S. at p. 303, original italics.)

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[137] Only

---

[137] See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann., art. 905.3 (West 1984); Md. Ann. Code, art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann.,§ 39-13-204(f) (1991); Tex. Crim. 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

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance–and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*, 16 Cal.4th at p. 1255; 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) substantially outweigh any and all mitigating factors.[138] As set forth in California's

---

1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).) On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az. 2003) 65 P.3d 915.)

[138] 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

"principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury, "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." (48 RT 5033; 7 CT 1609-1610; CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. 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.[139]

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 Pen. Code, 190.2 subsection (a)),

---

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.* at p. 460.)

[139] 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, supra*, 40 Cal.3d at p. 541.)

Apprendi does not apply. After *Ring*, the Court repeated the same analysis. (See, e.g., *People v. Prieto, supra*, 30 Cal.4th at p. 263 ["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"]; see also *People v. Snow* (2003) 30 Cal.4th 43.)

This holding in the face of the United States Supreme Court's recent decisions is simply no longer tenable. Read together, the *Apprendi* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi, supra*, 530 U.S. at p. 494.) As stated in Ring, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact–no matter how the State labels it–must be found by a jury beyond a reasonable doubt." (*Ring, supra*, 536 U.S. at p. 586.) As Justice Breyer, explaining the holding in *Blakely*, points out, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also (all punishment-increasing) facts about the way in which the offender carried out that crime." (*Blakely, supra*, 542 U.S. at p. 328 (dis. opn. of Breyer, J.), original italics.)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect–does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi, supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (§ 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring, supra*, 536 U.S. at p. 604, quoting *Apprendi, supra*, 530 U.S. at p. 541(dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase–that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring, supra*, 536 U.S. at p. 604, quoting *Apprendi, supra*, 530 U.S. at p. 494) and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) They thus trigger the requirements of *Blakely-Ring-Apprendi* that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

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.[140] The Court held that Ring does not apply, however, because the facts found at the penalty phase are "facts which bear

---

[140] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also–and most important–to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown, supra*, 46 Cal.3d at p. 448.)

upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow*, *supra*, 30 Cal.4th at p.126, fn. 32, citing *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has repeatedly sought to reject *Ring's* applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto, supra*, 30 Cal.4th at p. 275; *People v. Snow, supra*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence–in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death–no single specific factor must be found in Arizona or California. In both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And Blakely makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal Constitution.

In *People v. 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.' [Citation omitted.] No single factor therefore determines which penalty–death or life without the possibility of parole–is appropriate.

(*People v. Prieto, supra*, 30 Cal.4th at p. 263.)

This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present–otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan, supra*, 53 Cal.3d at pp. 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra*, 65 P.3d at p. 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency"]; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State, supra*, 59 P.3d 450.)

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own–a finding which, appellant submits, must

inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely, supra*, 542 U.S. at p. 304.) Thus, under *Apprendi, Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[141]

---

[141] In *People v. Griffin* (2004) 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]'": "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation." (*People v. Griffin, supra*, 33 Cal.4th at p. 595.) In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?

(*Leatherman, supra*, 532 U.S. at p. 429.) This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*. *Leatherman* was concerned with whether the Seventh Amendment's ban on re examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error

The appropriate questions regarding the application of Sixth Amendment to California's penalty phase, according to *Apprendi, Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC No. 8.88? The maximum sentence would be life without possibility of parole; (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto, supra*, 30 Cal.4th at p. 263.) *In Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed:

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . .

---

standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (*Id.* at pp. 437, 440.) *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

> extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(*Ring, supra*, 536 U.S. at p. 606, quoting with approval *Apprendi, supra*, 530 U.S. at 539 (dis. opn. of O'Connor, J.).)

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"].) As the high court stated in *Ring*:

> Capital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment . . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

(*Ring, supra*, 536 U.S. at p. 589.)

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The State and Federal Constitutions Require That the Jurors 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

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

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, supra*, 397 U.S. at p. 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, supra*, 430 U.S. at p. 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. 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. (*In re Winship, supra*, 397 U.S. at pp. 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. (*In re Winship, supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall, supra*, 375 U.S. at p. 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 In re Winship, supra*, 397 U.S. at p. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338, 342 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306, 310 [same]; *People v. Thomas* (1977) 19 Cal.3d 630, 632 [commitment as

narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 225 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure," *Santosky v. Kramer, supra*, 455 U.S. at p. 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] The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected [citation], 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."

(*Santosky v. Kramer, supra*, 455 U.S. at p. 755, quoting *Addington v. Texas, supra*, 441 U.S. at pp. 423, 424, 427.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky, supra*, 455 U.S. at p.

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." (*In re Winship, supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra*, 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (See *Monge v. California, supra*, 524 U.S. at p. 732.) In *Monge*, the Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (*Monge v. California, supra*, 524 U.S. at p. 732, quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441, emphasis added.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but also that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See, e.g., *People v. Griffin, supra*, 33 Cal.4th at p. 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision in a death penalty case. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (Conn. 2003) 833 A.2d 363, 408, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra*, 447 U.S. at pp. 637-638; *Monge v. California, supra*, 524 U.S. at p. 732.) Consequently, under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

C. The Sixth, Eighth, and Fourteenth Amendments Require That the State Bear Some Burden of Persuasion at the Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court* (*Mitchell*) (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes, supra*, 52 Cal.3d at p. 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra*, 455 U.S. at p. 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such

arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as proof beyond a reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the State while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the State and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland, supra*, 486 U.S. at p. 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden of persuasion for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see §190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan, supra*, 53

Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." [142]

A fact could not be established–i.e., a fact finder could not make a finding–without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, rule 4.420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520 ["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 acts of 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

---

[142] As discussed below, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*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. In addition, as explained in the preceding argument, to provide greater protection to noncapital 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, supra*, 897 F.2d at p. 421.)

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 260) and the "height of arbitrariness" (*Mills v. Maryland, supra*, 486 U.S. at p. 374)–that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

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*, 508 U.S. 275.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist. This raises the constitutionally unacceptable possibility that 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, as the case may be, is not–is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. 275.)

D. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require Juror Unanimity on Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based

on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo* (1992) 1 Cal.4th 103, 462-464 (cert. granted on other grounds in *Bacigalupo v. California* (1992) 506 U.S. 802); see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)[143]

---

[143] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo*–particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640–should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and thereby, undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[144]

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina*, *supra*, 494 U.S. at p. 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, 524

---

[144] Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto*, *supra*, 30 Cal.4th at 265.) Appellant raises this issue to preserve his rights to further review. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].) *Gregg v. Georgia* (1976) 428 U.S. 153, 18

U.S. at p. 732; accord *Johnson v. Mississippi, supra*, 486 U.S. at p. 584; *Gardner v. Florida, supra*, 430 U.S. at p. 359; *Woodson v. North Carolina, supra* 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury. (Cf. *Johnson v. Louisiana* (1972) 406 U.S. 356, 360 [holding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were not violated by a Louisiana rule which allowed for conviction based on a plurality vote of nine out of twelve jurors].)

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial 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 also *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[145] For example, in cases where a criminal defendant has

---

[145] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann., § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann., § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat., ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code, art. 27, § 413(i) (1993); Miss. Code Ann., § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); 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(c)(1)(iv) (1982); S.C. Code Ann., § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim.

been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California, supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) and, since providing more protection to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst, supra*, 897 F.2d at p. 421)–it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the Equal Protection Clause and by its irrationality violate both the Due Process and Cruel and Unusual Punishment Clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the United States Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "continuing series of violations" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. At the same

---

Proc. Code Ann., § 37.071 (West 1993).)

> time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

(*Id.* at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do; and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne, supra*, 4 Cal.4th at p. 79; *People v. Hayes, supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating

circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

E. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

Compounding the errors, the jury instruction failed to inform the jurors about the burden of proof. This impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Lockett v. Ohio, supra*, 438 U.S. at p. 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.)

"There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." (*Boyde v. California, supra*, 494 U.S. at p. 380.) Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Ibid.*) That likelihood of misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

A defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer considers it. However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was

explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. (See Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 10.)

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to convict appellant of any charge or special circumstance. Similarly, the jury was instructed that the penalty determination had to be unanimous. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here.

The failure of the California death penalty scheme to require instruction on unanimity and the standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize different standards. Such arbitrariness violates the Eighth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments, as well as his corresponding rights under article I, sections 7, 17, and 24 of the California Constitution.

F. The Penalty Jury Should also be Instructed on the Presumption of Life

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

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. Amend. XIV; Cal. Const., art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. Amends. VIII & XIV; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. (U.S. Const. Amend. XIV; Cal. Const., art. I, § 7.)

In *People v. Arias, supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital

cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

G. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

*****

XXVII.

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

A. Introduction

In the penalty phase, the trial court instructed the jury with CALJIC No. 8.88[146] on the weighing process. This instruction was vague and

---

[146] The trial court instructed the jury: "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on each defendant. ¶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 of aggravating and mitigating circumstances upon which you have been instructed. ¶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. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. ¶ The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. ¶ You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve

imprecise, failed to describe the weighing process accurately that jurors must apply in a capital case, was improperly weighted toward death and deprived appellant of the individualized, moral judgment required under the federal Constitution. This instruction, which formed the centerpiece of the trial court's description of the sentencing process, violated appellant's rights to a fair jury trial, reliable penalty determination and due process under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding sections of the California Constitution.[147] (See e.g., *Mills v. Maryland, supra*, 486 U.S. at pp. 383-384.) Reversal of the death sentence is required.

B. The Instructions Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard That Failed to Provide Adequate Guidance and Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) The use of this phrase violates the Eighth and Fourteenth

---

jurors must agree. ¶Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom." (48 RT 5033; 7 CT 1609-1610.)

[147] As previously set forth, appellant recognizes that this Court has rejected arguments challenging CALJIC No. 8.88 in cases such as *People v. Prieto, supra,* 30 Cal.4th at p. 264 and *People v. Catlin, supra,* 26 Cal.4th at p. 174. However, for the reasons stated below, those decisions should be reconsidered.

Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in Furman v. Georgia . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 867, fn. 5.)

In analyzing the word "substantial," the Arnold court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.

(224 S.E.2d at p. 392, fn. omitted.)[148]

Appellant acknowledges that this Court has opined, in discussing the

---

[148] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 202.)

constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [Arnold] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux's* summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold's* analysis. While *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold, supra*, 224 S. E. 2d at p. 392.) The instruction *in Arnold* concerned an aggravating circumstance that used the term "substantial history of serious assaultive criminal convictions" (ibid., italics added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia, supra*, 446 U.S. at p. 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black, supra*, 503 U.S. at p. 235.) Because the instruction rendered the penalty determination unreliable (U.S. Const., Amends. VIII and XIV), the death judgment must be reversed.

C. The Instructions Failed to Convey the Central Duty of Jurors in the Penalty Phase

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305; *People v. Edelbacher, supra*, 47 Cal.3d at p. 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown, supra*, 40 Cal.3d at p. 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948 (disapproved on other grounds in *People v. Combs* 2004 34 Cal.4th 821, 860); *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, the instruction under CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole, the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." Merriam-Webster's Collegiate Dictionary (10th ed. 2001) defines the verb "warrant" as, inter alia, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different determination than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo, supra*, 6 Cal.4th at pp. 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the

penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to the appropriateness of the death penalty. (6 CT 1434.) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "appropriateness of the death penalty" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]." (6 CT 1435.)

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., Amends. 8th and 14th) denies due process (U.S. Const., Amend. XIV; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346) and must be reversed.

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

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating

circumstances." (§ 190.3.)[149] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California, supra*, 494 U.S. at p. 377.)

This mandatory language is not included in CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violated the Fourteenth Amendment. (See *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates all the jury's findings," can never be harmless.(*Sullivan v. Louisiana, supra*, 508 U.S. at p. 281, original italics.)

This Court has found the formulation in CALJIC No. 8.88

---

[149] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown, supra,* 40 Cal.3d at p. 544, fn. 17.)

permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan, supra*, 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States, supra*, 157 U.S. at p. 310.)[150]

---

[150] There are due process underpinnings to these holdings. In *Wardius v. Oregon, supra*, 412 U.S. at p. 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" ... there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

The decision in *People v. Moore*, *supra*, 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the ... instructions ... do not incorrectly state the law ..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*Id.* at pp. 526-527, internal quotation marks omitted.)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing

instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the Equal Protection Clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants–if not more entitled–to the protections the law affords in relation to instructions strongly favoring the prosecution. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

E. The Instructions Failed to Inform the Jurors That Appellant did not Have to Persuade Them the Death Penalty was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes, supra*, 52 Cal.3d at p. 643 ["Because the determination of penalty is essentially moral and normative there is no burden of proof or burden of persuasion"].) That

failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

The instructions given in this case resulted in this capital jury not being properly guided on this crucial point. The death judgment must therefore be reversed.

F. Conclusion

As set forth above, the trial court's primary sentencing instruction, CALJIC No. 8.88, failed to comply with the requirements of the Due Process Clause of the Fourteenth Amendment and with the Cruel and Unusual Punishment Clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

*****

XXVIII.

THE FAILURE TO PROVIDE INTERCASE ROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

A. The Lack of Intercase Proportionality Review Violates the Eighth Amendment Protection Against the Arbitrary and Capricious Imposition of the Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original), quoting *Proffitt v. Florida, supra*, 428 U.S. at p. 251 [opinion of Stewart, Powell, and Stevens, JJ.].)

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and proportionality 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, supra*, 428 U.S. at p. 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 proportionality review is not constitutionally required. (See *People v. Farnam, supra*, 28 Cal.4th at p. 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 [], 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, [], *quoting Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (9th Cir. 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 case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia* (1972) 408 U.S. 238, 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.[151]

---

[151] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Coop. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. See *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre, supra,* 572 P.2d at p. 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

The present case exemplifies why intercase review should be mandatory in a capital case. This was a robbery gone bad, a single victim felony murder which in other counties in this state would have never been charged as a capital offense. The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the United States Supreme Court in *Pulley* 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.) 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 in the arguments following this one. Thus, the statute fails to provide 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.

XXIX.

CALIFORNIA'S USE OF THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, THE EIGHTH AMENDMENT, AND LAGS BEHIND EVOLVING STANDARDS OF DECENCY

The Eighth Amendment "draw'[s] its meaning from evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra*, 356 U.S. at p. 101.) The "cruel and unusual punishment" prohibited under the Constitution is not limited to the "standards of decency" that existed at the time our Framers looked to the 18th century civilized European nations as models. (See, e.g., *Stanford v. Kentucky, supra*, 492 U.S. at p. 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma, supra*, 487 U.S. at p. 830 (plur. opn. of Stevens, J.).) Rather, just as the civilized nations of Europe have evolved, so must the "evolving standards of decency" set forth in the Eighth Amendment. With the exception of extraordinary crimes such as treason, the civilized nations of western Europe which served as models to our Framers have now abolished the death penalty. In addition to the nations of Western Europe, Canada, Australia, and New Zealand have also abolished the death penalty. In 2004, five more nations (Bhutan, Greece, Samoa, Senegal, and Turkey) abandoned the death penalty. In 2005, Liberia and Mexico abolished the death penalty and in 2006, the Philippines also abolished it. Forty countries have abolished the death penalty for all crimes since 1990. Indeed, since 1976 an average of three countries a year have abolished the death penalty. (Amnesty International, The Death Penalty, Abolitionist and Retentionist Countries (as of August 2006), Amnesty International webcite, [www.amnesty.org]; "Facts and Figures on the Death Penalty," Amnesty International, August 2006.) The United States stands as one of a small

number of nations that regularly uses the death penalty as a form of punishment, a blemish on a rapidly evolving standard of decency moving to abolish capital punishment worldwide. (See *Ring, supra*, 536 U.S. at p. 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.) Indeed, in 2005, ninety-four per cent of all known executions took place in China, Iran, Saudi Arabia and the United States. (Amnesty International, supra, "Facts and Figures on the Death Penalty," August 2006.) While most nations have abolished the death penalty in law or practice, this nation continues to join a handful of nations with the highest numbers of executions. The United States has executed more than 1000 people since the death penalty was reinstated in 1976, and as of January 1, 2005, over 3,400 men and women were on death rows across the country. (Amnesty International, *supra*, About the Death Penalty.) As Dr. William F. Schulz, Executive Director of Amnesty International USA ("AIUSA") has said:

> Our report indicates that governments and citizens around the world have realized what the United States government refuses to admit - that the death penalty is an inhumane, antiquated form of punishment . . . Thomas Jefferson once wrote that 'laws and institutions must go hand in hand with the progress of the human mind;' it is past time for our government to live up to this Jeffersonian ideal and let go of the brutal practices of the past.

(April 5, 2005, AIUSA Press Release, "Amnesty International's Annual Death Penalty Report Finds Global Trend Toward Abolition.")[152]

---

[152] Amnesty International has also called attention to instances in which U.S. citizens were sentenced to death for crimes they did not commit:

> The cases of Derrick Jamison and the other 118 individuals released from death row since 1973 demonstrate that no judicial system is infallible. However sophisticated the

The continued use of capital punishment in California and the United States is therefore not in step with the evolving standards of decency which the Framers sought to emulate. As set forth above, nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See, e.g., *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law-of-nations principle that citizens of warring nations are enemies].) California's use of death as a regular punishment, as in this case, therefore violates the Eighth and Fourteenth Amendments. (See *Atkins, supra*, 536 U.S. at p. 316, fn. 21; *Stanford v. Kentucky, supra*, 492 U.S. at pp. 389-390 (dis. opn. of Brennan, J.).)

Additionally, the California death penalty law violates specific provisions of international treaties. The Universal Declaration of Human Rights, adopted by this country via the United Nations General Assembly in December 1948, recognizes each person's right to life and categorically states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." According to Amnesty International, imposition of the death penalty violates the rights guaranteed by the UDHR. (Amnesty International, International Law, Amnesty International website, *supra.*)

Additional support for this position is also evident by the adoption of

---

> system, the death penalty will always carry with it the risk of lethal error . . .

(*Ibid*; in February 2005, Derrick Jamison became the 119th wrongfully convicted person to be released from death row on the grounds of innocence.)

international and regional treaties providing for the abolition of the death penalty, including, inter alia, Article VII of the International Covenant of Civil and Political Rights ("ICCPR") which prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1990. Under Article VI of the federal Constitution, "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, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (See *Zschernig v. Miller* (1968) 389 U.S. 429, 439-441; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.) Consequently, this Court is bound by the ICCPR.[153]

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process, the conditions under which the condemned are incarcerated, the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between

---

[153] The ICCPR and the attempts by the Senate to place reservations on the language of the treaty have spurred extensive discussion among scholars. Some of these discussions include: Bassiouni, *Symposium: Reflections on the Ratification of the International Covenant of Civil and Political Rights by the United States Senate* (1993) 42 DePaul L. Rev. 1169; Posner & Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993* (1993) 42 DePaul L. Rev. 1209; Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights* (1993) 6 Harv. Hum. Rts. J. 59.

sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. For these same reasons, the death sentence imposed in this case also constitutes the arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR.

In the recent case of *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284, the Eleventh Circuit Court of Appeals held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (But see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Once again, however, appellant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. (*People v. Brown* (2004) 33 Cal.4th 382, 403; *People v. Ghent, supra*, 43 Cal.3d at pp. 778-781; see also *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero, supra*, 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).)

Appellant requests that the Court reconsider and, in this context, find the death sentence violative of international law. (See also *Smith v. Murray, supra*, 477 U.S. at p. 534 [holding that even issues settled under state law must be reraised to preserve the issue for federal habeas corpus review].) The death sentence here should be vacated.

XXX.

CALIFORNIA'S DEATH PENALTY SCHEME FAILS TO REQUIRE WRITTEN FINDINGS REGARDING THE AGGRAVATING FACTORS AND THEREBY VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS TO MEANINGFUL APPELLATE REVIEW AND EQUAL PROTECTION OF THE LAW

California's death penalty scheme fails to require that the jury make a written statement of findings and reasons for its death verdict. Although this Court has held that the absence of such a requirement does not render the death penalty scheme unconstitutional (*People v. Fauber* (1992) 2 Cal.4th 792, 859), that holding should be reconsidered as the failure has deprived appellant of his Fifth, Eighth, and Fourteenth Amendment rights to due process, equal protection, and meaningful appellate review of his death sentence.

The importance of explicit findings has long been recognized by this Court. (See, e.g., *People v. Martin* (1986) 42 Cal.3d 437, 449, citing *In re Podesto* (1976) 15 Cal.3d 921, 937-938.) Thus, in a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentencing choice. (*Ibid*; Pen. Code, § 1170, subd. (c).) Because the Eighth and Fourteenth Amendments afford capital defendants 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 because providing more protection to a non-capital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that the sentencing entity in a capital case is constitutionally required to identify for the record the aggravating and

mitigating circumstances found and rejected.

As discussed previously in this brief, the decisions in *Apprendi, supra*, 530 U.S. 466, *Ring, supra*, 536 U.S. 584, and *Blakely, supra*, 542 U.S. at pp. 304-305, require that a jury decide unanimously and beyond a reasonable doubt any factual issue allowing an increase in the maximum sentence. Without written findings by the jury, it is impossible to know which, if any, of the aggravating factors in this case were found by all of the jurors.

Moreover, the Court itself has stated that written findings are "essential to meaningful [appellate] review." (*People v. Martin, supra*, 42 Cal.3d at pp. 449-450.) Explicit findings in the penalty phase of a capital case are especially critical because of the magnitude of the penalty involved (*see Woodson v. North Carolina, supra*, 428 U.S. at p. 305) and the need to address error on appellate review. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 383, fn. 15.) California capital juries have wide discretion, and are provided virtually no guidance, on how they should weigh aggravating and mitigating circumstances. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 978-979.) Without some written explanation of the basis for the jury's penalty decision, this Court cannot adequately assess prejudice where, as in appellant's case, aggravating factors have been improperly considered.

Accordingly, the failure to require written findings regarding the sentencing choice deprived appellant of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, equal protection of the law, and meaningful appellate review of his death sentence. This constitutional deficiency in California's death penalty law requires reversal of appellant' s death sentence and remand for a new penalty trial.

CONCLUSION

Appellant requests the relief requested above be granted, including but not limited to the reversal of his convictions and his judgment of death.

DATED: January 3, 2007

Respectfully submitted,
MICHAEL J. HERSEK
State Public Defender

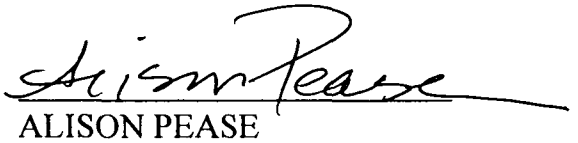
ALISON PEASE
Senior Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I am the Deputy State Public Defender assigned to represent appellant, Brandon Arnae Taylor, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer generated word count, I certify that this brief excluding the tables and certificates is 131,923 words in length.

Dated: January 3, 2007



ALISON PEASE

DECLARATION OF SERVICE BY MAIL

Case Name: *People v. Taylor*
Case Number: **Superior Court No. Crim. SCD113815**
Supreme Court No. S062562

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S OPENING BRIEF

by enclosing them in an envelope and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ **X** / **placing** the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on January 3, 2007, as follows:

Matthew C. Mulford
Deputy Attorney General
Office of the Attorney General
Post Office Box 85266
San Diego, CA 92186-5266

Brandon A. Taylor
Post Office Box K-58800
San Quentin State Prison
San Quentin, CA 94974

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 3, 2007, at Sacramento, California.

Saundra Alvarez