ORIGINAL

SUPREME COURT
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No. S065720

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	(Sacramento Superior
	)	Court No. 94F08352)
vs.	)	
	)	
SEAN VENYETTE VINES,	)	
	)	
Defendant and Appellant.	)	
	)	

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH
Superior Court of California, County of Sacramento
The Honorable James L. Long, Judge Presiding

APPELLANT'S OPENING BRIEF

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SEAN VENYETTE VINES

DEATH PENALTY

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INTRODUCTION.

On September 28, 1994, a McDonald's restaurant on Florin Road in Sacramento was robbed, and employee Ron Lee was shot and killed. Eleven nights earlier, on September 17, 1994, another McDonald's, on Watt Avenue in Sacramento, was also robbed; no one was shot, killed or seriously injured in that robbery.

William Deon Proby was tried and convicted of both robberies and the homicide, and was sentenced to life without parole.

Sean Venyette Vines, the appellant here, was separately tried and convicted, on all counts. On the theory he was the shooter, Vines was sentenced to death.

Of all the death penalty cases this Court has reviewed over the past two decades, this is one of the weakest.

Two eyewitnesses to the Florin Road robbery-homicide testified. Both eyewitnesses knew Sean Vines; both had worked with him at the Florin Road McDonald's. Neither eyewitness identified Vines as the shooter, or even as present at the scene. One eyewitness, a long-term McDonald's employee who was the store manager, thought the gunman's actions indicated he was not a McDonald's employee, as Vines had been. The other eyewitness described the gunman as someone substantially shorter than Vines, and testified that the robber he saw was not Sean Vines.

The main witness against Vines on the Florin Road crimes was one Vera Penilton – codefendant Proby's teenage girlfriend, and his confederate in other crimes. All of the money and property that was recovered from the two robberies was found in the bedroom Penilton shared with Proby. Penilton's testimony sought to minimize Proby's culpability. Penilton herself – a convicted criminal – had criminal liability arising from these events, and

testified under a prosecution grant of immunity. Penilton lied to the police, and lied on the stand about being the mother of Proby's child.

The case against Sean Vines for the Florin Road robbery-homicide was so shaky that any serious error will mandate reversal. Here, however, the Court has a menu of errors on which to rest its decision. These include the trial court's denial of severance of the Florin Road counts from the Watt Avenue charges; the trial court's denial of Vines' right to present a defense of third-party culpability, based on admissible evidence that not Sean Vines, but Vera Penilton's cousin, one Anthony Edwards, a member of the Bloods criminal gang, was in fact Proby's accomplice and the killer of Ron Lee; the astonishing failure of Vines' trial counsel to present admissible, plainly exculpatory evidence that a third eyewitness, also a McDonald's employee, had described the gunman who wielded the murder weapon as being eight inches shorter than Sean Vines, who is 6'3"; prosecutorial misconduct consisting of the knowing presentation of false evidence; and other serious errors and failings of counsel.

The evidence against Vines on the Watt Avenue counts was also shaky and far from overwhelming. Four eyewitnesses testified; all were store employees. One said the robber was Vines, but also said it was "just a hunch" the robber was Vines. A second witness testified the robber was Vines, but also described the robber as a man considerably shorter than Vines. A third eyewitness testified he did not recognize the robber as Vines, described the robber as shorter than Vines, and testified that the robber did not walk with Vines' distinctive limp. And a fourth eyewitness testified the robber was Vines, and also testified he wasn't sure it was Vines, and didn't come to believe it was Vines until he had talked to the store manager and an officer, neither of whom were present during the robbery.

Just as with the Florin Road robbery-homicide, the case against Sean Vines on the Watt Avenue charges was tainted by serious error. The errors that require reversal of the Watt Avenue convictions include the trial court's failure to sever the Watt Avenue charges from the Florin Road counts; the trial court's erroneous admission of inflammatory and irrelevant evidence against Vines; the court's violation of Vines' right to present a complete defense by restricting his attempt to show that eyewitnesses identified him as part of an orchestrated "consensus"; and the prosecutor's egregious misconduct in referring, in closing argument, to inherently prejudicial matters outside the evidence.

And even assuming none of the errors at the guilt phase mandate reversal of the convictions, the sentence of death cannot survive this Court's careful review. First, the evidence in aggravation was far from compelling; Vines had two prior convictions for burglary, and nothing else by way of a criminal history. The prosecution relied heavily on the circumstances of the crime in arguing for death. Yet here, where the evidence of guilt was also far from overwhelming, virtually all the serious guilt phase errors prejudicially tainted the penalty phase as well. Second, the penalty phase was additionally contaminated by the trial court's admission of excessive and inflammatory victim impact evidence, including a highly prejudicial videotape of the victim's musical performances.

Finally, relief is also compelled by serious errors at the jury selection phase. Here, although the trial court found a prima facie case of group bias based on the prosecutor's peremptory challenge of an African American prospective juror, the trial court failed to perform its constitutional obligation to make a reasoned evaluation of the prosecutor's asserted justifications for that challenge -- some of which were materially false. This error is reversible

per se.

Moreover, the trial court erroneously excluded for cause a juror who, while personally opposed to the death penalty, stated she could follow the court's instructions and impose death if warranted. This exclusion itself contravenes high court precedent. At the same time, the trial court applied a different, far more lenient standard to a pro-death juror, creating a fatal inconsistency also mandating reversal of the penalty.

Thus, as this brief will show, this was a weak case on both guilt an penalty, and the result could only have been obtained, as it was, as the product of prosecutorial misconduct and misrepresentation, defense counsel incompetence, and serious trial court error, all of federal constitutional dimension.

The only just result is reversal.

STATEMENT OF THE CASE.

On October 6, 1994, a felony complaint was filed in the Sacramento County Superior Court charging defendant and appellant Sean Venyette Vines (hereafter, "appellant" or "Vines") and codefendant William Deon Proby (hereafter, "Proby") in Count One with the murder of Ronald Joshua Lee in violation of Penal Code section 187, and in Count Two with the robbery of Jeffrey A. Hickey in violation of Penal Code section 211, crimes alleged to have been committed on September 28, 1994. The complaint further alleged the special circumstance that the murder was committed by the defendants while they were committing a robbery, that each of the defendants was armed with a firearm within the meaning of Penal Code section 12202.5 in the commission of the offenses, and that the offenses were serious felonies within the meaning of Penal Code section 1192.7, subdivision (c) (19). CT 21-23.

Thereafter, the prosecution amended the complaint to include numerous other counts arising from the same incident, and additional charges against the defendants arising from a prior incident on September 17, 1994, for a total of twenty-seven counts. RT 452-456.

A preliminary hearing was held on May 25, 26, and 30, 1995, after which Vines and Proby were held to answer on all charges. CT 83-97.

On April 5, 1996, the trial court granted the prosecution's motion to sever the trial of Proby from that of Vines. RT 483. The prosecution did not seek the death penalty against Proby. RT 444-445. Proby was tried separately before Vines, was found guilty, and was sentenced to life imprisonment without the possibility of parole, plus a term of thirty-eight years, in August 1996. *People v. Proby* (1998) 60 Cal.App.4th 922, 927.

On June 17, 1997, the prosecution filed an amended information alleging twenty-four felony counts and two prior convictions against Vines.

CT 467-481.[1]

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[1] These were the charges:

Count One – Victim Stanly Zaharko, September 18, 1994. Penal Code section 211, robbery. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Two – Victim John Burreson, September 18, 1994. Penal Code section 211, robbery. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Three – Victim Michael Baumann, September 18, 1994. Penal Code section 211, robbery. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Four – Victim Leticia Aguilar, September 18, 1994. Penal Code section 211, robbery. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Five – Victim Stanly Zaharko, September 18, 1994. Penal Code section 209, subdivision (b), kidnapping for purposes of robbery. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Six – Victim John Burreson, September 18, 1994. Penal Code section 209, subdivision (b), kidnapping for purposes of robbery. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Seven – Victim Michael Baumann, September 18, 1994. Penal Code section 209, subdivision (b), kidnapping for purposes of robbery. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Eight – Victim Leticia Aguilar, September 18, 1994. Penal Code section 209, subdivision (b), kidnapping for purposes of robbery. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Nine – Victim Stanly Zaharko, September 18, 1994. Penal Code section 236, false imprisonment. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Ten -- Victim John Burreson, September 18, 1994. Penal Code section 236, false imprisonment. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Eleven -- Victim Michael Baumann, September 18, 1994.

(continued...)

(...continued)
Penal Code section 236, false imprisonment. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Twelve -- Victim Leticia Aguilar, September 18, 1994. Penal Code section 236, false imprisonment. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Thirteen – Victim Stanly Zaharko, September 18, 1994. Penal Code section 245, subdivision (a)(2), assault with a deadly weapon.

Count Fourteen – Victim John Burreson, September 18,1994. Penal Code section 245, subdivision (a)(2), assault with a deadly weapon.

Count Fifteen – Victim Michael Baumann, September 18,1994. Penal Code section 245, subdivision (a)(2), assault with a deadly weapon.

Count Sixteen – Victim Leticia Aguilar, September 18,1994. Penal Code section 245, subdivision (a)(2), assault with a deadly weapon.

Count Seventeen – September 18,1994. Penal Code section 12021, subdivision (a), felon in possession of a firearm.

Count Eighteen –Victim Ronald Joshua Lee, September 18,1994. Penal Code section 187, subdivision (a), murder during the commission or attempted commission of a robbery. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a), and the offense was a serious felony within the meaning of Penal Code section 1192.7, subdivision(c)(1). A special circumstance – that the murder was committed while the defendants were engaged in the commission of a robbery, within the meaning of Penal Code section 190.2, subdivision (a)(17) – was also alleged.

Count Nineteen -- Victim Jeffrey A. Hickey, September 28, 1994. Penal Code section 211, robbery. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Twenty –Victim Ronald Joshua Lee, September 28, 1994. Penal Code section 211, robbery. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Twenty-one –Victim Pravinesh Singh, September 28, 1994. Penal Code section 211, robbery. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Twenty-two –Victim Jerome Williams, September 28, 1994. Penal Code section 211, robbery. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Twenty-three –Victim Jeffrey A. Hickey, September 28, 1994.

(continued...)

On July 7, 1997, jury selection began before the Honorable James L. Long. CT 530-531. Jury selection concluded on August 6, 1997. CT 612-615.

On August 11, 1997, the prosecution began the presentation of evidence in the guilt phase of trial. CT 784-793. The presentation of evidence and the arguments of counsel concluded on September 3, 1997, and the jury began deliberations that same day. CT 837-838. On September 9, 1997, the jury announced that it had agreed upon the verdicts. CT 848.

The jury found appellant Sean Vines guilty of all counts as charged in the amended complaint. CT 848-858. The jury further found that appellant had personally used a firearm in commission of the offenses, and found "true" the robbery special circumstance. *Ibid.*

The penalty phase began on September 16, 1997. CT 888-889. The presentation of evidence and the arguments of counsel concluded on September 18, 1997, and the jury began deliberations on that date. CT 940-941. On September 19, 1997, the jury returned a verdict of death. CT 952.

On November 7, 1997, the trial court denied appellant's motion to modify the verdict of death pursuant to Penal Code section 190.4, subdivision

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(...continued)
Penal Code section 245, subdivision (a)(2), assault with a deadly weapon. Vines personally used a firearm within the meaning of Penal Code section 12022.5(a).

Count Twenty-four –September 28, 1994. Penal Code section 12021, subdivision (a). Felon in possession of a firearm.

The amended information also alleged that Vines had two prior convictions: a conviction for burglary in Sacramento County in October 1991, and a second conviction for burglary in Los Angeles County in October 1992.

(e). CT 996-1002. The trial court imposed the death penalty for the murder count. CT 1070. The trial court additionally sentenced appellant to four consecutive life terms, and a total aggregate determinate sentence of fifty-five years and four months. CT 1073.

This appeal is automatic.

STATEMENT OF FACTS: GUILT PHASE.

A. The Florin Road Robbery-Murder.

The McDonald's on Florin Road in Sacramento was robbed on the night of September 28, 1994, and employee Ronald Lee was shot and killed during the robbery.[2]

Identity was the central issue at trial. Two eyewitnesses testified, McDonald's manager Jeffrey Hickey, and McDonald's employee Pravinesh "Bubba" Singh. Both Hickey and Singh knew Sean Vines, who had previously worked with them at the store.

Neither eyewitness identified Vines as one of the robbers.

The prosecution's chief witness was Vera Penilton, the girlfriend of separately-tried codefendant William Deon Proby. Penilton testified that she heard Vines admit to killing Ron Lee several hours after the robbery. Other witnesses not present at the scene also testified.

1. The Eyewitnesses.

Jeffrey Hickey, the manager of the Florin Road McDonald's, was in charge of the crew of three other employees the night of the robbery/homicide.

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[2] This Statement of Facts sets forth the facts in detail and does not use a narrative synthesis. The reason for this approach is to facilitate review. In many capital appeals, guilt is not seriously in question. Thus, a narrative that proceeds quickly past undisputed facts may be acceptable. Here, however, the identity of Vines as a guilty party was very much in dispute. In determining whether a defendant has been prejudiced by a federal constitutional error, such as the trial errors in this case, the reviewing court must assess the effect of the error based on the entire record. E.g., *United States v. Hasting* (1983) 461 U.S. 499, 509, fn. 7, 103 S.Ct. 1974, 76 L.Ed.2d. 96. The purpose of this detailed factual statement is to enable such "entire record" review.

RT 3849-3850. Sean Vines had been employed as a maintenance worker at that restaurant from October 1993 (RT 3854) until April 1994 (RT 3853, 3914).

On September 28, 1994, Hickey was working the closing shift; the restaurant closed at 11:00 p.m. RT 3855. At about 20 minutes to 11:00, Hickey went into the men's restroom to clean it. RT 3858. There were no customers in the restaurant. RT 3859. Jerome Williams was in the back room washing dishes; Pravinesh "Bubba" Singh was in the kitchen cleaning the grill; and Ron Lee was in the lobby area, sweeping and mopping. RT 3858.

The aluminum restroom fan was loud (RT 3858), and Hickey did not hear anyone approach (RT 3863). But as he worked, he noticed someone in the doorway (RT 3859).

Hickey saw a man pointing a rifle at him. The gunman was wearing a baseball cap, a scarf covering the lower portion of his face, an army-style jacket, slacks, and tennis shoes. He was black, and about eighteen to twenty-five years old. RT 3860. Hickey looked at him for five to ten seconds before the man spoke (RT 3860). Hickey estimated the man was about five-ten and a half, and about 165 pounds. RT 3871.

The gunman ordered Hickey to lay down on the floor. RT 3863. Hickey did so; the gunman headed toward the main area of the restaurant. RT 3864. After about two minutes, the gunman came back and said to him, "Can you open the safe?" Hickey said he could, and as the gunman pointed the rifle at him, he got up and walked back into the main area of the restaurant, then turned to go back behind the counter. RT 3865.

Hickey approached the safe area, and saw Ron Lee laying on the floor, just outside the doorway to the office. RT 3866-3867. The gunman stopped in the back area by the sink (RT 3885), where Singh and Williams were lying

on the floor (RT 3886). Hickey did not know whether Lee had been shot; he saw the other employees about six to eight feet from Lee, and figured the robber told everybody to lay on the floor. RT 3867.

Hickey also saw a second robber just outside the office, standing above Ron Lee, a foot or two away. RT 3867. He was leaning against a salad preparation table (RT 3918), holding a gun in his right hand at about waist level, pointing it forward (RT 3868). Hickey described this second robber as tall, of medium to stocky build. He was about six-two, also black, and seemed to be a little older than the first robber. RT 3871-3872, 3916-3917. Like the first robber, he was wearing a scarf (RT 3947), and all that was showing were his eyes, nose, eyebrows and forehead (RT 3939). Although Hickey never specifically looked at the second robber's face (RT 3869-3870, 3925, 3929), he did see the second robber for 5 to 10 seconds. RT 3873.

Hickey stepped over Ron Lee to enter the safe area (RT 3875), then kneeled down to open the safe (RT 3923) with the combination known only to the restaurant managers (RT 3925). While he was working on the combination, the second robber said "hurry up," three times. RT 3875, 3928. The voice didn't sound natural to Hickey; it sounded lower than normal, like "a young black male trying to make his voice sound gruff" (RT 3876) and demanding (RT 3928). Hickey got the safe open and then was directed to lay down on the ground. RT 3876-3877. He complied, and then he heard drawers being taken out of the safe and change jingling. RT 3877. Hickey's wallet was sticking out of his back pocket, and the second robber took it out and then laid it back down on Hickey's back. RT 3877-3878, 3937.

Two or three minutes after Hickey heard the safe drawers being gone through, he heard the restaurant door hardware jingle, then silence, and he realized the robbers had left. RT 3879-3878. He waited about two minutes

and got up. Jerome Williams and Bubba Singh also stood up; Ron Lee did not. He checked to see if Lee was okay, and saw the wound on the back of Lee's head. RT 3879. Hickey set off the silent alarm to call the police, and an ambulance came and took Ron Lee away. RT 3881.

Hickey estimated that about $550.00 in cash was stolen, together with a metal box containing $1.00 gift certificates that was also kept in the safe. RT 3881-3882. The robbers had left behind some loose and rolled coins. RT 3883-3882. But not all the cash drawers had been brought back to the safe at the time of the robbery; some of the cash trays were still in the registers. RT 3884.

Jeffrey Hickey had never seen William Deon Proby before the robbery. But Hickey was able to positively identify Proby as the first robber at the preliminary hearing and at Proby's trial, and he confirmed his identification of Proby at this trial. RT 3864.

Although Hickey knew Sean Vines, having trained him and worked with him for the several months (RT 3852-3853), he did not recognize Vines as one of the robbers, and Hickey never at any time identified Vines as one of the robbers. RT 3916, 3939-3940.

Hickey even viewed a surveillance videotape from the robbery, Prosecution Exhibit 116, containing taped images of two robbers. While he was able to confirm that Proby was the first robber, he was unable, at the prosecution's urging, to say anything more than that the second robber's height, build and skin color were "consistent with" those of his former employee Vines. RT 3873, 3898-3899.

Hickey, who had been with McDonald's for twenty years (RT 3849), expressed his view in statements to investigators that he did not think an employee of the store was responsible for the robbery. RT 3925.

An employee, Hickey figured, would have known Hickey was the manager, and that it was Hickey who had access to the safe (RT 3925); but these robbers took Ron Lee back to the safe area, not Jeffrey Hickey, as was shown in the tape of the incident and confirmed by Hickey. RT 3902.

Hickey observed that the robbers did not know to check the cash drawers at the front of the restaurant; they took only what was in the safe and left cash in the register drawers. RT 3884. Anyone pulling an inside job, prosecution witness Hickey reasoned, would have known how to get more money than was taken by the robbers of the Florin Road McDonald's. RT 3944.

Pravinesh "Bubba" Singh (RT 4130) was cleaning up the kitchen when his manager, Jeffrey Hickey, was approached by Deon Proby in the McDonald's men's room. RT 3858, 4230, 4132. Like the other employees working that night, Singh knew Sean Vines. He had worked with him up until the time Vines left the Florin Road McDonald's in April 1994 (RT 4099, 4130), and had seen Vines even after that, as Vines occasionally came in to the restaurant to say "what's up." RT 4135. Vines' most recent visit to the Florin Road McDonald's was about a month prior to the robbery. RT 4135.

Singh saw only one robber that night. RT 4102, 4132. He was standing by the sink when he saw someone pointing a gun at him. RT 4101. Singh described the gunman, who was standing about 10 feet away (RT 4102, 4132), as about five-eight, wearing all black, with a green ski mask. RT 4102, 4141. He estimated the gunman's height in relation to his own height of approximately five-eleven. The two men were facing each other, and Singh was looking slightly downward at him. RT 4102-4103. In describing how the robber he saw wielded the small "silver looking" hand gun aimed at him (RT 4103, 4168), Singh testified that the gunman appeared nervous and "his hand

kind of shook." RT 4104, 4173.

Singh did not hear the person who held him at gunpoint speak; the robber motioned at him with the gun to lie down on the floor, and Singh did so. RT 4136-4137. About ten seconds after he was ordered to lie down Singh looked back at where the robber was standing, and saw that although the man "wasn't paying attention" to him, he still had the gun pointed toward him. RT 4142. He also saw Ron Lee walking to the safe, and then standing by the office door. RT 4105, 4149.

The only voice Singh heard during those tense moments came from inside the office, some distance away from where he was lying face-down on the floor. RT 4107, 4155. Singh was unsure of the distance. RT 4182. He heard a demand made in "a real angry voice" that someone open the safe. RT 4107. Singh felt that the person demanding the safe be opened was not the same person who was at that moment holding him at gunpoint (RT 4107), because that robber was saying nothing, and the words he heard were "coming out of the office" (RT 4160). At first, he thought the person had a Hispanic-sounding voice, but changed his mind later. RT 4108, 4158, 4166-4167.

Just after the angry voice demanded that the safe be opened, Singh heard a gunshot. He did not hear Ron Lee say anything to the robber just before hearing the gunshot. RT 4154, 4178-79. Immediately after, he heard "like a dropping noise when someone falls down." RT 4109. Then, he heard one person run or walk "in a hurry" toward the front of the store. RT 4110-4111, 4150, 4170. He stayed on the ground until Jeff Hickey came and told him to get up; the robbers were gone. RT 4150.

Singh agreed that he had previously described the robber as dark-complected, and that Vines was dark-complected. RT 4140.

Yet Singh testified that the robber whom he saw was ***not*** Sean Vines;

he testified the same way at Deon Proby's trial. RT 4112. Prior to this trial, he had consistently stated to everyone who had interviewed him that the person with the silver gun was 5'10" or 5'11". Singh himself was approximately five-eleven. RT 4102. Vines was six-two or six-three. RT 3965.[3]

Jerome Williams, who was washing dishes that night, did not testify.[4]

2. Other Civilian Witnesses.

Patricia Ackeret, custodian of records for SAFE Federal Credit Union, testified that the bank records for Sean Vines' account for September 29, 1994 show a 3:17 p.m. deposit of $212.00, comprised of five-dollar and one-dollar bills. RT 3546-3549.

Sean Vines lived with **Ulanda Johnson** at the time of the robberies. RT 3745. Johnson testified that on September 28, 1994, Proby came to pick Vines up around dinner time. RT 3788-3789, 3760-3761. They left Johnson's apartment between 7:30 and 7:45 (RT 3761), and did not say where they were

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[3] Officer **Richard LaPorta**, a Sacramento police officer, responded to the Florin Road crime scene and interviewed Pravinesh Singh. Singh told LaPorta he heard someone demanding money, and he heard a gunshot, and heard the shooter run toward the front of the business. Singh saw only one suspect, who pointed a chrome pistol at him. Singh told LaPorta he got scared, and when the suspect made a downward move with the barrel, he got down, as did Jerome Williams. While they were laying down Singh heard the gunshot. RT 4188-4192.

[4] At the preliminary hearing, Detective Richard A. Overton of the Sacramento Police Department testified that he had interviewed Jerome Williams, and that Williams had told him that he had seen a robber with a small silver semiautomatic handgun. RT 397-398.

Williams described the robber as a dark-complected black male in his late 20's to early 30's, approximately five foot seven, a hundred and forty to one hundred sixty pounds. RT 400.

This evidence was not introduced at trial.

going (RT 3762).

The next time Ulanda Johnson saw Vines and Proby was outside her apartment that same night, around 11:30 p.m. RT 3762-3763, 3789. Proby's car was very loud. She could see the back of Proby's car from her window. She saw Vines get out of the driver's side of the car. RT 3763, 3790. He left the car door open and walked toward the apartment. RT 3790. She saw Proby go toward the driver's side and heard him say good night. RT 3763. Johnson did not actually see Proby get out of the car; she couldn't see him until he got to the rear of the car which was within view of her window. RT 3790-91. She heard one car door slam, and then she heard a second door slam; by that time, Vines had already opened the screen door and was on his way into the house. RT 3791.

Vines had his backpack with him when he left Johnson's house that evening with Proby. RT 3762. The next time she saw the backpack was the following morning, September 29, on her living room floor. RT 3763-3764. In it was a small black handgun with a barrel, about eight inches long. RT 3764. She was certain the gun was all black, with no silver on it. RT 3783. It did not have a clip. RT 3782. When she found it she "said some bad words," took it to her room (RT 3765), and threw it on the floor by her bed (RT 3783-3784).

The next day, Johnson and Vines had a confrontation about the gun she found in his backpack. RT 3787-3788, 3766.

Deborah Allen, a friend of Ulanda Johnson's, was staying at Johnson's apartment at the time of the Florin Road crimes. RT 3710. Allen had previously lived with her husband, Anthony Motley. RT 3704-3705, 3724-3725.

Vines knew about Motley's physical abuse of Allen (RT 3725), and the

day before the Florin Road robbery he went with Allen to her apartment so she could pick up some things (RT 3715). Vines accompanied Allen to make sure that Motley didn't lay a hand on her. RT 3725.

When Allen and Vines arrived at her apartment, Motley was "acting crazy, tripping out". RT 3716, 3726. Allen saw that Vines had a small silver-colored gun. RT 3733. He was not pointing it at anybody. RT 3716-3717, 3728-3729. After Allen got her things, she and Vines went back to Johnson's house. RT 3719.

3. Vera Penilton.

Vera Penilton was the only witness to place Sean Vines at the scene of the Florin Road robbery-homicide.

At the time of the Florin Road crimes, sixteen-year-old Vera Penilton (RT 3514) was twenty-four-year-old Deon Proby's girlfriend (RT 3517). Penilton was, she testified, four months pregnant with her first child when she met Proby (RT 3518), unemployed, and going to school "off and on." RT 3518-3519. Penilton resided with her mother and her mother's boyfriend Larry Day, her sister Monica Allen, and Catrell Smith (RT 3516).[5] Proby lived with his mother at the time, but he also lived at Penilton's home (RT 3516). He spent every day there (RT 3513, 3577), and slept in Penilton's bed every night (RT 3593, 4199), so it was as if he was living there although he had not formally moved in (RT 3517, 3593). Penilton's first child was born just a few weeks before the robberies, and she became pregnant again that summer while Proby was living with her, though she denied Proby was the father. RT 3516, 3044, 3685. Penilton had been convicted of at least six thefts, some which she

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[5] There is no indication that Monica Allen is related to witness Deborah Allen.

committed with Proby. RT 3620-3622.

Penilton testified under a grant of immunity. RT 3514-3515.

Penilton said that her sister Monica had a .25 caliber silver gun; Penilton fought with her sister and took the gun. She gave it to Proby and Proby gave it to Vines. RT 3539, 3591-3592. She knew they intended to pull a robbery. RT 3552.

Penilton said that she saw Proby and Vines together in the bedroom of her home on the night of the Florin Road robbery, both early in the evening, and afterward late at night. RT 3554-3555. Penilton testified inconsistently about where she was when they came to the house after the robbery, sometimes stating that she was in her room (RT 3669), sometimes that she was in the kitchen making something to eat (RT 3556, 3557, 3662). Vines and Proby went into her room and shut the door, without saying anything to her first (RT 3556). Penilton said that she went to the closed door to hear what they were talking about, and "they was talking about what they had did . . . they had robbed another McDonald's." RT 3557, 3562.

Through the door, Penilton heard Vines say "he had killed his friend." RT 3566. Proby responded, "For real, man, for real?" Penilton stated Proby sounded really surprised. RT 3653. First she testified that she went into the room when she heard Vines say this (RT 3563); and immediately after she said she didn't go into the room until "after I had got done making my stuff" (RT 3564).

Penilton testified that when she went into the room, Vines told her that "he had killed his friend because the boy had said his name" (RT 3564), and "because he would tell on him if he didn't" (RT 3567). She stated Vines told her he shot him in the back of the head. "He was sad, and a couple of tears was coming down his eyes." RT 3564.

Penilton was taken to the station after the car chase that resulted in the arrests of Proby and Vines, and she was interviewed by the officers. RT 3685. Penilton admitted that she lied during that interview. RT 3577. She did not tell the officers the whole truth (RT 3623), and she did not tell them everything she knew (RT 3688). The first thing Penilton asked Detective Minter, after he walked into the interview room, was

> "What if I ain't seen no money or nothing? How do I know about the robbery?"

RT 3636.

But Penilton did tell the detectives that Vines said he killed a boy. RT 3577.

Penilton denied that she was trying to protect Proby. RT 3624-3625. But she also testified that she did make an effort to protect Proby by making sure that the detectives knew he didn't have a gun since he was on parole; she told them it was not possible he could have had one. RT 3673. Penilton told Detective Minter that Vines told Proby where everything was in the store. RT 3591. She admitted to committing some petty thefts, and admitted that both she and Proby were convicted of those thefts (RT 3620-3622); but despite Proby's convictions, Penilton insisted Proby wasn't involved in the thefts. RT 3622.

At some point Penilton saw some McDonald's gift certificates in a metal box in her room. RT 3567. When the officers searched her room, they found the box of gift certificates underneath her bed, and some money. They came back a second time and got the cell phone stolen from the truck of Stanly Zaharko, the manager at the Watt Avenue McDonald's. RT 3578.

Penilton maintained that it was a "complete surprise" to her when the officers found the cell phone, the metal box and the McDonald's gift

certificates in her bedroom. RT 3681.

In September 1994, **Lawrence Day** lived with his girlfriend Mildred Robinson, who was Vera Penilton's mother. RT 4198. Deon Proby was living with Vera Penilton and stayed in her bedroom. Penilton was not working; Proby worked at the Watt Avenue McDonald's. RT 4199.

Before seeing the television program that showed the car chase and the arrest of Proby and Vines, Day saw Penilton with a large number of unrolled quarters; more than a person would just save up, and more like a person would have if they went to the bank and changed twenty or forty dollars into quarters. He estimated he saw Penilton with about forty dollars in quarters (RT 4205), and it struck him as unusual (RT 4200). He knew something was wrong, because she didn't usually have that kind of money. RT 4208.

Day saw the metal box that was traced to the Florin Road robbery when he was cleaning Vera's bedroom. He asked her about it but Penilton didn't tell him where it came from or anything about it. RT 4201.

Marilyn Mobert, a defense investigator (RT 4214), interviewed Vera Penilton on October 21, 1994, and was present during a second interview on May 17, 1995. RT 4220, 4224.

At the first interview, Penilton initially denied recalling the events of September 28, 1994. RT 4220-4221, 4265. But later in the interview, she recalled that she stood by her bedroom door and heard Vines say he might have killed his home boy. Penilton denied seeing any money or gift certificates, or a gun. RT 4222.

Mobert asked Penilton whether she had ever stolen anything. Penilton's response was, "Vera don't steal." RT 4223.

Penilton told Mobert that she talked to Proby daily on the phone. RT 4224.

At the second interview, Penilton was asked whether she recalled seeing Vines at her home on September 28, and she stated that she didn't remember seeing Vines or Proby; she didn't remember much at all about that night. RT 4224. Her demeanor was guarded and defensive. RT 4225-4226.

Later in that interview, Penilton admitted she had seen Vines and Proby in possession of a .25 caliber weapon the day after the Florin Road robbery/homicide, but she would not specify which individual had the gun. RT 4228-4230. She admitted that she had taken her sister's gun. RT 4268.

4. Law Enforcement Witnesses.

Detective Richard A. Overton of the Sacramento Police Department went to the Penilton residence on September 30 at about 3:26 a.m., talked to Vera Penilton and her mother, and got consent for a search. RT 4014, 4015. His partner, Det. Walker, searched Penilton's bedroom (RT 4015, 4020), and recovered the metal box that had contained the McDonald's gift certificates from between the mattress and the box springs of Penilton's bed. RT 4021. The gift certificates were recovered from Penilton's dresser drawer. RT 4018.

Detective John Cabrera of the Sacramento Police Department interviewed Vera Penilton together with Det. Minter on September 30, 1994, shortly after she was taken to the station. RT 3683, 3985. Penilton was very quick to advise Cabrera that Proby didn't tell her everything; that he hadn't known her that long and didn't trust her. RT 3981, 3982. During the interview, Penilton said nothing that would have put Proby anyplace doing anything wrong; "She just mentioned a conversation she heard between Mr. Vines and Deon." RT 3984.

Cabrera interviewed Proby on October 3, 1994, after he received a message from Proby stating he wanted to talk. RT 3987. Two days later,

Cabrera received a phone message from Penilton stating that she wanted to talk (RT 3986), and he interviewed her by phone on that same day (RT 4291).

Detective Glenn Walker of the Sacramento Police Department found out that Vines and Proby had been arrested on September 29, 1994, and went to the Hall of Justice where they were being held. He took custody of personal property from Vines, including a business card from the Rodeway Inn, and a credit union transaction slip. RT 4052-4053.

On September 30, Walker went to Penilton's home and searched Penilton's bedroom with Detective Overton. RT 4840. He found a tan metal box, some McDonald's gift certificates, some one dollar bills, and a telephone. RT 4053-4054.

Brian Maloney, an investigator with the Sacramento District Attorney's office, interviewed Lawrence Day, who said that right around the time of the robberies (RT 4284), Vera was "flashing a little bit of money, and she ain't had no money..." and that she put "a whole bunch of quarters and stuff" in a little piggy bank. RT 4283.

Dr. Sarah Campbell, who performed Ron Lee's autopsy, was unavailable, and the People called forensic pathologist **Dr. Robert Anthony** in her stead. RT 2086, 4029. He testified that it appeared that Campbell followed correct procedures in Lee's autopsy. RT 4028, 4030.

There was a gunshot would to the back right side of Lee's head, but no other injuries. RT 4031-4032. Campbell retrieved a projectile from the temporal bone above Lee's left ear (RT 4032, 4045). The trajectory of the bullet was left to right and back to front. RT 4033-4034. In Anthony's opinion, the gun that shot Lee could have been as close as one-and-a-half to two feet, or farther away (RT 4036-4037), even up to the maximum range of the weapon, six feet to twelve feet, or farther (RT 4040-4041). The weapon

would have been behind Lee's head and to the right, if he had been looking straight ahead. The facts were consistent with a large number of scenarios, including the victim either standing in front of the shooter, or laying down, and being shot by a right-handed person. RT 4037-4038.

Robert Garbutt, a criminalist with Sacramento County, identified the bullet recovered in the autopsy as a .25 caliber cartridge designed to be used in a semiautomatic gun. RT 4048-4049.

B. The Watt Avenue Robbery.

On September 17, 1994, eleven nights before the Florin Road McDonald's was robbed, another McDonald's in Sacramento, on Watt Avenue, was robbed. Again, the central issue at trial was identity. There was conflicting eyewitness testimony as to whether one of the robbers was Vines. Numerous law enforcement and civilian witnesses not present at the robbery also testified.

1. The Eyewitnesses.

Stanly Zaharko[6] was a manager at the McDonald's on Watt Avenue. He got to know Sean Vines when Vines worked there. Vines had been working there for three or four months before it was robbed. Proby also worked at the Watt Avenue McDonald's. Like Vines, he worked the closing shifts. RT 3232-3234.

The robbery occurred on Saturday, September 17, 1994, on the closing

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[6] Mr. Zaharko does not use the usual "e" in his first name. RT 24.

shift; the restaurant closed at midnight.[7] The employees working that night were Zaharko, John Burreson, Michael Baumann, and Leticia Aguilar. RT 3236-3237. Vines was supposed to work (RT 3353), but called in sick (RT 3239).

At about five minutes to midnight, Zaharko went outside to put trash in the dumpster. RT 3243. He came back, locked the doors, and went to check the rest rooms. One of the men's room stalls was locked; Zaharko jiggled the handle and a voice said it was occupied. RT 3244, 3353. The voice didn't seem disguised or altered, and didn't sound familiar. RT 3354.

Zaharko went back to the front counter and cooking area where the rest of the employees were, and asked Baumann if he had noticed anyone going into the rest room. RT 3245-3246. Baumann told Zaharko that he saw the guy coming in, but did not indicate that he knew who it was. RT 3381-3382. Zaharko told Baumann they would wait until fifteen minutes after twelve, and if the person did not leave the rest room by then, Zaharko would go in and tell them to leave. RT 3246-3247.

Zaharko and Baumann put on drive-through headsets so that Zaharko could tell Baumann to dial 911 if necessary. As Zaharko rounded the corner of the lobby, he saw a person exiting the rest room about fifteen to twenty feet from him (RT 3247) with a gun in his hands (RT 3248). He could not tell immediately, but at some point Zaharko thought he recognized Sean Vines. RT 3247-3248. Zaharko raised his hands and the robber raised the gun and pointed at him. RT 3248. The gun was a sawed-off rifle. RT 3254, 3392.

The area was well lit. The robber was wearing a parka-type jacket with

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[7] The amended information alleged the crimes took place on September 18, 1997, which is correct since the robbery occurred after midnight.

a hood, faded jeans, and a green scarf around his face. RT 3249-3250. Zaharko estimated the robber was approximately six feet tall (RT 3250), perhaps taller (RT 3336). Zaharko testified at the preliminary hearing that the robber was six-one (RT 3251), and also testified that the robber was "a little taller" then Zaharko (RT 3318); Zaharko himself was five-nine (RT 3250). The robber was about 200 pounds, 18 to 25 years old, and African-American with dark skin. RT 3250.

As the robber came closer, Zaharko started walking backwards all the way to the counter area. RT 3252. He told the robber they would give him whenever he wanted, and asked him not to hurt anybody. RT 3255. He walked directly to the safe, and the robber said in a low, gravelly voice, "Open the safe." Zaharko complied. RT 3256. The robber said "Give me the keys," in the same disguised voice. Zaharko put all his keys, including his car keys, on top of the safe. RT 3257. Vines had been in Zaharko's car before, when Zaharko gave him a ride home. RT 3258-3259.

The robber directed Zaharko to move to the back area (RT 3259), and as he walked he felt the gun on the back of his head (RT 3260, 3319). The other employees, Baumann, Aguilar, and Burreson, were together by the sink (RT 3260-3261) and the robber instructed them to go downstairs (RT 3261).

They proceeded in single file down the stairs, and walked through the basement toward the back. RT 3262-3263. When they reached the walk-in freezer, the robber instructed them to go in, and all four did so. RT 3264. It was approximately 20° in the freezer. RT 3265. Once they were inside, the robber slammed and locked the door. RT 3266. Zaharko told everybody that they were safe, and that they were going to wait for approximately ten minutes to allow the person to leave the restaurant. RT 3269.

While they were in the freezer, Baumann told Zaharko who he thought

the robber was. RT 3268-3269.

Leticia Aguilar was distressed, but Zaharko told her not to worry; there was an axe in the freezer. RT 3270. They used the axe to break through the door. RT 3271-3272. While getting out, Zaharko cut his hand. One of them called 911. RT 3272. They stayed in the basement until the officers arrived. RT 3272-3273.

Upstairs, Zaharko saw that the safe had been ransacked. RT 3273. The cash drawers and deposit bags had been dumped on the ground, and the rolled coin had been stolen. RT 3324. Zaharko's canvas attaché bag was gone, and his Dodge Dakota was missing from the parking lot. About four or five days later he got his vehicle back. A number of items were missing from it, including an Oki cellular phone. Zaharko found some rope and a bullet behind a seat. RT 3308-3310.

When the Sheriff's Department responded, Zaharko told an officer that the robber was Sean Vines, and gave them a description. RT 3331. But Zaharko also told Detective Minter that the only thing that made him think it was Vines was the guy's height and size. RT 3379.

At the preliminary hearing, Zaharko testified that he was "fairly certain" it was Vines (RT 3332), but at Proby's trial he testified that he didn't feel he had sufficient evidence to stand up in court and identify Vines as the robber, and that he was not so certain that he would want someone to convict Vines based on his identification. RT 3335. At Vines' trial he testified that from the first, he felt the robber was Sean Vines (RT 3385), and that it was still his feeling that unless someone could prove it wasn't Vines, he was certain it was him. RT 3333-3334.

But Zaharko also testified that he could not positively identify the robber as Vines simply from what he saw, and he told the officers responding

to the scene that it was "just a hunch" he had that it was Vines. RT 3373.

On the night of September 17, 1994, **Michael Baumann** was a trainee manager at the Watt Avenue McDonald's. Baumann had known Vines for a couple of months before the robbery; he had worked with him on at least 20 shifts. RT 3393-3395.

Just before closing time that night, Baumann saw someone enter the restaurant's north door. The person wasn't in disguise, and went into the bathroom. RT 3399. Baumann got a real quick glance at the person for a few seconds (RT 3397); at that time, he believed it was Sean Vines. When Baumann testified, however, he stated he was no longer so sure. He wasn't sure why he had believed it was Vines at the time: "It just played in my head that way." RT 3398. Baumann testified that person looked directly into his eyes and he recognized immediately that it was Sean Vines. RT 3457.

Baumann continued working. RT 3400. Within ten minutes, Zaharko approached him, and told him there was someone in the bathroom. RT 3458-3459. Baumann told Zaharko he saw him go in there (RT 3401) -- but he didn't tell Zaharko it was Sean Vines that he saw come in, or that he knew who had come in (RT 3462).

When Baumann was asked why, if he was almost certain it was Vines who walked through the door, he didn't identify him as Vines to Zaharko when Zaharko asked him if he saw anyone going into the bathroom, he said it was because Vines joked around a lot, and Baumann thought it was a joke. Baumann didn't want to believe it was Vines (RT 3476-3477); although nothing unusual had happened yet, it seemed unreal, like it wasn't really happening. RT 3478.

Zaharko put headsets on himself and Baumann, and told Baumann that if he said anything, to call 911. Baumann testified that before Zaharko even

got around the corner, the robber already had a shotgun or a gun on him, but Baumann didn't see the gun until they were at the safe. RT 3401. The gun was a bolt action shotgun or a rifle that appeared sawed off. RT 3404-3405. After Baumann saw the gun, he went to the other employees and told them they were being robbed; then he saw Zaharko open the safe at gunpoint, with the gun pointed at the back of his head. RT 3402.

The robber asked for everybody's keys, and then asked them to go downstairs, using a "Darth Vader voice." RT 3403, 3406, 3465. When they went downstairs the gun was pointed at the back of Baumann's head. RT 3403-3404. As soon as you got through the basement doors you could see the freezer; the robber told them to go to it, and they did. RT 3407. Baumann turned around when he got to the freezer and looked at the robber who was about a foot away, pointing the gun at him. RT 3408, 3467-3468.

The robber was wearing a scarf over his face and a green goose jacket with the hood on his head. RT 3409, 3526. The scarf was black and appeared to be cotton. RT 3466. He was about six-two, 200 pounds, and black with dark skin. RT 3409.

Just after they went into the freezer Baumann heard it being locked. They axed their way out of the freezer. RT 3409-3410.

When Baumann talked to the patrol officer who responded to the scene, he said that he thought the robber might have been Sean Vines, but he testified he didn't make that assumption until after he had talked to Lisa Lee, the store manager (RT 3412), who was already at the store when the officers arrived. RT 3460. Baumann spoke to the officer, then to Lisa Lee, and then to the officer again; it was the second conversation with the officer in which he said he thought it might be Vines. RT 3412, 3454.

Baumann also testified that he did not recognize the robber when he

looked at him outside the freezer, and that he didn't believe it was anybody in particular. RT 3408. He stated that while he was in the freezer, he wasn't sure who was robbing them. RT 3410. Later, Baumann testified that he was certain the robber was Vines *before* being locked in the freezer. But in his interview with defense investigator Mobert, he told her that it was only after he was in the freezer and began talking to Zaharko that he became convinced the suspect was Vines. RT 3471.

At the time of the robbery, **John Burreson** had been working at McDonald's one or two weeks. RT 4077. He had worked with Vines (RT 4078) about ten times (RT 4080). Burreson also knew Proby, with whom he had worked five or six times. RT 4080.

Burreson was closing down the grill when the robbery occurred. RT 4085, 4086. He saw Baumann crawling around the floor, and Baumann told him they were being robbed. RT 4078-4079. Then he saw the robber and Zaharko come around the corner from the grill area to the sink. The robber wore "an all green suit, green pants," and had on a mask. He was approximately six-two or six-three. RT 4079. Burreson used his own height for reference; the robber was six inches taller than Burreson, who was five-eight or five-nine, and about two inches taller than Zaharko. RT 4080. Burreson estimated Vines' height as "probably about six-five." RT 4093.

When Burreson first saw the robber he was about five feet away, and Burreson saw him for maybe four seconds (RT 4086); Burreson actually looked at him for about 2 seconds (RT 4087). Zaharko, Baumann, and Leticia Aguilar were between him and the robber. RT 4086. He never saw the robber's face because of the mask. He could see his eyes, but Burreson didn't look at his face, and had no idea whether he was African-American. RT 4090-4091.

The robber said "Go into the freezer." RT 4086. The robber had a "real muffly, like disguised voice" that Burreson did not recognize.

Burreson did not recognize the person as Sean Vines. RT 4085.

Burreson testified that Vines had an unusual way of walking; he walked with kind of a limp. Vines was the only person Burreson had ever seen who walked that way, and Burreson would tease him about it. RT 4081. When Burreson saw the robber walk towards him, he didn't notice that characteristic limp. RT 4082. He saw the robber take three or four steps. RT 4087. The person walked straight, and like he was mad. RT 4084.

Leticia Aguilar, who testified with the aid of an interpreter, had worked for McDonald's for about fifteen days before the robbery. RT 3601. She had worked with Vines about ten or twelve times, and the last time she had seen him was the day before the robbery. RT 3605-3606.

Aguilar estimated that the robbery occurred about fifteen minutes to eleven. RT 3605. She said that a person came in "to rob," pointed a gun at her head, and told her to "move, walk down," so she went downstairs. RT 3602. The robber was already alongside of her when she noticed him. RT 3607. They went downstairs and were locked in. RT 3602.

Aguilar was not able to see anything more than the robber's eyes; not even his eyebrows. RT 3611. Although she did not see the robber's face, just his eyes, from what she saw, she recognized the person. RT 3603. She testified she recognized the same look he had given her days before, and identified Vines in the courtroom as the person who robbed her. RT 3604.

2. Other Civilian Witnesses.

Sonya Williams, who was twenty-one years old in September 1994 (RT 3067), considered herself Vines' girlfriend (RT 3070, 3150).

Williams' phone number was one of those found on Stanly Zaharko's cellphone bill (RT 3068) after the phone was recovered from Vera Penilton's home, but Williams denied getting a call from Vines shortly before 5:00 a.m. in the middle of September (RT 3073). By the last half of September 1994, however, Williams was angry with Vines, and on September 29, she called the Crime Alert hotline (443-HELP), and implicated Vines in the Watt Avenue robbery. RT 3122, 3124.

Williams had exchanged letters with Vines (RT 3134), and had visited him a month before trial (RT 3135). Vines' letters sometimes addressed her as "Sonya Williams Vines," as if they were married. RT 3134. Williams testified that in August 1995 (RT 3173) she called the prosecutor to advise that she lied to the cops because she was mad at Sean. At the time, she was corresponding with Vines. RT 3174.

Williams was angry with Vines in September 1994 because he had told her about all the girls he had been with (RT 3122, 3123); he had tried to "get at" Williams' own cousin (RT 3169); he had taken another girl out to breakfast after spending the night with Williams at a hotel (RT 3123); and she learned that Vines had been sleeping with Ulanda Johnson (RT 3150-3151). Williams said she was also upset because Vines had told her about the robbery, although she didn't really believe at first that he committed the robbery. RT 3124. Williams was at her house, on the phone with Vines, when he told her he was going to rob McDonald's. RT 3087, 3111-3112.

Sometime in September 1994, Williams met Deon Proby and Vera Penilton for the only time, when she stayed at a hotel with Vines, Proby, and Penilton. RT 3071. Vines called her around nine or ten at night, told her Proby and his girlfriend were going to be at the hotel, and asked her to go with him. RT 3072-3073, 3150. When he picked her up, Penilton was with him.

RT 3074.

Williams initially testified that as they were driving, Vines calmly told her that "he did what he said he was going to do or what he talked about" (RT 3077, 3089); and when she asked him what he did, he pulled what appeared to be about fifty bills out of his pocket. RT 3077-3088. Williams admitted that she probably told Det. Minter that she asked Vines whether he robbed McDonald's, but she didn't think Vines ever admitted it to her; he just showed her a lot of money (RT 3080). She didn't think he actually said that he got the money by robbing a McDonald's. RT 3081. A videotape excerpt of her interview with detectives was played, in which she stated that Vines said, "We did what I told you," she responded by asking him "Did you rob McDonald's?" and Vines then admitted it. Williams testified nevertheless that she couldn't remember that, and didn't know if he used those words. RT 3110.

While Williams was in the car with Vines on the way to the hotel, she saw a gun on his lap. RT 3082, 3152-3154. She told Det. Minter she saw "a little silver gun" (RT 3109, 3111); but she also testified she couldn't tell what color the gun was; it was dark and she just glanced at it real quick (RT 3170).

When Williams called 443-HELP, she knew there was a $10,000 reward offered, but denied that the reward was her motivation for making the call (RT 3143-3144, 3146).

Within a day or two of Williams' statement to police, Vines phoned her at home, and calmly read back to her the statement of what she had told police. RT 3132. The phone accidentally hung up while they were talking (RT 3134), but Vines called her back and said he didn't do it (RT 3136).

Although she didn't take Vines' call as a threat (RT 3134), she was scared because she didn't know how he would take it (RT 3133).

Williams testified that she told Det. Minter that Vines had told her a

whole lot of things about the Watt Avenue robbery (RT 3139); but, in fact, she had learned some of that information from the news (RT 3114). She told detectives that Proby and Vines used Proby's car for the robbery, but Vines did not tell her that; she learned it from the news. RT 3114-3115.

Williams told detectives that Vines told her the employees were locked in the freezer at 12:20 in the afternoon, and stayed in the freezer until five o'clock in the afternoon. RT 3139. But she testified she made that up (RT 3164-3165, 3167, 3182), having heard it on the news (RT 3183).

Similarly, Williams heard on the news that the robber came out of the bathroom, pointed a gun in the guy's face and locked people in the freezer. RT 3183. Williams testified that Vines did not, in fact, tell her how he conducted the robbery (RT 3116, 3119).

The videotape of Williams' interview with detectives showed her telling them that Vines said he got $900 from the robbery and Proby got $700 (RT 3114); but Williams testified she heard on the news that the robbers supposedly had taken $900 (RT 3113); and she just made up the part about Vines telling her that Deon had $700 and Vines had $900 (RT 3163-3164).

Other facts Williams told detectives were completely made up; for instance, that Vines told her there were people screaming during the robbery (RT 3167-3168). In fact, he didn't tell her anything about anybody yelling (RT 3179).

The weekend after the Watt Avenue robbery, Vines did not stay at **Ulanda Johnson**'s house; he left on September 18. Johnson said he was only gone a couple of hours overnight; it was not more than one night. RT 3753-3754. Johnson had no recollection of receiving two phone calls from Vines at 4:53 a.m. and 4:57 a.m. on September 18, 1994. RT 3755. She did not know where Vines was at the time of the Watt Avenue robbery. RT 3775.

Sandhya Samant worked at the Rodeway Inn in North Highlands area. Samant provided a registration card which indicated Vines had checked in on September 17, 1994, paid cash, and checked out on September 20. RT 3191-3195.

In September 1994 **Charles Ruby** worked as a manager at the Watt Avenue McDonald's. RT 3207-3208. Both Vines and Proby were employed there. Ruby worked with Vines often, and considered him to be a superb worker, the type a manager wishes he could get. RT 3210, 3224-3225.

On September 17, 1994, Ruby worked the eleven-to-seven shift. Vines was supposed to work the closing shift, but Ruby got a call from him that day saying he would not be in for work. RT 3211-3212.

Ruby learned the store had been robbed the next morning. RT 3213. He thought about a conversation he had with Sean Vines two or three weeks earlier (RT 3213-3214). Vines was cashiering the drive-thru, and asked Ruby what the robbery procedures were for the drive-through. RT 3215. McDonald's orientation procedures for new workers included instruction on how to respond to a robbery, but that orientation was not detailed, and it was Ruby's practice to give a "one-on-one" to any workers who asked about robbery procedures. It appeared to Ruby that Vines had not been given any information about robberies other than the brief cursory orientation. RT 3225.

Ruby told Vines the procedure was to offer no resistance, give the robber the money, and try to get a description of the person and the car. Vines then asked what the procedures were for the indoors, and Ruby told him it was the same thing: offer no resistance, and usually the manager would take care of it and give them the money. After Ruby told him this, Vines kind of chuckled and said, "That easy, we are going to get robbed." RT 3215. Ruby described his demeanor as "serious" despite the joking. RT 3216, 3226.

Ruby had a second conversation with Vines about the robbery at some later time, when Vines mentioned that he had heard on the street that they were going to get robbed again. RT 3220, 3230-3231. They had no further conversation about it. RT 3231.

The afternoon after the robbery, Ruby saw Vines as he pulled up to the drive-through in Proby's car. RT 3217-3218. Ruby mentioned they had been robbed. RT 3219. Vines seemed genuinely surprised; Ruby did not think Vines' surprise was feigned. RT 3226.

A couple of days later, Ruby saw Vines with what appeared to be a brand-new red leather jacket, brand new shoes, and a disc player. RT 3218-3219. However, Ruby testified that, in fact, he couldn't tell if the jacket was real or imitation leather, whether it was actually brand-new or several years old, whether the shoes were in fact new , or whether the Walkman-type player was actually brand-new. RT 3227-3230.

In September 1994, **Lisa Lee** was general manager of the Watt Avenue McDonald's. She had supervised both Proby and Vines. RT 3483-3486.[8]

Stanly Zaharko notified Lee that the restaurant had been robbed, and she immediately went there, arriving two minutes after the Sheriff. She determined that approximately $2000 in coin and paper money had been stolen. Lee provided the surveillance tape from the VCR above the safe to the officer. Later, she was informed that the robbery was not depicted on the tape, and was instructed to take an inventory of how many tapes she had. Normally there would be fourteen tapes; when she counted them there were only twelve. Having given one to Det. Minter, there was one she could not account for, and she never did find it. RT 3489-3491.

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[8] There is no indication that Lisa Lee was related to victim Ron Lee.

Vines showed up for his shift the day after the robbery, and Lee said, so that Vines could hear it, "The police have an idea of who robbed the restaurant, and they are coming back tonight to talk to some people." RT 3493. Vines became fidgety and nervous. RT 3494. Vines did not work again after that Sunday, but Lee saw Vines and Proby at least twice again when they came into the restaurant to eat. RT 3495.

In September 1994, **Sean Gilbert** had worked at the Watt Avenue McDonald's for eight or nine months. Gilbert met Sean Vines at work and became friendly with him, and with Proby as well. RT 3279-3282.

Gilbert and Vines had talked about guns. Two or three weeks before the robbery (RT 3297), while they were laughing and joking (RT 3283), a tranquilizer gun was mentioned, and Vines said he could shoot somebody with it and it wouldn't kill them, it would just knock them out (RT 3282, 3284). A week or two before the robbery (RT 3283, 3296), Vines told Gilbert he had a rifle or shotgun RT (3282-3283), but Gilbert never saw it (RT 3283).

About a week before the robbery, Gilbert saw a gun at the house where Proby was staying (RT 3285); only Gilbert, Proby, and Proby's girlfriend were there (RT 3286, 3296). Gilbert handled the gun; it was .25 caliber nickel-plated semiautomatic handgun. RT 3286. Gilbert did not doubt that it was Proby's gun. RT 3297.

Gilbert worked the day after the robbery and saw Vines (RT 3287) while he was on a break out in front (RT 3301). Vines had a new Walkman and new starter jacket on (RT 3287, 3306); the Walkman was shiny and didn't have any marks on it (RT 3287-3288, 3329-3330); and the jacket was totally clean and smelled new (RT 3288-3289). The jacket was not leather; it was rayon or nylon. RT 3294.

Defense investigator **Marilyn Mobert** obtained a photo of Anthony Edwards, Vera Penilton's cousin, which she showed to Penilton, and Penilton

confirmed it was her cousin Edwards. RT 4281. During the interview with Baumann, Mobert showed Baumann the photograph of Anthony Edwards. RT 4236, 4248. Baumann said the person "kind of looked like Sean," and indicated that the nose, mouth and complexion of the person was similar to the person he saw that night (RT 4218-4219); the flat nose and big lips were similar; but the person in the photo had a darker complexion. RT 4249-4250.

Mobert also showed the photo to the other Watt Avenue employees, Zaharko, Aguilar and Burreson. All four said they had never seen him before, or see Proby with him. RT 4248-4249. (Mobert did not show a photograph of Edwards to any of the Florin Road eyewitnesses. RT 4280.)

Mobert was present on March 1, 1995 when Leticia Aguilar was interviewed, with an interpreter present, at the offices of McDonald's corporate counsel. Aguilar was asked what she could see about the person who committed the offense, and her response was that she could only see his eyes. Aguilar said he was just a little bit taller than Zaharko. RT 4226-4228.

Mobert asked Penilton if, at the Rodeway Inn, Sean or Deon had told her that they had robbed the McDonald's where they worked. Penilton said that the only thing they told her was that their McDonald's had been robbed and the manager was watching everybody very closely. RT 4223.

Vera Penilton first testified that she did not know beforehand that Vines and Proby were going to rob the Watt Avenue McDonald's, and that she didn't learn about it until after it happened. RT 3523. Immediately thereafter, however, she testified that they told her "a little bit" before they did it, but that she didn't really think they were going to do it. RT 3523.

Penilton testified that on the night of the robbery, Proby and Vines came to her house to get her, though she could not recall what time that was. RT 3525. She had no recollection of the number of nights they stayed at the hotel. RT 3537-3538. But she got her newborn baby and went with Proby and

Vines in a truck that she figured belonged to Zaharko because she saw his name tag on the floor, and she knew Zaharko was the manager of the Watt Avenue McDonald's. RT 3525-3526. At some point, Vines and Proby cleaned out the truck, wiped it down, and tried to burn it up. RT 3534.[9]

Penilton described Vines' attitude about the robbery as being "like he didn't care," "because he was laughing" (RT 3532-3533), but she didn't "really know" what her own boyfriend's attitude was about the crime (RT 3533). She testified that the only gun she saw while at the motel was in the possession of Sean Vines, not Deon Proby (RT 3533), but she also testified that, in fact, she never saw the the little silver gun she told detectives about while they were at the motel (RT 3595). She admitted to telling one of the detectives that while they were at the motel, Vines was bragging about having a .25 caliber gun; but she also testified that it was the same gun that she herself had stolen from her sister and given to Proby. RT 3594.

Penilton claimed she knew nothing about how much money Deon Proby got from the robbery. RT 3540. Consistently, Penilton could not remember anything at all that Proby might have told her about the robbery; yet details which allegedly came from Vines were abundant. Vines told her that he put some people in the freezer (RT 3530); that he waited in the bathroom until everyone was gone (RT 3532); and that he didn't really like his manager, Stan, and was going to kill him (RT 3531).

The single detail Penilton did remember about the Watt Avenue robbery that related to her boyfriend, rather than to Vines, was also a fact she claimed she heard from Vines: that Vines "did it by his self because Deon was scared

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[9] When Zaharko testified as to the condition of the truck when it was finally returned to him, he mentioned nothing about fire damage (RT 3309-3310); and **Officer Michael Tavares**, who recovered the vehicle, stated that it had not been burned (RT 3701).

and he waited in the car until he [Vines] got done." RT 3532.

3. Law Enforcement Witnesses.

Detective Richard Overton performed consent searches of Penilton's residence on September 30th, the day after Vines' and Proby's arrest, and the next afternoon. Penilton recovered Zaharko's phone from her bedroom in Overton's presence. RT 4015-4018.

On October 5th, **Detective John Cabrera** went to Vera Penilton's residence to conduct a search with Dets. Overton and Walker. RT 3987-3988. The cell phone belonging to Stanly Zaharko, manager of the Watt Avenue McDonald's, was located at that time. Penilton told him she knew nothing about the phone, only that Sean Vines had left it there (RT 3995, 4003). But later, when Cabrera was asking about cleaning out the truck, Penilton admitted to removing it from the truck herself. RT 3995-3996.

Detective Danny Minter of the Sacramento Sheriff's Department interviewed Michael Baumann a couple of weeks after he got the case (RT 3813-3814, 3830).

Baumann told Minter he believed the robber was Sean Vines. RT 3814, 3832, 3835-3836. Baumann said he got his first look at Vines when Vines came in the store (RT 3813, 3831, 3832-3833), and that he was ninety percent sure it was Vines at that time (RT 3813, 3835). Baumann said he got another look at the robber as he went in the freezer, and that he was sure it was Vines at that time as well. RT 3814.

But Minter testified he thought Baumann only suspected it was Vines; Baumann did not identify the person as Vines to Zaharko. RT 3833. Minter did not ask Baumann why he never told Zaharko he thought it was Vines. RT 3834.

Zaharko called Minter when he got his truck back to tell Minter he had

found a bullet inside the truck. RT 3815. Minter retrieved the bullet, a live .25 cal. automatic cartridge. RT 3815- 3816.

On September 30th, 1994, shortly after the arrest of Proby and Vines, Minter interviewed Sonya Williams. RT 3818, 3834. Sonya Williams told him that Vines admitted to her that he did the Watt Avenue robbery (RT 3819-3820), and that a couple of weeks before the robbery (RT 3820), he told her he was going to rob the McDonald's he worked at (RT 3828). Williams also told him that Vines said he was going to do the robbery with Proby. RT 3820-3821. Williams told Minter that Vines said he came out of the bathroom, put a gun to a guy's face, put everyone in the freezer, and took the money. While he was telling her this, she saw a small silver gun in his lap. RT 3821. He told her he got about $900 from the robbery and Proby got about $700; that they used Proby's car for the robbery, and that the store manager cut his hand getting out of the freezer. RT 3828.

Jeffrey Morace of the Sacramento County Sheriff's Department interviewed Michael Baumann at the crime scene at the Watt Ave. McDonald's. Morace testified that Baumann was excited, but he calmed down enough to give an interview. Baumann expressed suspicions as to who it was, but did not say outright; he told Morace he had the impression it was Sean Vines. He did not say for sure that it was Sean Vines. RT 4210-4213.

STATEMENT OF FACTS: PENALTY PHASE.

A. The Prosecution Case.

The prosecution case at the penalty phase featured the testimony of four of victim Ron Lee's survivors, together with the showing of a videotape of the victim's musical performances.

Andrea Clayton was the mother of Ron Lee's son. She had known Ron Lee since her freshman year in high school, when Ron was a junior. RT 4638. They began dating in the summer of 1993 when Andrea was sixteen, and their son was born eleven months later, in May 1994. RT 4639.

Once Clayton got pregnant, she and Ron stopped seeing each other. In July 1994, Ron Lee began pursuing a relationship with her again (RT 4647). Ron would watch their son while she was in school (RT 4649).

She had taken Ron to work the day he died. At about 3:00 a.m., Ron's aunt Diane called, and told her he had been shot and was dead. Clayton had told their son, who was three at the time of trial, that the mean people shot his daddy, and that his daddy was in heaven with Jesus. RT 4649-4651.

Ron Lee's maternal uncle **Littell Williams** had known Ron since he was born. RT 4654. Ron accompanied Williams to church every Sunday, where Ron was a drum beater and sang in the choir. RT 4655. He always had a smile on his face, and lived with Williams on occasion. Williams testified that Lee was a great help around the house. Williams described how Lee first worked at Burger King and then at McDonald's, at one point working both jobs. RT 4656. Lee was "crazy about his job," and wanted to go to school to become an x-ray technician. Lee was a young man trying to do something with his life, and Littell Williams spoke of how he missed talking to him, going to church with him and beating on the drums, and having his help

around the house. RT 4657.

Diane Williams, Ron Lee's cousin, was his legal guardian and surrogate mother. He moved in with her when he was eleven or twelve years old, and called her "Mom." Lee's parents were not a part of his life. RT 4659. Diane Williams also took in other children, and Ron helped her care for them. RT 4660. Littell Williams III came to live with them for a while, and they formed a singing group. RT 4661.

Diane was notified by someone who came to her house that Ron had been killed. RT 4662. She described Ron Lee as "full of life and ambitions" (RT 4662), and as the "joy of her life" (RT 4663). She testified their family has never been the same on holidays, and that since Lee's death the kids had stopped videotaping, singing and dancing; a void had been left in the family. RT 4663.

Littell Williams III, Ron Lee's cousin, testified about the strong bond he had with Ron Lee (RT 4666). They were raised as brothers. RT 4665. When Ron was ten and Littell thirteen, they began living together. Ron looked up to Littell (RT 4666), and they did everything together (RT 4667).

Littell remembered Ron's sincerity (RT 4668), and how Ron enjoyed working for McDonald's (RT 4669). The day he died, Littell was supposed to pick him up from work, but his car was stolen. They had seen one another four days earlier, and on that particular day, Ron told Littell, "You know, I love you man," and Littell told Ron, "Well, I love you too." RT 4670.

The night Ron was killed, Littell found out around 2:00 or 3:00 a.m. It was a shock, and he was still trying to learn to accept it. RT 4671. He found himself talking to Ron on occasion. RT 4672.

The prosecution also showed a videotape of the victim performing

music and dancing. Exhibit 130. And the prosecution introduced three photographs of the victim and his family.

The prosecution introduced evidence of Vines' two prior convictions, for burglary and residential burglary. RT 4665.

B. The Defense Case.

The defense case at the penalty phase featured the testimony of seven members of Vines' family, as well as that of a friend and a high school teacher.

Rene Vines was a brother of Roger Vines, Sean's father. He testified about his closeness to Sean; they saw one another on and off while Sean was growing up in Compton, throughout Sean's life. RT 4689.

Rene described Sean as a jokester, a dancer, a loner-type, and childish. Sean played with children a lot younger then he was. RT 4691-4692. Rene Vines never knew Sean to get mad, and Sean acted with respect to older people. RT 4693. The family never had any problems with him. RT 4695.

Kevin Vines, another of Sean's paternal uncles, testified that Sean lived in the Jordan Down Projects in Watts (RT 4600). Sean's mom and dad argued when Kevin was there, yelling and screaming (RT 4708), but Roger cared for Sean and they did the best they could for him. RT 4713.

Kevin was once associated with the Crips (RT 4703); there were gang members in his family, and they were all Crips. RT 4707, 4712. At the time of Kevin's testimony, however, he was married with kids, and was no longer associated with the gangs. He wanted a better life, and he stopped being affiliated with gangs in 1986 or 1987. RT 4704.

Sean was not cut out for gang life; he didn't have the heart. Sean had opportunities, but chose not to become a gang member. RT 4707.

Roger Vines, Sean's father, confirmed that Sean was a mild kid

growing up (RT 4622); Sean liked drawing and riding a bike. Roger separated from Sean's mother Evette when Sean was ten. RT 4621.

Roger was stern with Sean, and "whooped" him if necessary. RT 4622. Roger and Evette got into some physical and verbal disagreements. RT 4823.

Roger described Sean as a big kid who was like a big brother to a lot of kids in Sacramento He was a very mild child; never had a temper; and wasn't much of a fighter. Once, his jaw was broken by some kids who wanted him to be in a gang. RT 4823-4824.

But Sean was into school activities; he was in band and played trombone. Evette removed him from all the school activities; he had to drop out of band because it was interfering with their Jehovah Witness activities. Sean was disappointed; he looked forward to different activities in school and on the weekends. RT 4824-4825.

Roger disciplined Sean out of love. RT 4830. Sean came to live with Roger in Sacramento when he was fourteen, and did great. RT 4830. Roger recalled a time when Sean was living there and took the piggy bank. Roger slapped him, and Sean retreated with his hands in his pocket. RT 4826; 4829A. Sean's usual reaction to confrontation was retreat. RT 4829A.

Sean's sister **Myeisha Vines**, nineteen at the time of her testimony, spoke of growing up with Sean, who was four years older. RT 4726- 4727.

They lived in the Jordan Downs projects in Watts. Myeisha used to watch Sean play GI Joe, and she would be his audience when he danced (RT 4727) and played his trombone (RT 4741). Sean and his friends did Hip Hop dancing and practiced for her; they performed in front of other kids at school in Watts. RT 4727-4728. She was eight or nine years old when their parents

split up (RT 4729), and she was in the fourth grade when they left the projects. RT 4730. They did not always live together after that. Sean lived in the Compton area, with their paternal grandmother (RT 4729-4730).

When Myeisha was about sixteen (RT 4732), their mother did not want Sean in the house, and he left (RT 4731). She had orders not to let him in the house until their mother came home (RT 4731), and testified about an incident in which Sean came home when their mother wasn't there (RT 4732). She asked him get out, and then started screaming and hollering. She had a broom in her hand and she hit him in the leg with it. RT 4733. Sean ran up the stairs to his room to get his clothes or a radio, and she kept hitting him with the broom. A neighbor may have called the police. Somehow, she ended up telling the story that it was Sean who beat her up, but he didn't; it was Myeisha who was trying to sock Sean in the face (RT 4747) and hit him with the broom, not the other way around (RT 4724). Sean never hit her. RT 4735.

Sean was quiet, calm and cooperative. Sean was a good brother who taught her how to dance. Children loved Sean, and he played with them; he was like a big brother to everybody. Little babies stopped crying when they got in his arms. He was respectful to his grandmother and his aunts. He did chores without being asked, like cutting their grandmother's grass. Their grandma wanted all the grandchildren to go to church with her, and Sean was always the one who would go. RT 4735-4737.

The Jehovah's Witnesses became a big part of their mother's life. Myeisha and Sean went to religious meetings at the Kingdom Hall three nights a week, and studied before the meetings. (RT 4740). Sean went to the Kingdom Hall meetings (RT 4740), but Myeisha rebelled against it (RT 4738).

Myeshia's relationship with their father went well, but Sean's relationship with him was difficult. They didn't have a father-son bond because their father lived 500 miles away. Myeisha felt he needed his father. RT 4742, 4748.

Sean's mother's cousin, **Sharon Booker**, had known Sean his whole life. Sharon often took care of Sean because she didn't want him around the multiple strangers his mother brought home. There were others who also took care of Sean, like his grandmother. Sharon described how the relationship between Sean's mother, Evette, and his father, Roger, deteriorated. Evette moved back to the projects in Los Angeles, and didn't see Sean much. RT 4950-4752.

Evette's life wasn't very good until she changed for the better because of the Jehovah's Witnesses, and immersed herself in religion. RT 4752-4753.

Evette Pearson, Sean's mother, was fifteen when she gave birth to him. Sean's father Roger was in jail at that time, and they lived with Evette's mother, Lillian. When he got out they moved to Sacramento; when Sean was two they moved to Los Angeles. They got married when he was three. Roger had jobs with a food service company, and with Seven-Up. RT 4757- 4758.

They had their ups and downs (RT 4758), and Roger was physical with her throughout the years. Once, when Sean was three, he hit her because she came home late, and she hit him back. Sean and Roger had a normal father-son relationship. But Roger would beat Sean for no reason, and that was why they broke up. RT 4759. Roger would beat him with belts on his back (RT 4760) and put marks on him; Evette asked Roger if he was going to kill Sean when he was older (RT 4761). She and Roger fought about it, and she left because she felt it was child abuse (RT 4760). When Myeisha was

born, Roger treated Sean differently and just pushed Sean down. RT 4762. When discipline wasn't an issue, Roger was a good father. RT 4761.

Evette moved from Sacramento to L.A, and ended up in Watts living at her mom's house. Roger didn't want to pay child support. She got a job, and saved enough money to get her kids. She "snatched them off the streets" and took them back to the projects in Watts. RT 4764- 4765.

But life in Watts was awful; Evette was afraid of gunfire, of people getting killed, and of Roger finding out where they were, because she had taken the children. They did lots of Bible study (RT 4767). The kids rebelled somewhat against it, and didn't want to go to church (RT 4767); her schedule interfered with their school projects (RT 4768). Sean hated Jordan High; it was gang-infested. RT 4771. She never went to his school or met his teachers. RT 4772. Her main concern was God. RT 4768.

Sean was sweet and respectful, and didn't like to fight, even when the other kids picked on him. RT 4767. When it was time to get a whooping, Sean would lay across the bed and let his mother "whoop his butt; no problem." RT 4770.

But when he was about sixteen, they stopped getting along, and he moved out. RT 4768. He took her car and she was furious; she got a restraining order against him. RT 4769. She told Myeisha she didn't want Sean home when she wasn't there. RT 4770. Sean was not a fighter, and would never hurt Myeisha. RT 4770.

Lillian Richardson, Sean's great grandmother, had six children.[10] Sean's mother Evette (also known as Sonia) was Lillian's granddaughter. Evette was born when Evette's mother, Wilmarine, was 15 years old.

Roger Vines came into Evette's life when she was a teenager; then Sean was born. Roger had a temper; he went to prison, got out, and then he and Evette married. Lillian saw how Roger treated Sean. Once Sean came from school in the rain; he had gotten off on the wrong stop and was late. When he came in, Roger called him stupid and whipped him with a belt. At some point, Richardson witnessed Roger beating Sean.

When Roger was in prison, Evette and Sean lived with Lillian. Sean stayed with Lillian until he was 3 or 4 years old. After Roger got out, Sean and Evette moved back with him.

Roger assaulted Evette; he would "jump on her and beat her." He broke Evette's arm one time. Sean was outside.

There were more physical confrontations. Once Evette said, Roger knocked her thought the window. Her foot was cut, and she had stitches.

Roger treated Sean differently than Myeisha. Roger would beat Sean and whip him with a belt. Once Myeisha said the buckle punctured him, and it oozed. But Sean never said he didn't like Roger, or displayed a bitter attitude.

Sean was respectful, and loved children and elderly people. He was

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[10] Lillian Richardson's testimony was presented via a videotaped examination. The tape itself is Exhibit 101B. Unfortunately, no transcript was made of the testimony when it was played at trial. Moreover, during record correction and settlement proceedings, the trial judge refused to order that a transcript of Exhibit 101B (or of any other exhibit) be prepared. Accordingly, it is not possible to cite to particular transcript pages in connections with Lillian Richardson's testimony.

always friendly, trying to help them. People in the neighborhood liked Sean.

Sean was never mean or violent. She never saw him display anger or resentment. Richardson knew Sean was charged with killing a man. "I don't believe he did it."

The prosecutor recounted for Richardson how in 1992, Myeisha and the neighbors called the police because Sean wasn't allowed in the house, and that Sean came inside and found Myeisha there; that he hit Myeisha repeatedly with a broom and cut her leg; and that he choked her until she couldn't breath anymore. Richardson told the prosecutor that she knew the real story: it was Myeisha who hit Sean with a broom.

Louis Manning is married to Sean's aunt Joyce. The prosecutor asked whether Sean broke into Manning's home. Richardson said he went in there and got food and shaved. She didn't know if he was convicted of breaking in; she believed he only took food.

Luther Minor, a friend of Sean Vines, was a year older and had known him since 10th grade, when they were in marching band together. Sean played trombone, and Luther played tenor sax. They traveled, and did a lot of outside school activities. They raised money to buy new uniforms by selling candy and performing at game shows. RT 4714-4718.

Luther and Sean attended Jordan High together, and were both involved in the Future Teacher Program and the Peer Counseling Program, taught by Dr. Ann Stamnes. They went to elementary, junior high, and high schools and learned skills to deal with their peers and peer problems. RT 4719. This would allow kids to have someone their own age to communicate with about problems such as rape or molestation by a family member. They also made meals for the homeless, making 250 lunches every Thursday for a skid row

shelter. RT 4720.

Sean was not involved in gangs. RT 4722. Luther never saw Sean get into fights or physical confrontations; it wasn't Sean's style. RT 4723.

One of Sean's high school teachers, **Dr. Ann Diver-Stamnes**, testified. She taught at Jordan High from 1986 to 1990, and at the time of her testimony was an associate professor at Humboldt State University. Diver-Stamnes had a Ph.D. in educational psychology, and had published articles on adolescent development. RT 4773-4776. When she was Sean Vines' teacher, she was working on her dissertation about academic success and failure. RT 4777. She wrote a book about life in the inner city called *Lives in the Balance: Youth, Poverty and Education in Watts*. RT 4779, 4783.

Divers-Stamnes had known Sean well; she had started the Future Teacher Program and the Peer Counseling Program in which he was involved. She found Sean an articulate and engaging young man. RT 4789-4790. He was in both her peer counseling and homeroom classes five days a week. RT 4790; 4812. She spent a lot of time with him (RT 4791), and watched him interact with other students. Sean did extremely well as a peer counselor; he showed caring and empathy. RT 4792. He also participated with other students in making weekly lunches for skid row, as part of their class activities. RT 4794-4795.

Watts, however, was run-down and depressing. The campus was run down and very dirty; there was gang activity; and it was not safe at all. There was tremendous pressure to be in a gang. RT 4780, 4787-4796.

Sean was never involved in gangs. RT 4797. He did wonderful impressions and cartoons, and paid attention to grooming. He came to school and did his work. He was a stellar student, achieving top grades, and was

respected and cared for in class. RT 4804.

Divers-Stamnes felt Sean was needy, and spoke of how, as a teacher, she became important to him. She never met with his parents; few parents ever attended open house. Sean was in the marching band, and looked up to his friend Luther Minor. The band was a close-knit group. Once they were in a parade down Wilshire Boulevard. Sean was proud he was in the band and the peer counseling program. RT 4806-4809.

Additionally, part of a newspaper column that detailed two good deeds by Vines shortly before the crimes in this case, was read to the jury. The column, which was printed in the *Sacramento Bee* Metro section in August 1994, read in part:

> "And I don't know who Sean Vines is, but he ought to be a nominee for retail employee of the month.
>
> "Last month a reader called to praise the McDonald's employee for darting through traffic to deliver change to a customer who had pulled away without it.
>
> "Last week Vines managed to talk a down and outer who wandered into the store out of killing himself. I never saw the guy before said customer John Johnson who witnessed Vines' effort. But it seemed like a damn nice thing to do, and I thought people should know about it. Talk about maximum effort for minimum wages."

RT 4845; see CT 940-942.

ARGUMENT

I. THE JUDGMENT MUST BE REVERSED DUE TO *BATSON/WHEELER* ERROR.

A. Introduction.

"[R]acial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt. [¶] The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors. The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee." *Powers v. Ohio* (1991) 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (citations omitted).

When a prosecutor removes members of a racial, religious, or ethnic group from a jury based on group bias, this action violates the defendant's right under Article 1, section 16 of the California Constitution to a trial by a jury drawn from a representative cross-section of the community. *People v. Wheeler* (1978) 22 Cal.3d 258; *People v. Turner* (1986) 42 Cal.3d 711, 715-716. The prosecutor's action also violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Id.* at p. 716; *Batson v. Kentucky* (1986) 476 U.S. 79, 89, 100 S.Ct. 1712, 90 L.Ed.2d 69; *Miller-El v. Cockrell* (2003) 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931.[11] "The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." *People v. Silva* (2001) 25 Cal.4th 345, 386.

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[11] In addition to contravening the Equal Protection Clause, discrimination in jury selection during a capital trial such as this violates the defendant's right to a fundamentally fair and reliable trial under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

Vines is African American. The prosecutor used peremptory challenges to remove two African American jurors from the panel. Vines made a timely *Batson/Wheeler* motion, and the trial court impliedly found a prima facie case of discrimination as to one prospective African American juror, Mark Hopkins. Nevertheless, after requiring the prosecutor to justify the challenge, the trial court failed to perform its constitutional duty to conduct an adequate, reasoned evaluation of the prosecutor's challenge – the essential third step of the *Batson/Wheeler* analysis.

Under this Court's precedents, the trial court's failure to perform a reasoned evaluation of the prosecutor's justifications for the challenge of Mr. Hopkins is itself reversible error. This is because the record failed to support, and actually contradicted, one of the prosecutor's most important stated reasons for the challenge: that African American prospective juror Hopkins stated he would only impose the death penalty if required to do so. *People v. Silva, supra*, 25 Cal.4th 345. The prosecutor also asserted that he had excused other prospective jurors who had given similar answers; this too was false.

Moreover, had the trial court fulfilled its constitutional duty, it would have been compelled to grant relief, because analysis of the record shows the prosecutor's reasons were pretextual. Reversal is, therefore, required.

B. The Trial Court Failed to Perform its Constitutional Obligations at the Third Step of the *Batson/Wheeler* Procedure.

The United States Supreme Court has established a three-step process to be followed by trial courts when a party claims that an opponent has improperly discriminated in the exercise of peremptory challenges:

> "[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination."

Purkett v. Elem (1995) 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834. This Court adheres to the same standard under the *Wheeler* doctrine. *People v. Silva, supra*, 25 Cal.4th at p. 384.

In this case, only the first two steps were followed.

1. The First and Second Steps.

There was a total jury pool of 120 prospective jurors. The prospective jurors filled out a 28-page, 105-question jury questionnaire, and the trial court conducted sequestered voir dire. CT 14-15, 734-762. After voir dire and challenges for cause were completed, the first sixty of the remaining prospective jurors were called into the courtroom. The trial court then permitted the parties to exercise their peremptory challenges. CT 612-613.

The prosecutor used fourteen peremptory challenges in selecting the jury. CT 613.[12] He used two of them to remove two of the three remaining African American prospective jurors, Betty Hernandez and Mark Hopkins. RT 2974.

Defense counsel reserved objections to both peremptory challenges of African Americans. RT 2975. The trial court then met with counsel outside

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[12] The prosecutor used six additional challenges in selecting the alternates. CT 613.

the presence of the prospective jurors to consider the *Batson/Wheeler* motion.[13]

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[13] Defense counsel and the trial court referred only to *Wheeler*, and not to *Batson v. Kentucky*, in the proceedings at issue. But the *Batson* issue is properly before this Court as well.

This Court held in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118, that even when an appellant raises only *Wheeler* at trial and does not mention *Batson*, the Court will consider and decide the *Batson* claim as well as the *Wheeler* issue:

> "Consistently with . . . recent cases, we believe that to consider defendant's claim under *Batson*, *supra*, 476 U.S. 79, is more consistent with fairness and good appellate practice than to deny the claim as waived. As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal. Defendant's *Batson* claim is of that type. His motion under *Wheeler*, *supra*, 22 Cal.3d 258, required the trial court to conduct the same factual inquiry required by *Batson* into the possibly discriminatory use of peremptory challenges, and to apply a standard identical to *Batson*'s for determining whether defendant had stated a prima facie case. (See *People v. Johnson*, *supra*, 30 Cal.4th 1302, 1312-1318.) Under these circumstances, the *Batson* claim is properly cognizable on appeal by analogy to the well-established principle that a reviewing court may consider a claim raising a pure question of law on undisputed facts. [Citations.] While defendant does dispute the trial court's resolution of the factual issues underlying his *Batson* claim (i.e., whether he stated a prima facie case and whether the prosecutor's explanation was adequate), the same factual issues are properly before us already because of defendant's timely *Wheeler* motion. Under these circumstances, to consider the *Batson* claim entails no unfairness to the parties, who had an opportunity to litigate the relevant facts and to apply the relevant legal standard in the trial court. Nor does it impose any additional burden on us, as the reviewing court." (Footnotes omitted.)

Accord, *Ford v. Georgia* (1991) 498 U.S. 411, 418-419, 111 S.Ct. 850, 112

(continued...)

The trial court stated it had reviewed the questionnaires and *Hovey* voir dire for both Hernandez and Hopkins. RT 2974-2975. The court asked defense counsel to address each one, and counsel did so. The trial court stated that it was satisfied that Hernandez was not excused based on race.[14] The trial court then asked the prosecutor to address the question of his exclusion of prospective juror Mark Hopkins. RT 2975.

In requiring the prosecutor to provide justifications for his peremptory challenge of this prospective juror, the trial court clearly made an implied finding of a prima facie case. *People v. Fuentes* (1991) 54 Cal.3d 707, 716 ("we have consistently held that when the trial court inquires about the prosecutor's justifications, as in this case, the court has made 'at least an implied finding' of a prima facie showing"); accord, e.g., *People v. Cash* (2002) 28 Cal.4th 703, 725; *People v. Burgener*, *supra*, 29 Cal.4th at p. 864. Thus, step one was satisfied here, as to prospective juror Hopkins, and the question of a prima facie showing is now moot. See *Hernandez v. New York* (1991) 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 ("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.").

In step two of the *Batson/Wheeler* procedure, as noted above, the

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(...continued)
L.Ed.2d 935 (a defendant's objection to racial discrimination in jury selection was sufficient to invoke his federal right to be free of racial discrimination in jury selection under *Batson*, even if he did not cite *Batson* or describe with particularity the exact federal provision violated).

[14]Vines does not challenge the trial court's ruling as to Hernandez.

prosecutor must set forth race-neutral justifications for the disputed peremptory challenge. This step is easily satisfied by prosecutors, because it requires only that the prosecutor come up with some justification for excusing a minority juror that is not, *on its face*, racially discriminatory. *Purkett, supra,* 514 U.S. at pp. 767-768.

In this case the prosecutor set forth six reasons assertedly justifying his challenge of African American prospective juror Mark Hopkins. Although, as will be discussed, these reasons were pretexts for discrimination, this brief does not contend that the reasons were *facially* racially discriminatory.

The six asserted reasons the prosecutor provided for his challenge to this African American prospective juror included three that related directly to the imposition of the death penalty, and three that did not:

> (1) That Hopkins would only impose the death penalty if he were required to do so. RT 2977.
>
> (2) That the prosecutor didn't feel that Hopkins would have the strength to impose the death penalty. RT 2978.
>
> (3) That Hopkins felt the death penalty had in the past been imposed unfairly against African Americans or other minority groups, but was not sure about today. RT 2977-2978.
>
> (4) Hopkins' reaction to the O.J. Simpson trial. RT 2976.
>
> (5) That Hopkins "disagreed strongly" with the proposition that if the prosecution brings someone to trial, that person is probably guilty. RT 2976.
>
> (6) That Hopkins felt it was better for society to let some guilty people go free than to risk convicting an innocent person. RT 2977.

Because these reasons did not contain overt, unmistakable expressions

of racial discrimination, the second of the three *Batson-Wheeler* steps was met.

2. The Third Step.

> "It is in the third step, the step at issue in this case, that the court reaches the real meat of a *Batson* challenge."

Lewis v. Lewis (9th Cir. 2003) 321 F.3d 824, 830. In the third step of a *Batson/Wheeler* challenge, the trial court has "the duty to determine whether the defendant has established purposeful discrimination," *Batson, supra*, 476 U.S. at p. 98, and must evaluate the "persuasiveness" of the prosecutor's proffered reasons, see *Purkett, supra*, 514 U.S. at p. 768. In determining whether the defendant has carried this burden, the Supreme Court requires that

> "a court must undertake '<u>a sensitive inquiry into such circumstantial and direct evidence of intent as may be available</u>.'"

Batson, supra, 476 U.S. at p. 93 (emphasis supplied), quoting *Arlington Heights v. Metro. Hous. Dev. Corp.* (1977) 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450; *Hernandez, supra*, 500 U.S. at p. 363.

This Court has made clear in its unanimous opinion in *People v. Silva* that

> "the trial court [must meet] its obligations [1] to make '<u>a sincere and reasoned attempt to evaluate the prosecutor's explanation</u>' (*People v. Hall* (1983) 35 Cal.3d 161, 167-168) and [2] <u>to clearly express its findings</u> (*People v. Fuentes* (1991) 54 Cal.3d 707, 716, fn. 5)."

People v. Silva, supra, 25 Cal.4th at p. 385 (emphasis added). The Court in *Silva* further explained:

> "Although we generally 'accord great deference to the trial

> court's ruling that a particular reason is genuine,' we do so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. (*People v. Fuentes, supra*, 54 Cal.3d 707, 720; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1197-1198.) When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But ***when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient***."

People v. Silva, supra, 25 Cal.4th at pp. 385-386 (emphasis added); see *Purkett, supra*, 514 U.S. at p. 768 ("[i]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.").

3. The Trial Court Failed to Meet its Obligations.

In this case, it is starkly apparent that the trial court did not make a "sincere and reasoned effort" to evaluate the prosecutor's asserted justifications for peremptorily challenging African American juror Mark Hopkins, or make a sensitive inquiry into the evidence of intent; instead, the record shows the trial court engaging in no independent analysis whatsoever. Immediately after the prosecutor provided his justifications for dismissing Hopkins, this brief colloquy ensued:

> "THE COURT: All right. It is submitted, isn't it?
> "MR. BIGELOW: Yes, Your Honor. I would submit it and – with -- I'd submit it.
> "THE COURT: All right. Your motion are denied.
> "MR. BIGELOW: Thank you, Your Honor."

RT 2979. The trial court did not question the prosecutor, or make detailed findings – or, indeed, make *any* findings on the record.

Similarly, the minute order memorializing the denial of the *Batson/Wheeler* motion states only that "[t]he Court DENIED the motion." CT 613.

There is nothing in the record to indicate that the trial court made a sincere and reasoned evaluation of the prosecutor's asserted justifications for challenging prospective juror Hopkins, as this Court's cases require, or conducted a sensitive inquiry into the direct and circumstantial evidence of intent, as required by *Batson*.

As far as this record reveals, this trial judge was satisfied with the prosecutor's recitation of facially race-neutral reasons for the challenge of juror Hopkins, and evidently unaware of the court's independent constitutional obligation to inquire and evaluate.

This Court has held that a trial court's failure to meet its obligations under *Batson* and *Wheeler* is reversible per se. *People v. Fuentes* (1991) 54 Cal.3d 707, 718 ("the trial court did not satisfy its *Wheeler* obligation of inquiry and evaluation, and the judgment must therefore be reversed."); *People v. Hall* (1983) 35 Cal.3d 161, 164 ("We reverse, having concluded that the trial court failed to exercise its judgment in determining whether the prosecutor's use of peremptory challenges was for reasons relevant to the case before it or reflected a constitutionally impermissible group bias."). Other courts agree. E.g., *Lewis v. Lewis, supra*, 321 F.3d at pp. 834, 835 (granting habeas corpus petition because "[t]he trial court did not conduct a meaningful step-three analysis").

In this case, the trial court's failure to conduct a sincere and reasoned evaluation of the prosecutor's justification for his challenge of prospective juror Hopkins, and the trial court's failure to clearly express its findings and the

reasons therefore, require that the judgment be reversed in its entirety.

This is particularly true because the record *affirmatively contradicts* the prosecutor's asserted justification for excusing Hopkins based on his views about the death penalty.

As noted above, the prosecutor gave several reasons for challenging this African American juror. The first reason relating to the death penalty was this:

> "MR. GOLD: . . .On the death penalty views, ***[Prospective Juror Hopkins] put that in his belief about the death penalty, his opinions, he would only impose it if he were required to, and a number of other people put it in those terms, and I excused those people as well.*** I think some people were feeling that they'd only do it if His Honor told them to do it, and that's not the law. They are going to be faced with a choice, and nobody is going to tell them that they have to do anything. In fact, the law tells them the opposite. You don't have to do it, and you can only do it if it's substantially outweighed, and then only then you have your choice. And he is of the frame of mind, I feel someone is going to have to force him or require him to do it, and I don't believe on this type of a decision I want someone with that frame of mind, because it is a major decision in someone's life, and I think they have to feel comfortable about it, and I don't feel he felt comfortable about it."

RT 2977 (emphasis added). In fact, the prosecutor's assertion as to Hopkin's attitude toward the death penalty was materially false, and affirmatively contradicted by the record.

Prior to the *Hovey* voir dire, and before any education of these lay jurors as to the law of capital punishment in California, the prospective jurors filled out a questionnaire. The prosecutor probably meant to refer to Question 90 of the questionnaire. It stated: "90. Briefly describe your opinions about the death penalty." CT 756.

Prospective juror Mark Hopkins answered the question this way:

> "Death penalty should only be applied under certain circumstances. Only after fair trail. [Sic.] If I were required to impose it I would."

CT 2548. Plainly, Hopkins did ***not*** state that he would only impose the death penalty if required to do so, as the prosecutor asserted. Instead, he stated that he believed the death penalty should only be applied under certain circumstances, and only after a fair trial – a belief fully consistent with California and federal law. And he stated that if he were required to impose the death penalty he would. But Hopkins never stated in response to question 90, or any other question, that he would ***only*** impose the death penalty if required to do so. The prosecutor falsely ascribed a belief to African American prospective juror Hopkins that he had never expressed. The record contradicts the prosecutor's assertion.

Moreover, the voir dire of Hopkins also affirmatively contradicts the prosecutor's justification of his excusal of Hopkins based on Hopkins' supposed opinion that he would only impose the death penalty if required to do so. This is the entire voir dire:

> "THE COURT: You know, I'm so sorry you had to be the last one, but hang in there. The law requires that you fairly listen to and consider all of the evidence as it bears upon aggravating factors versus mitigating factors and that you not be predisposed automatically to give death or automatically to give life in prison without the possibility of parole. *Can you honestly and truthfully state that you can carefully and fairly consider both penalties in this case?*
> "PROSPECTIVE JUROR HOPKINS: ***Yes.***
> "THE COURT: Is that a yes?

"PROSPECTIVE JUROR HOPKINS: ***Yes.***
"THE COURT: Okay. Do you promise that you will follow all of my instructions on the applicable law that applies to this case?
"PROSPECTIVE JUROR HOPKINS: ***Yes.***
"THE COURT: You indicate on page twenty-four that it is your view that there is a disproportionate number, I guess, of ethnic groups, I guess, meaning African-Americans and other minorities that are subject to the death penalty, and I think maybe what you say is not sure, but at least that might be on your mind.
"And then you indicate that the death penalty is imposed unfairly against African-Americans and other minorities and you state yes. [[15]]
"Let me ask you this: Whatever your personal views might be, we are dealing with this one specific case. Do you understand me?
"PROSPECTIVE JUROR HOPKINS: Uh-huh.
"THE COURT: And I guess my question to you is can you set that aside, if that be your personal view, and just deal with this case as it pertains to Mr. Vines?
"PROSPECTIVE JUROR HOPKINS: ***Yes.***
"THE COURT: *Let me put it a little bit differently. After you have heard all the evidence in this case including the penalty phase evidence and you conclude that the proper sentence penalty or choice would be the death penalty, could you impose the death penalty on Mr. Vines if that's what you believe?*
"PROSPECTIVE JUROR HOPKINS: ***Yes, if that's what the evidence pointed to.***
"THE COURT: *And you would interpret and evaluate the*

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[15] The trial court misconstrued Hopkins' answer. In response to the question on the questionnaire, "Do you feel the death penalty is imposed unfairly against African Americans or any other minority group?" Hopkins checked yes, and explained, "Originally, I feel it was, but not sure about today." CT 2549. This cannot be construed as reflecting a belief by Hopkins that the death penalty was currently being imposed unfairly against African Americans.

evidence and after hearing everything you have found that those aggravating circumstances substantially outweigh the mitigating circumstances and death would be the appropriate verdict, could you impose death?
"PROSPECTIVE JUROR HOPKINS: ***Yes, I could, if that's what -- yeah.***
"THE COURT: *I mean, if you were persuaded --*
"PROSPECTIVE JUROR HOPKINS: ***If that's what the evidence shows.***
"THE COURT: Sure. On the other hand, the same question, if you were persuaded that the proper penalty would be life imprisonment without the possibility of parole, could you vote for that?
"PROSPECTIVE JUROR HOPKINS: ***Yes, if that's what the evidence showed.***
"THE COURT: I guess the question is you are not automatically in favor of one penalty over the other penalty; would that be true?
"PROSPECTIVE JUROR HOPKINS: ***Yes.***
"THE COURT: All right. Thank you. Do the lawyers have questions?
"MR. BIGELOW: I don't think so. Thank you.
"THE COURT: Do you have questions?
"MR. GOLD: No.
"THE COURT: Sir, you should report to this department tomorrow morning at 9:00 o'clock. Thank you very much and thank you for being patient."

RT 2939-2941 (emphasis added).

Not only does the voir dire of Hopkins lend no support to the prosecutor's notion that Hopkins would only impose the death penalty if required to do so, it also positively demonstrates that this was ***not*** Hopkins' view – the voir dire shows that Hopkins was entirely willing to consider and weigh aggravating and mitigating circumstances, as California law requires, and to impose the penalty of death if the evidence showed that was the appropriate verdict. RT 2940.

The prosecutor also stated, at the end of his listing of reasons for peremptorily challenging African American juror Hopkins:

> "MR. GOLD: And I also felt that as a death juror as opposed to the guilt phase where Mr. Simpson concerns would arise, I did not feel that he would impose the death penalty. I didn't feel that he would have the strength to do that, even if he felt that it was right. That's why I excused Mr. Hopkins."

RT 2978.

The prosecutor's statement that Hopkins would not have the strength to impose the death penalty logically flows from the prosecutor's untrue assertion that Hopkins said he would only impose the death penalty if required to do so. For the same reasons, it is refuted by the record. African American prospective juror Hopkins nowhere in his questionnaire answers or in his voir dire indicated that it would be a struggle to impose the death penalty – to the contrary, Hopkins <u>expressly affirmed</u> that he could weigh the aggravating circumstances against the mitigating circumstances, and if the evidence showed death was warranted, he could and would vote for the death penalty. RT 2940. Hopkins' answers to the trial court were direct and unambiguous as to his ability and willingness to apply the death penalty in this case if warranted under the law and by the evidence.

Moreover, the prosecutor's purported reasons for peremptorily challenging this African American juror incorporated yet another materially false factual representation to the trial court.

> "MR. GOLD: . . .On the death penalty views, *[Prospective Juror Hopkins] put that in his belief about the death penalty, his opinions, he would only impose it if he were required to,* ***and a number of other people put it in those terms, and I excused those people as well.*** . . ."

RT 2977 (emphasis added).

Thus, the prosecutor represented that he had peremptorily excused multiple other, presumably non-African American, prospective jurors because they too had stated that they would only impose the death penalty if it was required.

This asserted justification is also affirmatively contradicted by the record.

Prosecutor Gold used peremptory challenges to excuse thirteen jurors, apart from Mr. Hopkins. CT 613. These were prospective jurors John Hull, Jose Henriquez, Steven Pahota, Elaine Boomer, Peter Birdsall, Angie Torre, Betty Hernandez, Charise Whitaker, Linda Mendoza, Jeannine Kalfas, Loren Erlandson, Maisy Thurmond, and Loyda Beltran. CT 613.

Not one of these thirteen other jurors peremptorily excused by the prosecutor gave an answer, in response to the juror questionnaire questions on the death penalty, that indicated he or she would only impose the death penalty if required.

And not one of these thirteen other excused prospective jurors gave any answer during voir dire stating that he or she would only impose the death

penalty if required to do so.[16]

To properly discharge its duties under the *Batson/Wheeler* doctrine, the trial court must make "a sincere and reasoned attempt to evaluate *each stated reason*" proffered by the prosecutor. *People v. Silva, supra*, 25 Cal.4th at p. 386. Here, the required reason-by-reason evaluation did not occur.

In *Silva*, this Court held that the trial court failed to conduct a sincere and reasoned evaluation of the genuineness of the prosecutor's asserted justifications for exercising his peremptory challenges. *People v. Silva, supra,* 25 Cal.4th 345. The Court concluded that the prosecutor gave reasons that misrepresented the record of voir dire, by quoting a misleading portion of a prospective juror's answers concerning the death penalty. *Id.* at pp. 376-377, 385. In *People v. Silva* – just as in this case:

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[16] Rather than quote the complete juror questionnaire responses and voir dire of each of the thirteen other prospective jurors excused by the prosecutor, this table lists the CT pages and RT pages at which the pertinent questionnaire responses and voir dire can be located:

Excused Juror	CT pages	RT pages
Beltran	3125-3129	2735-2738
Birdsall	3154-3158	2551-2556
Boomer	1941-1945	2547-2551
Erlandson.	1278-1282	2629-2630
Henriquez	2057-2061	2557-2559
Hernandez	2086-2090	2601-2607
Hull	3414-3418	2531-2534
Kalfas	2577-2581	2619-2623
Mendoza	1626-1630	2526-2528
Pahota	2779-2783	2562-2565
Thurmond	2923-2927	2695-2698
Torre	1771-1775	2581-2586
Whitaker	3067-3071	2517-2520

> "the trial court erred in failing to point out inconsistencies and to ask probing questions. 'The trial court has a duty to determine the credibility of the prosecutor's proffered explanations' (*McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1220) . . . ."

People v. Silva, supra, 25 Cal.4th at p. 385 (emphasis added).

The picture should be viewed in context. In this case,

- the prosecutor falsely represented that Hopkins had written that he would only impose the death penalty if he were required to (RT 2977);

- the prosecutor falsely represented that he had excused other jurors who had given similar answers (RT 2977); and

- the prosecutor failed to asked this African American prospective juror even a single question on voir dire (RT 2941).

Yet the trial judge pointed out none of the conflicts between the record and what the prosecutor asserted, asked no "probing questions" of the prosecutor – indeed, asked no questions at all -- and made no comments on any of the prosecutor's reasons.

Under *People v. Fuentes, supra*, 54 Cal.3d at p. 720,

> "the first step in the evaluation process [is to] . . . determine[] which of the myriad justifications cited by the prosecutor were sham and which were bona fide."

Then there is

> "the next, necessary step of asking whether the asserted reasons actually applied to the particular jurors whom the prosecutor challenged."

Fuentes, supra, 54 Cal.3d at p. 721. And the trial court must determine

> "not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge."

Fuentes, supra, 54 Cal.3d at p. 720.

Here, the trial court did not take even the first step in the evaluation process. It cannot be said that the trial court performed its constitutional duty to conduct a sensitive inquiry here.

Moreover, reversal is also mandated because, even assuming for the sake of argument that the trial court conducted a constitutionally adequate evaluation, the trial court failed to clearly express any findings or the bases therefore.

> "[W]hen the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient."

People v. Silva, supra, 25 Cal.4th at p. 386. The trial court is constitutionally obliged to clearly express its findings at the third step of the *Batson/Wheeler*

procedure. *Id.* at p. 385.[17]

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[17] In *People v. Reynoso* (2003) 31 Cal.4th 903, a majority of this Court (over the vigorous dissents of Justices Kennard and Moreno, joined by Justice Werdegar) recognized a limited exception to the rule of *People v. Fuentes* and *People v. Silva* that trial courts must clearly express their findings and the basis for their findings and rulings.

The exception is inapplicable here.

The *Reynoso* majority first recognized that in *People v. Fuentes, supra,* 54 Cal.3d 707, this Court had

> "'reemphasize[d] the trial court's role in making an adequate record when dealing with a *Wheeler* motion. Notwithstanding the deference we give to a trial court's determinations of credibility and sincerity, we can only do so when the court has clearly expressed its findings and rulings and the bases therefore.' " (*Id.* at p. 716, fn. 5.)

Reynoso, supra, 31 Cal.4th at p. 929. The *Reynoso* court went on, however, to state that

> "neither *Fuentes* nor *Silva* requires a trial court to make explicit and detailed findings for the record in every instance in which the court determines to credit *a prosecutor's demeanor-based reasons* for exercising a peremptory challenge. ... [¶] Where ... the trial court is fully apprised of the nature of the defense challenge to the prosecutor's exercise of a particular peremptory challenge, *where the prosecutor's reasons for excusing the juror are neither contradicted by the record* nor inherently implausible ... , and where nothing in the record is in conflict with the usual presumptions to be drawn, i.e., that all peremptory challenges have been exercised in a constitutional manner, and that the trial court has properly made a sincere and reasoned evaluation of the prosecutor's reasons for exercising his peremptory challenges, then those presumptions may be relied upon, and a *Batson/Wheeler* motion denied, notwithstanding that the record does not contain detailed findings regarding the reasons for the exercise of each such peremptory challenge."

(continued...)

As noted above, the trial court made no express findings, not even an express but inadequate "global finding" that the reasons seemed sufficient. And as also shown above, the prosecutor advanced reasons for the peremptory challenge that are affirmatively contradicted by the record. The trial court failed to meet its obligation in such circumstances to make clear, detailed and express findings.

Even assuming the Court concludes that the trial court somehow did perform its duties at the third step to undertake a sensitive inquiry into intent, evaluate each of the prosecutor's stated reasons, and make clear and express findings, reversal would nonetheless be mandated, because of the significance of the prosecutor's misrepresentations, which greatly undermine his credibility and would render any finding, had one been made, constitutionally unreliable and unsupported by the record.

The prosecutor's false representation as to Hopkins' beliefs regarding whether he would only impose the death penalty if required to, and his false statement that he had excused other jurors who had given the same answer, are powerful evidence of purposeful discrimination. See *McClain v. Prunty*

(...continued)
Reynoso, supra, 31 Cal.4th at p. 929 (emphasis added).

Thus, the exception recognized by *Reynoso* to the holding of the unanimous Court in *People v. Silva* is specific to [1] a prosecutor's exercise of a challenge on "demeanor-based reasons" when [2] the asserted reasons for the challenge are "neither contradicted by the record nor inherently implausible."

This case does not come within the parameters of *Reynoso*. The prosecution's challenge of African American juror Hopkins was not assertedly based on demeanor. And, as shown above, the prosecutor's critical reasons relating to Hopkins' asserted unwillingness to impose the death penalty unless compelled to do so were substantially and positively contradicted by the record.

(9th Cir. 2000) 217 F.3d 1209, 1221 ("Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised. . . . The fact that one or more of a prosecutor's justifications do not hold up under judicial scrutiny militates against the sufficiency of a valid reason."). And making materially false factual representations to a court is devastating to a lawyer's credibility.

Accordingly, the judgment must be reversed.

C. The Record Provides Further Proof that the Prosecutor Engaged in Intentional Discrimination.

1. Comparative Juror Analysis Shows the Prosecutor's Challenge of Prospective Juror Hopkins Was Motivated by Impermissible Bias.

Even beyond the matters discussed in the previous section, the record in this case further demonstrates that the trial court, by failing to conduct a constitutionally adequate evaluation of the prosecutor's justifications for striking African American prospective juror Hopkins, allowed an improper challenge motivated by bias.

The prosecutor, as noted above, advanced six reasons when required to explain why he challenged Hopkins. Three reasons did not relate directly to the death penalty, but related more generally to the criminal justice system. The first such reason the prosecutor gave was based on Hopkins' response to a question on the juror questionnaire about the O.J. Simpson case:

> "MR. GOLD: As to Mr. Hopkins, on page 18 and question 65, I had inserted a question about the Simpson trial. To me I

> feel that that is a major issue these days in criminal justice, how people felt about that case. Of the 140 questionnaires that I read I would say that only two people felt that that was a good case, and something good came out of it. One of them is Mr. Hopkins, and his answer shocked me. He said that case restored his faith in the system. My personal belief, and most people that I know feel that was a travesty, and that was unjust, and that concerns me having someone with Mr. Hopkins' state of mind, having that belief about that case and this system, because I strongly disagree with that."

RT 2976.

The question was number 65-b, which asked "How, if at all, did the O.J. Simpson trial affect your view of the courts and the criminal justice system?" Hopkins answered, "restored faith." RT 2453. He did not elaborate, and was asked no questions about the subject in voir dire.

But Hopkins was not the only juror to express in questionnaire responses a positive view of the Simpson case. There was another member of the venire who gave comparable answers. This was Juror No. 7 – who was not challenged and, in fact, served on the jury. Juror No. 7 identified his "race or ethnic background" as "Anglo Saxon." CT 3991.

Juror No. 7 stated he had followed newspaper or television reports for the O.J. Simpson case "and Terry McVie." CT 4003. In response to the question asking, "What opinions, if any, did you form about the criminal justice system as a result?" Juror No. 7 wrote: "The Court System still works." CT 4003.

The <u>second</u> non-death penalty related reason given by the prosecutor for challenging African American prospective juror Hopkins was this:

> "MR. GOLD: . . . He also on questions 69 and 70 on page 19, there is a question 70, if the prosecution brings someone to trial, that person is probably guilty. There is 4 responses. The

> most extreme response is I disagree strongly, and he checked that box. Some people would say I disagree somewhat. Some people would say I agree somewhat. I can live with those responses. But anyone who is in the strong to me is a question mark, and I believe that anyone who believes strongly that if the People bring someone to trial, and they feel that they are not probably guilty, he disagrees strongly to me, that's a problem. I think most people, the way our system works in America, if the police arrested somebody, most people believe there is going to be something to it. They are not going to disagree strongly. That shows a bias in my mind for Mr. Hopkins."

RT 2976-2977.

Indeed, Hopkins did answer that he "disagree[d] strongly." CT 2544.

But this reason, too, applied just as well to Juror No. 7. This juror who was not challenged *also* stated he "disagree[d] strongly" in response to the statement, "If the prosecution brings someone to trial, that person is probably guilty." CT 4004.

Yet the "bias" prosecutor Gold discerned from the questionnaire answer given by prospective juror Hopkins was nowhere to be detected by the prosecutor when the ***identical*** answer was given by Juror No. 7.

The <u>third</u> and final non-death penalty related justification the prosecutor gave for excusing African American juror Hopkins concerned Question 69 of the questionnaire:

> "MR. GOLD: . . . He also felt that it was better for society to let some guilty people go free rather than risking convicting an innocent person. He checked I agree somewhat. That didn't concern me as much as number 70, but that does concern me, he has that belief. He is entitled to it, but as someone who is picking a jury, I would rather have people oriented the other way."

RT 2977.

It is true that Hopkins checked that he "*agree[d] somewhat*" with the proposition that "[i]t is better for society to let some guilty people go free than to risk convicting an innocent person." CT 2544.

But Juror No. 7, who was not challenged by the prosecution and served on the jury, checked that he "*agree[d] strongly*" with the proposition "[i]t is better for society to let some guilty people go free than to risk convicting an innocent person." CT 4004.

Thus, this reason, too, was highly suspect as an excuse to challenge prospective juror Hopkins. See *Hernandez v. New York, supra*, 500 U.S. at p. 365 ("In the typical peremptory challenge inquiry [into discriminatory intent], the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed.").

It is also highly probative of pretext that, after the trial court conducted its voir dire of Juror No. 7, the prosecutor then asked that white then-prospective juror a series of questions about his views on the death penalty. RT 2610-2611. By contrast, the prosecutor asked African American prospective juror Hopkins no questions, about the death penalty or anything else. RT 2941. See *Miller-El v. Cockrell, supra,* 537 U.S. at p. 344.

Indeed, Juror No. 7 and prospective juror Hopkins had backgrounds and life circumstances that *strikingly resembled each other*. Both were married; both had children; both were homeowners. CT 2531-2535, 3991-3996. Both Juror No. 7 and Hopkins were employed in professional technical jobs by the State of California: Juror No. 7 was a senior analyst responsible for strategic planning and information technology development at the Department of Food and Agriculture (CT 3991-3992), and prospective juror Hopkins was a systems

engineer for the State Board of Equalization (CT 2531-2532). Both enjoyed science fiction movies. CT 2536, 3996. Each lived in or near the Rancho Cordova area. CT 2531, 3991. Both Juror No. 7 and Hopkins graduated with bachelor's degrees – each with majors in accounting – from the same college, CSU Sacramento. CT 2533, 3993. And both had fathers who were officers in the U.S. Air Force. CT 2533, 3993.

But prospective juror Hopkins was black, and Juror No. 7 was white.

In view of the fact that each of the prosecutor's three non-death penalty reasons for challenging Hopkins applied as well to Juror No. 7, and in view of the fact that the three death penalty-related reasons were contradicted by the record, the only plausible conclusion is that the prosecutor's reasons for challenging this African American prospective juror were pretextual, and the prosecutor violated the *Batson/Wheeler* doctrine.

2. *People v. Johnson* does not preclude comparative juror analysis in this case.

In *People v. Johnson* (2003) 30 Cal.4th 1302, this Court *generally* disapproved the use of comparisons between challenged jurors and other jurors on appeal unless the comparisons were first raised in the trial court. Here, however, the comparison between prospective juror Hopkins and Juror No. 7 should be considered even though it was not raised in the trial court, for several reasons.

First, *Johnson* does not apply by its own terms. This Court in *Johnson* did not establish an absolute rule prohibiting comparative juror analysis for the first time on appeal, but set forth an important qualification to its ruling. This is the *Johnson* holding:

> "When such an analysis was not presented at trial, a reviewing court should not attempt its own comparative juror analysis for

> the first time on appeal, *especially when, as here, the record supports the trial court's finding of no prima facie case*."

Johnson, supra, 30 Cal.4th at p. 1325 (emphasis added).

In this case, of course, the trial court *did* find a prima facie case as to prospective juror Hopkins. *Johnson* is distinguishable on its own terms. Accordingly, *Johnson* should not be applied in this case.

Second, the rationales of *Johnson* do not support its application here.

Johnson generally rejected comparative juror analysis when raised for the first time on appeal because to engage in such analysis (a) "would discount ' "the variety of [subjective] factors and considerations," ' including 'prospective jurors' body language or manner of answering questions,' which legitimately inform a trial lawyer's decision to exercise peremptory challenges" and (b) "would undermine the trial court's credibility determinations." *Johnson, supra*, 30 Cal.4th at p. 1320, quoting *People v. Montiel* (1993) 5 Cal.4th 877, 909.

The first rationale for rejecting comparative juror analysis on appeal has no application here, because the prosecutor in this case did not make reference to any such "subjective" or demeanor-based justification at the third stage of the *Batson/Wheeler* procedure. The prosecutor's purported reasons for excusing African American prospective juror Hopkins did not center on his body language, attentiveness, facial expressions, manner of answering questions, neatness of dress or grooming, or any other "subjective" consideration that the trial judge would be uniquely positioned to evaluate. Instead, the six reasons the prosecutor gave for challenging Hopkins all related directly to Hopkins' views on the death penalty and criminal justice issues, as set forth in his responses to the jury questionnaire. RT 2976-2978. A comparison of the stated views of prospective juror Hopkins with those of

Juror No. 7 on the criminal justice system does not depend in any way on a subjective consideration of demeanor. Thus, the first rationale of *Johnson* is inapplicable in this case.

The second rationale – that to engage in comparative juror analysis for the first time on appeal would undermine the trial court's credibility determinations – has little or no force in these circumstances. In *Johnson* itself, the trial court spelled out in detail the reasons why it was rejecting the *Batson/Wheeler* motion. *Johnson, supra*, 30 Cal.4th at pp. 1307-1308. Here, by contrast, the trial court decided the motion without making any determinations whatsoever. Under *Johnson*, deference is predicated on the assumption the trial court has made "a 'sincere and reasoned effort' to evaluate the nondiscriminatory justifications offered." *Id.* at pp. 1319-1320. The trial court here did not do that, as shown above.

Johnson set forth a general rule that comparative juror analysis would not be conducted for the first time on appeal, but it expressly declined to establish the rule as an absolute one. *Johnson* excepted from its rule cases in which the trial court had found a prima facie case. This is such a case. And it would make little sense to extend the rule of *Johnson* to situations in which the rationales for the rule do not apply. When the reason for a rule ceases, so should the reach of that rule. The general rule of *Johnson* is inapplicable in this case.[18]

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[18] And even if the rule were technically applicable, this Court always has the discretion to reach issues that may have been waived. *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6. If *Johnson* is applicable, then this is an appropriate instance in which to exercise that discretion, for the reasons given above, and in order to reach a just result.

II. BY DENYING SEVERANCE AND ALLOWING THE WEAKER FLORIN ROAD ROBBERY-MURDER CHARGES TO BE TRIED WITH THE RELATIVELY STRONGER WATT AVENUE ROBBERY CHARGES, THE TRIAL COURT PREJUDICIALLY VIOLATED CALIFORNIA LAW AND APPELLANT'S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL.

A. Introduction.

The evidence against Sean Vines was weak on the most serious charges, arising from the Florin Road robbery-murder. No eyewitness could positively identify Vines as a robber, and the testimony of the prosecution's chief witness, Vera Penilton, was suspect because she was an accessory to the crimes, had strong motives to lie, and would testify under a grant of prosecutorial immunity.

But the evidence against Vines was, relatively, much stronger on the less serious Watt Avenue counts; several eyewitnesses said Vines was the robber.

Thus, the prosecutor sought to try the charges against Vines together, undoubtedly cognizant of this virtual certainty: that the weaker Florin Road charges would be lent enhanced credibility by their association with the somewhat stronger Watt Avenue counts. CT 467-481 (twenty-four count amended complaint).

Vines moved to sever the seventeen Watt Avenue counts from the seven Florin Road counts, contending that trial of the two sets of charges together would violate his rights under state law and his federal constitutional right to due process. CT 482.

Without a word of explanation or comment, the trial court denied the motion. RT 2059.

The trial court's ruling was prejudicially erroneous. Under this Court's precedents, and under federal constitutional law, the stronger noncapital Watt Avenue counts should not have been tried with the weaker Florin Road robbery-murder counts. Because the denial of severance likely affected the verdict and deprived Vines of a fair trial, the judgment must be reversed.

B. The Trial Court Abused its Discretion.

Joinder of charges is generally permissible under the broad and general terms of Penal Code section 954.[19] But even when two or more charges are joined under that statute, joinder may be improper. As this Court explained in *People v. Gutierrez* (2002) 28 Cal.4th 1083:

> " 'Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.' "

People v. Gutierrez, supra, 28 Cal.4th at p.1120, quoting *People v. Bradford,* (1997) 15 Cal.4th 1229, 1315.

" 'The burden of demonstrating that . . . denial of severance was

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[19] Two or more different offenses of the same class can be tried together "provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately . . . ." Penal Code section 954.

> a prejudicial abuse of discretion is upon him who asserts it . . . .' (*Ibid.*) A party seeking severance must 'clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' " (*Frank v. Superior Court, supra*, 48 Cal.3d at p. 640.)

People v. Davis (1995) 10 Cal.4th 463, 508.

In this case, each of the factors weighs in favor of severance. Collectively, they compel the conclusion that the trial court abused its discretion in failing to sever the seventeen Watt Avenue counts from the seven Florin Road charges.

Because this Court examines the trial court's severance ruling "on the record in which it was made," *People v. Davis, supra*, 10 Cal.4th at p. 508, the argument in this section is based on the record as it stood when the trial court made its ruling, including the preliminary hearing transcript.[20]

1. None of the Evidence Pertinent to the Offenses Was Cross-Admissible.

The initial step in reviewing whether a trial court has abused its discretion by denying severance is to consider the cross-admissibility of

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[20] Although the preliminary hearing included testimony by a detective as to his interview with codefendant William Deon Proby, this testimony is not considered in this section. Before the trial court ruled on the severance motion (RT 2059), the parties advised the trial court that Proby had been convicted, his conviction was on appeal, and his attorney had stated he would advise him to refuse to testify and assert his Fifth Amendment privilege. RT 2032-2034. Thus, the trial court knew that Proby almost certainly would not testify, and could not assume in deciding the severance motion that Proby's testimony or statements to police would be available. In fact, Proby did invoke his self-incrimination privilege (RT 2089-2094), and did not testify at trial, and his statements to police were not admitted at trial.

evidence. Here, evidence on each of the joined crimes would not have been admissible in a separate trial of the other crimes, as this brief will demonstrate.

But even before any detailed legal analysis, it should be immediately apparent that the evidence regarding the killing of the victim in the Florin Road robbery would not have been admissible to prove any facts about the Watt Avenue robbery in a separate trial. And the evidence that the Watt Avenue robber locked four employees in a freezer at closing time would not have been admissible in a separate trial of the Florin Road capital murder case. Neither of these highly condemnatory circumstances would have come before the jury in separate trials of the charges sought to be severed, because neither has any legitimate relevance to any fact in dispute in the trial of the other charges.

Under Evidence Code section 1101, evidence of a person's conduct on one specified occasion is inadmissible to prove he acted in character by his

conduct on another specific occasion.[21] In enacting this statute, the Legislature sought to prevent, among other things, the introduction of evidence of criminal propensity. But section 1101 does not prohibit the admission of evidence that a person committed a crime when it is relevant to proof of "some fact . . . *other than* his or her disposition to commit such an act."

This Court has spoken to the admissibility of just the sort of evidence that is at issue here -- evidence that the defendant committed other robberies. In *People v. Ewoldt* (1994) 7 Cal.4th 380, 406, the Court set forth this analysis:

> "For example, in most prosecutions for crimes such as burglary and ***robbery***, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, ***evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible.*** Although such evidence is relevant to

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[21] Evidence Code section 1101 provides, in pertinent part:

"(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

> demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, ***if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value.***" (Emphasis added.)

In this case, it was beyond dispute that both the Watt Avenue robbery and the Florin Road robbery-murder took place; the primary issue to be determined at trial was whether Mr. Vines committed these crimes.

Because under this Court's opinion in *Ewoldt*, evidence of other robberies is inadmissible to prove a common design or plan, even when "the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan," evidence that appellant was responsible for the Watt Avenue robbery is not admissible to prove a common plan or scheme that included the Florin Road robbery-murder. Nor is evidence of appellant's alleged responsibility for the Florin Road robbery-murder admissible to show a common plan that included the Watt Avenue robbery.

Here, evidence of another crime could only be admissible, if at all, to prove the disputed issue of identity. In a companion case to *Ewoldt*, this Court explained that:

> "the use of evidence of uncharged misconduct to demonstrate a common design or plan differs from the use of such evidence to prove *identity*. 'Evidence of *identity* is admissible where it is conceded or assumed that the charged offense was committed by someone, in order to prove that the defendant was the perpetrator.' (*People v. Ewoldt*, *supra*, *ante*, p. 394, fn. 2, italics in original.) In order for evidence of an uncharged offense to be relevant for this purpose, it must share with the charged offense characteristics that are '***"so unusual and distinctive as to be like***

> ***a signature***" [Citation.]' (at p. 403.) ***The highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense."***

People v. Balcom (1994) 7 Cal.4th 414, 424, 425 (final two emphases added); accord, *People v. Kipp* (1998) 18 Cal.4th 349, 370.

The crimes in this case lack an unusual, distinctive signature – indeed, they lack a common signature entirely.[22] Regrettably, there is nothing particularly unusual about armed robbery of a fast food outlet such as a McDonald's.

Indeed, there was evidence before the trial court that there were at least two *other* late-night fast food franchise robberies around the same time in Sacramento committed by young, African-American male suspects, one of which -- the robbery of a Carl's Jr. restaurant in which the armed robber or robbers forced the employees into a walk-in freezer, just like the Watt Avenue robber or robbers – occurred four days *after* Mr. Vines and Mr. Proby were arrested. CT 101, 99-102.

Not only do the Watt Avenue and Florin Road robberies lack a common signature – they are *materially dissimilar in at least four ways*:

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[22] The common marks between the charged and uncharged crimes must be highly distinctive in order to establish the inference that they were perpetrated by the same person: "The methodology must be 'bizarre,' 'highly characteristic,' 'distinguishing,' 'distinctive,' 'dramatically similar,'" an " 'earmark,' 'exceptional,' a "'fingerprint,' 'handiwork,' 'identifying,' 'idiosyncratic,' 'novel,' 'parallel,' 'peculiar,' 'remarkably similar,'" a " 'veritable trademark,' 'uncommon,' 'unique,'" or "unusual." Imwinkelreid, *Uncharged Misconduct Evidence* (1991) sec. 3:12, ch. 3, p. 26, fns. containing citations omitted.)

- In the Watt Avenue robbery, the eyewitnesses whose testimony or statements were introduced at the preliminary hearing were Stanly Zaharko and Michael Baumann. Each stated they saw *one* robber; neither indicated the participation of a second robber. RT 19 (Zaharko), 116 (Baumann). Thus, only one robber invaded the premises at Watt Avenue. But there were *two* robbers present at the Florin Road robbery, according to eyewitness Jeffrey Hickey. RT 256.

- In the Watt Avenue robbery, the robber herded the employees into a walk-in freezer, and locked them in. RT 58, 60, 62. In the Florin Road robbery, there was no attempt to herd the employees anywhere.

- In the Watt Avenue robbery, the robber or robbers took cash, and also stole the pickup truck of one of the employees, and his cell phone. RT 74. In the Florin Road robbery, the robbers took cash and a cash box, but no vehicles, phones or other such tangible personal property. RT 276-277.

- In the Watt Avenue robbery, the robber or robbers did not take any gift certificates, though the franchise had them at the time. RT 123. In the Florin Road robbery, the perpetrators took gift certificates. RT 277.

These robberies were more different than they were alike. Indeed, the Watt Avenue robbery bears a far more striking resemblance to the robbery of a Carl's Jr. restaurant in Sacramento on October 3, 1994 – <u>four days after Vines was arrested</u> – than it does to the Florin Road robbery-murder. In both the Watt Avenue robbery and the Carl's Jr. robbery, the robber or robbers forced the employees into a walk-in freezer (RT 58-62, CT 101) -- a shared characteristic far better meeting the description *"so unusual and distinctive as to be like a signature,"* in the words of this Court. *People v. Balcom, supra,* 7 Cal.4th at p. 425.

There are some commonalities between the Watt Avenue and Florin Road robberies, to be sure, but none amount to characteristics so unusual and distinctive as to be like a signature. The perpetrators of both robberies were young African-American males – but then, so were the perpetrators of other fast food franchise robberies around the same time in Sacramento. CT 101. Robbers in both the Watt Avenue and Florin Road robberies used rifles, but the use of rifles or handguns in armed robberies is hardly highly unusual or distinctive. The robbers in both robberies put guns to the heads of employees. But a robber placing a gun to the head of a victim is not a distinctive signature – it's a frequent occurrence in robberies. A January 2005 boolean search in the Lexis "CA Federal & State Cases, Combined" database for "robbery and put or held w/5 gun or handgun or firearm or rifle or pistol or revolver w/5 head" returned no less than 379 results. Robbers in both robberies did use disguised voices, but this is hardly a signature that "virtually eliminates the possibility that anyone other than the defendant committed the charged offense," *Balcom*, *supra*, 7 Cal.4th at p. 425, particularly viewed in light of the material differences between the two robberies delineated above. These robberies were more different than they were alike.

Thus, under the standards this Court set forth in *Ewoldt* and *Balcom*, assessed on the record as it existed at the time the trial court decided the severance motion, the evidence that defendant committed the Watt Avenue robbery would not have been admissible at a separate trial of the Florin Road robbery-murder, and the evidence that defendant committed the Florin Road crimes would likewise have been inadmissible at a separate trial of the Watt Avenue counts.

But even assuming *arguendo* that appellant is wrong and the Court

determines that evidence that defendant committed one robbery is not barred by section 1101 at a trial of defendant on charges arising from the other robbery, the cross-admissibility issue would nevertheless have to be resolved in appellant's favor, as this brief will explain.

Evidence Code section 1101, subdivision (b) does not itself authorize the admission of any evidence. It merely makes the prohibition of propensity evidence under subdivision (a) inapplicable when the evidence is proffered for some purpose "*other than* . . . disposition". The evidence may be inadmissible for some other reason. Thus, this Court has held that even when evidence of other crimes is otherwise admissible under Evidence Code section 1101, subdivision (b), it is nevertheless subject to exclusion under Evidence Code section 352:

> "Although the evidence of defendant's uncharged criminal conduct in this case is relevant ***to establish a common design or plan, to be admissible such evidence 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.*** [Citations.]' (*People v. Thompson, supra*, 45 Cal.3d at p. 109.) We thus proceed to examine whether the probative value of the evidence of defendant's uncharged offenses is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' " (Evid. Code, § 352.)

People v. Balcom, supra, 7 Cal.4th at pp. 426-427 (emphasis added); see *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 586-587. Other crimes evidence is "inadmissible if not relevant to an issue expressly in dispute". *People v. Alcala* (1984) 36 Cal.3d 604, 631-632.

Moreover, the introduction of evidence that is so unduly prejudicial that it renders the trial fundamentally unfair violates the Due Process Clause of the Fourteenth Amendment. *Payne v. Tennessee* (1991) 501 U.S. 808, 825,

111 S.Ct. 2597, 115 L.Ed.2d 720.

Here, even assuming for the purposes of analysis that some evidence of each robbery would be admissible to demonstrate identity or common plan in separate trials for the other robberies and transactionally-connected crimes, the admission of the evidence should have been prohibited as more prejudicial than probative under section 352, and irrelevant and unduly prejudicial under the Due Process Clause.

This is true of all the "other crimes" evidence, but it is particularly pertinent to the most inflammatory evidence on each charge:

In a separate trial of the Watt Avenue robbery, the evidence that the defendant shot and killed an employee at the Florin Road robbery would have been excluded under section 352 and the due process clause. This is because the evidence of the Florin Road victim's death has no relevance to any fact to be disputed at a separate trial of the Watt Avenue robbery. The prejudicial potential of this evidence vastly outweighs its probative value -- which is nil, since the only disputed issue at a trial of the Watt Avenue robbery would be identity. Evidence of the homicide would simply be inflammatory, and subject to exclusion at a separate trial of the Watt Avenue robbery counts.

Similarly, there was no evidence that the Florin Road robbers locked the employees there in a freezer. Evidence that the Watt Avenue robber forced the employees at that location into a walk-in freezer and then locked them in that freezer would have had no tendency to prove any fact in dispute with regard to the separate Florin Road robbery. But it is highly prejudicial. It too would have to have been excluded under due process and section 352 objections at a separate trial of the Florin Road charges.

The evidence -- and certainly, the most inflammatory and condemnatory

evidence -- was not cross-admissible. This factor counts strongly against consolidation of the charges.

2. The Evidence was Inflammatory.

The second factor in determining whether the trial court abused its discretion in refusing to sever the counts is whether "certain of the charges are unusually likely to inflame the jury against the defendant". *People v. Gutierrez, supra*, 28 Cal.4th at p.1120. In analyzing this factor, the Court has focused on the specific evidence and not the general nature of the charges. *People v. Ochoa* (2001) 26 Cal.4th 398, 425.

Here, the most blatantly inadmissible "other crimes" evidence on the Florin Road charges – that the Watt Avenue robber had forced four employees into a walk-in freezer late at night, and locked them in – would certainly be inflammatory in a separate trial of the Florin Road crimes. The jury would likely view this act -- which was, again, not relevant to any disputed issue of fact on the Florin Road counts -- as exhibiting great disregard for others.

Similarly, the most obviously inadmissible "other crimes" evidence on a separate trial of the Watt Avenue charges – that a perpetrator of the Florin Road robbery shot an employee in the back of the head, killing him – though not relevant to any contested fact regarding the Watt Avenue crimes, would be virtually guaranteed to inflame the jurors against the defendant.

Because the non-cross-admissible evidence included evidence of inflammatory acts, this factor also weighs heavily in favor of severance.

3. The Prosecution Evidence Against Vines was Substantially Stronger on the Watt Avenue Counts than on the Florin Road Charges.

The third factor the court considers in assessing severance is the relative strength of the evidence on the counts sought to be severed from each other. Viewed on the record as it existed at the time the trial court denied the severance motion, the evidence against appellant Vines on the Watt Avenue charges was much stronger than the evidence against him on the Florin Road counts.

Indeed, the evidence against Vines on the Florin Road counts was far from compelling.

Of the three eyewitnesses who were present at the Florin Road robbery-murder, <u>not one was able to positively identify Vines as a robber</u> -- despite the fact that all three witnesses knew Vines and had worked with him before.

Two of the three Florin Road eyewitnesses gave suspect descriptions that clearly did not match Vines:

- Jerome Williams described the suspect as 5'7". RT 400.
- Pravinesh Singh described him as 5'9" to 5'11". CT 495, 552, 565.
- Sean Vines is 6'3". RT 401.

All of the recovered money and gift certificates that came from the Florin Road robbery were found in the bedroom shared by co-defendant Proby and his girlfriend, Vera Penilton. RT 276-277, 378. No stolen funds or property taken in the Florin Road robbery were found on Vines personally, or in the residence he occupied at the time of his arrest.

Vera Penilton was the only witness expected to testify at trial who

would unequivocally implicate Vines in the Florin Road crimes. Her testimony regarding Vines' alleged admission to murder was inevitably suspect, however, because the evidence showed she likely had criminal liability as well – all the recovered property from the robbery was found in her bedroom – and because she had an obvious motive to lie, to protect her boyfriend, codefendant Proby, from ultimate responsibility for the murder, by shifting blame to Vines.

The evidence against Vines on the less-serious non-capital Watt Avenue counts was much stronger. At the time of the Watt Avenue robbery, Vines was an employee of the franchise. Victim Stanly Zaharko, who knew and worked with Vines, identified Vines as the person who robbed him. RT 86, 96. Victim Michael Baumann, who also knew and worked with Vines, was positive the robber was Vines. RT 139.[23]

The lack of parity in the strength of the prosecution evidence on the Watt Avenue charges and the Florin Road counts was undeniable.

4. The Florin Road Charges Carried the Death Penalty.

The fourth factor, whether "'any one of the charges carries the death penalty or joinder of them turns the matter into a capital case,' " *People v. Gutierrez, supra*, 28 Cal.4th at p.1120, is plainly met: Vines faced the death penalty for the Florin Road robbery-murder.

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[23] The evidence admitted at trial against Vines on the Watt Avenue counts, while stronger than the evidence against him on the Florin Road charges, was far from "overwhelming," however. See discussion *infra* at pp. 203-206, in Argument VIII.

5. Severance was Necessary.

All four factors in this case favored severance, as shown above. This is a capital case, and thus all doubts should have been resolved in favor of severance. The non-cross admissible evidence was inflammatory.

Moreover, as this Court stated in *People v. Ochoa* (2000) 26 Cal.4th 398, 423:

> "Even where the People present capital charges, joinder is proper so long as evidence of each charge is so strong that consolidation is unlikely to affect the verdict. (*People v. Arias* (1996) 13 Cal.4th 92, 130, fn. 11 (*Arias*); *People v. Lucky* (1988) 45 Cal.3d 259, 277-278 (*Lucky*).)" (Emphasis supplied.)

But here, the evidence on the capital charge was much weaker than the evidence of the Watt Avenue counts, as demonstrated above. This is just the sort of situation in which consolidation ***is*** "likely to affect the verdict." *People v. Alcala* (1984) 36 Cal.3d 604, 630-631, explained:

> "The rule excluding evidence of criminal propensity is nearly three centuries old in the common law. (1 Wigmore, Evidence (3d ed. 1940) § 194, pp. 646-647.) Such evidence 'is [deemed] objectionable, not because it has no appreciable probative value, *but because it has too much*.' (Italics added.) Inevitably, it tempts 'the tribunal . . . to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.' (*Id.*, at p. 646; quoted in *People v. Schader* (1969) 71 Cal.2d 761, 773, fn. 6.)" (Emphasis and brackets in original.)

Accord, *Old Chief v. United States* (1997) 519 U.S. 172, 181,117 S.Ct. 644, 136 L.Ed.2d 574. Here, in particular, there was danger of unfair prejudice with regard to the Florin Road charges – the danger that lay jurors would infer that, because Vines "did it once" – the Watt Avenue robberies – he must have "done it again," and thus deserved conviction on the Florin Road counts,

despite the absence of strong evidence on those more serious offenses.

The trial court abused its discretion by refusing severance.[24]

The question of prejudice is discussed *infra*.

C. The Trial Court's Failure to Sever the Watt Avenue Counts from the Florin Road Charges Violated Due Process and Resulted in an Unfair Trial.

The federal due process standard differs from the state law standard that is used to assess abuse of discretion. As this Court stated in *People v. Mendoza* (2000) 24 Cal.4th 130, 162:

> "Even if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the 'defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process.' " (*People v. Arias, supra*, 13 Cal.4th at p. 127.)

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[24] Any purported benefits of joinder would be marginal at best. Viewed on the state of the record at the time of the trial court's ruling, *none* of the civilian witnesses who testified or whose statements had come in at the preliminary hearing had given testimony or statements pertinent to both the Watt Avenue and Florin Road counts.

And while there will always be benefits to administrative efficiency in holding one trial instead of two – the more efficient use of the prosecutor's time, for example, or the need to pick only one jury, not two – these administrative advantages cannot in justice weigh heavily against a defendant's right to a fair trial, especially on charges carrying the death penalty. As this Court stated in *Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452:

> "Although there is inevitably some duplication in cases where the same defendant is involved, it would be error to permit this concern to override more important and fundamental issues of justice. Quite simply, the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial."

While the trial court's decision is reviewed for abuse of discretion under California law " 'in light of the showings then made and the facts then known'" at the time of the court's pretrial ruling, the federal due process inquiry, by contrast, looks to unfairness as it resulted at trial, based on the trial record. *People v. Mendoza*, *supra*, 24 Cal.4th at p. 162 fn. 3. And even when the evidence is cross-admissible, joinder of charges may nevertheless violate due process:

> "We have recognized that the risk of undue prejudice is particularly great whenever joinder of counts allows evidence of other crimes to be introduced in a trial where the evidence would otherwise be inadmissible. *See United States v. Lewis*, 787 F.2d 1318, 1322 (9th Cir. 1986). Undue prejudice may also arise from the joinder of a strong evidentiary case with a weaker one. *See id.; Bean*, 163 F.3d at 1085. The reason there is danger in both situations is that it is difficult for a jury to compartmentalize the damaging information. *See Bean*, 163 F.3d at 1084."

Sandoval v. Calderon (9th Cir. 2000) 241 F.3d 765, 772.

The United States Supreme Court has made clear that misjoinder rises to the level of a constitutional violation when it "results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *United States v. Lane* (1986) 474 U.S. 438, 446 fn. 8, 106 S.Ct. 725, 88 L.Ed.2d 814; see *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083 (joinder of strong and weak murder charges rendered trial fundamentally unfair), cert. denied sub nom., *Calderon v. Bean* (1999) 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239.

Here, the trial court's refusal to sever the Watt Avenue counts from the Florin Road charges resulted in a denial of Mr. Vines' right to a fair trial.

Joinder of the Watt Avenue and Florin Road charges deprived Vines of

a fundamentally fair trial on the Florin Road charges in particular. Consolidation of the relatively weak Florin Road case with the stronger Watt Avenue charges in a single trial violated Vines' right to due process by leading the jury to infer criminal propensity. This impermissible inference, in turn, allowed the jury to rely upon the Watt Avenue evidence to strengthen the otherwise weak case against him for the Florin Road robbery-murder.

The factors considered in determining whether an appellant's due process rights have been violated by a failure to sever counts overlap in part those factors considered under the state law analysis. They include whether the evidence on the charges sought to be severed was cross-admissible, whether the evidence is inflammatory, whether there is a disparity in the strength of the cases that were joined, the effect of the particular limiting instructions given by the trial court, if any, whether the record reflects that the jurors "compartmentalized" the evidence, and whether the evidence on the separate charges was "simple and distinct." See *Bean v. Calderon, supra,* 163 F.3d 1073, 1085.

Although joinder may violate due process even when evidence on the charges is cross-admissible, as shown above in subsection A.1 of this argument, the evidence against Vines on the Watt Avenue counts would not have been cross-admissible in a separate trial of the Florin Road counts, and vice-versa. There is "a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible." *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322.

There was non-cross-admissible evidence that was inflammatory, as also explained above in subsection A.2. The evidence that the Watt Avenue

robber forced four employees in a walk-in freezer at closing time and then locked them in is precisely the sort of factual detail "'uniquely tend[ing] to evoke an emotional bias . . . which has very little effect on the issues. ' " *People v. Garceau* (1993) 6 Cal.4th 140, 178.

There was a wide disparity in the strength of the evidence against Vines on the Florin Road and Watt Avenue charges, as demonstrated *supra* in subsection A.3.

The significance of this factor cannot be underestimated. The Ninth Circuit has given considerable weight to the disparity in evidentiary strength in the due process calculus:

> "This substantial disparity between the Schatz evidence and the Fox evidence prompts us to conclude that the strong evidence of Bean's guilt in the Schatz crimes tainted the jury's consideration of Bean's complicity in the Fox offenses. *See Lucero v. Kerby*, 133 F.3d 1299, 1315 (10th Cir.) ('Courts have recognized that the joinder of offenses in a single trial may be prejudicial when there is a great disparity in the amount of evidence underlying the joined offenses. One danger in joining offenses with a disparity of evidence is that the State may be joining a strong evidentiary case with a weaker one in the hope that an overlapping consideration of the evidence [will] lead to convictions on both.') (alteration in original) (citation omitted), *cert. denied*, 140 L.Ed.2d 821, 118 S.Ct. 1684 (1998); *see also Lewis*, 787 F.2d at 1322 (considering relative strength of evidence underlying joined charges as factor showing undue prejudice). ***This creates 'the human tendency to draw a conclusion which is impermissible in the law: because he did it before, he must have done it again.'*** " *United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985).

Bean v. Calderon, supra, 163 F.3d 1073, 1085 (emphasis added). Here, the same reasoning applies: the much stronger evidence of Vines' guilt of the Watt Avenue offenses tainted the jury's consideration of the Florin Road robbery-

murder, for which the evidence was comparatively weak, leading the jury to draw the understandably human, but impermissible, conclusion, "because he did it before, he must have done it again."[25]

The danger was particularly acute in this case because the evidence of the offenses, while not cross-admissible, was – from the perspective of a reasonable lay juror -- similar enough to unavoidably invite the inference of criminal propensity. Both the Watt Avenue and Florin Road crimes involved the armed robbery of McDonald's franchises at closing time by young African-American males. As explained in *People v. Grant* (2003) 113 Cal.App.4th 579, 593:

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[25] Prejudice arising from joinder is not a hypothetical legal construct. The court in *United States v. Lewis, supra,*787 F.2d 1318, recognized the existence of social science evidence showing that joinder influences jurors' decision-making:

> "***Studies have shown that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case.*** *See* Tanford, Penrod & Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 Law and Human Behavior 319, 331-35 (1985); Bordens & Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 Law and Human Behavior 339, 343, 347-51 (1985)."

Lewis, *supra*, 787 F.2d at p. 1322 (emphasis added). In fact,

> "[i]t is much more difficult for jurors to compartmentalize damaging information about one defendant derived from joined counts, [citation], than it is to compartmentalize evidence against separate defendants joined for trial."

Id. Thus, the more likely the damaging information is to influence the jury, the more important it is for the law to strictly delineate admissibility.

> "Where, as here, the evidence on two counts is considerably similar, and is considerably stronger on one count than the other, it is *highly probable* that the jury will draw the impermissible conclusion that 'because he did it before, he must have done it again.'" (*Bean, supra,* 163 F.3d at p. 1085.) (Original emphasis.)

It is also significant that the trial court did not give limiting instructions that could effectively prevent any impermissible inference of criminal propensity. The instruction given in this case was:

> "Each Count charges a distinct crime. You must decide each Count separately. The defendant may be found guilty or not guilty of any or all of the offenses charged. Your findings as to each Count must be stated in a separate verdict."

RT 4545; CT 722 (CALJIC 17.02). This instruction was essentially identical to the instruction given in *Bean v. Calderon*:

> "Each count charges a distinct offense. You must decide each count separately. The defendant must be found guilty or not guilty of any or all of the offenses charged. Your findings as to each count must be stated in a separate verdict."

Bean v. Calderon, supra, 163 F.3d at p. 1083. The federal appellate court held that this instruction was inadequate to assure a fair trial:

> "We have expressed our skepticism about the efficacy of such instructions on at least one prior occasion: 'To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities.' *Lewis*, 787 F.2d at 1323 (quoting *United States v. Daniels*, 248 U.S. App. D.C. 198, 770 F.2d 1111, 1118 (D.C. Cir. 1985)). Apart from the intrinsic shortcomings of such instructions, however, *the instructions here did not specifically admonish the jurors that they could not consider evidence of one set of offenses as evidence establishing the other*."

Bean v. Calderon, supra, 163 F.3d at p. 1084 (emphasis added). The

essentially identical instruction here is similarly inadequate to cure the constitutional error. Morever, here, as in *Bean*, the jury received the instruction "in the waning moments of the trial," a factor that further diminished any potential impact. *Id.*; RT 4545.

And also like *Bean*, "[t]his is not a case where acquittal on one joined charge establishes that the jury successfully compartmentalized the evidence." *Bean v. Calderon, supra*, 163 F.3d at p. 1085.

Nor was this a case where the evidence on the joined counts was simple and distinct, so that any improper influence was unlikely. Instead, this case involved twenty-four separate felony charges, and over thirty guilt-phase witnesses.

D. Vines Suffered Prejudice.

When a trial court has abused its discretion by denying severance, under state law the verdict must be reversed if it is reasonably probable that a result more favorable to the defendant would have been reached if there had been separate trials.

In this case, the elements of abuse of discretion also demonstrate the trial court's ruling was prejudicial. As demonstrated above, the evidence of the Watt Avenue and Florin Road crimes was not cross-admissible to show common design or identity. The evidence of the "other crimes" impermissibly led the jury to a virtually unavoidable inference of criminal propensity, that "because he did it before, he must have done it again." Some of the non-cross-admissible evidence was clearly inflammatory – such as the evidence that the Watt Avenue robber locked four people in a freezer at closing time. The evidence against Vines was considerably stronger on the Watt Avenue counts

than on the Florin Road charges. And no effective instruction limiting the jury's use of the evidence to infer criminal propensity was given. In view of all this, and considering that the case against Vines, especially on the Florin Road counts, was far from overwhelming,[26] it must be concluded that the denial of severance was prejudicial under state law.

As to the violation of Mr. Vines' federal due process right to a fair trial, it is doubtful that any further demonstration of error is necessary. As the court observed in *United States. v. Mayfield* (9th Cir. 1999) 189 F.3d 895, 906, concerning a denial of severance from a codefendant's trial:

> "In light of our finding that the failure to sever the trials actually prejudiced Mayfield and denied him a fair trial, we see no need in asking whether the error was harmless. . . . . We think it is clear that our holding that Mayfield has shown 'clear, manifest, or undue prejudice resulting from a joint trial,' *Arias-Villanueva*, 998 F.2d at 1506, necessarily means that the error was not harmless."

If another standard of prejudice does apply, it is that of *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705, under which it is the respondent's burden to demonstrate, beyond a reasonable doubt, that the constitutional error did not contribute to the verdict. In this case, for the reasons discussed above in connection with prejudice under California law, respondent will not be able to meet its burden.

Because the trial court abused its discretion in denying severance, and as a result Mr. Vines' right to a fair trial was violated, the judgment must be reversed.

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[26] See the discussion at pp. 140-150, *infra*, on whether or not there was "overwhelming" evidence of appellant's guilt on the Florin Road counts, incorporated herein by reference.

III. BECAUSE THE TRIAL COURT WRONGLY CONDITIONED APPELLANT'S EXERCISE OF HIS FEDERAL DUE PROCESS RIGHT TO PRESENT HIS DEFENSE OF THIRD-PARTY CULPABILITY ON A WAIVER OF HIS CONFRONTATION CLAUSE RIGHT TO CONFRONT A WITNESS AGAINST HIM, THE JUDGMENT MUST BE REVERSED.

A. Introduction.

Under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, every defendant in a criminal case has the right to present a defense. Under the Sixth and Fourteenth Amendments, a criminal defendant has the right to confront the witnesses against him.

Both rights apply in every trial. A criminal trial in which the trial court conditions the exercise of the defendant's right to present a defense on the defendant's waiver of his right to confrontation of a critical witness is an unfair trial.

That is what happened here. Defendant Sean Vines sought to present a defense of third-party culpability on counts 18-24 of the complaint, the Florin Road McDonald's robbery and homicide charges. Vines sought to show that the robber who accompanied codefendant William Deon Proby into the McDonald's store and shot and killed Ron Lee was a friend of Proby's, Anthony Edwards, also known as "Black Black."

Central to Vines' offer of proof was a statement Proby made to detectives in which he told them that "Blackie" had provided a shotgun and was the getaway driver in the Florin Road crimes. The physical description of Blackie that Proby gave to detectives – Blackie was about 5'10" tall, and thin

– far better matched the descriptions of the second robber provided by two eyewitnesses, than it did the description of Vines, who is 6'3" tall.

The in-custody confession given by Proby that inculpated Blackie also incriminated Vines as the shooter. At the time of Vines' trial, Proby's separate trial was over – his statements to detectives had been introduced, he had testified, and he had been found guilty on all counts. Proby invoked the Fifth Amendment and was not available to testify in Vines' trial. RT 2089-2094.

The trial court in this case ruled that Proby's statement inculpating Blackie could be introduced by Vines – but if Vines did introduce this statement, Proby's other statements from the same confession incriminating Vines would also be admitted, *despite the fact that Vines would not be able to confront or cross-examine Proby as to those incriminating statements.*

Thus, the trial court compelled Vines to elect either his constitutional right to present a defense, or his constitutional right to confront and cross-examine a critical witness against him.

This was a constitutionally impermissible enforced election. As a result, Vines was precluded from presenting the core of his defense of third-party culpability. Had he been permitted to do so, there is, as this brief will show, a substantial likelihood that in this close case, the result would have been more favorable to Vines.

B. Background.

Before trial, on July 7, 1997, the court and counsel discussed the issue of third party culpability, and the prosecutor objected to any references to Blackie being allowed in evidence. The trial court made a preliminary order that the defense not bring up evidence of third party culpability "unless he has

a witness that can prove that." RT 2081. The court reserved ruling on the prosecution's motion to exclude third party culpability evidence. CT 527.

Thereafter, Vines made a written pretrial motion for admission of third party culpability evidence, setting forth a fifteen-point offer of proof and specifically arguing that admission of the evidence was required by United States Supreme Court cases such as *Chambers v. Mississippi* (1973) 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297. CT 763-783.

In addition to Vines' motion to admit evidence of third party culpability, filed on July 8, 1997, he filed additional "points and authorities re: admission of Anthony Edwards' prior assaultive conduct." CT 590, filed 7/16/97. The argument stated that Edwards had a prior conviction for assault with a firearm on February 6, 1991 "among his many convictions." CT 591.

And Vines filed a memorandum "in support of request for limitation on admission of statements offered pursuant to Evidence Code section 356." Proby, in his statement in which he inculpated Blackie in the Florin Road crimes, also inculpated Vines; this motion argued that Proby's statements inculpating Vines should be excluded. CT 594.

In response, the prosecution filed an opposition brief entitled "People's supplemental points and authorities to exclude certain third party culpability evidence." CT 600, filed 7/17/97. The prosecution argued that the criminal history of Anthony Edwards was irrelevant to the trial, inadmissible character evidence, and should be excluded under Evidence Code section 352. "According to his CII rap sheet, Mr. Edwards has never been arrested or convicted for robbery . . . nor has he ever been convicted of using a firearm in any incident." Edwards did have three misdemeanor convictions, and a felony assault with a deadly weapon conviction in 1991, as well as a spousal abuse

conviction in 1991. CT 601. The prosecution also argued that "there is absolutely no admissible direct or circumstantial evidence linking Mr. Edwards in any way to the commission of the Florin Road murder." CT 603.

The trial court heard argument on the third party culpability motions on July 8, 1994 (RT 2102-2113) and July 18, 1997 (RT 2648-2675, 2681-2684), but made no final ruling.

The court took up the question of third party culpability evidence again on August 5, 1997. "The Court DENIED defendant's Motion to limit Proby's statement (re: third party culpability issue)." CT 611, RT 2947-2948.

The trial court also denied defendant's motion to permit evidence of Anthony Edwards' prior acts of violence, including firearm use. CT 611.

The following day, the court ruled:

> "With respect to opposing motions regarding Third Party Culpability the Court rules as follows. Defendant has not presented a legally sufficient basis; motion DENIED without prejudice. Motion DENIED without prejudice with respect to 'Blackie.' "

CT 614; RT 2987-2988 (August 6, 1997); RT 2992-2994 (August 6, 1997).

Thus, the trial court made three critical and interrelated rulings.

First, the trial court ruled that Proby's statement naming "Blackie" as a participant in the Florin Road robbery-murder could be used by the defense, as the prosecutor requested, only if the remainder of the statement inculpating Vines also came in. CT 611, RT 2947-2948.

Second, the trial court ruled that without Proby's statement, Vines had presented insufficient evidence of third-party culpability. CT 614.

Third, the trial court ruled that evidence of Anthony Edwards' assaultive conduct could not be admitted. CT 614.

The trial court committed reversible error. As this brief will show, Vines presented a more-than-adequate case under this Court's standards for the admission of third party culpability evidence. Third party culpability was the central defense to the Florin Road charges, and there was substantial evidence from which the jury could have inferred that Vines either was not present at the scene of the crime or, at a minimum, was not the robber who shot Ron Lee.

But the trial court stripped Vines of any viable third-party defense, by ruling that Proby's statements inculpating Vines in the Florin Road robbery would be admissible if Vines introduced Proby's statement that Blackie was a participant in the crimes. This is because Proby was unavailable as a witness due to his invocation of his Fifth Amendment privilege (RT 2089-2094), and Vines would be unable to cross-examine Proby on his statements inculpating Vines -- in violation of Vines' Sixth Amendment right to confront each of the witnesses against him.

The trial court put the defense to a constitutionally impermissible choice – either surrender Confrontation Clause rights in order to present a defense of third-party culpability, or forego the right to present a defense in order to avoid a violation of the right to cross-examine an adverse witness.

In the next section, this brief will show that the defense offer of proof met and exceeded the standards for admission of third party culpability evidence. The following sections will demonstrate that the trial court's ruling that Proby's statements could be used to incriminate Vines required Vines to make an impermissible choice that abridged his right to present a defense.

C. Vines' Third Party Culpability Evidence was Admissible.

1. The Third-Party Culpability Evidence was Admissible Under this Court's Standards.

This Court's decision in *People v. Hall* (1986) 41 Cal.3d 826 sets the standard California courts should apply to determine the admissibility of proffered third party culpability evidence:

> "[C]ourts should simply treat third party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code,] section 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion ([Evid. Code,] section 352)."

People v. Hall, supra, 41 Cal.3d at p. 834.

In *Hall*, this Court established a relatively liberal standard for admitting defense evidence of third party culpability:

> "To be admissible, the third-party evidence need *not* show 'substantial proof of a probability' that the third person committed the act; *it need only be capable of raising a reasonable doubt of defendant's guilt*."

Id., at p. 833 (emphasis added). In defining "reasonable doubt" in this context, the *Hall* court stated:

> "Evidence of mere motive or opportunity to commit the crime in another person, *without more*, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime...."

People v. Hall, supra, 41 Cal at p. 833 (emphasis added). In *Hall*, this Court warned trial courts not to be unduly restrictive in assessing the relevance of third-party culpability evidence: "[Trial courts] should avoid a hasty conclusion . . . that evidence of [a third party's] guilt [i]s incredible. Such a

determination is properly the province of the jury." *Id.* at p. 834.

This Court further advised trial courts to resolve any doubts in favor of the defense when assessing the competing risks (i.e., undue prejudice, jury confusion or consumption of time) under Evidence Code section 352:

> "Furthermore, *courts must focus on the actual degree of risk* that the admission of relevant evidence may result in undue delay, prejudice, or confusion. As Wigmore observed: 'If the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, *the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt*.' " (1A Wigmore, *Evidence* (Tillers rev. Ed. 1980) § 139, p. 1724.).

People v. Hall, supra, 41 Cal.3d at pp. 834 (emphasis added).

California law thus favors the inclusion of third party culpability evidence:

> "it is always proper to defend against criminal charges by showing that a third person, and not the defendant, committed the crime charged."

People v. Hall, supra, 41 Cal.3d at p. 832.

In this case, the trial court cut the heart out of Vines' third party culpability defense before actually ruling on it, by first ruling that if Proby's statement regarding Blackie was introduced by defendant, the prosecution could introduce Proby's statement inculpating Vines. Trial counsel indicated he would not offer the statement on this condition, and the court ruled on the third party culpability motions on the assumption that Proby's statement about Blackie would not be introduced.

But in order to assess the effect of the trial court's error in imposing an unconstitutional condition on the defense, it is first necessary to understand that defense.

Mr. Vines made a written 15-point offer of proof:

"1. Sean Vines is being prosecuted in this case as the shooter of victim Ronald Lee.

"2. Sean Vines was not identified by any of the four percipient witnesses to the robbery/homicide.

"3. The only witnesses who have provided statements that Sean Vines was involved in the robbery/homicide are codefendant Deon Proby and his girlfriend, Vera Penilton.

"4. All property that was found in this case that was directly traced to the robbery/homicide was found in the residence of Deon Proby and Vera Penilton. None of the property was found on Sean Vines or the apartment where he resided.

"5. Sean Vines' physical description is:

- Male;
- African-American;
- 6'3" tall;
- 165 pounds; and
- 22 years old.

"6. Sean Vines had previously worked at the Florin Road McDonald's for approximately five months. He had been trained by the manager, Jeff Hickey, a percipient witness in this case. Mr. Vines, during that period of time, also worked with a second percipient witness, Pravinesh Singh.

"7. On October 3, 1994, codefendant Proby stated in an interview with law enforcement officers that a third person, referred to as 'Blackie,' was involved in the Florin Road McDonalds robbery that occurred on September 28, 1994. According to Mr. Proby's statement, 'Blackie's' involvement was to supply a sawed-off rifle and drive the vehicle after the robbery.

"8. Codefendant Proby stated that 'Blackie' was just a friend from the neighborhood and that his girlfriend Vera Penilton would know his true identity.

"9. Codefendant Proby gave a description of 'Blackie' that more closely matches the description of the shooter given by two of the percipient witnesses to the robbery/homicide as follows:

A. Mr. Proby's description of 'Blackie' :
- Male, Black;
- 5'9" to 5'10" tall;
- Thin and dark complected.

B. Description of shooter given by:

(1) Pravinish Singh:
- Male, Black;
- Dark;
- 5'8" to 5'9" tall; and
- 150 pounds, small build.

(2) Jerome Williams:
- Male, Black;
- Real dark, thin;
- 140 to 150 pounds; and
- 5'7" tall.

"10. The description given by the two witnesses, Singh and Williams, is consistent with the description given by Mr. Proby of Blackie, and not consistent with defendant Vines, who is 6' 3" tall.

"11. The McDonalds manager, Jeff Hickey, gave a statement that also indicates it was not likely Sean [V]ines who was the responsible for this robbery/homicide. Mr. Hickey testified under oath at the preliminary hearing that he worked with Sean

Vines for almost three months (RT 234, 325[27]) and did not identify Mr. Vines as the robber (RT 287-288). The voice of the robber did not sound familiar to him. (RT 340.) He did not think the robbers were persons who had worked at McDonalds before. (RT 328.) This impression was based on the fact that the robbers did not appear to know that he had the combination to the safe and that he had a key to a drop that would have given them a lot more money than they got from the safe.

"12. Based on Mr. Proby's statement that Vera Penilton may know who 'Blackie' is, our investigator made contact with Ms. Penilton. Vera Penilton stated that she has a cousin by the name of Anthony Renard Edwards who has a nickname of "Black Black" due to being dark complected. She further stated that Mr. Edwards would sometimes go places with Mr. Proby in Mr. Proby's car and had done so several times during the month of the robbery charged here.

"13. Anthony Renard Edwards was residing in the Del Paso Heights area at the time of this robbery/homicide. According to parole records, Mr. Edwards was released on parole on July 31, 1994, to the Sacramento area, Natomas office, and it is believed that he resided at 709 Lindsay Avenue, Sacramento, which is within walking distance from the area of Arcade and Del Paso Boulevard. Mr. Edwards' parole office would be able to verify this information.

"14. Mr. Edwards has an extensive record of assaultive behavior and use of weapons.

"15. The fact that Mr. Edwards is related to codefendant Proby's girlfriend, Vera Penilton and that Mr. Edwards

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[27] The pagination referred to in this paragraph has been edited to reflect the current pagination of the reporter's transcript.

> has an extensive criminal history, indicates that both Mr. Proby and Ms. Penilton have a motive, bias, and interest in incriminating Mr. Vines while mitigating 'Blackie' s' involvement."

CT 763-767.

This offer of proof – specifically including Proby's statement regarding Blackie -- plus additional information put before the trial court, including (1) Anthony Edwards' association with the Bloods criminal gang (RT 2649, 2987), and (2) his felony convictions for being an ex-felon in possession of a firearm and assault with a deadly weapon (RT 2669, 2671) – was more than enough to warrant the admission of Vines' third-party culpability defense under *People v. Hall*, *supra*, 41 Cal.3d 826.

The evidence proposed by Vines was "capable of raising a reasonable doubt" as to his guilt, as required by *People v. Hall*. Codefendant Proby stated that a third person known as "Blackie" participated in the robbery. Proby described Blackie as about 5'10", thin and dark-complected – a description that far better matches the physical description of the gunman with the silver gun given by Singh (5'8" to 5'9", small build) and Williams (5'7", thin), than it does the description of defendant Vines.

The facts set forth in the preceding paragraph, without more, are sufficient to raise a reasonable doubt as to Vines' identity as the shooter, which was the very premise of the prosecution's case for a sentence of death for Mr. Vines.

But there was more. Proby's girlfriend Penilton – who offered the only other evidence that Vines was the shooter – had a cousin, Anthony Edwards, who was nicknamed "Black Black," who had a criminal record, was out on parole at the time of the Florin Road crimes, and who would go places with Proby in Proby's car around the period of the crimes. As stated in the offer of

proof, both Penilton and Proby had "a motive, bias, and interest in incriminating Mr. Vines while mitigating 'Blackie' s' involvement." CT 767.

Thus, in this case there was far more than mere motive or opportunity evidence of third party culpability – there was direct and circumstantial evidence linking Anthony Edwards, aka Blackie, to the actual perpetration of the Florin Road killing.

There was no reason to believe that the admission of the third party culpability evidence would result in undue delay, prejudice or confusion. The evidence was not extremely involved or difficult to understand. The prejudice to the prosecution's case would be real, but in no sense unfair. Under this Court's standards, such evidence directly linking a third party to the commission of a charged crime is "always proper," and should have been admitted in this case.

2. Proby's Statement Regarding Blackie's Involvement was Admissible as a Matter of Due Process.

Here, the trial court did not rule inadmissible Proby's statements inculpating Blackie in the Florin Road robbery. See RT 2102-2104 (trial court indication that the evidence was admissible). Indeed, after initially objecting on hearsay grounds to admission of Proby's statement, the prosecutor offered to stipulate to admission of all of Proby's statement. RT 2683. Instead, the trial court denied Vines' motion to limit Proby's statement, ruling that Proby's statement regarding Blackie's involvement in the Florin Road crimes was admissible, but only on the condition that the prosecution could introduce Proby's statement inculpating Vines in the same crimes. RT 2947-2948.

Nevertheless, it is important to note that Proby's statements incriminating Blackie in the Florin Road crimes were admissible under Evidence Code section 1230.[28] Moreover, these statements were critical defense evidence that had to be admitted under the strictures of the Due

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[28] Proby' statements regarding Blackie were admissible as a declaration against interest under Evidence Code section 1230. That statue provides:

> "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

Here, the declarant, Proby, was unavailable as a witness because he had invoked his Fifth Amendment privilege and would not testify. E.g., *People v. Zapien* (1993) 4 Cal.4th 929, 975 fn. 6; *People v. Malone* (1988) 47 Cal.3d 1, 23; RT 2089-2094. Proby's statements inculpating Blackie unavoidably also implicated Proby himself, and were directly contrary to his penal interest. Proby's statements regarding Blackie did not attempt to shift blame from himself to Blackie or minimize his own role in the robbery. Moreover, as shown *infra*, Proby's statements inculpating himself and Blackie contain considerable assurances of reliability. They were therefore admissible as declarations against penal interest under section 1230. See *People v. Duarte* (2000) 24 Cal.4th 603.

And Proby's statements concerning Blackie were, in this context, directly contrary to his social interests, in that they tended to, in the words of the statute, "create[] . . . a risk of making him an object of hatred" -- and not just hatred, but possible violent retaliation from Blackie, aka Anthony Edwards, and the criminal gang he was associated with – the Bloods. RT 2649.

Process Clause of the Fourteenth Amendment, regardless of their admissibility under state hearsay rules.

As the United States Supreme Court has made clear, when a state rule of evidence conflicts with the right to present significant exculpatory evidence,

> "the [state hearsay] rule may 'not be applied mechanistically to defeat the ends of justice.' "

Rock v. Arkansas (1987) 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed. 2d 37.

> "Our cases establish, at a minimum, that criminal defendants have . . . *the right to put before a jury evidence that might influence the determination of guilt.*"

Taylor v. Illinois (1988) 484 U.S. 400, 408, 108 S.Ct. 646, 98 L.Ed.2d 798 (emphasis added).

The defendant in a criminal case has

> "the right to present a defense, the right to present the defendant's version of the facts . . . to the jury so it may decide where the truth lies."

Washington v. Texas (1967) 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019. This right is rooted not only in due process, but also in the Sixth Amendment. *Crane v. Kentucky* (1986) 476 U.S. 683, 690-91, 106 S.Ct. 2142, 90 L.Ed.2d 636. And the Constitution

> "guarantees criminal defendants 'a meaningful opportunity to ***present a complete defense.***'"

Id. at p. 690 (emphasis added).

In *Lilly v. Virginia* (1999) 527 U.S. 116, 130, 119 S.Ct. 1887, 144 L.Ed.2d 117 (plurality), the Supreme Court summarized its holding on the admissibility of codefendant hearsay statements that are proffered, not by the prosecution, but by a criminal defendant:

> "[I]n 1973, this Court endorsed the more enlightened view in

> *Chambers* [*v. Mississippi, supra,* 410 U.S. 284], holding that ***the Due Process Clause affords criminal defendants the right to introduce into evidence third parties' declarations against penal interest -- their confessions -- when the circumstances surrounding the statements 'provide considerable assurance of their reliability.'*** 410 U.S. at 300. Not surprisingly, most States have now amended their hearsay rules to allow the admission of such statements under against-penal-interest exceptions. See 5 J. Wigmore, Evidence § 1476; p. 352, and n. 9 (J. Chadbourn rev. 1974); *id.* § 1477, p. 360, and n. 7; J. Wigmore, Evidence § § 1476 and 1477, pp. 618-626 (A. Best ed. Supp. 1998). But because hearsay statements of this sort are, by definition, offered by the accused, the admission of such statements does not implicate Confrontation Clause concerns. ***Thus, there is no need to decide whether the reliability of such statements is so inherently dependable that they would constitute a firmly rooted hearsay exception.***" (Emphasis added.)

Chambers v. Mississippi itself shows the approach that courts should take in evaluating whether hearsay evidence of third-party culpability is admissible. There, the Court reasoned:

> "The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability. First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case -- McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal-interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest. See *United States v. Harris*, 403 U.S. 573, 584 (1971); *Dutton v. Evans*, 400 U.S., at 89.

> McDonald stood to benefit nothing by disclosing his role in the shooting to any of his three friends and he must have been aware of the possibility that disclosure would lead to criminal prosecution. Indeed, after telling Turner of his involvement, he subsequently urged Turner not to 'mess him up.' Finally, if there was any question about the truthfulness of the extrajudicial statements, McDonald was present in the courtroom and was under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury. See *California v. Green*, 399 U.S. 149 (1970)."

Chambers v. Mississippi, supra, 410 U.S. at pp. 300-301 (emphasis added).

In this case, consideration of the four factors set forth in *Chambers* demonstrates that Proby's statement incriminating Blackie in the Florin Road robbery-murder was admissible as a matter of federal due process.

First, Proby's statement was made five days after the Florin Road robbery-murder had occurred, and after he was taken into custody. This factor would ordinarily weigh somewhat against its reliability. Yet although in-custody statements as a class are presumptively suspect, not all in-custody statements are suspect in the final analysis.

Here, the prosecution *itself* manifested its belief in the reliability of Proby's in-custody statement in the most meaningful way possible -- the prosecution introduced the same in-custody statement by Proby, including the statements inculpating Blackie, as evidence against Proby in his prior trial on the Florin Road charges. RT 2110-2111; see *People v. Proby, supra,* 60 Cal.App.4th 922, 926. This factor weighs heavily in favor of a conclusion the evidence was required to be admitted.

The Supreme Court's opinion in *Green v. Georgia* (1979) 442 U.S. 95, 97, 99 S.Ct. 2150 , 60 L.Ed. 2d 738, illuminates the significance of this factor. There, the Court reversed a sentence of death due to exclusion of defense

evidence at the penalty phase of a statement of a codefendant who was tried separately, finding for several reasons the statement was sufficiently reliable:

> "Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. . . . *Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore* [Green's co-defendant], and to base a sentence of death upon it." (Emphasis added).

Green v. Georgia, supra, 442 U.S. at p. 97 (emphasis added); see *Gray v. Klauser* (9th Cir. 2002) 282 F.2d 633, 646.

Second, Proby's statements as to Blackie's involvement were corroborated by other evidence of Blackie's participation in the Florin Road offenses. There is a circumstantial web of fact that strongly supports the conclusion that Proby spoke the truth when he told detectives that Blackie was involved in the Florin Road crimes.

As we have seen, Proby lived with his girlfriend, Vera Penilton, who was the only other witness to place Vines at the Florin Road crime scene. Vera Penilton had a cousin, "Black-Black," Anthony Renard Edwards. Edwards was associated with the Bloods criminal gang; he had just been released on parole; and he had a record of assaultive behavior and weapons use. Vera Penilton stated that Edwards would sometimes go places with Mr. Proby in Mr. Proby's car, and had done so several times during the month of the robbery charged here.

Moreover, two independent eyewitnesses – Singh and Williams – had provided descriptions of the robber that were far closer to Proby's description of Blackie (5'9" or 5'10") than they are to Vines' description (6'3").

Thus, there was substantial corroboration of Proby's statement

regarding Blackie's participation, and certainly enough factual substance to make any charge of complete fabrication a question for the jury.

Third, "whatever may be the parameters of the penal-interest rationale," Proby's statement to the detectives "was in a very real sense self-incriminatory and unquestionably against interest." *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 300-301. Proby sealed his own fate by admitting participation in the crimes. And if Blackie did not exist, or had not participated in the Florin Road crimes in some capacity, it would do Proby no good whatsoever to incriminate an imaginary person, or one who was not at all involved. Notably, Proby did not in his statement attempt to shift blame from himself on to Blackie, who was, in Proby's account, the getaway driver. Moreover, Proby acted against his own interests "in a very real sense" in inculpating Edwards aka Blackie, because Edwards was a person of violent tendencies who was associated with a criminal gang; a person incriminating a member of the Bloods might very well fear for his own physical safety.

Fourth, Proby was not available for cross-examination, because he invoked the Fifth Amendment. RT 2089-2094. But here, *the prosecution had a full and fair opportunity to cross-examine Proby at his own trial* on the veracity of his statement to the detectives. And the prosecution would have been able to impeach Proby's statement regarding Blackie's involvement with Proby's later testimonial denial of Blackie's very existence at his own trial. Thus, although Proby was not available for cross-examination in this case, in light of the prosecution's prior full opportunity for cross-examination, and its subsequent opportunity for impeachment had the Blackie evidence been admitted, this factor cannot weigh substantially against the admission of Proby's statements inculpating Blackie. The opportunity – and fact – of the

prosecution's prior cross-examination of Proby at his own trial provides further constitutionally significant assurance of the reliability of the evidence sought to be admitted by Vines.

Thus, the four factors assessed by the Supreme Court in *Chambers v. Mississippi* weigh strongly in favor of admission.

Other federal courts have balanced the significance of the proffered evidence to the defense against the prosecution's interest in excluding it in deciding whether the exclusion of defense evidence violates the Due Process Clause or the Sixth Amendment. See *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 884, citing *Miller v. Stagner* (9th Cir. 1985) 757 F.2d 988, 994.

It seems debatable whether the prosecution's interest in excluding probative defense evidence has any place in consideration of the defendant's right to present a defense based on hearsay statements of an accomplice or codefendant that have considerable assurances of reliability. The Bill of Rights protects the trial rights of defendants, after all, not the trial rights of prosecutor's offices. And the Supreme Court in cases such as *Chambers* and *Lilly* has focused on "whether the circumstances surrounding the statements 'provide considerable assurance of their reliability.'" *Lilly v. Virginia, supra,* 527 U.S. at p. 130. The high court has never indicated that the constitutional calculus called for in such circumstances includes a weighing of the prosecution's interest in denying the defendant his rights.

But even assuming this Court chooses to follow the Ninth Circuit's approach and consider the prosecution's interest in excluding defense evidence that has considerable assurances of reliability, the result would not change.

Here, as noted previously, the prosecution ultimately did not object to the exclusion of Proby's statement about Blackie, but rather sought to have

Proby's statement inculpating Vines admitted at the same time. RT 2683-2684.

The prosecution argued that it would be disadvantaged if the jury was not told of Proby's statement inculpating Vines as the shooter in the Florin Road robbery-murder when it was told of Proby's statement inculpating Blackie. According to the prosecution, this would leave the jury with the misleading impression that there were only two robbers, Proby and Blackie. RT 2652.

There are two distinct and fatal flaws in the prosecution's reasoning as to the prejudice it hypothesized it would suffer had Proby's statement regarding Blackie been admitted, but not Proby's statement regarding Vines.

First, the admission of the evidence in this form would not, contrary to the prosecutor's assertion, necessarily lead the jury to believe there were only two robbers and not three. The prosecutor was free to argue otherwise, and the question was one from which differing inferences could be drawn. This is because, as set forth in the offer of proof, Proby stated that Blackie was the getaway driver. CT 765. Thus it is not necessarily inconsistent with the literal truth of Proby's statement as proffered by Vines that Blackie did not enter the restaurant, and that the witnesses in the restaurant saw only two of the three robbers.

Second, what Vines sought in this case was, in essence, the redaction of Proby's statement to omit any reference to Vines. The prosecution complained that it would be unfairly burdened by such a redaction.

Yet as cases from the United States Supreme Court make clear, the redaction of a codefendant's statements to omit any reference to the very existence of another jointly tried defendant is not only acceptable – it is

constitutionally required.

If Proby and Vines had been jointly tried, Proby's in-custody statement could have come into evidence only if all references to Vines had been eliminated. The high court ruled in *Richardson v. Marsh* (1987) 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176:

> "We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, *the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence*." (Emphasis added.)

Thus, it's proper under Supreme Court precedent to eliminate from a confession of a codefendant any reference to the existence of the accused.

> "*Bruton* [*v. United States* (1968) 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620], as interpreted by *Richardson*, holds that certain 'powerfully incriminating extrajudicial statements of a codefendant' -- those naming another defendant -- considered as a class, are so prejudicial that limiting instructions cannot work. *Richardson*, 481 U.S. at 207; *Bruton*, 391 U.S. at 135."

Gray v. Maryland (1998) 523 U.S. 185, 192, 118 S.Ct. 1151, 140 L.Ed.2d 294. The redaction of a nontestifying accomplice's confession to exclude any reference to the defendant's existence is therefore necessary to protect Sixth Amendment confrontation rights.

This case differs in one way from *Gray v. Maryland* and the *Bruton* line of cases. Those cases deal with the confessions of nontestifying codefendants who were jointly tried; this case involves the confession of a nontestifying codefendant who was separately tried.

In *Gray v. Maryland*, the prosecution sought to introduce the codefendant's confession only against the codefendant, and not against the defendant who was incriminated by the codefendant's statement; indeed, the

trial court gave a limiting instruction prohibiting the use of the confession against the incriminated defendant. The Court found the limiting instruction did not cure the error. 523 U.S. at pp. 189, 192.

The governmental interest that was *insufficient* to mandate the admission of codefendant statements in *Gray v. Maryland* is entirely *absent* in this case, where there was no nontestifying codefendant who was jointly tried.

Thus, the Supreme Court has made clear in a closely related context that a codefendant's out-of-court statement implicating a defendant cannot be admitted at trial, even though this means that the jury will hear a version of the codefendant's statement that has been redacted to remove any reference whatsoever to the defendant's existence.

As discussed above, the prosecution considered Proby's statements to detectives sufficiently reliable to use in Proby's own trial. The statements at issue were substantially corroborated by other evidence suggesting Blackie's participation. The statements were, in a very real sense, against Proby's penal interests, and against his personal safety interests. And the prosecution had a full and fair opportunity to impeach the statements with Proby's prior cross-examination on the same subject.

Accordingly, Proby's statements incriminating Blackie were admissible as a matter of federal due process under the rationale of cases such as *Chambers v. Mississippi*, *Green v. Georgia*, and their progeny.

Moreover, the trial court in this case erred in separately ruling that evidence of assaultive conduct by Edwards or "Blackie" would not be admitted. Having denied Vines' motion to admit third-party culpability evidence, the trial court considered the offer of proof of assaultive conduct standing alone. CT 611.

Under *People v. Lewis* (2001) 26 Cal.4th 334, 373, a third party's prior acts of violence are, *without more*, inadmissible to show third party culpability. In *Lewis*, this Court considered a case in which the defendant had

> "fail[ed] to establish how, apart from suggesting [third-party] Pridgon's 'criminal disposition,' Pridgon's prior acts of violence connected him to the present crimes. [Citation.] Thus, this evidence was inadmissible."

People v. Lewis, supra, 26 Cal.4th at p. 373

But here, unlike the scenario in *Lewis*, third party Anthony Edwards' prior acts of violence did not stand alone as an attempt to demonstrate criminal propensity. Rather, these acts and Edwards' felony convictions, taken in the context of the entire fifteen-point offer of proof, are evidence that could legitimately reinforce the already-strong inference that Edwards, not Vines, was the person who killed Ronald Lee. *Lewis* does not apply, and evidence of Edwards' prior acts of violence was admissible as part of Vines' showing of third-party culpability under *People v. Hall.*

D. Proby's Statement Incriminating Vines was Inadmissible.

The trial court ruled that if Vines introduced Proby's statement inculpating Blackie, the remainder of the statement inculpating Vines must also come in under Evidence Code section 356. CT 611, RT 2947-2948.

The ruling making admissible Proby's statements inculpating Vines was erroneous; it violated Evidence Code section 356, Evidence Code section 352, and the Confrontation Clause.

Evidence Code section 356 provides:

> "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole *on the same subject*

> may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is *necessary to make it understood* may also be given in evidence." (Emphasis added.)

Here, the subject on which Vines sought to introduce portions of Proby's statement was the participation of Blackie in the Florin Road offenses. This is plainly not the "same subject" as the participation of Sean Vines in the Florin Road offenses. And it is not necessary to an understanding of Proby's statement incriminating Blackie to also understand that Proby specifically incriminated Vines as well.

Moreover, even if the trial court had been correct in its ruling under section 356, the trial court could not properly admit those portions of Proby's statement incriminating Vines in the Florin Road offenses.

The admission of evidence under section 356 is also subject to Evidence Code section 352. *People v. Pride* (1992) 3 Cal.4th 195, 235. Issues of relevancy and factors under section 352, granting trial courts discretion to exclude evidence if its probative value is substantially outweighed by its prejudicial effect, are among the mix of concerns that the trial court properly considers in its discretion in determining whether to admit evidence offered under section 356. *Benson v. Honda Motor Co.* (1994) 26 Cal.App.4th 1337, 1349-1350. Even assuming *arguendo* that the parts of Proby's statement concerning Vines would have been otherwise admissible under section 356, they should have been excluded under section 352 in the exercise of the court's discretion. This is because it would be an abuse of discretion to admit out-of-court statements incriminating a criminal defendant in derogation of the basic right of cross-examination.

And in any event, whether or not the admission of the statement would have violated state law, the admission of Proby's statement incriminating Vines would have independently violated Vines' right to confront the witnesses against him, as guaranteed by the Sixth Amendment. See RT 2110, 2684.

It has long been clear under the Sixth Amendment as interpreted by the Supreme Court that the admission of a confession of a nontestifying accomplice such as Proby is improper. As the Supreme Court has stated:

> "We held in *Douglas v. Alabama*, 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074 (1965), that ***the admission of a nontestifying accomplice's confession, which shifted responsibility and implicated the defendant as the triggerman, 'plainly denied [the defendant] the right of cross-examination secured by the Confrontation Clause.'*** *Id.* at 419."

Lilly v. Virginia (1999) 527 U.S. 116, 131, 119 S.Ct. 1887, 144 L.Ed.2d 117 (emphasis supplied); see *Lee v. Illinois* (1986) 476 U.S. 530, 539-547, 106

S.Ct. 2056, 90 L.Ed.2d 514.[29]

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[29] Indeed, the situation in *Douglas v. Alabama* (1965) 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934, is similar to the one in this case. In *Douglas*, the petitioner and a codefendant, one Loyd, were both charged with assault with intent to murder, and tried separately. Loyd was tried first, and convicted. At petitioner's trial, the prosecutor called Loyd, who invoked the Fifth Amendment and refused to testify.

> "Under the guise of cross-examination to refresh Loyd's recollection, the Solicitor purported to read from the document, pausing after every few sentences to ask Loyd, in the presence of the jury, 'Did you make that statement?' Each time, Loyd asserted the privilege and refused to answer, but the Solicitor continued this form of questioning until the entire document had been read. The Solicitor then called three law enforcement officers who identified the document as embodying a confession made and signed by Loyd. . . .
>
> ". . . The statements from the document as read by the Solicitor recited in considerable detail the circumstances leading to and surrounding the alleged crime; of crucial importance, they named the petitioner as the person who fired the shotgun blast which wounded the victim. The jury found petitioner guilty."

Douglas v. Alabama, *supra*, 380 U.S. at pp. 416-417. The Supreme Court reversed, concluding that

> "petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause."

Id. at p. 418. Here, of course, Vines and Proby were both charged with robbery-murder. Proby confessed, and incriminated Vines. They were tried separately. Proby was tried first, and convicted. At Vines' trial, the prosecutor called Proby, and outside the jury's presence Proby invoked the Fifth Amendment and refused to testify. RT 2089-2094.

Because Vines was unable to cross-examine Proby, had Proby's statements regarding Vines' involvement in the Florin Road crimes been admitted in any form, this would have "plainly" resulted in a denial of

(continued...)

It was therefore clear under prior Confrontation Clause doctrine at the time of trial, as later summarized in *Lilly v. Virginia*, that the admission of a nontestifying accomplice's confession that shifted responsibility to the defendant on trial was constitutionally impermissible. In *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the Supreme Court adopted a new approach that leads inevitably to the same conclusion.

In *Crawford*, the defendant was arrested for the assault and attempted murder of a man who had allegedly tried to rape his wife. While in police custody, and while she was herself a potential suspect in the case, the defendant's wife Sylvia Crawford gave a tape-recorded statement to police that arguably undermined her husband's defense of self-defense. *Crawford v. Washington, supra*, 541 U.S. at p. ___ , 158 L.Ed.2d at pp. 184-185.

Crawford invoked a state-law marital testimonial privilege to prevent his wife from testifying at trial. The trial court determined the tape-recorded statements could be played for the jury as prosecution evidence without violating the Confrontation Clause, despite the defendant's inability to cross-examine the witness, because under the Supreme Court's previous decision in *Ohio v. Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, the wife's statements had "adequate 'indicia of reliability.'" *Crawford v. Washington, supra*, 541 U.S. at p. ___ ,158 L.Ed.2d at pp. 185-186.

Crawford was convicted of assault, and his conviction was affirmed by the state supreme court. The United States Supreme Court reversed in an opinion joined by seven Justices, overruling *Ohio v. Roberts* with respect to

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(...continued)
Vines' rights as secured by the Confrontation Clause. *Douglas v. Alabama, supra*, 380 U.S. at pp. 416-417; *Lilly v. Virginia, supra*, 527 U.S. 116, 131.

testimonial hearsay. The Court declared that

> "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."

Crawford v. Washington, supra, 541 U.S. at p. ___,158 L.Ed.2d at p. 192. The high court explained:

> "The text of the Confrontation Clause reflects this focus. It applies to 'witnesses' against the accused -- in other words, those who 'bear testimony.' [Citation.] 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' [Citation.] An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement."

Crawford v. Washington, supra, 541 U.S. at p. ___,158 L.Ed.2d at pp. 192-193.

> "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' . . . [The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."

Crawford v. Washington, supra, 541 U.S. at p. ___,158 L.Ed.2d at pp. 192-193. Thus, the high court held:

> "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination [by the defendant]."

Crawford v. Washington, supra, 541 U.S. at p. ___,158 L.Ed.2d at pp. 192-

193. The Supreme Court declined to comprehensively define the term "testimonial." 541 U.S. at p. ___, 158 L.Ed.2d at p. 203. The Court did, however, hold that its rule

> "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; *and to police interrogations*. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed. *Ibid.*" (emphasis added.)

The rule of *Crawford v. Washington* applies to this case, because this case was pending on appeal when *Crawford* was decided in March 2004.

> "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."

Griffith v. Kentucky (1987) 479 U.S. 314, 322, 107 S.Ct. 708, 93 L.Ed.2d 649; accord, *Johnson v. United States* (1997) 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718.

And the analysis of *Crawford* is applicable here. Just as in Crawford's case, here there was another suspect apart from the defendant who gave a statement adverse to the defendant as a result of police interrogation. And just as in Crawford's case, the second suspect or accomplice was unavailable to testify at trial; Crawford's wife was unavailable because Crawford invoked a marital privilege, and Proby was unavailable because he invoked the Fifth Amendment self-incrimination privilege. RT 2089-2095; see *People v. Zapien, supra,* 4 Cal.4th at p. 975 fn. 6; *People v. Malone, supra,* 47 Cal.3d at p. 23. Proby did not testify at the preliminary hearing, and unlike the prosecution, Vines had no opportunity, of course, to cross-examine Proby at Proby's own trial. Under the rule of *Crawford* (as well as under the prior rule

of *Douglas v. Alabama*, *supra*), Proby's statement incriminating Vines in the Florin Road crimes was inadmissible under the Confrontation Clause.

E. The Trial Court Impermissibly Compelled Vines to Choose Between His Fundamental Right to Present a Defense of Third Party Culpability, and His Fundamental Right to Confront the Witnesses Against Him.

As shown above, Vines made an offer of proof that, taken together with additional information made known to the trial court, met and exceeded this Court's requirements for admission of third party culpability evidence. Of course, without codefendant Proby's statement implicating the third party, Blackie aka Anthony Edwards, Vines' defense of third party culpability was unpersuasive, because its central component was missing.

The trial court did not rule that Proby's statement about Blackie's participation was inadmissible; instead, the trial court expressly required Vines to make an election. If Vines elected to use Proby's statement implicating Blackie, then the court would also allow the prosecution to introduce Proby's statements that Vines was a participant in the robbery and the one who shot the victim. If Vines choose not to put on the Blackie evidence, then the trial court

would deny Vines' motion to introduce evidence of third party culpability.[30]

This was an impermissible compelled election that deprived Vines of his right to present a defense. The trial court subjected Vines to an unfair and unconstitutional Hobson's choice: either forego the right to present the third-party culpability defense based on Blackie's participation, by not using the only evidence that puts Blackie at the scene of the crime, or forego his Confrontation Clause rights to cross-examine Proby on his statement implicating Vines, because Proby has exercised his Fifth Amendment right not to testify. RT 2089-2094.

The Supreme Court recognized that criminal defendants cannot be forced to surrender basic constitutional rights in order to exercise other basic constitutional rights in *Simmons v. United States* (1968) 390 U.S. 377, 88

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[30] "THE COURT: . . . . I have made that ruling. So, what I am saying is if, one, are you going to use the statement or not use the statement? *If you elect to use the statement*, then, of course, that bears on the question of third party culpability.

"*If you do not elect to use the statement and the People do not offer the statement, then flowing out of that statement is nothing whereby there is any basis for third party culpability*. And what you told me yesterday is that you were not going to use the statement, that you were going to rely on some other indicia or third party culpability, to wit, the testimony or the statement of -- I forget the lady's name.
"MR. BIGELOW: Vera Penilton.
"THE COURT: Vera Penilton whereby she makes reference of Proby and Blackie, one, she knows them both, one's related to her, and they drive around and hang out together.
"MR. BIGELOW: That's correct.
"THE COURT: And that's all I get out of that.
"MR. BIGELOW: That's also correct.
"THE COURT: Is that your offer as to third party culpability?
"MR. BIGELOW: Yes."
RT 2992-2994 (August 6, 1997) (emphasis added).

S.Ct. 967, 19 L.Ed.2d 1247. In *Simmons*, the Supreme Court held "that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.* at p. 394. To establish standing to bring a suppression motion, defendant testified he owned a suitcase. Money wrappers from a bank robbery were found in the suitcase and defendant's testimony about ownership of the suitcase was used to convict him of robbery. The Court found it was

> "intolerable that one constitutional right should have to be surrendered in order to assert another."

Simmons v. United States, supra, 390 U.S. at p. 394. *Simmons* remains controlling law:

> "Justice Harlan's [majority] opinion in *Simmons* holds that it would be constitutionally unacceptable to require a criminal defendant to choose between two *constitutional* rights--there, the right to remain silent (Fifth Amendment) and the right to be free from unreasonable searches (Fourth Amendment)."

Bittaker v. Woodford (9th Cir. 2003) 331 F.3d 715, 723, fn. 7 (orig. emphasis); accord, *People v. Clark* (1993) 5 Cal.4th 950, 1007 (distinguishing *Simmons* because "we are not faced in this case with an intolerable conflict between constitutional rights."); see *United States v. Cretacci* (9th Cir. 1995) 62 F.3d 307, 311.

The Supreme Court further explained the applicable doctrine in *McGautha v. California* (1971) 402 U.S. 183, 213, 91 S.Ct. 1454, 28 L.Ed.2d 711:

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. *McMann v. Richardson*, 397 U.S., at 769. Although a defendant may have a right, even of

> constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. *The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.*" (Emphasis added.)

Thus, a criminal defendant may be required to choose between waiver and another course of action "as long as the choice presented to him is not constitutionally offensive." *United States v. Moya-Gomez* (7th Cir. 1988) 860 F.2d 706, 739.

> " 'It is not inconsistent with the concept of a voluntary waiver to require a choice between waiver and another option, *provided that other option is itself consistent with the protection of [the defendant's] constitutional rights.*' "

United States v. Moya-Gomez, *supra*, 860 F.2d at p. 739, quoting W. LaFave & J. Israel, *Criminal Procedure* § 11.4(d) at p. 495 (1984) (emphasis added).

In this case, the compelled election the trial court required of Vines impaired "to an appreciable extent" the policies behind the constitutional rights involved, and presented to Vines a choice that was constitutionally offensive because it was inconsistent with the protection of his constitutional rights.

The fundamental policy behind the Confrontation Clause was set forth by the Supreme Court in *Mattox v. United States* (1895) 156 U.S. 237, 242-243, 15 S.Ct. 337, 39 L.Ed.409:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

The Supreme Court recently reaffirmed this principle in *Crawford v. Washington, supra*, 541 U.S. at p. ___,158 L.Ed.2d at p. 192. But the Court has for decades held that

> "it is this literal right to 'confront' the witness at the time of the trial that forms the core of the values furthered by the Confrontation Clause."

California v. Green (1970) 399 U.S. 149, 157, 90 S.Ct. 1930, 26 L.Ed.2d 489.

Plainly, the core policies behind the Confrontation Clause were directly implicated in this case, and impaired by the trial court's ruling that Proby's statement implicating Vines would come into evidence, despite Proby's unavailability for cross-examination, if Proby's statement inculpating Blackie was introduced by Vines.

The policies behind the Due Process right to present a defense were no less directly implicated. In *Chambers v. Mississippi, supra*, the high court explained the fundamental nature of this right:

> "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. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black, writing for the Court in *In re Oliver*, 333 U.S. 257, 273 (1948), identified these rights as among the minimum essentials of a fair trial:
>
> " 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.'"

Chambers v. Mississippi, supra, 410 U.S. at p. 294.

As both *Chambers* and *Lilly v. Virginia* make clear, this due process right to present a defense easily encompasses "the right to introduce into

evidence third parties' declarations against penal interest" even though the declarations do not qualify as hearsay exceptions in a technical sense, when the declarations do have adequate indicia of reliability and are critical to the defense. *Lilly v. Virginia*, *supra*, 527 U.S. at p. 130 (summarizing *Chambers*).

The fundamental policy behind the due process right to present a defense was directly impaired by the trial court's ruling in this case – in essence, the trial court deprived Vines of the opportunity to present his defense of third party culpability by requiring him, if he choose to put on the defense, to forfeit his right of confrontation with respect to Proby's statements implicating him.

The compelled election the trial court forced Vines to make impaired, far more than to "an appreciable extent," the fundamental constitutional policies of confrontation and due process guaranteed to all criminal defendants. Vines had a due process right to present his defense of third party culpability in this case, and he had a Sixth Amendment right to confront witnesses against him. The compelled election was impermissible.

F. The Trial Court's Denial of Vines' Right to Present His Third-Party Culpability Defense Prejudiced Him at Both the Guilt Phase and the Penalty Phase.

Vines made his forced choice between constitutional rights. If he had elected to present Proby's statement incriminating Blackie, he would have suffered a violation of his Confrontation Clause rights as a consequence of his inability to cross-examine Proby about the statements Proby made incriminating Vines. But Vines elected not to suffer the Confrontation Clause violation -- and as a direct result, he was denied his due process right to

present a third-party culpability defense.

This was federal constitutional error of the trial type, rather than structural error, and therefore the question is whether the prosecution can meet its burden to show, beyond a reasonable doubt, that the exclusion of the evidence could not have affected the verdict.[31] In other words, the heightened

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[31] In *People v. Cudjo* (1993) 6 Cal.4th 585, 611, this Court indicated that when a trial court abuses its discretion under Evidence Code section 352 to exclude defense evidence of third-party culpability, the applicable standard of prejudice is that for state law error, as set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, i.e., whether it is reasonably probable a more favorable result would have been achieved absent the error.

Cudjo, however, does not control the standard of prejudice in this case, because the error complained of is not that the trial court abused its discretion under section 352 to exclude third-party culpability evidence, as was the error at issue in *Cudjo*. Instead, the error at issue in this case is the trial court's decision that Vines would have to suffer the admission of directly incriminating statements by a non-testifying codefendant if he elected to proceed with his third-party culpability defense. This was not an exercise of discretion under section 352, and, in any event, the trial court could have no discretion to condition the right to present a defense on the waiver of Confrontation Clause rights, or to compel an election between basic trial rights.

Cudjo is also inapplicable here for another reason: this case fits within the rule of *Chambers v. Mississippi*. See *People v. Hawthorne* (1992) 4 Cal.4th 43, 56 (interpreting *Chambers* as holding, in the particular circumstances of the case, that the combined effect of state rules of evidence violated defendant's right to present a defense by "exclud[ing] potentially exculpatory evidence crucial to the defense".)

Finally, in its determination that the applicability of the federal standard depends on whether or not "general rules of evidence or procedure" are at issue, *Cudjo* is just plain wrong. When a case is within the rule of *Chambers* -- that is, when a defendant seeks to introduce otherwise inadmissible hearsay evidence that is critical to his defense and bears considerable assurances of reliability – *Chapman* determines the standard of prejudice, even when the error could also be characterized as

(continued...)

standard of *Chapman v. California* (1967) 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 applies. Under that controlling precedent, it is not the defendant's burden to show the error caused harm. On the contrary, it is the prosecution's heavy burden to demonstrate the *absence* of any harmful effect flowing from the error. The prosecution must

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(...continued)
one of mere state evidentiary law. It is immaterial whether the future viability of a "general rule of evidence or procedure" is at stake. As Justice Kennard observed in her dissent in *Cudjo*:

> "What the state and federal Constitutions secure for the accused is the right to present a defense, not merely the right to be free of unduly restrictive state laws of evidence and procedure."

People v. Cudjo, supra, 6 Cal.4th at p. 611 (dis.opn. of Kennard, J.). If this Court finds that *Cudjo* is implicated here and is not distinguishable, the Court should overrule *Cudjo* in pertinent part, and bring California law into conformance with Supreme Court caselaw. As the Supreme Court has made clear, in a case decided after *Cudjo*:

> "[T]he Due Process Clause affords criminal defendants the right to introduce into evidence third parties' declarations against penal interest -- their confessions -- when the circumstances surrounding the statements 'provide considerable assurance of their reliability.'"

Lilly v. Virginia, supra, 527 U.S. at p.130. This constitutional right exists, and has controlling force, independent of the nature of the particular state rule used to deny it.

In any event, even if *Cudjo* does somehow control the standard of prejudice, the same factors analyzed in connection with the federal constitutional *Chapman* standard also lead to the conclusion that it is more than reasonably probable that, absent the trial court's rulings regarding the admissibility of third-party culpability evidence, Vines would have obtained a more favorable result. *People v. Watson, supra,* 46 Cal.2d 818, 836.

> "prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained."

Chapman v. California, supra, 386 U.S. at p. 24; see *Neder v. United States* (1999) 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (erroneous admission of evidence in violation of the Fifth Amendment and erroneous exclusion of evidence in violation of the Sixth Amendment are both subject to harmless-error analysis under *Chapman*).

The trial court's ruling compelling Vines to make an unconstitutional election prejudiced him at both the guilt and penalty phases of the trial.

1. Guilt Phase Prejudice.

An assessment of the strength of the evidence against the defendant is a critical component of the harmless error inquiry. Here, an examination of the evidence against Vines on the Florin Road charges show it was far from compelling.

The evidence bearing on Vines' liability for the Florin Road charges falls into three categories: (1) the testimony of Vera Penilton; (2) the testimony of the eyewitnesses, Jeffrey Hickey and Pravinesh Singh; and (3) the remaining circumstantial evidence arguably implicating Vines.

(1) Vera Penilton.

The key to the prosecution's case against Vines on the Florin Road counts was the testimony of Vera Penilton, codefendant Deon Proby's girlfriend.

Penilton said that she gave a .25 caliber silver gun to Proby and Proby gave it to Vines. RT 3539, 3591-3592. She knew they intended to pull a robbery. RT 3552. It was undisputed that a .25 cal. bullet was used in the shooting.

Penilton said that she saw Proby and Vines together in the bedroom of

her home late on the night of the Florin Road robbery. RT 3554-3555. Penilton said that she went to the closed door to hear what they were talking about, and "they was talking about what they had did . . . they had robbed another McDonald's." RT 3557, 3562. Through the door, she heard Vines say "he had killed his friend."

Penilton testified that when she went into the room, Vines told her that "he had killed his friend because the boy had said his name" (RT 3564), and "because he would tell on him if he didn't" (RT 3567). She stated Vines told her he shot him in the back of the head. "He was sad, and a couple of tears was coming down his eyes." RT 3564.

This evidence, if believed, was legally sufficient to convict Vines of the robbery-murder.

But there were substantial reasons for the triers of fact to conclude that Penilton was lying.

She was biased because of her relationship with Proby.

Penilton was impeached with her priors for theft, some committed with Proby. RT 3620-3622.

There was strong evidence indicating Penilton's criminal complicity - she knew about the robbery in advance, she provided the murder weapon, and all the recovered property and gift certificates were found in her bedroom.

Penilton maintained that it was a "complete surprise" to her when the officers found the cell phone, the box and the McDonald's gift certificates in her bedroom. RT 3681.

Penilton testified under a grant of immunity. RT 3514-3515.

Penilton admitted she lied to police in the first interview. RT 3577, 3623.

She admitted she tried to protect Proby, by making sure that the detectives knew he didn't have a gun since he was on parole; she told them it was not possible he could have had one. RT 3673.

She later lied to a defense investigator about her thefts. RT 4223.

And she admitted she didn't like Vines. RT 3632.

Penilton's story was factually implausible. When Vines supposedly told Proby he had shot someone, Penilton stated Proby sounded really surprised. RT 3653. But Proby could not be surprised, because he was present in the store when the shooting occurred, according to eyewitness Hickey.

Moreover, ***the time-lines of Penilton do not match those of other witnesses***. According to store manager Jeffrey Hickey, the Florin Road McDonald's was robbed about 10:40-11:00 p.m. on September 28, 1994. RT 3858-3859. The surveillance tape of the incident shows a robbery ending no earlier than 10:53 p.m. RT 3904; see Exhibit 15-A (tape apparently showing robber at 10:53 p.m.).

Ulanda Johnson saw Proby drop off Vines at her apartment, where Vines lived with her, that same night, around 11:30 p.m. RT 3762-3763. She knew it was at eleven-thirty that Vines returned home, because she had heard a news program finish, and she actually looked at her clock. RT 3789 ("I was on the phone when they pulled up. And I said that boy's car sounds like a train, and I said at eleven-thirty at night . . . .") Ulanda Johnson testified that she heard Vines say good-night to Proby, and that Vines then came in the house. RT 3763, 3789-3790.

Yet Vera Penilton testified that after the robbery, Proby and Vines came to her residence, and after they had been there for *probably as much as two hours*, she heard Vines state that he had killed his friend. RT 3570.

The store was robbed shortly before 11:00 p.m. RT 3904. *Penilton placed Vines in her apartment, for the devastating admission Penilton claimed Vines made, an hour-and-one half* ***after*** *the time at which Johnson testified Proby dropped Vines off at her residence* – plainly, a physical impossibility.[32]

Thus, the testimony of Vera Penilton was tainted with bias, and conflicted with the testimony of unbiased witnesses. Penilton was an admitted liar and thief. The jury had ample reasons from which it could have concluded that her incrimination of Vines was sheer, corrupt invention.

(2) Florin Road Eyewitness Hickey and Singh.

Two eyewitnesses testified regarding the Florin Road crimes – defense witness Pravinesh "Bubba" Singh, and prosecution witness Jeffrey Hickey, both McDonald's employees.

Singh saw one robber that night. RT 4102, 4132. He described the gunman as about five-eight, wearing all black, with a green ski mask. RT

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[32] Assuming only for the purpose of analysis – and directly contrary to Ulanda Johnson's testimony that Vines came home at 11:30 p.m. -- that the two defendants had driven from the Florin Road McDonald's straight to Penilton's apartment, that too would have taken time. The prosecution introduced evidence that the distance from the Florin Road McDonald's to Vera Penilton's residence was about 14 miles, and by the most common direct route took 18 minutes 27 seconds to drive. Two other routes took slightly longer. RT 3837-3839.

Recognizing that the robbery was completed at 10:53, as the time-stamp of the surveillance camera reflects (RT 3904), and adding this travel time to the two hours that Vera Penilton testified that Vines and Proby spent at her apartment prior to Vines' alleged admission, would mean that Vera Penilton heard Vines' alleged admission that he had shot Ron Lee at no earlier than 1:11 a.m. – more than an hour-and-a-half ***after*** Vines was dropped off, at 11:30 p.m. by Proby (when he "came home," as Ulanda Johnson described it (RT 3762)).

4102, 4141. He had previously said the robber was 5'10" or 5'11". As noted above, Vines is 6'3". The robber Singh saw had a small "silver looking" hand gun. (RT 4103, 4168).

Singh knew Vines, having worked with him at the Florin Road McDonald's (RT 4099, 4130). But Singh testified unequivocally, as he had at Proby's trial, that the robber with the silver gun was not Sean Vines. RT 4112.

Hickey, the manager of the Florin Road McDonald's, saw two robbers. Hickey positively identified the first robber as Deon Proby, though he had never seen Proby before. RT 3864.

The second robber Hickey described as about six-two, medium-to-stocky build, also black, and a little older than the first robber. RT 3871-3872, 3916-3917.[33] Hickey knew Vines -- in fact, Hickey had trained Vines when both worked at the Florin Road McDonald's. RT 3852-3853. And although he was a prosecution witness, Hickey would not say more than that Vines' height, build and skin color was "consistent with" the second robber's height, build and skin color.

In fact, prosecution witness Hickey told investigators that he did not believe that an employee of the Florin Road McDonald's was responsible for the robber, because the robbers did not know how to get money from the cash registers, and took Ron Lee – not Hickey – back to open the safe, when an employee would have known it was Hickey who had access to the safe. RT 3925, 3944.

Thus, neither of the eyewitnesses to the Florin Road crimes who

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[33] Interestingly, this description matches the description of Vera Penilton's cousin Anthony Edwards given in law enforcement records. CT 773.

testified at trial could identify Vines as one of the robbers, though both of them knew and had worked with Vines.

(3) Remaining Circumstantial Evidence.

There was evidence that Vines had possessed a gun around the time of the Florin Road crimes. Vines' roommate/girlfriend Ulanda Johnson testified that the day after the Florin Road robbery, she found a gun in Vines' backpack. The gun was all black, with no silver on it. Rt 3783. And around the time of the Florin Road crimes, Vines went with Johnson's friend Deborah Allen to pick up some of Allen's possessions in the presence of her abusive former boyfriend. Allen saw Vines in possession of a small silver gun at that time. Rt 3733.

Vines' possession of a gun around the time of the Florin Road offenses was, however, far from conclusive evidence of his guilt of those crimes. The prosecution theory was that the homicide was committed with a small silver handgun. But the handgun that Ulanda Johnson found in Vines' backpack the day after the crimes was not silver – it was all black. RT 3783. And Vines had a non-criminal purpose in possessing a gun when he accompanied Deborah Allen to retrieve her things from her physically abusive husband, to protect this abused woman from further harm. Notably, it was uncontested that Vera Penilton stole a .25 caliber handgun from her sister Monica, and gave it to her boyfriend, Deon Proby. RT 3539, 3591-3592. And witness Sean Gilbert recalled Proby showing off that gun while it was Proby's sole possession. RT 3285-3286, 3296-3297.

There was also evidence that the day after the Florin Road robbery, Vines deposited $212 in cash in his credit union account. But a $212 cash deposit is not unusual, particularly in the era of multiple check-cashing shops

in urban neighborhoods. And there was nothing suspicious about Vines possessing $212, in view of the fact that he had recently worked two jobs (RT 3736-3737 (Vines had worked at both McDonald's and Denny's)), and that his McDonald's paycheck was over $200. Nor was there anything particularly criminal in the fact that, as established by Ulanda Johnson, Vines wanted a car – in that regard, he was like virtually every other Californian of modern times who does not have a car: he wanted one.

Ulanda Johnson saw Vines and Proby leave her apartment together at about 7:45 p.m. on the night of the Florin Road crimes, and heard them when Vines came back to her apartment that same night, around 11:30 p.m. RT 3762-3763, 3789. It was undisputed that Vines and Proby were friends and hung out together. But going somewhere with someone who commits a crime is not the same thing as committing a crime.

None of the money or gift certificates taken in the Florin Road robbery were found on Vines' person, or in a search of the residence where he lived with Ulanda Johnson. All of the stolen Florin Road money and gift certificates that were recovered were recovered from the shared bedroom of Vera Penilton and Deon Proby.

The silver gun was never found. No fingerprints were found that tied Vines to the Florin Road crimes.

Thus, the evidence against Vines on the Florin Road counts was indisputably sufficient -- but the evidence at trial was not particularly one-sided, and the evidentiary picture was far from compellingly clear.

The testimony of the two eyewitnesses, Singh and Hickey, supported the conclusion that Vines was ***not*** one of the robbers. Vera Penilton lied to police, lied to a defense investigator, was impeached with her prior thefts, was

codefendant Proby's girlfriend, and told inconsistent stories. She testified under a grant of immunity because of her criminal liability here. The jury apparently found Penilton's testimony incriminating Vines credible, but there were substantial reasons why, given a shift in the evidentiary landscape occasioned by the admission of third-party culpability evidence, they might not have. And the remaining circumstantial evidence, while on balance unhelpful to Vines, was by itself not likely to be taken by a jury as convincing proof beyond a reasonable doubt of felony-murder.

As it went to the jury, this case was a closely-balanced one, in which the jury had to weigh the testimony of a witness who was biased, together with some corroborating evidence, against the unbiased eyewitness testimony of two people who knew the defendant well, and yet failed to identify him.

Assessing the strength of the evidence presented, however, is just the first stage of the harmless error inquiry. This case, like Confrontation Clause cases arising from the denial of cross-examination, involves assessing the effect of evidence that was not admitted. In *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674, the Supreme Court held that the unconstitutional exclusion of evidence was subject to *Chapman* harmless-error analysis, and stated:

> "The correct inquiry is whether, *assuming that the damaging potential of the cross-examination were fully realized*, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt."

Delaware v. Van Arsdall, supra, 475 U.S. at p. 684 (emphasis added).

Here, by analogy, the correct inquiry is, assuming the third-party culpability evidence inculpating Vera Penilton's cousin, Anthony Edwards, had been admitted and the potential of the third-party culpability defense had

been "fully realized," this Court can nonetheless say that the error was harmless beyond a reasonable doubt.

As noted above in connection with severance, there was no dispute that the Florin Road crimes were committed – the issue at Vines' trial was identity. And, whenever identity is the central issue at a criminal trial,

> "jurors [will] naturally ask themselves, 'If the defendant didn't [commit the crime], who did?' Introduction of the [third-party culpability] evidence would have answered this question."

United States v. Crosby (9th Cir. 1996) 75 F.3d 1343, 1347. In that context, evidence "supporting an alternative theory of how the crime might have been committed" is likely to be "crucial to the defense." *Id.*

Here, the probative value of the excluded evidence on the central issue was high. The third party culpability theory offered by the defense answered the question, "If Vines did not do it, who did?" It answered the question by suggesting that there was at least a reasonable doubt that the responsible party

was, in fact, not Vines, but Anthony Edwards, also known as Black Black.[34]

Edwards was Vera Penilton's cousin. He was associated with the Bloods criminal gang. He had been released from prison just a few months before the Florin Road crimes, and lived in the Sacramento area.

Anthony Edwards was friends with codefendant Proby. And Penilton, his cousin, told an investigator that Edwards and Proby went places in Proby's car together during the month of the robbery.

Proby made a statement to detectives that someone he knew only as Blackie participated in the robbery, and that Vera Penilton would know Blackie's true identity. The inference is clear that Blackie and Black Black are

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[34] Despite the trial court's ruling, the defense was able to introduce some limited evidence relating to third-party culpability. The defense was able to establish that Anthony Edwards was a cousin of Vera Penilton, that he was also known as Black Black, and that he was a friend of Proby. RT 3629-3630. Penilton described her cousin in vague terms, RT 3630, and denied that she had seen her cousin go places with Proby. She testified that when Proby and Vines left to do the robbery, she didn't see Blackie with them. RT 3651-3652.

And Ulanda Johnson testified that after Vines had been dropped off by Proby on the night of the Florin Road robbery, Vines had entered her house, and then she had heard *two* car doors slam. RT 3791.

But these facts, without more, were just pieces of a mosaic whose central image was missing; they were insufficient for Vines to present his third-party culpability defense. Without the admission of Proby's statement about Blackie, there was no evidentiary link between Anthony Edwards and the third person who slammed the car door, who was a participant in the Florin Road robbery, and who was the robber who killed the victim.

Moreover, it is ironic and unfair that, although Vines was prohibited from mounting a coherent third-party culpability defense directed at showing that the Florin Road crimes were committed by Vera Penilton's cousin Anthony Edwards, the prosecution was allowed to introduce evidence tending to show that Edwards was not mistaken for Vines by the employees of the Watt Avenue McDonald's. RT 4241-4242.

two variations on a single nickname, and one and the same person. Blackie provided a shotgun and drove the getaway car, according to Proby.

But there was evidence indicating that Proby was not telling the whole truth. Proby described Blackie as a black male, 5'9" to 5'10" tall, thin and dark complected. Eyewitness Pravinesh Singh described the person with the silver gun as a black male, 5'8" to 5'9" tall, 150 pounds, small build, and dark. And the offer of proof also included the description of the shooter by eyewitness Jerome Williams as a black male, 5'7" tall, thin, 140-150 pounds, and real dark.

These eyewitness descriptions far better match Proby's description of Blackie than they do the appearance of Vines, who was 6'3" tall.

Eyewitness Jeffrey Hickey saw two robbers; the first he identified as Proby. The second robber Hickey described as medium to stocky build, taller than the first robber, about 6'2", also black, and a little older than the first. RT 3871-3872, 3916-3917. As noted above, Hickey knew Vines, and had trained him; yet Hickey never positively identified the second robber as Vines, and said he thought a McDonald's employee was not responsible for the crime.

Law enforcement descriptions of Anthony Edwards state he was black, 6'1" tall, about 210 pounds, dark-complected, and in his late twenties at the time. CT 773.

Thus, Hickey's description of the second robber better matches law enforcement descriptions of Edwards than it does Vines, who was taller, skinnier, and younger than the man described by Hickey. And Edwards, aka Black Black or Blackie, was not only placed at the scene of the crime by Proby – he was an associate of the violent criminal gang the Bloods, and had a history of violent conduct.

The jury was deprived of this evidence, which was more than sufficient to raise a reasonable doubt as to Vines' guilt. As shown above, this was a close case. Vera Penilton incriminated Vines, but neither Hickey nor Singh could identify Vines as a robber, and the circumstantial evidence was inconclusive.

Here, the introduction of the third-party culpability evidence would have both weakened the believability of Vera Penilton's statements incriminating Vines, and strengthened the defense argument that Vines was not present.

Vera Penilton would have been shown to have a specific and credible reason to lie about Vines' involvement – to protect her cousin, Anthony Edwards, aka Black Black or Blackie. And given Edwards' association with the Bloods, the jury would have been free to infer she feared gang retaliation if she implicated her cousin in a murder.[35]

In view of the fact that Vera Penilton was the prosecution's star witness, and the only witness to place Vines at the scene of the Florin Road crimes, the jury might well have determined that the prosecution's case against

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[35] This might illuminate the obstructive behavior of a witness who was not called, Chamyra Lands. Defense investigator Mobert testified at trial that on May 17, 1995, she and Vines' prior counsel Gevercer went to meet with Penilton to show her the photo of Edwards, and also to interview Mildred Robinson. Also present at Penilton's home was a male of 16 or 17 who might have been called "T-Bone," and a young lady named Chamyra Lands, who was about 14. Lands did not want Penilton to talk to Mobert about the case; "she was very verbal about it." RT 4268-4270.

Vines was not worthy of belief beyond a reasonable doubt.[36]

The excluded evidence would also have substantially weakened the already weak eyewitness evidence. Proby's description of Blackie would have reinforced Singh's description – a description of a substantially shorter individual than Vines. And the description of the robber by Hickey more closely matched the law enforcement description of Edwards than it did Vines. This was, by itself, more than enough to quicken a reasonable doubt in the mind of a reasonable juror.

Thus, as shown above, the evidence could have tipped the scales sufficiently so that the jury would have found themselves not convinced beyond a reasonable doubt that Vines was present at the Florin Road crimes and participated in them. The jury could have concluded that there was unconvincing proof that he was present or, finding he was with Proby on the night of the crimes, have concluded there was no evidence he actually participated in the robbery-homicide.

2. Firearm Use and Penalty Phase Prejudice.

There is a second way in which the third-party culpability defense stood to benefit Vines in his trial.

Alternatively, the jury might have concluded, far less favorably to

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[36] The jurors deliberated over four days – partial days on Wednesday, September 3, 1997 (CT 838) and Tuesday, Sept. 9, 1997 (CT 848), and full days on both Thursday, September 4, 1997 (CT 840-841), and Monday, September 8, 1997 (CT 844-845) – before they could reach a verdict, strongly suggesting that, from the jury's perspective, the evidence of guilt was not overwhelming, and the case was a close one. See, e.g., *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 637 (deliberations lasting 9 hours over 3 days indicative that guilt is not clear-cut).

Vines, that while Penilton's testimony was untrustworthy, there was enough to place Vines at the Florin Road crime scene, and enough to infer that he participated in the crimes.

But participating in a robbery-homicide is not the same thing as being the shooter. And the jury could well have concluded that, in view of the similarities between the robber described by Singh and the robber described by Proby, and the further similarities between the second robber described by Hickey and the law enforcement description of Anthony Edwards, that Blackie was the shooter with the silver gun, and Vines was not, and was plausibly not even in the store when the shooting occurred.

Plainly, a jury determination that Vines was not the shooter would make no difference in Vines' liability for first-degree murder with a felony-murder special circumstance; non-shooters are guilty too. But the jury's conclusion that Vines was not the robber with the silver handgun, and thus not the shooter, would have two significant consequences. It would mean that Vines was not liable for personal use of a handgun, as the jury found (RT 4593) under Penal Code section 12022.5. And it would make a dispositive difference in penalty. The trial court's ruling compelling Vines to forego the heart of his third-party culpability defense also prejudiced him at the penalty phase.

The prosecution tried this case on the theory that Sean Vines personally shot and killed Ron Lee in "an execution." Indeed, this theme was so central to the prosecutor's theory of the case that these were the prosecutor's first words to the jury in his guilt-phase opening statement:

> "Good morning, members of the jury. ***There has already been one execution in this case***. Here's a photograph of Ronald Joshua Lee on the day that he was murdered."

RT 3040 (emphasis added).

"This was a flat out intentional killing," insisted the prosecutor in closing argument. RT 4544. Vera Penilton, according to the prosecutor, described "what [Vines] said as if it was, we submit, an execution. ... She said he called his name, boom." RT 4456.

At the penalty phase, the prosecutor stressed his view that Vines intentionally shot and killed the victim:

> "And you can imagine what Ronald Lee must have felt. Just as the victims in the first robbery, Ronald Lee saw Sean Vines. He knew Sean Vines. Sean Vines put a gun up to his head, and Sean turned him around and Ron Lee's back was to him, and he was not knowing whether he was going to live or die. And Sean Vines made the choice. He made his decision."

RT 4867.

That was not all:

> "We submit to you when you look at the evidence, that ***he was executed***. There is no accident here. He made a choice. That's what he told Vera Penilton. That's everything that makes sense here. ***He executed him.***'

RT 4874 (emphasis added).

In his argument at the penalty phase, the prosecutor focused on the theme that Vines had committed an intentional, execution-style killing as a major factor warranting a sentence of death.

> "Ron Lee had a beautiful face, beautiful eyes. [¶] He looked at him, and he turned him around, and he blew him away. And we submit to you, ***if for nothing else, that alone, his due is death***."

RT 4880-4881 (emphasis added).

A jury determination that Vines, though guilty of robbery-murder, was

not the robber wielding the silver handgun, and did not personally shoot and kill victim Ronald Lee, was perfectly plausible if the jury had heard the full extent of the third-party culpability evidence -- and it would have been devastating to the prosecution's case for a death sentence, which relied on the concept that Vines deserved death because he had "executed" the victim.[37]

Moreover, the jury was instructed it could consider lingering doubt of the defendant's guilt in deciding whether to impose a capital sentence. RT 4858. Some or all jurors still harbored genuine doubts about Vines' guilt, or his role as the shooter -- as demonstrated by the fact that the jurors requested and received a read-back of Jeffrey Hickey's eyewitness guilt-phase testimony during their penalty-phase deliberations. CT 952.

Here, had the jury been permitted to hear Vines' third-party culpability evidence, even had it found him guilty of special circumstances murder, it is reasonably likely that, in this close case, the seeds of doubt that Vines was both present and the shooter would have prevented a unanimous death verdict.

Thus, considered under any standard of prejudice, the trial court's ruling impermissibly compelling Vines to choose between his right to present a defense of third-party culpability and his right to confront a witness against him, prejudiced Vines at both the guilt and penalty phases of his trial.

Reversal is required.

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[37] Indeed, in argument on the motion to modify the verdict to life in prison, the prosecutor expressed his view that the "act of an execution" of the victim was "primarily the motivation" for the jurors in returning a verdict of death. RT 4948.

IV. VINES' TRIAL LAWYER WAS CONSTITUTIONALLY INEFFECTIVE BECAUSE HE FAILED TO INTRODUCE CRITICAL EXCULPATORY EVIDENCE THAT FLORIN ROAD EYEWITNESS JEROME WILLIAMS DESCRIBED THE ROBBER AS BEING FIVE FEET SEVEN INCHES TALL -- EIGHT INCHES SHORTER THAN VINES, WHO IS SIX FEET THREE INCHES TALL.

A. Introduction.

The law on ineffective assistance of counsel under the Sixth Amendment is established. This Court recently summarized the federal constitutional standard as it applies to claims on direct appeal in *People v. Burgener* (2003) 29 Cal.4th 833, 880:

> "To demonstrate ineffective assistance of counsel, a defendant must show that counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 104 S.Ct. 2052].) To establish prejudice, a defendant must show a reasonable probability that, but for counsel's failings, the result of the proceeding would have been more favorable to the defendant. (*Id.* at p. 694.) Because we are limited to the record on appeal, we must reject the contention that counsel provided ineffective assistance if the record sheds no light on why counsel acted or failed to act in the manner challenged unless (1) counsel was asked for and failed to provide a satisfactory explanation or (2) there simply could be no satisfactory explanation."

In this case, under cross-examination at the preliminary hearing

conducted by Vines' prior counsel,[38] a police detective testified that Jerome Williams, one of three witnesses who were employees of the Florin Road McDonald's, described the robber with the silver handgun as approximately 5'7" tall. Vines was 6'3".

Williams' statement was admissible. Unaccountably, Vines' trial counsel did not even attempt to introduce it. This failing was clearly deficient under prevailing professional norms. And because this was a close case on guilt, and not even the prosecution's single eyewitness could positively identify Vines as the robber, it is likely that introduction of this important evidence, directly contradicting the prosecution's case, would have led to a different outcome on the Florin Road charges.

B. Eyewitness Jerome Williams' Statement.

At the preliminary hearing, the prosecution called Detective Richard A. Overton of the Sacramento Police Department. On cross-examination by counsel for Vines, Detective Overton admitted that he had interviewed one of the Florin Road McDonald's employees, Jerome Williams, shortly after the robbery. The robbery occurred just before 11:00 p.m on September 28, 1994, and Overton interviewed Williams at about 1:20 a.m. RT 396-397.

Williams told Detective Overton that he had seen one robber. RT 398. The robber commanded Williams at gunpoint to get down on the ground.

Williams described the robber to Detective Overton as:

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[38] Vines was represented through the preliminary hearing by attorneys from the Sacramento County public defender's office. Thereafter, the public defender's office declared a conflict of interest, and the trial court appointed new counsel. CT 5, RT 468-470.

> "[a] male black in his late 20's to early 30's, ***approximately five foot seven, a hundred and forty to one hundred sixty pounds*** wearing a dark green homemade mask with one large eye hole cut out. The mask was possibly made of a sweater and was tied around the back of his head. He was a dark complected male, black male, was wearing a dark colored short-sleeved shirt and dark gray or brown colored cloth gloves and was armed with a small silver semiautomatic handgun, possibly a .22 caliber."

RT 399 (emphasis added).

Detective Overton himself had contact with Vines, and described Vines as six feet, three inches tall. RT 400.

Overton thought Jerome Williams was about 5'9" or 5'10" – so the robber described by Williams was shorter than Williams himself.

While the robber with the silver gun Jerome Williams described was in his late 20's to early 30's, Vines was as much as a decade younger; he was 21 at the time of the crimes.

Williams did not see any other suspects, and did not see Ron Lee being killed, though he heard a pop. RT 401.

C. Vines' Trial Counsel Unprofessionally Failed to Use Jerome Williams' Exculpatory Description of the Robber.

There can be no real doubt that, when trial counsel for a defendant charged with a capital crime has in his possession evidence that someone other than his client committed the crime – in this case, the eyewitness statement of Jerome Williams that the Florin Road robber with the silver handgun was eight inches shorter than Sean Vines – trial counsel must use that evidence to cast doubt on the prosecution's case.

Yet here, Vines' trial counsel failed to attempt to introduce evidence of

Jerome Williams' statement describing the robber as someone much shorter than Vines.

The evidence was admissible as a spontaneous statement within the meaning of Evidence Code section 1240. That section provides

> "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

The statement of Jerome Williams to Detective Overton qualifies under section 1240.

Subsection (a) was satisfied: the statements of Jerome Williams describing the robber were part of his statements describing the event Williams had perceived, the robbery of the McDonald's where he worked.

And subsection (b) was satisfied. Here the statement was made in response to questions approximately two-and-one-half hours after the robbery RT 396-397. But, as this Court has made clear in cases approving the admission of evidence proffered by the prosecution, such statements are nevertheless not barred by section 1240.

> "When the statements in question were made and whether they were delivered directly or in response to a question are important factors to be considered on the issue of spontaneity. [Citations.] But as we emphasized in *People* v. *Washington*, 'Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance*.' (*People v. Poggi* (1988) 45 Cal.3d 306, 319, quoting *People v. Washington* (1969) 71 Cal.2d 1170, 1176, italics added in *Poggi*.)"

People v. Brown (2003) 31 Cal.4th 518, 541 (emphasis by the Court). In *Brown*, this Court held that hearsay statements sought to be introduced by the prosecution under section 1240 were admissible despite the fact that they were made by the declarant two-and-a-half hours after the event:

> "Although Mark Bender's statement was made about two and one-half hours after the crime, that fact is not dispositive of the issue. (See *People v. Raley* (1992) 2 Cal.4th 870, 893-894 [statement made 18 hours after event held spontaneous under Evid. Code, § 1240].) 'The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is ... the mental state of the speaker.' "

People v. Brown, supra, 31 Cal.4th at p. 541 (bracketed material and ellipsis in original).

On cross-examination at the preliminary hearing, Vines' then-counsel asked Detective Overton:

> "Q Now, going back to Jerome Williams, at the time that you interviewed Jerome Williams, *what was his demeanor at that time?*
>
> "A ***Upset, frightened***, sad, concerned."

RT 416 (emphasis added).

Thus, the evidence indicates that, when Jerome Williams made his statement to Detective Overton less than two-and-one-half hours after the crime, just as with the statement at issue in *Brown*, "'it nevertheless appears that [the statement was] made under the stress of excitement and while the reflective powers were still in abeyance.'" *Brown, supra,* 31 Cal.4th at p. 541.

Under the standards of section 1240, as interpreted by this Court, Jerome Williams' statement to Detective Overton describing the robber as 5'7" was not made inadmissible by the hearsay rule; it was relevant evidence that,

if Vines' trial counsel had sought to introduce it, should and likely would have been admitted.

Additionally, even assuming for the purpose of analysis only that Jerome Williams' statement to Detective Overton would not have been admissible for some imaginative reason under section 1240 or other state hearsay law, it would nevertheless have to have been admitted as a matter of federal constitutional due process, under Supreme Court cases such as *Lilly v. Virginia, supra,* 527 U.S. 116, 130 and *Chambers v. Mississippi, supra*, 410 U.S. at p. 300. As discussed in detail above in Argument III, these controlling due process decisions require the admission of otherwise inadmissible hearsay statements offered in defense to a criminal charges when the statements are made under circumstances showing their reliability.

Here, the hearsay statements involved were made under circumstances that provided "considerable assurance of their reliability." *Lilly v. Virginia, supra,* 527 U.S. 116, 130; *Chambers v. Mississippi, supra*, 410 U.S. at p. 300.

Jerome Williams' statements were made shortly after the events, and while he was frightened and upset – thus falling comfortably within the basic rationale of the spontaneous statements exception to the hearsay rule. Jerome Williams' statements were made to a law enforcement officer, who presumably reported them accurately. And perhaps most significantly, the prosecution itself deemed Detective Overton's interview with Jerome Williams sufficiently reliable to use as part of its *own* case to bind defendant over for murder at the preliminary hearing. RT 372-376. Thus, the statement contained considerable assurances of reliability, and the state could have no interest sufficient to overcome the admission of reliable evidence that was central to the defense.

There was and could be no rational tactical purpose in failing to seek the admission of Jerome Williams' statement.

Jerome Williams was unavailable as a witness. At a *Marsden* hearing held after the guilt phase but before the penalty phase, Vines complained that his trial lawyer had not called Jerome Williams to testify in Vines' defense. RT 4617. The record shows that the reason Vines' trial counsel did not present the testimony of Jerome Williams was that trial counsel and his staff were unable to locate him. RT 4619.[39] [40] A necessary step in introducing Jerome Williams' statement under section 1240 was to show that he was, as counsel represented, unavailable as a witness. But counsel failed to substantiate his representation.

In fact, Vines' trial counsel clearly recognized the significance of Jerome Williams' statement to the detective. Counsel included Jerome Williams' description of the robber with the silver gun as part of his written offer of proof for his third-party culpability motion. CT 765.[41]

Detective Richard Overton, however, did testify at trial -- as a witness

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[39] See Argument XV, *infra*, discussing the *Marsden* motion.

[40] Trial counsel admitted:

> "Jerome Williams we looked for, tried to find, tried to subpoena, we were unable to do so." RT 4619.

Under Evidence Code section 240, subdivision (a)(5), a witness is unavailable when he is absent from the hearing and the proponent has exercised reasonable diligence to procure his attendance. There is no question but that Jerome Williams was absent from the hearing.

[41] Trial counsel also relied in his briefing on *Chambers v. Mississippi* -- a case that clearly supports the admissibility of Jerome Williams' statement, as explained *supra*. CT 780-783. Yet he failed to argue that Jerome Williams' statement was admissible.

for the prosecution. RT 4011-4022. Overton, therefore, was available, and could have easily testified as to the statements describing the robber that Jerome Williams made to him in the hours following the robbery – the same statements he testified to in the preliminary hearing.

The prosecution's factual theory of the case was that Vines had obtained a small silver handgun from codefendant Proby, and used it to shoot and kill Ron Lee. RT 4452-4453. Jerome Williams' statements to Detective Overton describing the robber directly contradict the prosecution's factual theory that the robber with the small silver handgun was Sean Vines. The evidence was admissible – indeed, the exculpatory statement provided by Jerome Williams had the additional, impressive benefit that it would be presented to the jury through the testimony of a law enforcement officer, thus enhancing its credibility in the eyes of the jury.[42] There was every reason for Vines' trial counsel to introduce the statement. His failure to do so was objectively unreasonable, and entirely negligent. *Strickland v. Washington* (1984) 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.

Moreover, assuming *arguendo* that Jerome Williams was <u>not</u> unavailable as a witness, and thus his statement could not have been introduced under section 1240 for that reason, Vines' trial counsel nevertheless performed below the standard of reasonable professional competence for an attorney defending a capital case.

If Jerome Williams was not unavailable, and could have been found and summoned to court to testify, then the evidence of the description of the short robber with the silver gun this eyewitness gave just after the robbery

[42] The testimony of law enforcement officers carries "'an aura of special reliability and trustworthiness.'" *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1178.

undoubtedly could have been placed before the jury. If Jerome Williams was available, then trial counsel's failure to produce him and to introduce that evidence was certainly below the required standard, given the importance of the evidence. See, e.g., *Hart v. Gomez* (9th Cir. 1999) 174 F.3d 1067, 1070-1071, cert. denied, 528 U.S. 929, 145 L.Ed.2d 254, 120 S.Ct. 326 (1999) ("a lawyer who fails adequately to investigate, and to introduce into evidence, evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.")[43] Simply put, if Jerome Williams was available, it was counsel's duty, through the use of reasonable diligence, to locate, subpoena and call him to testify. If Jerome Williams was unavailable, it was counsel's duty to introduce his statement through the testimony of Detective Overton.

D. Vines was Prejudiced by His Lawyer's Failure to Introduce this Critical Exculpatory Evidence.

When trial counsel's performance was deficient under an objective standard of reasonableness, as it was here, the Sixth Amendment requires reversal of the judgment if the defendant shows

> "that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"

People v. Staten (2000) 24 Cal.4th 434, 451. A "reasonable probability," in

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[43] If Jerome Williams was not unavailable, this would also mean that trial counsel had affirmatively deceived the court when he represented that Williams was unavailable. RT 4619. This, of course, would also violate counsel's professional obligations and constitute deficient representation.

this context, does not mean that it is more likely than not that, absent counsel's unprofessional act or omission, the defendant would have achieved a more favorable result – instead, a "reasonable probability" means "*a probability sufficient to undermine confidence in the outcome*.' " *Id.* (emphasis added).

Perhaps the most important factor in assessing whether an error that led to the omission of evidence the jury would otherwise have heard was prejudicial is whether or not the evidence against the defendant was "overwhelming."

In this case, as discussed in the previous section, the evidence against Vines on the Florin Road counts was not overwhelming – in fact, the case was a close one.

As shown above, two eyewitnesses to the Florin Road robbery did testify. Prosecution witness Jeffrey Hickey, who knew Vines and had trained him when Vines worked as an employee at that very store, could not identify Vines as one of the robbers. And defense witness Pravinesh Singh, who also knew and had worked with Vines, testified the robber he saw was not Vines.

Against the failure of these eyewitnesses to actually identify Vines, the strongest prosecution evidence was the testimony of Vera Penilton, codefendant Proby's girlfriend. Penilton testified that Vines admitted to her not only participating in the Florin Road robbery, but intentionally killing victim Ron Lee.

But, as also discussed *supra* at pp. 140-143, there were strong reasons for the jury to disbelieve Penilton. She was Proby's girlfriend and had an incentive to minimize Proby's participation. She admitted she lied to police officers when they first interviewed her. She had prior theft convictions. She provided the gun that was assertedly used in the killing. Her testimony as to

Vines' presence in her apartment hours after the robbery when he made his supposed admissions conflicted directly with Ulanda Johnson's testimony that he was at home with her at that time. And all the recovered money and property from the Florin Road robbery was found in Penilton's bedroom.

Of course, Vines did not have to prove he was not guilty -- all Vines' defense had to do to obtain a more favorable result on the Florin Road counts was to induce a reasonable doubt of his guilt in the mind of a single juror. The prosecutor argued that Hickey's testimony was supportive of his theory, because Hickey said that the second robber he saw had a physical appearance "consistent with" that of Vines, and that Singh was not a credible witness because his descriptions of the robber he saw were not entirely consistent – Singh described the robber at trial as about 5'8", but had previously described him as 5'10" or 5'11".

The introduction of Jerome Williams' description of the robber he saw would have very likely succeeded in inducing a reasonable doubt in the mind of at least one juror that the second robber was Sean Vines. Jerome Williams' description of the robber he saw confirmed the description given at trial by Pravinesh Singh.

- Pravinesh Singh described the gunman as about 5'8", wearing all black clothes with a green ski mask. RT 4102, 4141. The robber Singh saw wielded a small "silver looking" hand gun (RT 4103, 4168). He was dark-complected. RT 4140.

- Jerome Williams described the gunman as about 5'7", wearing a dark-colored shirt with a dark green mask. The robber Williams saw wielded a small silver handgun. He was a dark-complected black male. RT 399.

There was no evidence at trial that there were more than two robbers

inside the Florin Road McDonald's. The first robber, who carried a rifle, Hickey positively identified as Proby. With evidence from not one, but two of the three surviving witnesses who agreed on the description of the second robber, and agreed he was someone quite a bit shorter than the 6'3" Vines, it is reasonably probable that the jurors would have harbored a reasonable doubt that the second robber was Vines.

Accordingly, reversal of Vines' convictions on the Florin Road counts is required.

Moreover, even assuming *arguendo* that some reason could be found why the introduction of Jerome Williams' statement describing the second robber would not have made a difference as to guilt, it surely would have done so as to penalty. The record shows that lingering doubt was a factor in penalty-phase deliberations: the jurors requested and received a read-back of Jeffrey Hickey's eyewitness guilt-phase testimony. CT 952.

As discussed *supra*, the prosecution's jury argument for the death penalty depended on the factual theory that Vines had deliberately "executed" the victim with the silver handgun he had obtained from Proby. The prosecutor argued that "***if for nothing else, [for] that alone, his due is death***." RT4880-4881. (emphasis added).

Even assuming that, had Jerome Williams' description of the robber been introduced, the jury somehow would have still found that Vines participated in the Florin Road robbery, it is most unlikely that the jurors would have determined – *in the face of descriptions from* ***two*** *eyewitnesses that the robber with the silver gun was a much shorter man* -- that Vines was the triggerman. And absent such a determination, the prosecution would not likely have obtained a sentence of death.

V. THE TRIAL COURT REVERSIBLY ERRED BY REFUSING TO INSTRUCT THE JURY THAT BECAUSE VERA PENILTON TESTIFIED UNDER A GRANT OF USE IMMUNITY, HER TESTIMONY SHOULD BE VIEWED WITH DISTRUST.

Before trial, the prosecution sought an order of use immunity for Vera Penilton, the only witness to place Vines at the scene of the Florin Road robbery-murder. CT 616-167. The court granted the order for use immunity. CT 614, 617. Thereafter, Penilton testified at trial under a grant of immunity. RT 3514-3515.

Vines requested that the jury be instructed to view Vera Penilton's testimony with distrust because she was testifying under a grant of immunity. The trial court denied the instruction. CT 825. The court did tell the jury that it could consider "anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness," including "[w]hether the witness is testifying under a grant of immunity." CT 647-648.

The trial court's refusal to give a cautionary instruction that the testimony of a witness who has been immunized should be viewed with distrust was erroneous – witnesses testifying under grants of use immunity, like accomplices and in-custody informants, have strong incentives to falsify their testimony, and fundamental fairness requires that jurors be informed there is a special disfavor of their testimony or, at the very least, that their testimony be viewed with great caution.

As discussed above and elsewhere in this brief, Vera Penilton was the prosecution's critical witness on the Florin Road counts. Had the jury been instructed to view her testimony with distrust, it is reasonably likely the result

would have been different.

A. The Trial Court Should Have Instructed the Jury that Vera Penilton's Testimony Should be Viewed with Distrust Because She had been Granted Use Immunity by the Prosecution.

There are, of course, two types of immunity:

> "Use immunity protects a witness only against the actual use of his compelled testimony, as well as the use of evidence derived therefrom. Transactional immunity protects the witness against all later prosecutions relating to matters about which he testifies. (*Kastigar* v. *United States* (1972) 406 U.S. 441, 449-453, 460, 32 L.Ed.2d 212, 219-222, 226, 92 S.Ct. 1653; *People* v. *DeFreitas* (1983) 140 Cal.App.3d 835, 837.)"

People v. Hunter (1989) 49 Cal.3d 957, 973 fn. 4.

People v. Hunter is the leading case from this Court on jury instructions relating to immunized witnesses. In *Hunter*, this Court considered and rejected the argument that when a witness testifies under a grant of transactional immunity, a cautionary instruction must be given on defense request. Justice Kaufman wrote the opinion for a unanimous Court. In rejecting the defendant's argument, this Court drew a pointed distinction between transactional immunity and use immunity:

> "Defendant relies on law developed by the federal courts holding that a defendant is entitled on request to an instruction that the testimony of informers, accomplices and immunized witnesses should be viewed with suspicion. (See *United States* v. *Watson* (7th Cir. 1980) 623 F.2d 1198, 1205; *United States* v. *Morgan* (9th Cir. 1977) 555 F.2d 238, 242-243.)
>
> "No California decision has adopted or applied the federal rule, however, and the reason is not difficult to perceive. Under federal law the prosecutor cannot grant transactional

> immunity. (18 U.S.C. § 6002; *United States* v. *Herman, supra*, 589 F.2d at p. 1202; *United States* v. *Leonard* (D.C. Cir. 1979) 494 F.2d 955, 961, fn. 11.) Thus, the government remains free to prosecute the witness after he testifies, as long as the prosecution is not based on the witness's testimony. The grant of immunity therefore does not totally eliminate the witness's incentive to testify falsely. (*United States* v. *Leonard, supra*, 494 F.2d at p. 961, fn. 11.) California law, however, provides that a witness ordered to testify over a claim of self-incrimination shall be given ***transactional immunity***. (§ 1324; *Daly* v. *Superior Court* (1977) 19 Cal.3d 132, 146; *People* v. *DeFreitas, supra*, 140 Cal.App.3d at pp. 839-840.) ***The prosecution's leverage over the witness is thereby sharply diminished, as is the witness's motive to falsify***. Thus, to paraphrase *Alcala*, 'whatever consideration [an immunized witness] may expect for testifying, the direct, compelling motive to lie is absent.' (36 Cal. 3d at p. 624.)"

People v. Hunter, *supra,* 49 Cal.3d at pp. 977-978 (bracketed words in orig.) (emphasis added).

Thus, under this Court's reasoning, transactional immunity removes a direct and compelling motive to lie, while use immunity does not.

The witness who has been granted use immunity knows that, if she does not give the prosecutor the testimony that the prosecutor wants and expects to hear, the prosecutor can turn around and prosecute her for the underlying offenses.

After this Court decided *People v. Hunter, supra*, the Legislature amended Penal Code section 1324 to provide for use immunity in addition to transactional immunity. In this case, witness Vera Penilton was granted use immunity, not transactional immunity, in a trial held after the statue was amended.

An instruction that a witness's testimony should be viewed with caution or distrust is required on request for the testimony of accomplices (see *People*

v Guiuan (1998) 18 Cal.4th 558) and in-custody informants (see Penal Code section 1127a, subdivision (b), requiring the jury be instructed, upon request, that " 'testimony of an in-custody informant should be viewed with caution and close scrutiny' "). Like accomplices and in-custody informants, witnesses who have received use immunity have strong reasons to lie. Like transactionally-immunized witnesses, they still face prosecution for perjury should they lie on the stand.[44] But there is a "direct compelling" motive for a witness who as received only use immunity to lie. The witness who has received only use immunity may still be prosecuted for the underlying crimes. As explained by the court in *United States v. Leonard* (D.C. Cir. 1979) 494 F.2d 955, 961, fn. 11:

> "Although the incentive to prevarication is perhaps greatest when the prosecutor first offers immunity, the protection afforded the witness by the actual grant of immunity does not necessarily eliminate that incentive. Since the government cannot grant transactional immunity pursuant to 18 U.S.C. § 6002, and is under no constitutional compulsion to do so, *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972), the government is still free to prosecute the witness, after he testifies, as long as the prosecution is not based on the witness' testimony. *See* nn. 24-26, infra. ***The government therefore retains its 'carrot and stick' and the***

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[44] Before this Court's decision in *Hunter*, the appellate court wrote in *People v. Harvey* (1984) 163 Cal.App.3d 90, 112:

> "[I]t is highly unlikely that a witness whose testimony does not implicate the charged defendant will be afforded immunity. And once a witness has received immunity in the expectation that his testimony will implicate the defendant, contrary testimony at trial -- regardless of its truth -- will subject him to possible perjury charges. Thus, an immunized witness has a considerable interest in testifying in a manner which is acceptable to the prosecutor."

witness' incentive to falsify continues." (Emphasis added.)

Thus, the federal courts require an instruction cautioning the jury about immunized testimony, when defendant requests it. *United States v. Leonard, supra,* 494 F.2d 955. A standard text on federal jury instructions, E. Devitt and C. Blackmar's *Federal Jury Practice and Instructions*, provides a specific cautionary instruction on immunized witnesses.

> "One who testifies under a grant of immunity with a promise from the government that he will not be prosecuted is a competent witness. His testimony may be received in evidence and considered by the jury even though not corroborated or supported by other evidence.
>
> "*Such testimony, however, should be examined by you with greater care than the testimony of an ordinary witness*. You should consider whether the testimony may be colored in such a way as to further the witness' own interest for a witness who realizes that he may procure his own freedom by incriminating another has a motive to falsify. After such consideration, you may give the testimony of the immunized witness such weight as you feel it deserves."

Devitt & Blackmar, *Federal Jury Practice and Instructions*, section 17.04 (4th ed. 1992) (emphasis added).

Similarly, the Ninth Circuit Model Criminal Jury Instructions contain an instruction to the same cautionary effect:

> "You have heard testimony from [*witness*], a witness who [received immunity. That testimony was given in exchange for a promise by the government that [the witness will not be prosecuted] [the testimony will not be used in any case against the witness];
>
> . . . .
>
> "For [this][these] reason[s], in evaluating [*witness's*] testimony, you should consider the extent to which or whether [*witness's*] testimony may have been influenced by [this] [any of these] factor[s]. In addition, you should examine [*witness's*] testimony

with greater caution than that of other witnesses."

Ninth Circuit Model Criminal Jury Instructions, No. 4.9 (2003 ed.).

In this case, rather than instructing the jury to view the immunized testimony with "greater caution," the jury was instructed to view the testimony of the immunized witnesses under the same standard by which they would determine the credibility of any other witness. Such an approach comports neither with protection of a defendant's right to a fair trial, nor with the truth-seeking function of a criminal trial.

This is particularly true in cases such as this one, when the immunized witness testifies to purported admissions made by the defendant. As this Court has recognized:

> "Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. *No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself.* (2 Jones, Commentaries on the Law of Evidence, 620.)"

People v. Ford (1964) 60 Cal.2d 772, 800 (emphasis added).

Moreover, it is significant that in this case, the immunized prosecution witness had an additional, compelling reason to fear adverse consequences should she not testify as the prosecution clearly desired. Penilton had given two out-of-court statements to law enforcement, the first a few hours after the arrests of Proby and Vines. Any failure on her part to testify in material conformity with her prior statements to law enforcement inculpating Vines, as the prosecutor expected, would foreseeably put her in genuine danger of a perjury prosecution, as well as for prosecution as an accessory on the Florin

Road charges. This was Vera Penilton's reality.

It may well be that, under the analytic approach set forth by this Court in *People v. Hunter*, whenever a prosecution witness testifies under a grant of use immunity (and not transactional immunity), a cautionary instruction must be given. But the Court need not so broadly hold, because this case can be resolved on narrower grounds. In a case such as this one – in which (a) a witness who has given a prior statement to law enforcement inculpating the defendant, (b) testifies under a grant of use immunity (c) as to admissions purportedly made by the defendant – the federal constitutional guarantee of due process and the search for truth compel the giving of a cautionary instruction on request.

B. Vines Was Prejudiced by the Trial Court's Refusal to Instruct the Jurors to View Vera Penilton's Testimony with Distrust Because She Had Been Granted Immunity.

Whether measured by the state law standard of *People v. Watson*, *supra*, 46 Cal.2d at p. 836, or the more demanding federal constitutional standard of *Chapman v. California*, the trial court's refusal to instruct that the testimony of immunized witness Vera Penilton be viewed through a lens of distrust was prejudicial error as to the Florin Road charges.

The central importance of Vera Penilton's testimony to the prosecution's case against Vines on the Florin Road counts cannot be denied. Penilton was the only witness to place Vines at the scene of the crimes, and the admission Penilton said Vines made – that he had intentionally shot and killed

distrust due to her status as an accomplice, the jury would first have to find that Vera Penilton *was* an accomplice.

While instructing generally on accomplices, the trial court refused to give Vines' proposed instruction that Penilton was an accomplice as a matter of law.[47] RT 4304. The prosecutor repeatedly emphasized the argument that Penilton was not an accomplice. RT 4429, 4446, 4463, 4535, 4536. The

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[47] As explained in *People v. Brown* (2003) 31 Cal.4th 518, 555:

> "'An accomplice is ... defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' (§ 1111.) If sufficient evidence is presented at trial to justify the conclusion that a witness is an accomplice, the trial court must so instruct the jury, even in the absence of a request. (*People v. Tobias* (2001) 25 Cal.4th 327, 331.)"

There is ample evidence that Vera Penilton was an accessory after the fact. There is some evidence that she could be liable as an accomplice – she provided a gun, knew in advance that Vines and Proby were going to do a robbery, and shared in the proceeds. But there is no evidence in the record that when she provided the gun, she knew it would be used in a robbery.

More importantly, however implausibly, Penilton testified that the discovery of the Florin Road proceeds in her bedroom was a complete surprise to her. RT 3681. This Court has held that an accomplice-as-a-matter-of-law instruction can only be given when there is but a single inference that can be drawn by the trier of fact. *People v. Williams* (1997) 16 Cal.4th 635, 679. There was more than one inference that could be drawn as to whether Penilton was an accomplice. Penilton was therefore not an accomplice as a matter of law. The jury could have found she was not an accomplice at all but, as the prosecutor argued, merely an accessory. The reasonable inference from the results in both the guilt and penalty phases is that the jury indeed determined that Penilton did not have liability equivalent to that of Proby and Vines, and was not an accomplice, and that her testimony was credible, just as the prosecutor urged.

prosecutor contended that "legally, if anything, she is an accessory after the fact." RT 4446. Penilton's status as an accomplice, or not, was in fact debatable. Given the burden of proof on the defense to show Penilton was an accomplice (CT 674, CALJIC 3.19), and in light of the result of conviction on all counts at trial, it seems more than likely that the jury concluded that Penilton was not an accomplice, and that her testimony was, therefore, not to be viewed with distrust. Because the instruction that the testimony of an accomplice was to be viewed with distrust likely was not operative, it could not have cured the trial court's failure to instruct on viewing the testimony of immunized witnesses with distrust.

Second, even assuming the accomplice instructions *had* come into play, the trial court's erroneous refusal to instruct the jurors to view immunized witness's testimony with distrust would not have been harmless. That is because, in the complex world of human relationships and difficult judgments, caution or distrust are not binary emotions, with values of zero or one. Distrust is not like a lamp switch, either on or off. Instead, caution and distrust are progressive and cumulative. Jurors are human beings; like other human beings, they may distrust some witnesses a little; others they may distrust somewhat, and yet others they will view as complete liars.[48] And the more reasons a reasonable juror has to distrust a witness, the more likely the juror is to reject all that witness's testimony – not just some.

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[48] For example, the reasonable juror may, like many other citizens, distrust politicians, used car salespersons, and lawyers. But that does not mean she distrusts all three equally. And that certainly does not mean that she would not distrust a politician who owned a used car lot more than she would a mere lawyer. The juror might distrust a used car salesman, who became a lawyer and then went into politics, most of all. Distrust is progressive, and cumulative.

But here, the trial court's failure to give an instruction that the testimony of an immunized witness should be viewed with distrust clearly made the prosecution the beneficiary. The prosecutor argued in his guilt phase rebuttal[49] that the jury should believe Penilton precisely ***because*** she was granted immunity:

> "Don't believe her, he [defense counsel] says, because she gets immunity. The flip side is ***I would believe her because she gets immunity***. Nothing she says except perjury is going to get her in trouble. She has already been given a pass. This is after she admitted what she has really done."

RT 4535 (emphasis added).

This is completely misleading. As shown above, a witness who has been granted use immunity by the prosecution has a "direct, compelling motive to lie" -- and the failure of the trial court to instruct that, for this reason, Vera Penilton's testimony should be viewed with distrust, had a decisive impact on the trial. Had Penilton's testimony been so viewed, the jury would likely have rejected it, and with it the prosecution's case against Vines on the Florin Road counts.

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[49] As the Supreme Court has made clear, in assessing the effect of instructional error, the reviewing court must consider prosecutorial misconduct in closing argument even if it is not separately raised as error. *Taylor v. Kentucky* (1978) 436 U.S. 478, 486-487 & fn. 14, 98 S.Ct. 1930, 56 L.Ed.2d 468.

VI. BECAUSE THE PROSECUTOR ELICITED TESTIMONY FROM PROSECUTION WITNESS VERA PENILTON THAT HE KNEW WAS FALSE, AND FAILED TO CORRECT IT, THE JUDGMENT MUST BE REVERSED.

The law is clear: A prosecutor violates due process when he knowingly presents perjured testimony, *Mooney* v. *Holohan* (1935) 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791, or allows false evidence to go uncorrected, *Napue v. Illinois* (1959) 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217. Here, the prosecutor did both in connection with the testimony of prosecution witness Vera Penilton.

A. The Prosecutor's Violation of Due Process.

The prosecutor deliberately elicited false and misleading testimony from his witness Vera Penilton regarding whether separately tried codefendant Deon Proby was the father of any of her children, and failed to correct that testimony. Near the start of his direct examination, the prosecutor asked Penilton about her living arrangements in September 1994:

"Q Who else was living there?
"A My sister Monica Allen, Catrell Smith and my mom boyfriend Larry Day and Deon.
"Q Okay. In the summer -- were you pregnant that summer?
"A Yes.
"Q Did you already have one child?
"A Yes.
"Q When did you have your first child?
"A Her birthday is August the 20th, 1994.
"Q That was your first child?
"A Yes.

"Q She was born that summer?
"A Yes.
"Q You mentioned you were living there with Deon. Is that
William Proby?
"A Yes.
"Q Do you call him Deon?
"A Yes.
"Q Was Deon the father of your child that you had on August 20th?
"A No.
"Q How old was Deon when you first met him?
"A I don't remember.
"Q He was older than you, correct?
"A Yes."

RT 3516 (emphasis added).

The prosecutor returned shortly thereafter to the same topic:

"Q If I told you it was on the 29th, on the 29th of September of '94, how much time before that day, before Deon was arrested was it that you first met him?
"A I was four months pregnant.
"Q You were four months pregnant?
"A (Nodding.)
"Q So, that would have been, what, about March or April that you met him?
"A I think so. I'm not for sure.
"Q Was your child born at full term, at nine months?
"A Huh-uh. She was a month early.
"Q A month early. So, would it be fair to say that you met Deon in approximately April of '94?
"A Yes."

RT 3518 (emphasis added).

Again, the prosecutor returned to the subject on his redirect of Penilton:

"Q How many children do you have now?
"A Three.
"Q Is Deon the father of any of them?
"A No."

RT 3684 (emphasis added).

Penilton's testimony that Proby was not the father of any of her children was, as the prosecutor well knew, false. It was contradicted by a direct admission Penilton made, before Proby was arrested, to another key prosecution witness, Sonya Williams.

Sonya Williams – the first witness called in the prosecution's guilt phase case-in-chief – testified on direct examination that she had gone with Vines to a motel, where she met codefendant Deon Proby and his girlfriend, Vera Penilton. Williams testified that this was the first and only time she had met Proby or Penilton. RT 3071.

Sonya Williams also gave a videotaped interview to law enforcement shortly after Vines and Proby were arrested. She was not in custody – she volunteered her statement. Portions of that videotaped interview were admitted into evidence on the prosecutions's motion. The transcript of the interview, provided as prosecution exhibit 101-A, appears at CT 4900-4909, and includes segments not provided to the jury.

Near the beginning of her videotaped interview with Detective Minter, in a segment of the interview not provided to the jury, Sonya Williams told the detective that Vines picked her up so that they could "kick it" with Vines's friend Deon, and Deon's girlfriend. CT 4901. Vines picked her up in Deon's car:

> "And then we got to the end, he dropped me off and Vera, and then he went to go get Sean from work, cuz Sean worked at McDonald's, too. I mean, not Sean, but Deon worked at

> McDonald's, too. So he went to go pick him up and me and, um, - ***me and Vera, we was just talking about babies, cuz she just had a baby by, um, Deon. And she thinks pregnant again,*** and we was just talking and stuff."

CT 4902 (emphasis added).

Thus, weeks before the arrests and interrogations in this case, Vera Penilton admitted to a new social acquaintance that she had a baby by Deon, and was expecting another one.

The circumstances of this admission provide substantial assurances of its trustworthiness. It was a freely made statement. Penilton had no reason to lie. There was no advantage to be gained by Penilton, on her own behalf or on anyone else's, by falsely representing to her new acquaintance Sonya Williams that her boyfriend Proby was the father of her child.

The inescapable conclusion is that Vera Penilton lied when she testified that Vines' codefendant Deon Proby was not the father of any of her children, and lied about when she met him.

The prosecutor elicited this false and misleading testimony from Penilton, and failed to correct it. The United States Supreme Court and this Court have held that a prosecutor's

> "duty to correct false or misleading testimony by prosecution witnesses applies to testimony which the prosecution knows, *or should know*, is false or misleading (see *United States v. Agurs, supra*, 427 U.S. at p. 103 [49 L.Ed.2d at pp. 349-350]), and has concluded this obligation applies to testimony whose false or misleading character would be evident in light of information known to other prosecutors, to the police, or to other investigative agencies involved in the criminal prosecution."

In re Jackson (1992) 3 Cal.4th 578, 595.

There can be no doubt that the prosecutor knew of Penilton's statement

to Williams that she had had a baby by Proby, because it was contained in a transcription of a prosecution exhibit, and also in the videotape of the Williams interview itself, also a prosecution exhibit.

Thus, the prosecutor in this case knowingly and repeatedly elicited false testimony by his star witness Vera Penilton, and when Penilton failed to correct her testimony, the prosecutor did nothing. This was a due process violation.

The fact that defense counsel was aware of the same information does not eliminate the due process violation:

> "[T]he government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false. Where the prosecutor knows that his witness has lied, he has a constitutional duty to correct the false impression of the facts."

United States v. LaPage (9th Cir. 2000) 231 F.3d 488, 492.[50]

Moreover, the existence of other grounds to disbelieve this prosecution witness does not alter the analysis or outcome. As the Supreme Court observed in similar circumstances in *Napue v. Illinois, supra*, 360 U.S. 264, 270:

> "[W]e do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one."

The prosecutor's violation of due process is also not diminished because Penilton's false testimony did not directly relate to an element of the

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[50] Indeed, perjured testimony by a prosecution witness may violate due process even where the prosecution neither knew or should have known about it. *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1208.

crimes charged, but related instead to Penilton's bias arising from her relationship with codefendant Proby, and her untrustworthiness as shown by her willingness to commit perjury. As the Supreme Court explained in *Napue v. Illinois:*

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. . . . .
> " 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.' "

Napue v. Illinois, *supra*, 360 U.S. at pp. 269-270; accord, *Giglio v. United States* (1972) 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104.

B. The Prejudice That Resulted.

The prosecutor's introduction of false testimony and his failure to correct it is federal constitutional error, to be measured for prejudice under the federal constitutional standard of *Chapman v. California*, *supra*, 386 U.S. 18, 24. Under *Chapman*, the prosecution bears the burden to show that the violation could not, beyond a reasonable doubt, have affected the verdict. *Id.*

The prosecution cannot meet that burden. As discussed elsewhere in this brief, Vera Penilton was the prosecution's most important witness, and the only witness to place Vines at the scene of the Florin Road robbery-homicide. She testified that Vines admitted intentionally killing victim Ron Lee.

Vera Penilton's credibility was more than just important to the prosecution -- it was nothing short of essential to the case against Vines as the

Florin Road shooter.

If the prosecutor at trial had corrected Vera Penilton's false testimony that Deon Proby was not the father of any of her children, it is likely this would have affected the jury's deliberations in at least three ways.

First, it would have revealed a strong additional reason for bias and interest in Penilton's testimony – Proby was the father of Penilton's child.

Second, the prosecutor's correction would have demonstrated to the jury that Penilton had lied in telling the detectives in her interview that she and Proby didn't know each other that well. This would have further substantiated the defense theme that Penilton cooked up her story to shift blame away from Proby, and away from herself, onto Vines.

Third, the prosecutor's correction would have demonstrated that Penilton had lied on the stand. See *United States v. LaPage, supra,* 231 F.3d 488, 492.

Because the case against Vines on the Florin Road charges depended on the credibility of Vera Penilton, the damage to Penilton's credibility that would have resulted from the prosecutor's correction of her false testimony could not have been harmless beyond a reasonable doubt.

VII. VINES' TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO IMPEACH PROSECUTION WITNESS VERA PENILTON WITH INFORMATION SHOWING THAT SHE LIED TO THE JURY ABOUT THE FACT THAT CODEFENDANT DEON PROBY WAS THE FATHER OF HER CHILD.

As shown above in connection with Argument IV, the law on ineffective assistance of counsel under the Sixth Amendment is clear. An appellant must demonstrate that his counsel's performance was objectively unreasonable under prevailing professional norms, and that it is reasonably probable that absent his lawyer's error, the result would have been more favorable. When ineffective assistance is raised on a direct appeal, the court will " reject the contention that counsel provided ineffective assistance if the record sheds no light on why counsel acted or failed to act in the manner challenged *unless* (1) counsel was asked for and failed to provide a satisfactory explanation or (2) *there simply could be no satisfactory explanation.*" *People v. Burgener, supra,* 29 Cal.4th at p. 880 (emphasis added).

A. Trial Counsel's Failure to Impeach Penilton was Deficient Under Prevailing Professional Norms.

Appellant's trial counsel provided prejudicially ineffective assistance by failing to impeach prosecution witness Vera Penilton, the main witness against his client, with the fact that she testified falsely at trial about not having a baby with Deon Proby, and with the fact itself that she had a baby by Proby

As stated in a standard California text for criminal practitioners:

> "*The purpose of cross-examination is to impeach a witness* or to show that the witness's testimony should not be considered as important as the testimony given by the cross-examining party's witnesses. Primarily, *cross-examination is used to convince the trier of fact to disbelieve the witness* or to qualify the effect of the testimony."

California Criminal Defense Practice, v. 4, ch. 82, § 82.21, p. 82-55 (Matthew Bender (2004)) (emphasis added). Impeachment of prosecution witnesses on cross-examination is a basic norm of professional practice. See *California Criminal Defense Practice*, *supra*, § 82.34, p. 82-81 (setting forth checklist for impeachment).

Thus, it can hardly be controverted that, when a defense attorney in a capital murder case has in his or her possession evidence that can properly and effectively be used to impeach the prosecution's most critical witness on the murder charge, the defense attorney has a professional obligation to use that impeachment evidence, and impeach that prosecution witness.

Vines' trial counsel had in his possession impeachment evidence that would have shown Penilton to have lied to the jury to conceal a matter directly affecting her bias – yet he failed to use it.

As set forth in the previous argument at pages 180-182, near the beginning of his direct examination of Vera Penilton, the prosecutor brought out that Penilton had delivered a baby in the month before the crimes charged in this case, on August 20, 1994. The prosecutor then elicited Penilton's unqualified statement that codefendant Deon Proby was <u>not</u> the father of the child born on that date. RT 3516.

Shortly thereafter, the prosecutor elicited from Penilton her testimony that Proby was the father of none of her three children, and that she had met

Proby when she was four months pregnant. RT 3518.

Yet, as also detailed in the immediately preceding argument, Penilton's testimony was false. In fact, Penilton had informed prosecution witness Sonya Williams, when she met Williams for the first time in September 1994, that Proby was the father of her child. As Sonya Williams told detectives in a portion of her videotaped interview that was not introduced into evidence,

> ***"me and Vera, we was just talking about babies, cuz she just had a baby by, um, Deon. And she thinks pregnant again,*** and we was just talking and stuff."

CT 4902 (emphasis added).

Thus, appellant's trial counsel heard the prosecution's chief witness, Penilton, lie to the jury regarding whether she had a child by Proby. Counsel unquestionably had access to the proof of her prior admission to Sonya Williams that she had just had a baby by Proby, because it was contained in a court exhibit, memorialized in both a videotape and a written transcript, other portions of which came before the jury. Yet appellant's trial counsel unaccountably failed to impeach Penilton with her prior statement to Williams.

Here, the record does not affirmatively show why counsel failed to impeach Penilton with evidence of her statement to Williams. But this is one of those infrequent situations in which "there simply could be no satisfactory explanation" (*People v. Burgener, supra,* 29 Cal.4th at p. 880) for counsel's failure to act according to professional standards.

There could be no satisfactory explanation for counsel's failure to impeach Penilton, because the defense had everything to gain, and nothing to lose, by impeaching Penilton with evidence she had lied about not having a baby with Proby.

The importance of Penilton as a prosecution witness confirms the necessity of impeachment. As previously demonstrated in this brief, Penilton was the prosecution's most important witness on the Florin Road counts. The two Florin Road eyewitnesses who testified at trial, Hickey and Singh, both knew Vines, yet neither could identify him. Penilton was the only witness to place Vines at the scene of the crime, and she was the only witness to directly implicate Vines as the person who shot and killed Ron Lee. Clearly, her credibility was central.

Indeed, trial counsel did recognize the obvious necessity of calling Penilton's credibility into question. He impeached Penilton on other grounds – including her prior thefts and her prior convictions for theft (RT 3620-3622) – and argued in closing to the jury that Penilton was not a believable witness. RT 4503-4519. He tried to convince the jury that Penilton lied to shift blame away from Proby. RT 4503-4504, 4511-4513, 4517-4518. His impeachment of Penilton with her statements to Sonya Williams would only have advanced trial counsel's strategy.

Furthermore, it was especially advantageous that Penilton would be impeached with her statements to *another prosecution witness*, Sonya Williams. Williams was the prosecution's lead-off witness in its case-in-chief.

There are two ways Penilton could have responded to impeachment with her statement to Sonya Williams.

Penilton could have admitted it – thus admitting that she lied on the stand, to the jury, in direct examination by the prosecutor.

Or she could have denied it – a situation that would be also favorable to the defense. It would place *this* question before the jury – ***which prosecution witness is lying?***

The failure of Vines' trial counsel to impeach chief prosecution witness Penilton's testimony with her statement to Sonya Williams that she had a baby by codefendant Proby the month before the robberies -- thus demonstrating (a) that she had an additional bias, and (b) that she had perjured herself -- was deficient under prevailing professional norms.

B. Vines was Prejudiced by his Trial Counsel's Failure to Adequately Impeach Penilton.

To establish prejudicially ineffective assistance of counsel, a defendant must show it is reasonable probable that, but for counsel's failings, the result of the proceeding would have been more favorable to the defendant. *Strickland v. Washington*, supra, 466 U.S. 668, 694.

1. Guilt phase prejudice.

As previously discussed, the case against Vines on the Florin Road counts was not an overwhelming one.

The eyewitness testimony favored the defense. Two eyewitnesses testified, both knew Vines, and neither could identify him as a robber. Eyewitness Singh was sure the robber he saw was not Vines. And eyewitness Hickey did not believe that the robbers were employees of the store, as Vines had been.

If the jury had discarded the testimony of Vera Penilton as not credible, there would have been little remaining on which to base a determination that Vines was guilty on the Florin Road charges. The jury would be left with essentially this: Ulanda Johnson saw Vines leave with Proby and come back with Proby on the night of the Florin Road robbery, and Hickey identified Proby as one of the robbers; other witnesses saw Vines with a gun in the days

prior to the robbery; and Vines made a bank deposit the day after the robbery.

Certainly these facts would be suspicious, in the minds of most reasonable jurors – but hardly enough to convince most reasonable people that, *beyond a reasonable doubt*, Vines participated in a robbery-murder.

It might, of course, be argued that Penilton was impeached on other grounds – that she committed thefts, that she had misdemeanor theft convictions, that she was admittedly Proby's girlfriend. But it was vital to the defense that she be impeached thoroughly, because she was the prosecution's chief witness, and the only witness to attest to Vines' supposed admissions to the Florin Road crimes.

And the evidence that trial counsel failed to use was not cumulative or trivial, but unique and powerful impeachment evidence. It provided proof of three things:

First, that Penilton had an additional reason to give biased testimony – Proby was not merely her boyfriend, but the father of at least one of her children. This evidence of a much stronger bond leads to the inference of a much stronger bias.

Second, that Penilton necessarily lied to the detectives when she told them that she and Proby hadn't known each other that long.

Third, that in testifying before the jury that she had no children by Vines' codefendant Deon Proby, Penilton ***knowingly concealed her true bias***. ***Penilton lied to the jury*** about not having children with Proby, and lied to the jury about how long she had known him.

The jurors found Penilton's testimony to be important: Along with Sonya Williams' testimony, the jury asked that Penilton's testimony be read back to them during their guilt-phase deliberations. RT 4560.

If the jurors had not resolved their doubts and decided to credit Penilton, it is unlikely they would have convicted Vines on the Florin Road counts. The only reasonable inference from the result in this case is that the jurors decided they believed Penilton's account.

Yet, if Vines' trial counsel had properly impeached Penilton – thus revealing her to have concealed her true relationship with Proby, ***and*** to have committed perjury on the witness stand -- it is unlikely the jurors she lied to would have credited her testimony.

The exposure, during trial, of the fact that a witness has testified falsely before the jurors hearing that case is indisputably likely to seriously damage that witness's credibility in the eyes of those jurors. And, as the Supreme Court stated in *Napue v. Illinois, supra*, 360 U.S. 264, 269:

> "***The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence,*** and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." (Emphasis added.)

Here it is more than likely that if trial counsel had impeached Penilton with her prior statement, and shown her to have lied on the witness stand, the jury would have concluded her testimony was corrupt and unbelievable, and accordingly would not have found Vines guilty beyond a reasonable doubt of the Florin Road crimes.

2. Penalty phase prejudice.

Assuming, only for the purposes of analysis, that trial counsel's unprofessional failure to impeach prosecution witness Vera Penilton as discussed above did not prejudice Vines at the guilt phase, it is nevertheless highly likely that it prejudiced him at the penalty phase.

The main thrust of the prosecution case for aggravation at the penalty

phase, apart from victim-impact evidence, rested upon the circumstances of the crime. As discussed previously at pp. 153-155, in connection with the exclusion of third-party culpability evidence, the prosecutor emphasized the factual theory that Vines was not just a culpable participant in the Florin Road offenses, and thus guilty of felony murder with special circumstances, but was the actual shooter of victim Ron Lee.

Moreover, the prosecutor repeatedly stressed in his penalty-phase argument to the jury the factual theory that Vines had performed an intentional, "execution-style" killing. The prosecutor urged the jury that this fact should be dispositive of the penalty verdict:

"if for nothing else, [for] that alone, his due is death."

RT 4880-4881 (emphasis added).

Yet even assuming the jury found that Vines was a participant in the Florin Road robbery-murder, there was no evidence, apart from Vera Penilton's report of Vines' supposed admissions to her, that Vines was the shooter of Ron Lee.

Thus, even if the jurors somehow concluded, based on other evidence, that Vines was a participant in the Florin Road crimes, there was not enough evidence for them to find that Vines was the actual shooter if they did not believe Vera Penilton's testimony about Vines' supposed admissions. The question of Vera Penilton's credibility was central to the prosecution's "execution-style" murder scenario, and thus central to the penalty-phase argument that "his due is death."

In this context, the failure of trial counsel to impeach Vera Penilton with evidence of her statement to lead prosecution witness Sonya Williams that she had just had a baby by Proby (CT 4902) was a missed opportunity with

very real consequences. Had trial counsel deployed this impeachment material in a professionally competent manner, he could have demonstrated to the jury that Penilton was not a reformed liar with nothing to hide and nothing to gain, as the prosecutor portrayed her, but instead someone who concealed facts showing her bias, and someone who lied, straightfaced, in direct examination by the prosecutor, to the jurors who would decide this case.

Had Vines' trial counsel competently impeached Vera Penilton with evidence showing she concealed her bias by lying on the witness stand in the prosecution's case-in-chief, the jury likely would not have found her testimony credible. And had the jury not believed Penilton's testimony, the jury would not have sentenced Vines to death.

VIII. THE PROSECUTOR VIOLATED VINES' FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION, CROSS-EXAMINATION AND DUE PROCESS BY INFORMING THE JURY IN CLOSING ARGUMENT OF A SUPPOSED "FACT" OUTSIDE THE EVIDENCE – THAT PROSECUTION WITNESS MICHAEL BAUMANN HAD ACTUALLY RISKED HIS LIFE BY TESTIFYING AGAINST VINES.

A. Events at Trial.

At trial, the prosecution sought to explore prosecution witness Michael's Baumann's fear of retaliation by defendant. After at a hearing outside the presence of the jury, the trial court ruled that the evidence of Baumann's fear would be admitted, and that the prosecutor could question Baumann regarding a relative of his who had worked at another McDonald's with Vines, but there would be no evidence as to threats allegedly made against Baumann by Vines. RT 3439.

Thereafter, Baumann resumed testimony before the jury. The trial court told the jurors that "this area of testimony is being offered to show the state of the mind of this witness. It is in no way offered to show that Mr. Vines either directly or indirectly threatened this witness and/or any of his family members." RT 3445. The prosecutor elicited from Baumann that Baumann knew that Vines had previously worked with a relative of Baumann's at the Florin Road McDonald's before he came to work at the Watt Avenue McDonald's, that Vines had grown up in a neighborhood in which Baumann's family members had also grown up, that Baumann had expressed concern about that to a detective, and that Baumann had refused to identify the relative

who had worked with Vines. Baumann had not been directly threatened by Vines. RT 3444-3445. The prosecutor asked about Baumann's fear:

> "Q (By Mr. Gold) Did you indicate that you were afraid about testifying in court because Mr. Vines knows where your family lives?
> "A Yes."

RT 3446.

The prosecutor returned to this subject a short while later in his direct examination of Baumann:

> "Q (By Mr. Gold) What does it mean to you if you testify against somebody?
> "A You could die.
> "Q What's that?
> "A You could die."

RT 3479.

B. The Prosecutor's Closing Argument.

After eliciting on direct examination the evidence that witness Michael Baumann was scared to testify, and feared for his life and the lives of this family members, the prosecutor in his arguments to the jury argued that Baumann:

> "is scared to death to sit in front of this man and say these things [identifying Vines]."

RT 4529.

The prosecutor told the jury that Michael Baumann

> "cares about his family, and he doesn't want his family to get hurt. He wouldn't even tell us the name of the family member that works with Mr. Vines because maybe he is hoping Mr. Vines forgot. He was afraid."

RT 4529.

But the prosecution did more than argue that Baumann was fearful. The prosecutor told the jury that Watt Avenue eyewitness Michael Baumann was not just fearful – he was heroic:

"*We submit Michael Baumann is somewhat of your quiet hero.*"

RT 4433 (emphasis added).

Baumann, the prosecutor told the jury, was in a "tough jam". RT 4433. Referencing Baumann's statement that "you could die" for testifying, the prosecutor stated that Baumann "risk[ed] that." RT 4433.

In his guilt-phase rebuttal, the prosecutor argued that Baumann was actually at risk for his life:

> "It would be real easy for [Michael Baumann] to say I don't know who it was, ***and he is off the hook. He puts himself into jeopardy and risk by saying it is him***."

RT 4530 (emphasis supplied).

There was, however, no evidence that Michael Baumann actually put himself at mortal risk – or any risk at all – by testifying before the jury.

There was evidence that Baumann was fearful. But Vines had not directly threatened Baumann. There was evidence that Vines knew where Baumann's family lived, that Baumann's relative had worked with Vines, that Vines was from a neighborhood Baumann knew, and that Baumann thought he or his family might get killed if he testified. But these facts do not support the conclusion that Baumann was actually at risk for his life by testifying against Vines.

In fact, as this Court has noted, "a witness's statement, alone, that he or she is afraid to testify is 'far from accusing defendant or his associates of threatening [the witness] if he testified.'" *People v. Williams* (1997) 16

Cal.4th 153, 212. But here we have a witness's statement, and something more. A prosecutor's statement that a witness actually faces mortal danger if he identifies the defendant as the perpetrator of a violent crime is not far from an accusation; it is tantamount to one. There was no evidence before the jury supporting the prosecutor's claim that Baumann actually faced mortal danger.

C. The Prosecutor Committed Misconduct by Referring to Facts Not In Evidence.

As this Court stated in *People v. Hill* (1998) 17 Cal.4th 800, 828, for a prosecutor to refer to facts not in evidence

> "is 'clearly ... misconduct' (*People v. Pinholster* (1992) 1 Cal.4th 865, 948), because such statements "tend[] to make the prosecutor his own witness--offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' [Citations.]" (*Bolton, supra*, 23 Cal.3d at p. 213; *People v. Benson, supra,* 52 Cal. 3d at p. 794 ["a prosecutor may not go beyond the evidence in his argument to the jury"]; *People v. Miranda* (1987) 44 Cal.3d 57,108; *People v. Kirkes* (1952) 39 Cal.2d 719, 724.) "Statements of supposed facts not in evidence ... are a highly prejudicial form of misconduct, and a frequent basis for reversal. (5 Witkin & Epstein, *supra*, Trial, § 2901, p. 3550.)"

Moreover, a prosecutor may not accomplish the objective of relying on evidence outside the record through the expedient of only *implying* that there is additional evidence against a defendant rather than stating it outright. A prosecutor is prohibited not only from stating but even from implying facts for which there is no evidence before the jury. *People v. Bain* (1971) 5 Cal.3d 839, 847.

> "***The prosecutor's statement constituted improper argument, for he was attempting to smuggle in by inference claims that could not be argued openly and legally***. In essence, the prosecutor invited the jury to speculate about - and possibly base a verdict upon -'evidence' never presented at trial."

People v. Bolton (1979) 23 Cal.3d 208, 212 (emphasis added).

In this case, the prosecutor referred, by clear implication, to a fact for which there was no evidence before the jury – that Michael Baumann actually risked his life by testifying against Sean Vines. This was "clearly misconduct." *People v. Hill, supra*, 17 Cal.4th at p. 828.

Because "the prosecutor, serving as his own unsworn witness, is beyond the reach of cross-examination," misconduct of this type violates a defendant's Sixth Amendment right to confrontation. *People v. Bolton, supra*, 23 Cal.3d at 214, fn 4. Additionally, this misconduct was of such a serious nature that it rendered the trial fundamentally unfair, in violation of the Due Process Clause of the Fourteenth Amendment. *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431. And because the prosecutor's claim of facts outside the evidence involved "the use of deceptive or reprehensible methods to attempt to persuade" the jury, it was misconduct under state law as well. *People v. Earp* (1999) 20 Cal.4th 826, 858.

D. This Misconduct is Subject to Review.

There was no objection to this misconduct. Generally, for prosecutorial misconduct to be reviewed on appeal, the appellant must have made a timely objection and request for an admonition. There are several exceptions to this general rule; one is that a claim of prosecutorial misconduct is reviewable "'if an admonition would not have cured the harm caused by the misconduct.' " *People v. Valdez* (2004) 32 Cal.4th 73, 122. That exception is applicable here.

The main reason an admonition would not have cured the harm is the inflammatory nature of the information the prosecutor imparted to the jury, considered in the context of this case.

The unavoidable inference from the prosecutor's representation that Michael Baumann was actually at risk for his life in testifying that Vines was the robber was that Vines *in fact* posed a deadly threat to Baumann.

This Court has recognized that misconduct may be

> "so outrageous or ***inherently prejudicial*** that an admonition could not have cured it."

People v. Dennis (1999) 17 Cal.4th 468, 521 (emphasis added).

The information imparted by the misconduct here – that the defendant on trial for his life poses an actual, mortal danger to a key witness testifying against him – was inherently prejudicial. Certainly no jury could be expected to ignore that a death penalty defendant has lethal designs on the life of a prosecution witness or his family members. When a jury hears this information – which might literally send chills down the spine – it will not forget it.

The information that Vines actually posed a threat to Baumann was inherently prejudicial as to guilt. Why would a defendant wish to kill a witness? The question answers itself. Just as evidence of flight shows consciousness of guilt, and thus an inference of guilt itself, so too evidence that a defendant poses a threat of death to a witness who testifies against him supplies damning evidence of consciousness of guilt, and guilt itself.

The prosecutor's representation that Baumann was in real mortal danger because he testified against Vines was inherently prejudicial as to penalty as well. The jurors would not be likely to forget the prosecutor's statement that Baumann risked his life by testifying. And they could not but help being

influenced. The jurors knew that Vines was arrested shortly after the Florin Road robbery, and knew that Michael Baumann feared him even when he was in jail. The outside-the-record information introduced by the prosecutor clearly guided the jurors towards the belief that ***Vines was an individual who was homicidally dangerous even when he was incarcerated.***

Moreover, this extra-record information came from a source juries trust and hold in high esteem. As noted above, information imparted by a prosecutor in closing argument, "although worthless as a matter of law, can be 'dynamite' to the jury because of *the special regard the jury has for the prosecutor*, thereby effectively circumventing the rules of evidence." *People v. Bolton*, *supra*, 23 Cal.3d at p. 213 (emphasis added). The source of the information goes a long way in establishing its credibility.

No admonition to disregard the prosecutor's statement that Baumann was actually at risk for his life could "unring the bell" – the jury heard what it heard.

Modern juries are members of the general public, which has been exposed for decades to TV and movie dramas that turn on criminals who go free because of wrongful exclusion of damning evidence by misguided judges. Even a strict admonition would likely have only reinforced the belief that the prosecutor had information about Vines and the threat presented to Baumann that he was not permitted to present.

The timing of the misconduct also made it especially unlikely that an admonition would have erased the prejudicial impact. The most egregious assertion of facts outside the record came in the prosecutor's guilt-phase rebuttal argument, in his claim that Baumann "puts himself into jeopardy and risk by saying it is him." RT 4530. Thus, any admonition to disregard to

prosecutor's claims would have come late in argument – shortly before deliberations – and without any opportunity for defense counsel to respond by way of argument, lessening any possible efficacy.

The misconduct is subject to review.

E. Reversal is Required.

Because the prosecutor's reference to a supposed "fact" not in evidence – that prosecution witness Michael Baumann placed himself in mortal jeopardy by testifying against Vines – violated the Sixth Amendment rights to cross-examination and confrontation, as well as the Due Process Clause of the Fourteenth Amendment, the federal constitutional prejudice standard of *Chapman v. California*, *supra*, 386 U.S. 18, 24, applies. Under *Chapman*, it is the prosecution's obligation to show beyond a reasonable doubt that the error could not have affected the verdict. *Id.*

The prosecutor's misconduct in telling the jury that Baumann actually risked his life in retaliation in return for his testimony against Vines caused prejudice under the *Chapman* standard at both the guilt and penalty phases.

1. Guilt phase prejudice.

Whether or not the evidence against a defendant is "overwhelming" is typically the most significant factor in determining whether an error is harmless. Here, the case against Vines on the Watt Avenue counts was far from overwhelming.

The testimony of four eyewitnesses was central to the trial of the Watt Avenue charges. All four were McDonald's employees, and each had worked

with Vines. No one claimed to see more than one robber. But the eyewitnesses disagreed on what they saw.

Parts of Stanly Zaharko's testimony inculpated Vines. Yet Zaharko's accounts were riddled with inconsistencies on the critical issue of identification. Zaharko testified that he told Detective Minter that the only thing that made him think it was Sean Vines was the guy's height and size. RT 3379.

At the preliminary hearing, Zaharko testified that he was "fairly certain" it was Vines (RT 3332) -- but at Proby's trial, Zaharko testified that *he didn't feel he had sufficient evidence to stand up in court and identify Vines as the robber*, and that he was not so certain that he would want someone to convict Vines based on his identification. RT 3335. At Vines' trial, he testified that *he could not positively identify the robber as Vines* simply from what he saw, and that he told the officers responding to the scene that it was "*just a hunch*" that the robber was Vines. RT 3373 (emphasis supplied).

Leticia Aguilar testified that the robber was Vines. Aguilar did not, however, tell the police officer who interviewed her after the robbery that the robber was her co-worker. Indeed, Aguilar did not tell the officer anything more than that she recognized "the look" of the robber – and in fact, admitted that all she had seen of the robber were his eyes. RT 3604-3611.

And Aguilar had previously stated <u>that the robber was just a little bit taller than Zaharko</u>. RT 4227. Zaharko testified he was five-nine. RT 3250. <u>Vines is six inches taller</u>.

John Burreson did not recognize the robber as Vines. RT 4085. Burreson testified that Vines had an unusual way of walking; he walked with kind of a limp, and Vines was the only person Burreson had ever seen who

walked that way; Burreson was a friend and would tease him about it. RT 4081. When Burreson saw the robber walk towards him, he didn't notice that characteristic limp. RT 4082. The person walked straight, and like they were mad. RT 4084. He saw the robber take three or four steps. RT 4087.

Moreover, the robber Burreson saw not only did not walk with a limp – *the robber was also about three inches shorter than Vines*. RT 4093-4095.

Thus, apart from Michael Baumann, the three eyewitness to the Watt Avenue robbery included (a) one eyewitness who testified, twice, that he couldn't positively identify Vines as the robber (Zaharko), (b) a second eyewitness who claimed she could identify Vines, though all she saw was the robber's eyes, and had previously described the robber as someone much shorter than Vines (Aguilar), and (c) a third eyewitness who did not recognize the robber as Vines; saw that the robber did not walk with Vines' characteristic limp; and observed the robber was about three inches shorter than Vines (Burreson).

Michael Baumann's testimony was shaky.

Baumann supposedly saw and recognized Vines when the robber entered the bathroom. RT 3398.

But Baumann said nothing about Vines to manager Stanly Zaharko when Zaharko, alarmed, asked Baumann if he had noticed anyone going into the rest room, and told Baumann to get ready to call 911. RT 3245-3246. Baumann did not tell Zaharko it was Sean Vines, or indicate that he knew who it was. RT 3381-3382.

And after the robbery, Baumann talked to the patrol officer who responded to the scene, then to Lisa Lee, then to the officer again; it wasn't until the second conversation with the officer in which he said he thought it

might be Vines. RT 3412, 3454. Baumann testified about his identification of Vines:

> "*I wasn't sure* and then I talked to Lisa [Lee, the store manager] and she was saying do you think it could be Sean? And then *it seemed like it could be* because everything described or kind of described toward him."

RT 3416-3417 (emphasis added).

Baumann's identification of Vines as the robber was belated, inconsistent, tainted and uncertain.

Thus, the state of the eyewitness testimony on the Watt Avenue counts was ambiguous at best. In light of these varying descriptions by the eyewitnesses, the evidence against Vines simply cannot be described as "overwhelming."

The effect of the prosecutor's conduct was to substantially strengthen the credibility of Michael Baumann in his testimony that Vines was the robber. Once the prosecutor had conveyed to the jury that Baumann's fear of retaliation for his testimony was based on real risk of death, Baumann's identification of Vines could be portrayed as an act of courage. ("*We submit Michael Baumann is somewhat of your quiet hero.*" RT 4433 (emphasis added).)

Absent the prosecutor's misconduct, Baumann's testimony and his identification of Vines would not have been lent a false aura of veracity and courage.

Moreover, and no less significant, is the inherently prejudicial nature of the information communicated by the prosecutor to the jury – that Vines posed an actual threat of death to a prosecution witness in retaliation for

testimony. This would, in the minds of some jurors, seal the matter of guilt without more.

The inference of guilt arising from information that a defendant may try to have a prosecution witness killed is a powerful one.

Vines not only suffered prejudice on the Watt Avenue counts from the prosecutor's misconduct; he also was prejudiced on the Florin Road charges.

As shown above in connection with Arguments III, IV and V, the case the prosecution presented against Vines on the Florin Road charges was not a strong one. Neither Jeffrey Hickey nor Pravinesh Singh, who both knew Vines, could identify him as one of the robbers. Hickey didn't think the robbers were McDonald's employees, and Singh testified that the robber he saw was not Vines. The prosecution's case depended primarily on the testimony of Vera Penilton, but as discussed above, there were numerous reasons to disbelieve Penilton.

The prosecutor, by his misconduct in conveying to the jury that Michael Baumann risked his life by identifying Vines as the Watt Avenue robber, substantially strengthened the prosecution's case against Vines on the Watt Avenue counts. Because the Watt Avenue and Florin Road charges were tried together, there was an inherent danger of an impermissible inference of criminal propensity – the "'human tendency to draw a conclusion which is impermissible in the law: because he did it before, he must have done it again.'" *Bean v. Calderon, supra,* 163 F.3d at p. 1085.

And the trial court gave no instructions that would effectively limit the jury's consideration of any part of the prosecution's Watt Avenue case against Vines in its determination of whether Vines committed the Florin Road crimes.

Thus, the jury was free to infer that the prosecutor's representation that

Baumann's life was in danger, and the greater degree of assurance this lent to Baumann's identification of Vines, not only made it more likely that Vines committed the Watt Avenue crimes, but also made it more likely that Vines was the sort of person who would have committed the Florin Road robbery as well.

Even assuming *arguendo* that severance of the Watt Avenue and Florin Road charges was properly denied, the prosecutor's claim that Baumann was in danger for testifying against Vines strongly supported an inference of murderous criminal propensity by Vines and significantly changed the evidentiary picture before the jury not just on the Watt Avenue charges but on the Florin Road crimes as well. Absent this misconduct, and in view of the weakness of the prosecution's case that Vines was the robber, it is reasonably likely that Vines would have achieved a better result on the Florin Road charges as well.

It is, of course, the prosecution's burden under *Chapman* to show that the prosecutor's misconduct could not, beyond a reasonable doubt, have affected the guilt verdict. It will not be able to make that showing. Even under the lesser state law standard of *People v. Watson*, the judgment of conviction on all counts must be reversed.

2. Penalty phase prejudice.

Vines was also prejudiced at the penalty phase by the prosecutor's misconduct in claiming that Michael Baumann was actually at risk of death for testifying against Vines. There were two separate types of prejudice.

First, Vines was prejudiced at the penalty phase on the issue of lingering doubt, on which the jury was instructed. RT 4858. The prosecutor's

misconduct strengthened the prosecution's case against Vines on the Watt Avenue counts. And as noted above, there is a human tendency to infer that "because he did it one, he must have done it again." The impermissible argument on the Watt Avenue counts could only strengthen by association the jury's conviction that Vines was guilty on the Florin Road charges. Yet that conclusion was far from a foregone one – indeed, during the penalty phase jury deliberations, the jurors asked to see Vines' letter to Sean Gilbert, and to have read back the testimony of Florin Road witness Jeffrey Hickey. CT 952.

Thus, lingering doubt was plainly on the minds of the jurors at the penalty phase, and it cannot be said that, beyond a reasonable doubt, the prosecutor's misconduct in claiming that Baumann was actually at risk of being killed because he testified against Vines did not contribute to erasing that lingering doubt.

Second, the prosecutor's misconduct was prejudicial at the penalty phase because his representation to the jury that Baumann ***"puts himself into jeopardy and risk***" by identifying Vines as the robber led to the clear and devastating implication that Vines was responsible for the threat to Baumann's life.

The claim that Vines posed a threat to Baumann's life was not openly exploited by the prosecutor in his penalty phase argument – but it didn't have to be. The jurors would not be likely to forget the prosecutor's claims in the guilt phase arguments. And they could not but help being influenced. The jurors knew that Vines was arrested shortly after the Florin Road robbery, and knew that Michael Baumann feared him <u>even when he was in jail</u>.

The outside-the-record information introduced by the prosecutor clearly pointed the jurors towards the belief that ***Vines was an individual who was homicidally dangerous even when he was incarcerated.***

The significance of this factor in the decisional process for the jury should not be underestimated. Recent empirical research has confirmed what may be intuitively obvious – that jurors are influenced by whether the capital defendant seems likely to be a continued threat to society:

> "future dangerousness is 'at issue' in virtually all capital cases, even when the prosecution says or does nothing to put it there."

Blume, Garvey & Johnson, *Study: Future Dangerousness in Capital Cases: Always "At Issue"* (2001) 86 Cornell L.Rev. 397, 401 (South Carolina data).

Moreover, recent empirical research has also demonstrated that *fear of the defendant is the single most prevalent emotional response among jurors who vote to impose the death penalty*. There is a marked statistical correlation between a juror's fear of the defendant and a final vote for death. Garvey, *The Emotional Economy of Capital Sentencing* (2000) 75 N.Y.U.L.Rev. 26, 64.

These studies break no startling new ground, but merely reaffirm what is common sense – that, apart from the direct circumstances of the crime itself, the jurors are most likely to focus on whether the defendant is a future threat in making the life or death judgment.

Here, the prosecutor's representation, that Baumann *"puts himself into jeopardy and risk"* for his life by testifying against Vines, was likely to have a strong impact on the minds of the jurors. The prosecution will not be able to show that this misconduct, beyond a reasonable doubt, did not contribute to the penalty phase verdict.

IX. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED DUE PROCESS BY ADMITTING AN IRRELEVANT AND INFLAMMATORY STATEMENT ATTRIBUTED TO VINES BY PROSECUTION WITNESS SONYA WILLIAMS.

Over defense objection, the trial court admitted evidence that, in response to Sonya Williams' question about locking people in the freezer during the Watt Avenue robbery – "What if you would have killed those people?" – Vines had told her, "They just would have died." This evidence had no tendency to prove any fact in dispute, and was so inflammatory and prejudicial as to deny Vines a fair trial on both guilt and penalty.

A. Background.

Sonya Williams testified at trial as the prosecution's lead-off witness. Williams had previously given a statement to detectives that had been videotaped, and during its direct examination of Williams, the prosecution sought to impeach Williams with evidence of her alleged prior inconsistent statements made during the interview.

The defense objected to the prosecution's impeachment of Williams with a videotape of her prior statement to detectives. RT 3093-3106. The trial court overruled in major part the defense objections, and allowed the prosecution to impeach Sonya Williams by showing the jury excerpts of her videotaped statement to Detectives Minter and Cabrera. The transcript of the redacted version of the videotape (i.e., the transcript of the excerpt used to impeach Williams) is Exhibit 101-C, found at CT 4910-4917.

The defense specifically objected to an excerpt of Williams' videotaped interview with the detectives regarding Vines' alleged the comments about people in the freezer at the Watt Avenue robbery who might have died. RT 3102. The trial court overruled the objection. RT 3104.

Thereafter, the prosecutor asked Sonya Williams whether she had asked Vines about what if he had killed the people he put in the freezer. Williams testified she remembered asking Vines about that, but couldn't remember what he had said. RT 3119-3120. The prosecution then played a videotape excerpt of Sonya Williams' interview with Detective Cabrera, as follows:

> "[DETECTIVE] CABRERA: Okay. What did he [Vines] tell you about, uh, that the people were in there? I mean, you asked –
> "WILLIAMS: [O]h, when I was at the hotel. I asked him, I said, 'What if those people are – ' No. We was in the car driving to the hotel. And I was like, 'What if those – ***what if you would have killed those people***?' Was it in the hotel? I don't remember.
> "CABRERA: But, essentially, you asked him, you said –
> "WILLIAMS: (Unintelligible)
> "CABRERA: – 'What if those people would have – what if you would have killed those people?
> "WILLIAMS: ***I said, 'What if they would have died? Whatcha gonna do?' He said, 'They just would have died.***' "

CT 4916 (emphasis added).

B. Analysis.

Under Evidence Code section 352, the court must determine whether the "probative value" of the evidence sought to be admitted is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The trial court abused its discretion under Evidence Code section 352 in ruling that the evidence of Vines' alleged statement regarding the hypothetical fate of the people in the freezer would be admitted (RT 3104), because the statement had no substantial probative value as to any disputed material issue, yet was highly prejudicial.

First, the evidence had no "substantial probative value" on any "disputed material issue". See *People v. Kipp* (2001) 26 Cal.4th 1100, 1121.

The prosecutor attempted to justify admission of Sonya Williams' videotaped statements regarding Vines' alleged statements to her on the basis that the tape "impeaches directly" Williams' prior testimony. RT 3104. But at no point before the trial court's ruling that the statement was admissible had Sonya Williams testified as to anything she had discussed with Vines regarding leaving people in the freezer. See RT 3066-3092. Thus, there simply was no prior testimony to be "impeached directly" by Williams' prior inconsistent statement.[51]

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[51] *After* the trial court ruled that the prosecutor could impeach Williams with her statements that were assertedly inconsistent with her prior testimony (RT 3104), the prosecutor elicited from Williams that she couldn't remember what Vines said to her about leaving people in the freezer (RT 3119-3120). But testimony cannot be introduced solely to provide a basis for subsequent impeachment with a prior inconsistent statement – there must be some independent relevance for the testimony before it can be introduced, and then impeached. Here, there was no such independent relevance. It has long been established that

> "A party cannot cross-examine his adversary's witness upon irrelevant matters, for the purpose of eliciting something to be contradicted. . . It is well settled that a witness cannot be impeached by contradicting him upon collateral matters."

People v. Dye (1888) 75 Cal. 108, 112; accord, *People v. Lavergne* (1971) 4

(continued...)

The prosecutor also argued that the evidence of Williams' recounting Vines' alleged statement regarding the possible death of the people in the freezer at Watt Avenue was relevant because it

> "goes to his intent in falsely imprisoning them which is one of the elements of the crime. It goes to his role in the robbery while it's very fresh after it occurred. I believe it's highly relevant on his intent, state of mind."

RT 3103-3104.

The trial court accepted the prosecutor's reasoning on this point. RT 3104.

The trial court was wrong. It was not a fact in dispute that the Watt Avenue robber intended to falsely imprison the employees. What *was* in dispute was whether or not Vines was that robber.

The only "probative value" the evidence had was on an issue that was never in dispute. Thus, the evidence had no probative value whatsoever -- let alone any "substantial probative value" -- on any "disputed material issue". *People v. Kipp*, *supra*, 26 Cal.4th at p. 1121.

Because the evidence in question had no probative value whatsoever on any disputed material issue, there was nothing for the trial court to properly weigh on the "probativity" side of the balance. Even prior to any consideration

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(...continued)
Cal.3d 735, 744. The rule is no different when, as here, the prosecutor treats his own witness as adverse. A trial court has no discretion to allow impeachment of a witness on irrelevant matters.

of the "prejudice" side of the balance, it is apparent the trial court abused its discretion.[52]

Moreover, the evidence was indeed highly prejudicial. As this Court has explained:

> "The 'prejudice' referred to in Evidence Code section 352 applies to *evidence which uniquely tends to evoke an emotional bias against the defendant as an individual* and which has very little effect on the issues."

People v. Karis (1988) 46 Cal.3d 612, 638 (emphasis added).

The evidence in question is Vines' alleged statement, in response to Sonya Williams' question about what he would have done if the people in the freezer had died: "'They just would have died.'" CT 4916.

As shown above, this evidence has no "effect on the issues," because it was not probative of any disputed fact.

But it is just the sort of evidence which "uniquely tends to evoke an emotional bias against the defendant as an individual." If credited, it shows a conscious disregard for the possible consequences of the Watt Avenue robbery – that four people might have lost their lives. It would be a rare juror

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[52] Even when the proffered evidence is, considered by itself, somewhat probative, if in the context of the total evidence it is cumulative, there is also nothing for the trial court to balance on the "probativity" side of the Evidence Code section 352 equation.

Thus, in *People v. Ewoldt, supra*, 7 Cal.4th 380, 405-406, this Court considered whether evidence of a defendant's similar uncharged acts would generally be admissible under section 352:

> "In many cases the prejudicial effect of such evidence would outweigh its probative value, because *the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute*. (*People v. Schader*, *supra*, 71 Cal.2d 761, 775.)"

indeed who would not react with a negative emotional bias against the speaker of such a statement. This was evidence likely to arouse an emotional bias against the defendant as an individual.

Because the probative value of the evidence under the standards of section 352 was nil, and the danger of undue prejudice was great, the trial court abused its discretion in admitting the evidence under section 352.

Moreover, admission of the evidence of Vines' alleged comment that the people in the freezer "just would have died" (CT 4916) violated Vines' federal constitutional right to due process of law.[53]

Federal courts find due process violated when the prosecution introduces evidence that has no legitimate probative value from which inferences can be drawn, and the evidence is of an "inflammatory quality" so as to prejudice the right to a fair trial. E.g., *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385, 1386.

In this case, the same factors that establish that the trial court necessarily abused its discretion under section 352 also demonstrate that the trial court's ruling violated federal due process principles. The evidence of Vines' alleged comment was relevant to no disputed issue, as discussed above, and had no probative value. And the evidence was of an inherently

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[53] Vines objected on the bases of relevance, undue prejudice under section 352, and improper impeachment. RT 3102. Before trial, Vines sought an order that "all defense counsel's objections at trial be deemed objections under the Constitutions of both the State of California and the United States." CT 360. The prosecution presented no objection or argument to the contrary, and the trial court granted the order. CT 527; RT 2041-2042. Accordingly, Vines must be held to have preserved the federal constitutional issue in this instance, as elsewhere in this appeal.

inflammatory nature, as the comment attributed to Vines displayed a shocking indifference to causing the intentional deaths of four human beings.

C. Prejudice.

Whether using the *Chapman* standard for federal constitutional error, or the lesser standard of *People v. Watson* for state-law error, the Court should conclude that the erroneous admission of Vines' alleged statement regarding the hypothetical fate of the people in the freezer prejudiced Vines at both the guilt and penalty phases.

The prosecutor fought successfully to get the statement that Williams attributed to Vines into evidence, because he knew this evidence of Vines' state of mind, if believed, would have an impact on the jury. If the jurors believed Sonya Williams' statement, they would be convinced that Sean Vines had demonstrated a conscious, and conscienceless, willingness to commit a multiple murder – an attitude that would just shock any reasonable juror.

This evidence was prejudicial to Vines on the Watt Avenue charges, counts One through Seventeen.

As shown above in connection with Argument VIII, the prosecution case against Vines on the Watt Avenue counts was far from airtight. Stanly Zaharko could not positively identify the robber as Vines simply from what he saw, and he told the officers responding to the scene that it was "just a hunch" the robber was Vines. RT 3373. John Burreson did not recognize the robber as Vines, and testified that the robber did not walk with Vines' distinctive limp. RT 4081-4085. The robber was shorter than Vines. RT 4093-4095. Leticia Aguilar thought the robber was Vines, but described the robber as someone considerably shorter than Vines. RT 3604, 4427, 3250 (see p. 204,

subjective state of mind – just as the prosecutor and the judge had recognized. RT 3104. It was certain to cause an emotional bias against Vines. The erroneous admission of this inflammatory and irrelevant evidence, in the absence of effective limiting instructions, had a toxic "spillover effect" and, in light of the relatively much weaker evidence against Vines on the Florin Road counts, cannot be held to be harmless.

The wrongful introduction into evidence of Vines' alleged statement about the possible fate of the people in the freezer additionally prejudiced Vines at the penalty phase.

As this brief has shown in Argument III.F.2, *supra*, the prosecutor, in making his argument for the penalty of death, stressed the theory that Vines deserved death because of the intentional, "execution-style" killing of Florin Road victim Ron Lee. RT 4867, 4874, 4880-4881. Plainly, this was an argument that depended on Vines' supposed mental state – his willingness to kill in order to successfully rob.

But the prosecutor's argument as to Vines' alleged mental state during the Florin Road killing of Ron Lee rested almost entirely on the testimony of Vera Penilton – and as we have seen *supra* (at pp. 140-143), the testimony of Vera Penilton was highly suspect.

In these circumstances, the admission of Vines' alleged statement regarding the fate of the four employees locked in the Watt Avenue freezer – a statement that, if credited, reveals the speaker to be chillingly indifferent to the concept of the almost incidental deaths of four people that he knew – powerfully reinforced the prosecution's portrayal of Vines as a cold-blooded killer, deserving of the ultimate sanction..

Because the improper admission of this evidence prejudiced Vines at the penalty phase, the sentence of death must be reversed.

X. THE TRIAL COURT REVERSIBLY ERRED IN ADMITTING A LETTER FROM VINES TO PROSECUTION WITNESS SEAN GILBERT.

A. Background.

Two months before his testimony, and after serving three months for receiving stolen property, prosecution witness Sean Gilbert was released from the Sacramento County Jail. RT 3289. Two weeks before being released from jail (RT 3296), Gilbert received a letter from Vines, who was also in custody there. RT 3289. After he read it, he notified one of the officers about the letter (RT 3290), and called District Attorney Gold to tell him about it (RT 3294). Gilbert testified that being in custody, he was "a little concerned" about the letter. RT 3291. He didn't know how to take it, but he turned it over to the officer because he considered it a threat. RT 3295.

Over defense objection (RT 2991-2992), a redacted portion of the letter was read to the jury:

> "Well, well, well, look at who the cat dragged in. Didn't expect to hear from me, did you? I knew you were in here not too long ago for some domestic violence or something like that. Deon told me he saw you when he was going to trial. He told me some other things, also. I know he told you I was going to kick your ass because of your statement. He told me why you did it. You should never made a faulty statement regardless, if you were going to get fired or not. We don't do shit like that. Deon is a snitch period. Fucc that nigga. I'll get into that in a minute. You ain't never seen me in no leather jacket, new or old, nor a starter jacket. I don't know why you told them that. Nor a shotgun or tranquilizer gun. I'm seriously thinking about beating your ass on sight. I'm not though. Why? From what Deon told me you don't remember none of that. As long as I don't see your face during my trial, we cool on that aspect.

"I should be out very, very shortly, and you going to have to see me. We were way cool, smoke bud. I came to your spot to kicc it with you. Then you tried to dogg me out. Never try to fucc a dog cause your going to get bit.

"Tell this dude named Anthony Gregory Motley, aka Tony in 3 W 324, that Yolanda's roommate Sean said it is not over. Tell him I should have kicced his ass when I saw him hiding in the power closet waiting for Debbie to come by to jump her. It is not over by a long shot, especially about lying about I pulled a gun on you. Tell that to him. Tell him to write back if he is man enough.

"I'm outie, Sean and hope to hear from you soon. Oh, I knew were you here again cause you signed up for school and I -- and I'm one of the teacher's aides. Shaq."

RT 3291-3293.[54] A redacted copy was admitted into evidence. CT 614; 838; Ex. 98-A.[55]

B. Analysis.

The prosecutor set forth two theories of admissibility: that the letter was admissible because it contained admissions, and that it was admissible because it contained threats by Vines. RT 2989. Defense counsel contested both theories of admissibility, and argued as well that the letter should have been excluded as more prejudicial than probative under Evidence Code section 352. RT 2991-2992. The trial court overruled the objections, concluding that the letter was admissible under both the prosecutor's theories. RT 2992. Again, the trial court was wrong.

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[54] The trial court ordered that the letter be "sanitized" to exclude references to gangs. CT 614, RT 2992.

[55] The redacted version admitted into evidence and later inspected by the jury differed slightly in its editing. Compare RT 3291-3293 with CT 4878-4880.

First, the prosecutor's theory that the letter was admissible because it was an admission, or contained admissions, is defective.

Evidence Code section 1220 regulates admissions -- but it does not make admissions of a party affirmatively admissible. Section 1220 does nothing more than set forth the rule that "[e]vidence of a statement [of a party] is not made inadmissible by the hearsay rule" when offered against the party. And the fact that a piece of evidence is not barred by the hearsay rule does not mean it is admissible.

The written statement of a defendant that admits some fact in dispute in a criminal trial might possibly be admissible (subject to the operation of other evidentiary and constitutional rules, of course). But the written statement of a party that admits no fact in dispute in the criminal trial is not admissible, because it does not tend to prove any part of the prosecution's case.

The Vines-to-Gilbert letter was not admissible on the theory that it tended to prove some part of the prosecution's case, because it had no such tendency. Even assuming the letter's authenticity, there is not a word in it that admits Vines' participation in the Florin Road or Watt Avenue crimes. It is, in reality, *a denial, not an admission*. Gilbert told the police that after the Watt Avenue store was robbed, he had seen Vines with some new clothes and a new Walkman. Vines in the letter expressed frustration because Gilbert had lied: "You should never made a faulty statement regardless, if you were going to get fired or not." RT 3292. This was not an admission.

Because a denial is not an admission, the letter was inadmissible on the theory it was an admission.

Second, the trial court erroneously ruled the letter was admissible to show a threat by appellant.

Evidence of a threat by a criminal defendant is subject to the rules of evidence, and is therefore admissible only if it is relevant. Evidence Code section 350. Evidence of a threat by a criminal defendant might be relevant in a given case for two reasons: to show the state of mind of the witness who received the threat, where that is relevant to the testimony of the witness, or to show a defendant's attempt to prevent a witness from testifying truthfully, which in turn would lead to an inference of consciousness of guilt.

Here, however, neither reason is applicable.

The state of mind of witness Sean Gilbert at the time of his testimony was never at issue. While Gilbert did state that he was a little concerned at the time he received the letter, Gilbert did *not* testify that his receipt of the letter made him afraid to testify at the time of trial. Nor did Gilbert state that his receipt of the letter caused him to change his testimony in any way. Nor was there any indication at trial that this was the case. To the contrary, Gilbert stated he was *not* concerned about a threat at the time of trial. RT 3295. Therefore, the letter could not have been admitted on the theory that it was relevant to explain inconsistencies or reluctance in Gilbert's testimony. Compare, e.g., *People v. Burgener*, *supra,* 29 Cal.4th 833, 869.

Evidence of a criminal defendant's attempt to suppress evidence is, of course, usually admitted, on the theory that it indicates consciousness of guilt. Thus, for example, this Court stated in *People v. Pinholster* (1992) 1 Cal.4th 865, 944:

> "Defendant claims the prosecutor committed misconduct in eliciting testimony from Todd Croutch that he had received a threatening phone call from defendant, who said that if Croutch testified, he would be killed. The claim is untenable; such evidence is clearly admissible to show consciousness of guilt.

(*People v. Hannon* (1977) 19 Cal.3d 588, 599-600; *People v. Slocum* (1975) 52 Cal.App.3d 867, 887.)"

But the rule is not a rigid one, insensitive to the context of its application – and it cannot override the rule of relevance. It is a fundamental maxim of this state's jurisprudence that:

"When the reason of a rule ceases, so should the rule itself."

Civil Code section 3510. Here, the threats at issue showed, not "consciousness of guilt," as in *People v. Pinholster, supra*, but the very opposite – consciousness of innocence. Vines in the letter chastised Gilbert, not for speaking the truth – but for *lying to save his job*. In such circumstances, the general rule that threats by a criminal defendant can be admitted to show consciousness of guilt has no application. The threat by Vines did not manifest consciousness of guilt, and there was nothing in the letter from which the jury could infer such consciousness.

Thus, because the letter did not contain any admissions by Vines of any part of the prosecution's case, and because the threat contained in the letter did not lead to an inference of consciousness of guilt, but instead pointed to consciousness of *innocence*, the letter was inadmissible under the prosecution's theories, either as an admission or to show threats. The trial court erred in ruling to the contrary.

Moreover, because the letter had no substantial probative value on any disputed material issue at trial, the trial court could not have properly exercised its discretion to admit the letter under Evidence Code section 352. That statute expressly requires the trial court to determine whether the "probative value" of challenged evidence outweighs the danger of undue prejudice. But when, as here, the evidence has no "substantial probative value" as to any "disputed material issue" (see *People v. Kipp, supra*, 26 Cal.4th at p. 1121), then

necessarily the "probative value" side of the scale weighs nothing. It is an abuse of discretion under section 352 for a trial court to admit challenged evidence that has no substantial probative value on a material disputed issue.

Even assuming *arguendo* that the letter as admitted had some probative value, the trial court nevertheless abused its discretion in admitting it in the form it was admitted, due to undue prejudice. As previously noted, "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." *People v. Karis, supra,* 46 Cal.3d at p. 638. The letter as admitted in this case unquestionably contained evidence that uniquely tended to evoke an emotional bias against the defendant – evidence that he contemplated committing acts of violence against others.

There were two such pieces of evidence in the letter. First, there was Vines' arguable threat against Gilbert regarding his testimony (which, as demonstrated above, was not relevant to Gilbert's testimonial state of mind, and did not show consciousness of guilt).

Second, there was Vines' request that Gilbert communicate to another jail inmate, Anthony Gregory Motley, or Tony in 3 W 324: "Tell him I should have kicced his ass when I saw him hiding in the power closet waiting for Debbie to come by to jump her. It is not over by a long shot . . . ." RT 3292-3293.

This evidence shows Vines ready to do violence to another person for a reason unconnected with the charges in this case and arising prior to his arrest – that Motley intended to "jump" Vines' friend Debbie Allen. The evidence suggests that Vines planned to violently retaliate against Motley.

Vines' expressed plan to assault Motley because of Motley's lying-in-wait to assault Debbie Allen had ***no*** "effect on the issues" in this case – the ***only*** *function of this evidence was to prejudice the jury against Vines due to his violent propensities.*

Thus, even under the untenable hypothesis that the letter had some substantial probative value to be considered on one side of the section 352 scale, the letter as admitted could only be regarded as unduly prejudicial, because it contained evidence of Vines' propensity toward violence – evidence that tended uniquely to evoke an emotional bias against Vines, and which had no effect on the issues.[56]

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[56] Vines' counsel argued that, if any part of the letter was allowed in evidence, then the whole letter should come in under Evidence Code section 356. The trial court rejected this alternative ("your motion that the balance come in under 356 is denied."). RT 2992.

This ruling was erroneous; see *People v. Hamilton*, *supra*, 48 Cal.3d at p. 1174 ("'In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence.'").

The prosecutor misled the jury by editing the letter to make it appear as if Vines was threatening Gilbert regarding his testimony. In the edited version of the letter, just after the sentence, "As long as I don't see your face before trial, we cool on that aspect." (CT 4878) the following passage appears:

> "I should be out very, very shortly, and you going to have to see me about that alone. You know I mad as hell at you. We were way cool, smoke bud. I came to your spot to kicc it with you. Then you tried to dogg me out. Never try to fucc a dog cause your going to get bit."

CT 4879.

(continued...)

Moreover, the trial court did not only abuse its discretion in admitting the Vines-to-Gilbert letter -- the court also violated Vines' federal constitutional due process rights.[57] As noted above, the federal due process guarantee is violated when the prosecution introduces evidence that has no legitimate probative value from which inferences can be drawn, and the evidence is inflammatory and thus prejudices the defendant's right to a fair trial. E.g., *Jammal v. Van de Kamp*, *supra,* 926 F.2d 918, 920; *McKinney v. Rees*, *supra,* 993 F.2d 1378, 1385, 1386.

As the preceding discussion has shown, the letter had no substantial probative value and there were no legitimate inferences to be drawn from it, yet it was highly prejudicial, because it was, in essence, evidence of violent propensity – the type of evidence that is, *inter alia*, prohibited by Evidence

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(...continued)

It thus appeared to the jury from the prosecutor's redacted version that Vines was "mad as hell" with Gilbert because of Gilbert's statements regarding his case.

But the *unedited* version of the letter, not seen by the jury, contains material before the "mad as hell" paragraph that clarifies that the reason Vines was upset with Gilbert was that Gilbert had tried to pry away and seduce one of Vines' girlfriends. CT 4874-4875.

Accordingly, even assuming the trial court correctly ruled the letter was admissible, it prejudicially erred in admitting the redacted, misleading version proffered by the prosecutor, which gave rise to the false implication that Vines was contemplating violence against Gilbert because of Gilbert's statements to law enforcement.

[57] Before trial, on Vines' written motion, and without any prosecutorial opposition, the trial court granted an order that "all defense counsel's objections at trial be deemed objections under the Constitutions of both the State of California and the United States." CT 360; CT 527; RT 2041-2042. Vines thus preserved the federal constitutional issues even when, as here, federal objections were not expressly made.

Code section 1101, subdivision (a), making evidence of character inadmissible to prove conduct. This evidence of Vines' propensity for planned violent assault was inflammatory, and prejudiced Vines' federal due process right to a fair trial.

C. Prejudice.

Whether assessed under the federal constitutional standard of *Chapman v. California*, or the less rigorous California standard of *People v. Watson*, Vines suffered prejudice from the improper admission of the letter at both the guilt and penalty phases.

As discussed in the preceding section, the letter was unduly prejudicial because it gave rise to the impermissible inference that Vines had a propensity for planned acts of violent assault. Evidence of criminal propensity is "objectionable, not because it has no appreciable probative value, *but because it has too much.*'" *People v. Alcala, supra*, 36 Cal.3d 604, 631; see *Old Chief v. United States, supra,* 519 U.S. at p. 181 ("'Although ... 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged--or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment--creates *a prejudicial effect that outweighs ordinary relevance*.") (emphasis added).

The case against Vines on the Watt Avenue counts was shaky, as discussed more fully in Argument VIII, *supra*. There were four eyewitnesses, all of whom knew Vines, but all were problematic. Zaharko said it was "just a hunch" the robber was Vines, Aguilar stated the robber was considerably shorter than Vines, Baumann testified he "wasn't sure" it was Vines, and Burreson stated he did not recognize the robber as Vines. On the shaky state

of the Watt Avenue eyewitness evidence, the highly prejudicial evidence of criminal propensity in the Vines-to-Gilbert letter could not have been harmless.

The prosecution evidence against Vines on the Florin Road charges was even weaker still. As discussed earlier in Arguments III and IV, both eyewitnesses who testified at trial knew Vines and had worked with him at McDonald's. Jeffrey Hickey never identified Vines as one of the robbers, and stated he did not think the robbers were McDonald's employees. RT 3925. And Pravinesh Singh testified that the robber that he saw was not Sean Vines, but was a considerably shorter man. RT 4112. In the face of this failure of eyewitness proof, the prosecution relied on the testimony of Vera Penilton, a witness who was very likely an accessory after the fact, who had been given immunity, and who admitted she had lied to law enforcement officers. Even more than with the Watt Avenue counts, the evidence against Vines on the Florin Road counts was porous and questionable. The impermissible evidence of criminal propensity contained in the Vines-to-Gilbert letter was prejudicial as to the Florin Road counts under any standard.

The impermissible evidence of violent propensity in the Vines-to-Gilbert letter was also prejudicial at the penalty phase.

And as California death penalty cases go, this was far from being one of the most egregious cases. Vines did not kill multiple victims. The victim who was killed did not experience torture or prolonged suffering, and there was no intention to inflict pain or obtain sexual gratification. Vines did not kill a child, a senior citizen, a disabled person, or any other exceptionally vulnerable victim. He did not commit acts of terrorism for religious or political purposes. He did not kill a police officer or a judge.

The prosecutor's theory was the Vines deserved death because he had committed a cold, execution-style killing of the victim. RT 4867, 4874, 4880-4881. Supporting this scenario was the testimony of Vera Penilton as to Vines' alleged admission of the crime. Penilton was the only witness who placed Vines at the scene of the killing, and the only witness who identified him as the shooter. But Vera Penilton was, as shown above, a highly suspect witness.

In these circumstances, the erroneously admitted Vines-to-Gilbert letter, which showed that Vines planned to assault Anthony Motley, contributed materially to the jury's impression that Vines had a propensity for violence, which could only reinforce the prosecutor's contentions that Vines was the shooter, and that Vines had deliberately chosen to execute the victim. It is highly likely that the jurors were troubled at the penalty phase by lingering doubt about Vines' participation in the Florin Road crimes, or about his role as the shooter. The jurors were instructed on lingering doubt. And during penalty phase deliberations, the jurors asked for and received a read-back of Florin Road eyewitness Jeffrey Hickey's testimony from the guilt phase. Hickey did not identify Vines.

Moreover, during penalty phase deliberations, the jurors asked to see the Vines-to-Gilbert letter. RT 4922.

Thus, the impermissible evidence of violent and criminal propensity contained in the improperly admitted letter more than likely contributed to the verdict at the penalty phase. Accordingly, the sentence of death must be reversed.

XI. THE TRIAL COURT VIOLATED VINES' CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE BY IMPERMISSIBLY RESTRICTING HIS ATTEMPT TO DEMONSTRATE THAT WATT AVENUE EYEWITNESSES IDENTIFIED HIM AS PART OF A "CONSENSUS."

A. Introduction.

In a case concerning pretrial lineups, *United States v. Wade* (1967) 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, the Supreme Court observed:

> "*The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.* . . . A commentator has observed that 'the influence of *improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor* -- perhaps it is responsible for more such errors than all other factors combined.' Wall, Eye-Witness Identification in Criminal Cases 26. Suggestion can be created intentionally or unintentionally *in many subtle ways*."

Id. at pp. 228-229 (emphasis added).

In this case, Vines sought to defend against the Watt Avenue charges by showing that the eyewitness identifications of him as the robber were unreliable, and were based, not on the individual witnesses' separate identifications of Vines as the robber based on their own direct observations, but on conversations between the eyewitnesses and others which led to a *consensus identification* of Vines. RT 4478, 4479, 4485, 4494.

The trial court, however, refused to allow Vines to introduce two key pieces of evidence that supported the defense of an unreliable consensus identification: (1) evidence that eyewitness Leticia Aguilar had a conversation with Watt Avenue McDonald's manager Lisa Lee in which Lee encouraged

Aguilar to identify Vines as the robber, and (2) evidence that before Detective Danny Minter interviewed Michael Baumann, he learned that employees were talking among themselves and repeating rumors about the robbery.

As shown in Argument III, the Fifth, Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right and opportunity to present a defense. The trial court's rulings denied Vines that right, and were erroneous under state evidence law, and require reversal.

B. The Trial Court's Rulings Were Erroneous.

First, on direct examination, defense investigator Marilyn Mobert testified that she interviewed Watt Avenue McDonald's employee and eyewitness Leticia Aguilar, and that Aguilar said she had had a conversation with store manager Lisa Lee. RT 4277. Defense counsel then attempted to ask Mobert about the contents of the conversation Aguilar said she had with Lee, and particularly about Lee's statements, but the prosecutor's hearsay objection was sustained. RT 4277.[58]

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[58] The examination was as follows:

"Q Now, during that interview with Ms. Aguilar, did she indicate to you that Ms. Lee, she had had a conversation with Ms. Lee?
"A Yes.
"MR. GOLD: I'm going to object as leading and hearsay.
"MR. BIGELOW: Again, I'm certainly not offering this next statement for the truth of the matter.
"MR. GOLD: Then what's the relevance?
"THE COURT: I don't know what you have.
"MR. BIGELOW: All right.
"(By Mr. Bigelow) During the -- did Ms. Lee tell Ms. Aguilar -- according to Ms. Aguilar, did Ms. Lee --

(continued...)

The hearsay objection was improperly sustained. Hearsay evidence, of course, is evidence of a statement made by someone other than the witness that is offered to prove the truth of the matter stated. Evidence Code section 1200, subdivision (a). In this instance, however, the contents of the conversation were not offered to prove the truth of those contents. Instead, Vines' counsel inquired into the contents of what Lisa Lee told Leticia Aguilar about the robbery and the robber or robbers in order to prove that Lisa Lee, who had *not* witnessed the robbery, suggested to her employee Leticia Aguilar that the robber was Sean Vines. The purpose of the inquiry in this area was, of course, to show that Aguilar's identification of Vines was based in whole or in significant part, not on her own percipient observations, but on a consensus of employees encouraged and orchestrated by Lisa Lee.

Second, the trial court improperly restricted defense cross-examination of Detective Danny Minter on the same subject. Detective Minter testified that he had been assigned to investigate the Watt Avenue robbery:

> "Q All right. Did you go back out to the McDonald's?
> "A Oh, eventually yes, sir.
> "Q Eventually you did, you talked to a lot of people at the McDonald's, a lot of the employees?
> "A Several, yes, sir.
> "Q And did you learn in your interviews with those people that -- the day after the robbery, couple of days after the robbery, I mean, there were rumors flying all over the place, right?
> "MR. GOLD: I am going to object to rumors.
> "THE COURT: Objection is sustained.

(...continued)

> "MR. GOLD: Your Honor, I'm going to object as hearsay.
> "THE COURT: Yeah, the objection is sustained."

RT 4277.

"Q (By Mr. Bigelow) People were talking, employees were talking among themselves about what happened?
"MR. GOLD: Object.
"THE COURT: Still sustained."

RT 3829-3830.

Thus, the trial court sustained two prosecution objections to defense questions without ever requiring the prosecutor to state the legal basis of the objections. It is, therefore, impossible to ascertain what those objections might have been. There is no Evidence Code section that makes evidence of rumors inadmissible *per se*. The prosecutor cited no authority that would preclude a detective from testifying to what he had learned in the course of his investigation into a case, including regarding communications between employees and managers of a workplace that had been robbed. Again, this evidence was not inquired into by the defense for the purpose of proving the truth of the matters asserted -- that is, for proving the truth of the rumors or the truth of the contents of the conversations – but instead, were subject to inquiry to show that the eyewitness identifications of Vines by some of the witnesses were the tainted by, or the product of, conversations with other employees and managers of the store. Thus, the hearsay rule would not preclude the testimony even if a hearsay objection had been made.

Because the evidence of the conversations between Leticia Aguilar and Lisa Lee and of what Detective Minter had learned of the conversations between employees and others regarding the Watt Avenue robbery was not inadmissable under the Evidence Code, the trial court erred in precluding such evidence.

Moreover, the trial court's rulings also violated Vines' rights under the Fifth, Sixth and Fourteenth Amendments to present his defense to the Watt Avenue charges. The Constitution

> "guarantees criminal defendants 'a meaningful opportunity to ***present a complete defense.***' "

Crane v. Kentucky, supra, 476 U.S. at p. 690 (emphasis added). Vines had "the right to present [his] version of the facts . . . to the jury so it may decide where the truth lies." *Washington v. Texas, supra,* 388 U.S. at p. 19; accord, *Taylor v. Illinois, supra,* 484 U.S. 400, 408.

Vines sought to defend against the Watt Avenue charges by showing that the eyewitness identifications of him as the robber were unreliable because they were the product of rumor and managerial suggestion. Some evidence supporting this theory did come before the jury, notably Michael Baumann's admission that he wasn't sure the robber was Vines until he talked to store manager Lisa Lee.

But the right to present a complete defense means more than the right to present one or two pieces of isolated evidence. The defense here, that the identifications of Vines by the Watt Avenue eyewitnesses were not reliable because produced by a number of acts by Lisa Lee, and conversations with others, in an attempt to reach a "consensus" by McDonald's employees, depends by its very nature on multiple conversations. By refusing to allow this evidence showing that a consensus developed, and how it developed, the trial court deprived Vines of his constitutional right to present a complete defense to the Watt Avenue charges.

C. Vines Was Prejudiced.

The identity of the Watt Avenue robber was very much in dispute at trial. All four eyewitnesses knew Vines. Burreson thought the robber was a shorter man, who did not walk with Vines' limp, and he did not recognize the robber as Vines. Zaharko had said it was "just a hunch" that the robber was Vines; Baumann had stated he wasn't sure until he talked to Lisa Lee; and Aguilar did not mention to the officer who interviewed her at the scene that the robber was her coworker Vines, and described the robber as a much shorter man. The prosecution's other main witness, Sonya Williams, had serious credibility problems: she was angry at Vines for his sexual escapades with other women, she knew about a $10,000 reward when she called the crime alert hotline, her statements about what Vines had or had not told her were wildly inconsistent, and she had lied to police.

Thus, the prosecution evidence against Vines was far from ironclad. Indeed, it was porous. The state of the evidence was such that any serious error was likely to make a difference.

Defense counsel argued that the Watt Avenue eyewitness identifications of Vines were unreliable, and particularly set forth the theory that there had been a *consensus identification* of Vines. RT 4478, 4479, 4485, 4494. Counsel argued that after the robbery, there was

> "lots of talk going on, lots of speculation, lots of consensus building . . . that it was Vines."

RT 4479.

But Vines' counsel was unable to substantiate this contention with the evidence that he had not been permitted to introduce. While he could show that Baumann wasn't sure of his identification of Vines until he talked to

general manager Lisa Lee, he could not argue from the evidence that Leticia Aguilar was similarly compromised by her conversations with Lee, because the trial court had excluded that evidence.

Argument is no substitute for evidence. Had the trial court admitted the evidence of "consensus identification" it erroneously excluded, it is reasonably likely that Vines would have achieved a better result on the Watt Avenue counts. And the prosecution will not be able to show, on the record of this closely-contested case, that the errors were harmless beyond a reasonable doubt.

Moreover, the trial court's erroneous rulings also prejudiced Vines on the Florin Road counts. As we have seen, the case against Vines for the Florin Road offenses was even weaker than on the Watt Avenue charges: neither of the Florin Road eyewitnesses who testified at trial could identify Vines as one of the robbers, though both witnesses knew Vines, and there were substantial reasons for the jurors to discount the testimony of Vera Penilton as unreliable. But given the general similarity of the offenses, and the absence of any effective limiting instruction, it is likely that the jury determined that if Vines "did it once," he also "did it again." The exclusion of the consensus identification evidence on the Watt Avenue counts thus also likely made a difference in the result on the Florin Road charges as well.

And the same logic applies to the imposition of the death penalty. Even assuming the jury would have reached the same verdicts on both sets of charges had the evidence been admitted, the additional degree of doubt that the consensus identification evidence would have engendered likely would have lead to a different result at the penalty phase.

XII. VINES' CONVICTIONS ON THE WATT AVENUE COUNTS MUST BE REVERSED DUE TO THE PREJUDICIAL "SPILLOVER" EFFECT OF ERRORS ARISING IN THE TRIAL OF THE FLORIN ROAD COUNTS.

The Court should also reverse the judgment on the basis of the spillover effect of prejudicial error. As demonstrated *supra*, the errors giving rise to Argument II, concerning severance, and Arguments VIII, IX, X and XI, arising from the trial of the Watt Avenue counts, require reversal on both the Florin Road counts and the Watt Avenue counts. But the toxic effects of the errors that contaminated Vines' trial did not end with those arguments.

With respect to the errors and failures of counsel discussed in Arguments III, IV, V, VI, and VII, arising from the trial of the Florin Road counts, Vines suffered prejudice not just on those counts, but also on the Watt Avenue charges. This is so even assuming the trial court properly denied severance of counts arising from the two separate incidents. The two robberies were sufficiently alike so as to invite the jury to infer guilt on the Watt Avenue charges due to guilt on the Florin Road charges, and *vice versa*. The general similarity of the charges meant that almost any serious error arising on the trial of the capital Florin Road crimes and going to the question of guilt -- which in this case the jury undoubtedly took to mean the issue of identity -- was likely to affect the jury's determination of the truth of the Watt Avenue charges as well. As this brief has shown, the case against Vines on the Watt Avenue counts was not a strong one – eyewitnesses Zaharko and Baumann made vacillating, uncertain identifications of Vines at various times, Aguilar described the robber as someone shorter than Vines, and Burreson did not

recognize the robber as Vines. The testimony of Sonya Williams was highly suspect, as was that of Vera Penilton.

On its own terms, the Watt Avenue prosecution was problematic – but the stronger the case against Vines on the Florin Road counts seemed, the more likely the jury would infer his guilt of the Watt Avenue crimes as well, due to the criminal propensity effect. Each of the federal constitutional violations arising from the Florin Road counts – the trial court's denial of Vines' right to present a third-party culpability defense (Argument III), Vines' lawyer's failure to introduce the exculpatory statement of eyewitness Jerome Williams (Argument IV), the trial court's refusal to instruct the jury to view the testimony of Penilton with caution or distrust because she had been granted immunity (Argument V), the prosecutorial misconduct in connection with Penilton's testimony (Argument VI), and trial counsel's failure to impeach Penilton with evidence that she had had a child with codefendant Proby (Argument VII) – acted to unfairly strengthen the prosecution's case on the Florin Road counts, and thus, by close association, gave rise to a powerful inference as to Vines' guilt on the Watt Avenue charges. It is thus likely that the federal constitutional errors discussed in Arguments III, IV, V, VI and VII prejudiced Vines on the Watt Avenue counts as well, and the judgments of conviction on those counts must, therefore, be reversed.

XIII. VINES' CONVICTIONS FOR KIDNAPPING TO COMMIT ROBBERY MUST BE REVERSED DUE TO INSUFFICIENT EVIDENCE.

The Supreme Court has long held that the Due Process Clause of the Fourteenth Amendment forbids a state to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt. See *Jackson v. Virginia* (1979) 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560; *In re Winship* (1970) 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). When there is no substantial evidence supporting an element of a crime, a defendant's conviction of that crime violates due process.

> "In determining on appeal if substantial evidence supports a conviction, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' "

Jackson v. Virginia, supra, 443 U.S. at p. 319; see *People v. Johnson* (1980) 26 Cal.3d 557, 576 (whether " 'a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.' "). This requires a consideration of the essential elements of the crime.

Vines was convicted of four counts of kidnapping for the purpose of robbery in violation of Penal Code section 209, subdivision (b), in connection with the Watt Avenue robbery. Counts Five, Six, Seven and Eight of the

information alleged the kidnappings of Zaharko, Burreson, Baumann and Aguilar, respectively. CT 623-625.[59]

Vines' convictions on these four counts must be reversed because there is insufficient evidence of asportation, an essential element of the crime of kidnapping for the purpose of robbery.

In *In re Early* (1975) 14 Cal.3d 122, this Court held that, as to the asportation element of kidnapping for the purpose of robbery in violation of Penal Code section 209,

> "movements of a victim can constitute kidnaping for the purpose of robbery (§ 209) *only* if the movements (1) are not merely incidental to the commission of the robbery *and* (2) substantially increase the risk of harm beyond that inherent in the crime of robbery."

In re Early, supra, 14 Cal.3d at p. 127 (orig. emphasis); accord, e.g., *People v. Rayford* (1994) 9 Cal.4th 1, 12. "[T]o convict a defendant of violating section 209 the jury must find both of the foregoing matters." *In re Early, supra,* 14 Cal.3d at p. 127.

In this case, the jury had no basis on which it could reasonably find that the movements of the Watt Avenue employees by the robber satisfied the first element of the asportation requirement, that the movements were not merely incidental to the commission of the robbery.

The record reveals that the Watt Avenue robber did no more than move the employees around *inside the premises* of the Watt Avenue McDonald's.

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[59] At the time of the offenses in this case, Penal Code section 209 read, in pertinent part:

> "(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with possibility of parole."

In order to accomplish the robbery, the robber moved the four employees into the freezer and confined them there. There is no indication that he had any purpose other than robbery in so doing.

This Court has long held that the movement of robbery victims within the premises where the robbery occurs is insufficient to constitute asportation. The Court so held in *People v. Daniels* (1969) 71 Cal.2d 1119. The Court reaffirmed this principle in *People v. Williams* (1970) 2 Cal.3d 894 and *People v. Mutch* (1971) 4 Cal.3d 389. More recently, in *People v. Rayford* (1994) 9 Cal.4th 1, this Court again reaffirmed the principle, writing:

> "in *Daniels*, the defendants, 'in the course of robbing and raping three women in their own homes, forced them to move about their rooms for distances of 18 feet, 5 or 6 feet, and 30 feet respectively.' (*People v. Daniels*, *supra*, 71 Cal.2d at p. 1126.) We held that these brief movements were merely incidental to the commission of robbery. (*Id.* at p. 1140.) We observed, 'Indeed, *when in the course of a robbery a defendant does no more than* ***move his victim around inside the premises*** *in which he finds him--whether it be a residence, as here, or a place of business or other enclosure--his conduct generally will not be deemed to constitute the offense proscribed by section 209.* ***Movement*** across a room or ***from one room to another, in short, cannot reasonably be found to be asportation "into another part of the same county***.' (Pen. Code, § 207.)"

People v. Rayford, supra, 9 Cal.4th at pp. 12-13 (emphasis added). California appellate courts must follow this Court's *Daniels-Williams-Mutch-Rayford* line of cases. Thus, in *People v. Hoard* (2002) 103 Cal.App.4th 599, 607, the court of appeal reasoned:

> "Here defendant robbed the jewelry store by forcing the two employees to move about 50 feet to the office at the back of the store. Confining the women in the back office gave defendant free access to the jewelry and allowed him to conceal the robbery from any entering customers who might have thwarted

> him. Defendant's movement of the two women served only to facilitate the crime with no other apparent purpose. Considering the particular circumstances of this crime, we conclude it was 'merely incidental' to the robbery to confine the women in the back of the store."

This case is controlled by the *Daniels-Williams-Mutch-Rayford* line of cases. The robber robbed the Watt Avenue McDonald's by forcing the employees to move to the freezer and confining them there. His movement of the employees served only to facilitate the crime of robbery, with no other apparent purpose. This was movement within the same premises – "*from one room to another*" and thus "*cannot reasonably be found to be asportation*" under this Court's precedents. *People v. Rayford, supra,* 9 Cal.4th at pp. 12-13 (emphasis added).

Because the jury could not, on these facts, have reasonably found the essential element of asportation under the standard of Penal Code section 209 as authoritatively interpreted by this Court, the judgment of conviction of this statute must be reversed due to insufficient evidence, in conformance with the dictates of the Fourteenth Amendment. *Jackson v. Virginia, supra,* 443 U.S. 307, 316.

XIV. THE JURY INSTRUCTIONS IMPERMISSIBLY DILUTED THE REASONABLE DOUBT REQUIREMENT.

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*, *supra*, 397 U.S. at p. 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40, 111 S.Ct. 328, 112 L.Ed.2d 339; *People v. Roder* (1983) 33 Cal.3d 491, 497. The requirement of proof beyond a reasonable doubt is a fundamental component of the right to trial by jury in our scheme of justice. *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 ("the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"). Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions 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, 114 S.Ct. 1239, 127 L.Ed.2d 583.

The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278.

A. The Instructions on Circumstantial Evidence Undermined the Requirement of Proof Beyond a Reasonable Doubt.

The court gave the jury instructions dealing with the sufficiency of circumstantial evidence. CALJIC Nos. 2.01 and 8.83 concerned the sufficiency of circumstantial evidence to prove guilt and the truth of the special circumstance, respectively. The last two paragraphs of each provide:

> "Also, if the circumstantial evidence as to a particular [count] [special circumstance] [permits] [is susceptible] of two reasonable interpretations, one of which points to [the defendant's guilt and the other to his innocence] [truth of a special circumstance the other to its untruth], you must adopt that interpretation which points to [the defendant's innocence] [its untruth] and reject the interpretation which points to [his guilt] [its truth].
>
> *"If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation appears to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."*

CT 639; RT 4370; CT 706-707; RT 4395-4396 (emphasis added).

These instructions informed the jurors that if appellant *reasonably appeared* to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. The directive undermined the reasonable doubt requirement in two separate but complementary ways, violating appellant's constitutional rights to due process (U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 and 15), trial by jury (U.S. Const., Amends. V, VI and XIV; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, § 17). *Sullivan v. Louisiana*, *supra*, 508 U.S. at 278; *Carella v. California* (1989) 491 U.S. 263, 265, 109 S.Ct. 2419, 105 L.Ed.2d 218; *Beck v. Alabama* (1980) 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392

First, the instructions not merely allowed, but actually compelled, the jury to find appellant guilty on all counts and to find the special circumstances to be true using a standard lower than proof beyond a reasonable doubt. See *In re Winship*, *supra*, 397 U.S. at p. 364. The instructions in this case 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 them to be "reasonable." An interpretation which appears to be reasonable, however, is not the same as an interpretation which has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. *Jackson v. Virginia. supra*, 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ("It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty.") (emphasis added). Thus the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

The instructions on circumstantial evidence were also constitutionally infirm because they improperly shifted the burden of proof to appellant by creating a mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption 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, 105 S.Ct. 1965, 85 L.Ed.2d 344(emphasis added, fn. omitted). Here, the instructions told the jury that if only one

interpretation of the evidence appeared reasonable, they *must* accept the reasonable interpretation and reject the unreasonable.

Thus, once the prosecutor advanced an apparently reasonable incriminatory interpretation of the circumstantial evidence, the instructions placed on appellant the burden of coming forward with an alternative interpretation of the evidence that also appeared reasonable *and* pointed toward his innocence. This was error. "The accused has no burden of proof or persuasion, even as to his defenses. [Citations.]" *People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-15 (1990); accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.

Instructions which embody mandatory presumptions, even mandatory presumptions that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. *Francis v. Franklin*, *supra* 471 U.S. at pp. 314-18; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524, 99 S.Ct. 2450, 61 L.Ed.2d 39. In *People v. Roder,* this Court applied this principle to invalidate 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. *People v. Roder*, *supra*, 33 Cal.3d at p. 501. *A fortiori*, this Court should invalidate these instructions which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless

appellant produced a reasonable interpretation of that evidence pointing to his innocence.[60]

This Court has instead rejected challenges to the circumstantial evidence instructions similar to those made herein by stating that the plain meaning of the instructions was that the jury should reject unreasonable interpretations of the evidence but give the defendant the benefit of any reasonable doubt. See, e.g., *People v. Freeman* (1994) 8 Cal.4th 450, 506; *People v. Jennings* (1991) 53 Cal.3d 334, 386.

The flaw in this analysis is that what this Court has characterized as the "plain meaning" of the instructions is simply not what the instructions say. The question is whether there is a reasonable likelihood that the jury has applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385) and there is certainly a reasonable likelihood that the jury has applied the circumstantial evidence instructions according to their express terms.

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[60] In addition, the reference in CALJIC No. 2.01 to the jury's binary choice of either "guilt" or "innocence" diminishes the prosecution's burden of proving guilt beyond a reasonable doubt. As one court stated:

> "We recognize the semantic difference and appreciate the defense argument. We might even speculate that the instruction will be cleaned up eventually by the CALJIC committee to cure this minor anomaly, for we agree that the language is inapt and potentially misleading in this respect *standing alone.*"

People v. Han (2000) 78 Cal.App.4th 797, 809. *Han* erroneously concluded there was no harm because the other standard instructions make the law on the point clear enough, particularly CALJIC No. 2.90. *Id.*, citing *People v. Estep* (1996) 42 Cal.App.4th 733, 738-39.

This Court has also speculated that the jury would derive a constitutional interpretation of the circumstantial evidence instructions by reading them in conjunction with the reasonable doubt instruction. See, e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1200; *People v. Crittenden* (1994) 9 Cal.4th 83, 144; *People v. Wilson* (1992) 3 Cal.4th 926, 942-43. Again, appellant respectfully suggests that the analysis is flawed. The error in an instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on 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* (1989) 124 Cal. 452, 457) (if instruction states an incorrect rule of law, 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 circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[61] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by

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[61] A reasonable doubt instruction was also given in *People v. Roder*, *supra*, 33 Cal.3d at p. 495, but it was not found to have cured the harm created by the impermissible mandatory presumption.

the circumstantial evidence instructions, which contain their own *free-standing* references to reasonable doubt.

For all these reasons, appellant submits that there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant guilty on a standard that is less than that which is constitutionally required.

B. Other CALJIC Instructions Given in this Case Further Vitiated the Reasonable Doubt Standard.

The trial court gave three other standard instructions that, individually and collectively, impermissibly diluted the constitutionally-mandated reasonable doubt standard: CALJIC No. 2.21.2, regarding willfully false witnesses (CT 649; RT 4374); CALJIC No. 2.22, regarding weighing conflicting testimony (CT 650; RT 4374); and CALJIC No. 2.27, regarding sufficiency of evidence of one witness (CT 658; RT 4376). Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. *Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra,* 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358. Perhaps the most egregious of these offending instructions was former 2.22, which provides 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 a

> 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. ***The final test*** *is not in the relative number of witnesses, but in* ***the convincing force of the evidence."***

CT 650; RT 4374 (emphasis added).

This instruction informed the jurors, in plain English, that their ultimate concern – the "final test" – was to determine which side had presented evidence that was comparatively more convincing than that presented by the other side. In specifically directing the jury to determine each factual issue in the case by deciding which witness, or which version, was more credible or more convincing than the other, the instruction violated the constitutional mandate that the elements of all charges against a criminal defendant be proved beyond a reasonable doubt.

Similarly, CALJIC No. 2.21.2 authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (Emphasis added). This instruction allowed the jurors to rely on prosecution witnesses if the mere "probability of truth" favored their testimony, even if the jurors did not find the testimony true beyond a reasonable doubt, thereby lightening the prosecution's burden of proof. *Sandstrom v. Montana*, supra, 442 U.S. 510, 524; see *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 (instruction telling the jury that a prosecution witness' testimony could be accepted based on a "probability"

standard is "somewhat suspect").[62] The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 276; *In re Winship*, *supra*, 397 U.S. at p. 364.

CALJIC No. 2.21.2 also *elevated* appellant's burden: if the jury found some part of any defense witness's testimony not to be true, appellant had not merely to create a reasonable doubt about the prosecution's case; he had to establish that "the probability of truth favor[ed]" the testimony of that defense witness.[63]

The flaw of CALJIC No. 2.27 (advising the jurors that they could consider the uncorroborated testimony of one witness to find true a fact

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[62] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-57, in which the court found no error where an instruction arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

[63] Appellant recognizes that this Court has rejected the challenges raised (see, e.g. *People v. Beardslee* (1991) 53 Cal.3d 68, 94-95 [as applied to defense witnesses]; *People v. Riel*, *supra*, 22 Cal.4th at p. 1200 [as applied to prosecution witnesses]), but respectfully urges the Court to reconsider its rulings. Appellant also requests that the Court reconsider its general acceptance of such false-in-part instructions. See *People v. Allison*, *supra*, 48 Cal.3d at p. 895.

As courts in other jurisdictions have recognized, such instructions are superfluous and invite the jury to conclude the court believes one or more witnesses have lied. See e.g., *Kinard v. United States* (D.C.App.1980) 416 A.2d 1232; *State v. Harris* (R.I. 1970) 262 A.2d 374, 377; *Knihal v. State* (Neb. 1949) 36 N.W.2d 109, 112- 114; *Rowland v. St. Mary's Bank* (N.H. 1944) 40 A.2d 741, 742.

required to be established by the prosecution) was its erroneous suggestion to the jurors that the defense, like the prosecution, had the burden of proving facts. The defense is only required to raise a reasonable doubt, not establish a "fact." The jury was not adequately made aware of his true burden of proof in this regard. This Court has noted the flaws of this instruction. In *People v. Turner*, the Court "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense. . . . We encourage further effort toward the development of an improved instruction." *People v. Turner* (1990) 50 Cal.3d 668, 697. Nevertheless, the Court concluded that the jury could not have been misled because it received full instructions on the burden of proof. *Id.*

C. The Errors Require Reversal.

Although each one of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed herein. See e.g., *People v. Riel*, *supra*, 22 Cal.4th at p. 1200 (standard instructions on false testimony (CALJIC No. 2.21.2) and circumstantial evidence do not reduce the prosecution's burden of proof); *People v. Noguera* (1992) 4 Cal.4th 599, 633-34 (addressing CALJIC No. 2.27); *People v. Wilson*, *supra*, 3 Cal.4th at pp. 942-43 (addressing standard circumstantial evidence instructions); *People v. Jennings*, *supra*, 53 Cal.3d at p. 386 (same). While recognizing the shortcomings of some of the instructions, the Court has consistently concluded, in what has become a stock response, that the instructions must be viewed "as a whole," rather than singly,

and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence.

The essential rationale employed in those decisions – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – cries out for reconsideration by this Court. In each instance there is at least a pair of instructions giving opposite directives. For example, CALJIC No. 2.90 tells the jurors that the prosecution must convince them "beyond a reasonable doubt," while CALJIC No. 2.22 advises them that "the final test" they are to apply in evaluating the evidence is to decide which version has the greater "convincing force." To conclude that "correct" language of the former instruction simply cancels out the "wrong" language of the latter instruction is contrary to fundamental interpretive principles, for "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Francis v. Franklin*, *supra*, 471 U.S. at p. 322.

Even assuming that the language of a lawful instruction can somehow cancel out the language of an erroneous and improper one – rather than vice-versa – this case stretches the principle to its breaking point. Appellant's jury heard several separate instructions, each of which contained language antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: the oft-criticized and confusing language of Penal Code Section 1096 as set

out in former CALJIC No. 2.90.[64] Moreover, while former No. 2.90 was famously obscure and difficult for lay jurors to penetrate, each of the challenged instructions suggested in comparatively understandable English that the jurors could make critical determinations by the simple and familiar means of deciding which party had tendered the stronger case on the given point.

Plainly, the supposed curative has been overwhelmed by the infirmity. This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not for a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson*, *supra*, 3 Cal.4th at p. 943 (citations omitted).) If this principle has any meaning, it cannot seriously be maintained that a single, quite imperfect instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the much greater mass of contrary pronouncements. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be brought on by a single instruction inconsistent with the rest.

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[64] As this Court has noted, the statutory language – with its references to "moral evidence" and "moral certainty" – is itself in some tension with the strictures of due process, and has only *provisionally* passed constitutional muster. See *People v. Freeman* (1994) 8 Cal.4th 450, 503, *cert. denied*, 515 U.S. 1149 (1995) (discussing *Victor v. Nebraska*, *supra*, 511 U.S. 1 (majority opinion); *id.* at p. 23 (Kennedy, J. concurring); *id.* at p. 24 (Ginsburg, J. concurring). In combination with the instructions discussed in this section, it is reasonably likely that CALJIC No. 2.90 allowed the jurors to convict appellant on proof less than beyond a reasonable doubt in violation of appellant's right to due process. *In re Winship*, *supra*, 397 U.S. 358.

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error which is reversible *per se*. *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-82. If the erroneous circumstantial evidence instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. *Carella v. California*, *supra*, 491 U.S. at pp. 266-67. Here, that showing cannot be made. The instructions directly related to the determination of whether appellant was present when the Florin Road and Watt Avenue McDonald's were robbed, the major issues presented to the jury during the guilt phase. Reversal is required. *People v. Roder*, *supra*, 33 Cal.3d at p. 505.

XV. THE TRIAL COURT DEPRIVED VINES OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL BY DENYING HIS PRE-PENALTY PHASE *MARSDEN* MOTION.

The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. In this case, the defendant was understandably convinced that his counsel had rendered ineffective assistance, and after the guilt phase, made a *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118). The trial abused its discretion and committed constitutional error in denying the motion. Accordingly, reversal is required.

A. The *Marsden* Motion.

After the guilt phase verdict but before the start of the penalty phase, Vines sent a letter directly to the trial judge, dated September 5, 1997 (during jury deliberations), but file-stamped September 10, 1997 (after the verdicts). CT 4634. In the letter, Vines informed the trial court that he "believed he wasn't properly represented in these serious cases." CT 4634. Vines stated that his trial counsel had not called two witnesses who would have helped him, and had failed and refused to ask questions of witnesses that Vines thought should be asked. Vines stated that his lawyer had been "pressuring me to take the [plea] deal," and became "verbally angry" with him when he did not. Vines did not ask for a remedy. CT 4634.

Thereafter, on September 16, 1997, the trial court – in open court, at a pre-penalty phase hearing, with the prosecutor present – inquired of Vines what it was he was asking by the letter. Vines was not allowed to answer directly, and Vines' counsel stated "He is requesting, in effect, that I move for

mistrial based on the inadequacy which he perceives occurred during the course of these proceedings." RT 4614.

This exchange followed:

> "MR. BIGELOW: I think in light of that, the court must appoint counsel to investigate it and to explore the issue, and to move for mistrial, because he is, in effect, suggesting ineffective assistance of counsel because I did not ask questions which he thought I should ask, and I would so request on his behalf.
> THE COURT: That motion is denied."

RT 4615.

The trial judge then stated that:

"[W]hat I am going to do is treat this as a *Marsden* Motion. ..."

RT 4615.

The trial court convened a hearing outside the presence of the jury, the prosecutor, and other non-essential parties. RT 4616. The trial court asked Vines if he wished to be heard.

Vines stated that his attorney did not call certain witnesses in his defense. When the trial court asked him which witnesses he was talking about, Vines identified Jerome Williams and Tina Villaneuva. RT 4617.

The trial court asked Vines, "What are the other matters that you complain of?" RT 4617. Vines identified several specific matters in the examination of prosecution witnesses Sonya Williams, Ulanda Johnson, Sandhya Samant, Lisa Lee and Leticia Aguilar that his trial counsel failed to cover. RT 4618.

The trial court asked Vines' trial counsel to address these areas. RT 4619. Trial counsel stated:

> "Jerome Williams we looked for, tried to find, tried to subpoena, we were unable to do so."

RT 4619.

Trial counsel explained that in his view Tina Villanueva would commit perjury if called and would be otherwise not helpful to Vines' defense, and answered generally with regard to Vines' other complaints that "[t]hey were issues which I felt at the time were either better left alone or not further explored as I recall." RT 4619.

Vines' trial counsel expressed uncertainty about whether he should ask to be relieved, and stated that Vines had not indicated that he wanted him relieved, but was "in effect making a record for appeal", and suggested that Vines be asked whether he wanted trial counsel relieved. RT 4620. The trial court asked Vines if there was anything else, and when Vines said there was not, stated "You have made an insufficient showing, Mr. Vines. Your motion is denied." RT 4620. In its minute order, the trial court identified the motion that was denied as "the motion for mistrial." CT 889.

B. The Legal Standard.

This Court has frequently addressed the legal principles governing *Marsden* motions. In *People v. Valdez* (2004) 32 Cal.4th 73, 95, the Court summarized the law this way:

> "The governing legal principles are well settled. "Under the Sixth Amendment right to assistance of counsel, ' " '[a] defendant is entitled to [substitute another appointed attorney] 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.' " ' [Citation.] Furthermore, ' " ' When a defendant seeks

> to discharge 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.' " ' " (*People v. Welch* (1999) 20 Cal.4th 701, 728; see also *Marsden, supra,* 2 Cal.3d at pp. 124-125.) " '[S]ubstitution is a matter of judicial discretion. 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.' [Citations.] (*People v. Hart* (1999) 20 Cal.4th 546, 603.)" (Emphasis added.)

C. Analysis.

Obviously -- though neither the trial court nor Vines' counsel seemed aware of it -- a "mistrial" was not the proper remedy, or even a possible one. By the time the trial court took up and decided Vines' motion, the guilt phase trial was over and the penalty phase had yet to begin. The question of a mistrial was moot.

But even though the trial court stated it was denying the motion for a mistrial (CT 889), the court also expressly stated it would "treat this [motion] as a *Marsden* Motion" (RT 4615). A *Marsden* motion is, of course, a motion to relieve counsel and appoint substitute counsel. See *People v. Marsden, supra*, 2 Cal.3d at p. 122. And in *Marsden* itself, the Court cautioned that a lay defendant's imprecise articulation of his rights "should not be given undue weight in determining the protection to be accorded" those rights. *Id.* at p. 124. The same reasoning applies to a defendant's remedies. Accordingly, this Court should treat the motion as the trial court did, as a *Marsden* motion. *People v. Kelley* (1997) 52 Cal.App.4th 568, 580.

As this Court has made clear, "[a] defendant is entitled to [substitute another appointed attorney] if the record clearly shows that the first appointed attorney is not providing adequate representation". *People v. Valdez, supra*, 32 Cal.4th at p. 95.

In this case, the record clearly shows that Vines' trial counsel had not provided adequate representation.

Vines complained at the *Marsden* hearing that his lawyer had failed to call Jerome Williams as a witness. As shown above, Jerome Williams was the Florin Road employee and eyewitness who, in the hours immediately after the robbery-homicide, told a detective that the robber with the silver gun was "*approximately five foot seven, a hundred and forty to one hundred sixty pounds*." RT 399 (emphasis added). Trial counsel explained to the court that he had been unable to locate Jerome Williams. RT 4619. Trial counsel knew that Jerome Williams' statements would have been highly favorable to Vines, and the record confirms this. The trial court knew at the time it ruled on the *Marsden* motion that eyewitness Jerome Williams had described the robber as someone eight inches shorter than Vines, who is 6'3". The preliminary hearing transcript shows that when Jerome Williams gave his description of the gunman to Detective Overton shortly after the crimes, he was frightened and upset.

These facts, apparent on the record, show clearly that trial counsel performed inadequately with respect to presenting the exculpatory description of the gunman given by eyewitness Jerome Williams. Any trial judge or experienced trial attorney would know that a description of a suspect given by a crime victim to a police officer a few hours after the crime, while the witness was still upset, would be admissible under the spontaneous statements

exception to the hearsay rule, Evidence Code section 1240, whether offered by the prosecution or the defense. And the trial court knew that Vines' trial counsel had not attempted to introduce that critical exculpatory evidence.

Thus, the record clearly showed that Vines' counsel was not providing adequate representation.

Accordingly, the *Marsden* motion should have been granted. *People v. Valdez, supra,*32 Cal.4th 73, 95.

It might be argued, of course, that Vines did not make an optimally *precise* objection regarding his attorney's ineffective assistance. But Vines made unmistakably clear to the trial court that he believed that his lawyer had not effectively represented him in this death penalty case because the lawyer had failed to get Jerome Williams' evidence before the jury. RT 4617. This clearly covers the basic point. It would be unreasonable – indeed, it would be utterly unrealistic – to expect a lay defendant such as Vines to specify that his trial counsel had failed him because he had neglected to take advantage of the spontaneous statements exception to the hearsay rule as embodied in Evidence Code section 1240.

But if it is the law that a lay defendant must, in order to have his counsel removed for incompetence in a capital murder trial, cite chapter and verse of the Evidence Code, and identify with lawyer-like precision what *exactly* his lawyer should have done to get the missing exculpatory evidence before the triers of fact, then fundamental fairness – as well as the due process clause and the Sixth Amendment – must also require that the trial court, when faced with a showing such as that made by Vines here, that his lawyer had failed to bring before the jury *known exculpatory evidence*, do more. The trial court under such circumstances must either appoint separate counsel to

investigate and present the matter, or at least conduct a meaningful inquiry.

The trial court here did neither. The inquiry it conducted could not have been more perfunctory. The trial court asked not a single follow-up question regarding trial counsel's failure to present Jerome Williams' exculpatory evidence, and completely failed to explore whether this evidence could have been presented. This was plainly insufficient under the Sixth Amendment, which requires "'such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern,'" an inquiry that provides a "'sufficient basis for reaching an informed decision.'" *United States v. Adelzo-Gonzales* (9th Cir. 2001) 268 F.3d 772, 777.

Vines was prejudiced by the trial court's denial of his *Marsden* motion. The trial court's failure to appoint new counsel meant that no new trial motion based on ineffective assistance of counsel was made. Had such a motion been made, it would have been meritorious, as demonstrated by the analysis of counsel's ineffective representation set forth in Argument IV, *supra*.

XVI. PROSPECTIVE JUROR OLGA AYALA REPEATEDLY STATED THAT SHE WOULD FOLLOW THE COURT'S INSTRUCTIONS AND VOTE FOR DEATH, IF WARRANTED, DESPITE HER RELIGIOUS VIEWS, AND THE TRIAL COURT REVERSIBLY ERRED IN EXCUSING HER FOR CAUSE.

A. Introduction.

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776, the Supreme Court held that a capital defendant's right to an impartial jury under the Sixth and Fourteenth Amendments prohibited the exclusion of venire members

> "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

391 U.S. at p. 522. The Court reasoned that the exclusion of venire members must be limited to those who were "irrevocably committed . . . to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," and to those whose views would prevent them from making an impartial decision on the question of guilt. *Id.* at p. 522, fn. 21.

In *Wainwright v. Witt* (1985) 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841, the Court clarified the standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment. The Court held that the controlling inquiry is *"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.*" (Emphasis added.)

This Court stated in *People v. Heard* (2003) 31 Cal.4th 946, 958-959:

"'The real question is " ' "whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror.*" ' " ' (*People v. Ochoa* (2001) 26 Cal.4th 398, 431, quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1318, quoting in turn *People v. Hill* (1992) 3 Cal.4th 959, 1003.) Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty (*Morgan v. Illinois* (1992) 504 U.S. 719, 726-728 [119 L.Ed.2d 492, 112 S.Ct. 2222]), it is equally true that the 'real question' is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror." (*People v. Cash* (2002) 28 Cal.4th 703, 719-720; see also *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005 [["A prospective juror who would *invariably vote either for or against the death penalty* because of one or more circumstances likely to be present in the case being tried, *without regard to the strength of aggravating and mitigating circumstances,* is therefore *subject to challenge for cause*, whether or not the circumstance that would be determinative for that juror has been alleged in the charging document" (italics added)].)" (Orig. emphasis.)

In this case, the trial court violated the standards set forth in the controlling cases, by excusing for cause Prospective Juror Olga Ayala – a juror who *repeatedly affirmed* that, despite her personal religious scruples about the death penalty, she could and would follow the trial court's instructions, and impose the death penalty if warranted.

B. Prospective Juror Ayala's Voir Dire.

To facilitate review of this error, the transcript of the voir dire of Prospective Juror Ayala is set forth herein:

"THE COURT: How are you, ma'am.
"PROSPECTIVE JUROR AYALA: I am fine, thank you.

"THE COURT: Ma'am, the law requires that you fairly listen to and consider all of the evidence as it bears upon aggravating factors versus mitigating factors, and you not be predisposed automatically to give death or automatically to give life in prison.

"Can you honestly and truthfully state that you can carefully and fairly consider both penalties in this case?

"PROSPECTIVE JUROR AYALA: No, I don't think that I can.

"THE COURT: Ma'am, does that mean you are predisposed to one penalty?

"PROSPECTIVE JUROR AYALA: Yes.

"THE COURT: What would that be?

"PROSPECTIVE JUROR AYALA: Life imprisonment.

"THE COURT: All right. Ma'am, does that mean that despite whatever the evidence might be, after you have heard the aggravating -- guilt phase, the penalty phase, the court's instructions, and the argument of the lawyers, that despite my instructions, you feel in your heart and honestly that you would not vote for death?

"PROSPECTIVE JUROR AYALA: ***I think that I would probably follow the court's instructions.***

"THE COURT: Ma'am, let's make this -- I want to make it clear. And you remember I told you that what we are looking for would be honesty and not pat answers. Remember that?

"PROSPECTIVE JUROR AYALA: Yes.

"THE COURT: Because the People of the State of California and Mr. Vines would be entitled to a fair trial.

"PROSPECTIVE JUROR AYALA: Absolutely.

"THE COURT: And only you know your heart. You understand your true feelings?

"PROSPECTIVE JUROR AYALA: Yes.

"THE COURT: Ma'am, after you have heard all the evidence through the guilt phase and through the penalty phase, you have heard the arguments of the lawyers, and the court's instructions, and after hearing all of that, you conclude after reasoning and thinking about everything, that the death penalty is the more appropriate penalty, ***would you vote death?***

"PROSPECTIVE JUROR AYALA: ***Probably. I think so, yes.***
"THE COURT: By probably and I think so, does that mean that the question I put to you after considering all those factors, if you thought it was appropriate that you would vote death?
"PROSPECTIVE JUROR AYALA: I think reason I am hedging more is because I feel that -- ***I would have a difficult time doing it, but I would follow the court's instruction***.
"THE COURT: I understand. It would be difficult, but if I were to instruct you on the applicable law, you determine the facts, and you determine the penalty, and after listening to the facts and following my instructions, ***if you felt that that would be the appropriate penalty, despite it being difficult and despite maybe you not liking it, you would vote the death penalty, is that true, ma'am?***
"PROSPECTIVE JUROR AYALA: ***Yes.***
"THE COURT: All right.
"PROSPECTIVE JUROR AYALA: ***That's true.***
"THE COURT: Do the lawyers have questions?
"M[R]. BIGELOW: No, I don't. Thank you.
"THE COURT: Do you have questions, Mr. Gold?
"MR. GOLD: Yes.
"By ROBERT GOLD, Deputy District Attorney:
"Q Good afternoon, Miss Ayala.
"A Good afternoon.
"Q In your questionnaire you filled out 3, 4 weeks ago, you had written that you would automatically refuse to vote for the death penalty in a second phase. Do you remember that?
"A Yes, I do.
"Q You also wrote that you would automatically always vote for life in prison?
"A Did I use the word automatically?
"Q Well, there are some -- we have you check the boxes. The question 3 on page 24, it says automatically refuse to vote for the death penalty in the second phase if you reach it. You checked yes. And you also checked you would also automatically vote life in prison.

"What I am trying to find out is, is that the law in our state gives you a choice, nobody is going to make you vote for the death penalty.

"Even if you feel that the aggravating circumstances outweigh substantially the mitigating circumstances, you can still vote against the death penalty. No one is going to make you.

"What I am asking you is, based on your religious values, your moral values, your philosophical believes, can you personally do that, vote to have someone put to death?

"A You are -- ***to me you are saying something different than Judge Long has said. See, I interpret instructions from the court as being made to make that decision. If you are instructed to look at the mitigating, and you are instructed to -- that's what you have to look at.***

"Q Sure.

"A ***So to me then, I would be made to make that -- to look at that decision.***

"THE COURT: Well, let me deal with this situation. I gave you three situations, but the third one, you as a juror form the opinion that the aggravating factors outweigh the mitigating factors, what do you do, how must you vote on the issue of punishment?

"The answer is that the court does not tell you what you must do. You decide. However, before voting for death you must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors that death is warranted instead of life in prison without parole.

"Now, Mr. Gold, you can take it from there.

"Q (By Mr. Gold) Okay. Do you believe that the death penalty is not right, ***just on your personal beliefs?***

"A Yes, I do.

"Q Okay. And why do you believe that?

"A Why do I believe that? Because I don't believe it's our decision to make.

"Q ***Is that based partly on religious --***

"A ***Yes, it is.***

"Q ***Values that only God has that type of power?***

"A ***Yes, it is.***

"Q Recognizing that we are in court and the state laws, Caesar's laws, that you actually as a juror would be making that decision, ***can you make this decision knowing that you don't believe that it's right?***
"THE COURT: ***From the religious standpoint.***
"PROSPECTIVE JUROR AYALA: ***No, I couldn't.***
"Q (By Mr. Gold) I am trying to understand your true heart.
"A ***Yeah, I couldn't.***
"Q ***Nobody is going to force you. You don't have to if you feel it's wrong. Do you believe that?***
"A I would find a way not to vote for death?
"THE COURT: Is it submitted?
"MR. GOLD: Yes, submitted.
"THE COURT: Mr. Bigelow.
"M[R]. BIGELOW: No questions, Your Honor.
"THE COURT: Ma'am, could you wait in the hallway, please?
"(Proceedings held outside the presence of the prospective jurors.)
"MR. GOLD: I would ask that Miss Ayala be excused for cause.
"THE COURT: Is there any argument against --
"M[R]. BIGELOW: Submitted.
"THE COURT: All right. She is excused.

RT 2783-2788 (emphasis added).

C. The Trial Court Erred in Excusing Ayala for Cause.

Prospective Juror Ayala's responses to the questions posed by the court and counsel on voir dire do not support a determination that her views regarding the death penalty "would prevent or substantially impair the performance of her duties as a juror" so as to justify her excusal for cause under *Wainwright v. Witt*, *supra*, 469 U.S. 412, 424.

Prospective Juror Ayala was first questioned by the court. After stating that she had a predisposition toward life imprisonment, Ayala then went on to make quite clear that she would follow the court's instructions. RT 2784. After hearing all the evidence and arguments, she could in fact vote for death. RT 2785. In following the court's instructions, if death was the appropriate penalty, Ayala affirmed that she could and would vote for death, even if she didn't like it. RT 2785.

Thus, Ayala affirmed ***five times*** that she could follow the court's instructions and would vote for death if it were warranted under the instructions. RT 2784-2785.

The prosecutor, no doubt not wishing to use a valuable peremptory challenge to rid the jury of a non-death-prone juror, did what he could to manufacture a challenge for cause – he changed the subject, asking Ayala "based on your ***religious values***, your moral values, your philosophical believes, can you personally do that, vote to have someone put to death?" RT 2786 (emphasis added).

But Ayala did not "rise to the bait" – she did *not* state that her religious or moral values would present her from imposing the death penalty if it was otherwise warranted. Instead, in response to the prosecutor's question about her "religious values," this prospective juror told the prosecutor:

> ***"to me you are saying something different than Judge Long has said. See, I interpret instructions from the court as being made to make that decision. If you are instructed to look at the mitigating, and you are instructed to -- that's what you have to look at."***

RT 2786 (emphasis added). Thus Ayala, for a ***sixth time***, affirmed her willingness to apply the court's instructions even if that meant deviating from her personal beliefs.

The prosecutor returned to the subject of Ayala's religious beliefs, and elicited the answer that her personal religious beliefs were that only God could take a life. The prosecutor then asked whether Ayala could "make this decision knowing that you don't believe that it's right?" Before Ayala could answer, the trial court interjected this significant qualification:

"THE COURT: ***From the religious standpoint.***"

RT 2787 (emphasis added).

Ayala answered that she couldn't make the decision to vote for death "from the religious standpoint." She sought to confirm that the prosecutor was asking whether she would "find a way not to vote for death," but *before she could obtain clarification of her question*, examination was terminated by the court. RT 2787.

But, consistent with her previous answers, her religious views did ***not*** mean that she could not make the decision to vote for death under the trial court's instructions that she had ***repeatedly affirmed*** she would follow. Read in the entire context of the examination, prospective juror Ayala's position was not conflicting or ambiguous, but was entirely clear: she had conscientious and religious scruples against the death penalty, but would nonetheless subordinate her views to her task as a juror.

The exclusion from a capital case jury of a juror who has religious scruples against the death penalty but nonetheless affirms that he or she can follow the court's instructions and impose death violates controlling Supreme Court precedent. As then-Associate Justice Rehnquist wrote for the high court

in a case decided a year after *Witt*, *Lockhart v. McCree* (1986) 476 U.S. 162, 176, 106 S.Ct. 1758, 90 L.Ed.2d 137:

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

As stated in *Gray v. Mississippi* (1987) 481 U.S. 648, 658-659, 107 S.Ct. 2045, 95 L.Ed.2d 622:

> "The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.' *Wainwright* v. *Witt*, 469 U.S., at 423. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It 'stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law.' *Witherspoon* v. *Illinois*, 391 U.S., at 523."

Prospective Juror Olga Ayala's exclusion for cause was improper because she made it clear that while she couldn't make the decision to vote for death "from a religious standpoint," *she could nonetheless place her personal views aside*, and thus her personal religious views on the death penalty would not "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions," in accordance with the standards of *Witt*. As a result, reversal of the judgment of death is necessary.

D. The Trial Court Improperly Applied Disparate Standards to Pro-Life and Pro-Death Jurors.

Moreover, in this case, the trial court additionally failed to properly apply *Witherspoon-Witt*, and thus reversibly erred, for a second, distinct reason – the trial court did not apply to pro-life prospective juror Olga Ayala the same standard it applied to pro-death prospective juror Brad Schottle.

The United States Supreme Court's standard that a prospective juror be excused for cause if the juror's views on capital punishment "would ' prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'" (*Wainwright v. Witt*, *supra*, 469 U.S. 412, 424-425), applies regardless of whether the juror is predisposed to the death penalty, or predisposed to life in prison. It is "the same standard". *People v. Coleman* (1988) 46 Cal.3d 749, 765.

The voir dire of prospective juror Ayala is set forth above.

Prospective juror Schottle took a diametrically opposite position, based also on religious reasons. Prospective juror Schottle took his view of the death penalty from Scriptures, and he testified unequivocally that he believed the death penalty should be "automatically" imposed on anyone who intentionally killed another person. RT 2591. Schottle admitted that his Biblical beliefs "could" make a difference in his "predisposition to penalty," but he felt he could be fair. RT 2589. And Schottle claimed that he could set aside his "belief system" that someone who intentionally killed another should automatically get the death penalty. RT 2591.

The trial court's ruling on Vines' challenge for cause of this pro-death prospective juror was terse:

> "THE COURT: I'm not going to excuse him. He stated the bottom line was he would follow the law and could impose both penalties. Let's go to the next one."

RT 2593-2594.

Yet prospective juror Olga Ayala *also* stated that she would follow the law and could impose both penalties. RT 2784-2786. The trial court did not follow the same standard with respect to pro-life juror Ayala that it followed with pro-death juror Schottle. If the court had done so – and taken Ayala at her word, based on her repeated assurances that her religious beliefs would not make a difference, as Schottle was taken at his word, based on his assurances that his religious beliefs would not make a difference – then Ayala would not have been removed for cause.

Thus, the record demonstrates that the trial court applied a different, more exacting standard to pro-life juror Ayala than to pro-death juror Schottle.

The effect of the trial court's improper application of a more stringent standard to pro-life juror Ayala than to pro-death juror Schottle was to vitiate the integrity of the *Witherspoon-Witt* standard as used in this case. The trial court's findings of fact and assessments of the jurors can be entitled to no deference under such circumstances. Further, the procedure violated Mr. Vines' right to a fair and impartial jury under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. The trial court' s more accommodating treatment of pro-death prospective jurors than pro-life prospective jurors contravened appellant's Fourteenth Amendment rights to due process and equal protection of the law by improperly tilting the jury selection process in favor of the prosecution.

The erroneous excusal of even a single juror for cause is not subject to harmless-error analysis. The trial court's unconstitutional excusal of

prospective juror Ayala requires reversal of appellant's death sentence. *Gray v. Mississippi, supra*, 481 U.S. 648, 666-668; *People v. Ashmus* (1991) 54 Cal.3d 932, 962.

XVII. THE PLAYING FOR THE JURY OF A VIDEO OF THE MURDER VICTIM'S MUSICAL PERFORMANCES WAS SO UNFAIR AND INFLAMMATORY THAT IT DEPRIVED VINES OF A FAIR PENALTY PHASE TRIAL.

A. Introduction.

Victim impact evidence is not inadmissible *per se* at the penalty phase of capital trials under *Payne v. Tennessee, supra,* 501 U.S. 808. But that does not mean that any and all victim impact evidence is admissible.

As the Supreme Court recognized in *Payne*, some evidence is so prejudicial and inflammatory in the context of a particular case that its admission may render the penalty phase fundamentally unfair. *Payne v. Tennessee, supra,* 501 U.S. 808, 825.

This is such a case. The prosecution introduced victim impact testimony of four witnesses. Their testimony could hardly have been more emotional, or more affecting in the circumstances. On top of this extensive testimony, the prosecutor also introduced three photographs of the victim and his family, and a videotape of several musical performances by the homicide victim was played for the jury at the very end of the prosecution's evidentiary case in aggravation.

The playing of the videotape of the victim's musical performances was, in the context of this case, highly prejudicial. These living, breathing performances by the victim could only have had a strong impact on the emotions of the jurors, and fatally infected the fairness of the sentencing proceeding.

B. Background.

The prosecution filed a notice of the evidence it intended to use in aggravation at the penalty phase, but the notice did not mention that the prosecution would seek to introduce videotaped performances by the victim. CT 226-227. Thereafter, before the start of the penalty phase, the prosecution asked to be heard regarding the videotape of the victim.

> "THE COURT: All right. Is there another motion dealing with a video or something before we bring in the jury?
> "MR. GOLD: Yes, Your Honor. As one of the factors in aggravation that the People are going to present evidence on is circumstances of the crime, and victim impact evidence. And I am asking the court to permit the People to show three photographs of Mr. Lee, one involving him and his girlfriend, Andrea, who is the mother of his child, one of his child, and one of just Mr. Lee, and also a 5-minute video that will accompany the testimony of some of his family members.
> "Mr. Lee was a very good singer, a very good dancer, and that's what his family and friends remember very much about him. And they have some home videos, a couple of hours worth, that I narrowed down to 5 minutes, but I wanted to show the jury to show them what Ron Lee was like, and how this impacted the victims.
> "THE COURT: Have you seen these?
> "MR. BIGELOW: I have not, Your Honor.
> "THE COURT: Do you wish to see them?
> "MR. BIGELOW: I do.
> "THE COURT: Let's go.
> "MR. GOLD: Marked as Prosecution 130.
> "(Whereupon the video was played.)
> "MR. GOLD: Mr. Lee is on the right.
> "THE COURT: And Mr. Gold, when this is being shown, you intend to ask someone some questions or something?
> "MR. GOLD: What I intend to do, the other gentleman in the video is a cousin, Litelle Williams, and Litelle would set up the video and mention that they sang together, they would dance together, they had a group together, that they had

> played and cut a record with a company out of Los Angeles. That's what he loved to do with Ron, and he had a lot of joy and pleasure from singing and dancing with him. All I am asking is that the court show the jury 5 minutes of 20 years of his life so that they have an understanding of the loss.
> "THE COURT: Well, is there any objection?
> "MR. BIGELOW: Yes.
> "THE COURT: Is that it?
> "MR. BIGELOW: Well, I don't think it's relevant. I think it goes beyond victim impact evidence that is permissible. It involves too many additional people. I just don't think that it involves -- falls within what is permitted under case law, and I would object. I guess it's a relevancy objection.
> "THE COURT: Well, all they are doing is a little singing and a little rapping.
> "MR. BIGELOW: I understand.
> "THE COURT: That's about all I see. And it doesn't appear to me that there is nothing inflammatory that would divert the jury from their proper function. And it may well go to the extent of their loss, at least their feelings. I don't -- is that -- is it submitted?
> "MR. BIGELOW: Submitted.
> "THE COURT: Your motion is denied."

RT 4630-4631; see CT 889.

Thereafter, the prosecution gave an opening statement, and presented its case in aggravation. Apart from a stipulation to appellant's two prior burglary convictions, the evidence presented at the penalty phase by the prosecution consisted entirely of victim impact evidence. Four survivors of victim Ron Lee testified: Andrea Clayton, his former girlfriend and the mother of his child; Littell Williams, his mother's uncle; Diane Williams, his mother's cousin and his legal guardian; and Littell Williams III, the victim's cousin, with whom he was raised.

At the culmination of the testimony of Littell Williams III, as the capstone of the prosecution's evidentiary case for death, the videotape was played for the jury. It is Prosecution Exhibit 130.

Though Littell Williams III testified that he and Ron Lee had received a recording contract, the performances on the videotape are not highly polished; rather, they have the warm appeal of kids performing at home, for families and friends. The several videotape excerpts show Ron Lee in song and dance routines with Littell Williams, and other, younger children. There is a videotape segment in which Lee is shown from behind while singing live to a crowded school auditorium. There is a dance segment featuring Lee. Ron Lee and his cousin perform a version of Stevie Wonder's 1984 easy-listening hit, "I Just Called to Say I Love You." Exhibit 130.

C. The Exhibition of the Videotape was So Prejudicial in the Context of this Case as to Render the Penalty Phase Fundamentally Unfair.

While *Payne v. Tennessee* opened the door to victim impact testimony and argument in capital sentencing,[65] the decision did not remove all constitutional constraints on victim impact evidence. The *Payne* Court stated that the admission of sufficiently prejudicial victim impact evidence could

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[65] In *Payne v. Tennessee*, *supra*, 501 U.S. 808, the Supreme Court partially overruled two previous decisions which had strictly prohibited the introduction of victim impact evidence in the sentencing phase of a capital trial, *Booth v. Maryland* (1987) 482 U.S. 496, 107 S.Ct. 2527, 96 L.Ed.2d 440, and *South Carolina v. Gathers* (1989) 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876. A divided Supreme Court held that the Eighth Amendment is not a *per se* bar to all evidence or argument concerning the effect of the capital crime on the victim's family. *Payne v. Tennessee*, *supra*, 501 U.S. 808.

result in a capital sentencing which was "fundamentally unfair," thereby violating the Due Process Clause of the federal constitution. *Payne, supra*, 501 U.S. at p. 825. Concurring opinions signed by a majority of Justices in *Payne* expressly emphasized the same point; see Justice O'Connor's concurrence in *Payne* at p. 831. Justice Souter, writing for Justice Kennedy and himself, was quite clear:

> "Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. . . . [I]n each case there is a traditional guard against the inflammatory risk, in the trial judge's authority and responsibility to control the proceedings consistently with due process, on which ground defendants may object and, if necessary, appeal. . . . With the command of due process before us, this Court and the other courts of the state and federal systems will perform the 'duty to search for constitutional error with painstaking care,' an obligation 'never more exacting than it is in a capital case.' *Burger v. Kemp,* 483 U.S. 776, 785, 97 L.Ed.2d 638, 107 S.Ct. 3114 (1987)."

Payne v. Tennessee, *supra*, 501 U.S. at pp. 836-837 (conc. opn. of Souter, J.).

The Supreme Court did not consider in *Payne*, or in any subsequent case, precisely which types of victim impact evidence are constitutionally permissible, let alone address the constitutional admissibility of photographs, videotapes, or other media as a class at the penalty phase.

Nor has the high court instructed lower courts precisely how to conduct a fundamental fairness analysis. But the Tenth Circuit, in a recent opinion considering the admission of photographs at a penalty phase trial, set forth the following standard:

> "Although there are no clearly defined legal elements, the fundamental-fairness inquiry requires us to look at the effect of the admission of the photographs within the context of the entire

> second stage. [Citation.] We consider the relevance of the photographs and the strength of the aggravating evidence against Spears and Powell as compared to the mitigating evidence in their favor and decide whether admission of the photographs could have given the State an unfair advantage. Ultimately, we consider whether the jury could judge the evidence fairly in light of the admission of the photographs."

Spears v. Mullin (10th Cir. 2003) 343 F.3d 1215, 1226, cert. denied sub nom., *Powell v. Mullin* (2004) __ U.S. __, 124 S.Ct. 1615, 158 L.Ed.2d 255. In *Spears v. Mullin*, the federal appellate court held that the trial court's admission of photographs showing the injuries of the victims was unduly prejudicial under the Due Process Clause, and required reversal of the death sentences imposed by the state court.

Here, the playing of the videotape over appellant's objection was unduly prejudicial, inflammatory and fundamentally unfair in violation of federal due process guarantees.[66]

The videotape was irrelevant to any fact actually disputed by the parties. And to the extent it was relevant to undisputed issues, it did not itself illustrate the circumstances of the crime; instead, the videotape simply confirmed the truth of the testimony of Littell Williams III, the victim's cousin.

In fact, the videotape was entirely cumulative to Littell Williams III's testimony. Williams testified that he was a cousin of victim Ron Lee but that they were raised together. "We played together, we sang together, we went out together." With a couple of friends, they formed a singing group doing

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[66] Trial counsel actually made two distinct objections: that the videotape was not relevant, and that "it goes beyond victim impact evidence that is permissible." RT 4631. In view of the trial court's order that all objections at trial be deemed to include federal constitutional objections even if not specified (CT 360-361, 527, RT 2041-2042), this objection clearly preserved the federal constitutional issue.

R&B, *a cappella* and vocals with a little music. They'd also sing together in the house. RT 4667. Williams testified that they would perform together for the family. "We formed a bond that could never be broken . . . ." The singing group they formed was called "Tre." They got a contract with a company in Los Angeles and made a record for them. They performed at Valley High School for the seniors' good-bye rally, when the victim was a senior. RT 4668-4669.

In his far from unemotional testimony, the victim's cousin made the factual point that music and performance had been important aspects of the victim's life.

Thus, the videotape added nothing to the testimony of Littell Williams III.

Moreover, the evidence was specifically offered by the prosecution to explain the impact of the loss of Ron Lee loss on his survivors. RT 4631. Yet the videotape depicted victim Ron Lee at an *earlier stage of his life*. When the tapes were made Lee was a senior in high school, a boy living at home. But by the time of his death, Lee was 20 years old,[67] a father, an assistant store manager, and living in his own apartment. RT 4647-4649. The late teens are a time of rapid maturation and profound change, and certainly they were for Ron Lee. The videotape did not depict the victim as he was at the time of his death – that is, as he was when the survivors suffered their loss. For that reason alone, the evidence was misleading and prejudicial.[68]

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[67] Lee was born on August 15, 1974. RT 4647.

[68] See *State v. Salazar* (Tex.Crim.App. 2002) 90 S.W.3d 330, 337, 338 (holding inadmissible video featuring adult victim's childhood photos that were "barely probative of the victim's life at the time of his death.").

The admission of videotape presentations of a murder victim's life under *Payne v. Tennessee* was addressed by Texas' highest criminal court in *State v. Salazar* (Tex.Crim.App. 2002) 90 S.W.3d 330. There, the victim impact testimony was very brief; only two witnesses testified and their testimony filled a total of five pages of the transcript. However, the prosecution also introduced a 17-minute video montage of approximately 140 still photographs which had been prepared by the victim's father for his son's memorial service. Almost half of the photographs depicted the victim's infancy and early childhood; there were also photographs of his extended family, and visual portion of the video was accompanied by a musical soundtrack. *Id.* at p. 333.[69]

In a unanimous decision, the Texas Court of Criminal Appeals held that both the visual and audio portions of the video had been improperly admitted because they were far more prejudicial than probative.

The Texas court found that the life history evidence was prejudicial because of its sheer volume (*State v. Salazar*, *supra,* 90 S.W.3d at p. 337) and noted that

> "A 'glimpse' into the victim's life and background is not an invitation to an instant replay."

State v. Salazar, *supra,* 90 S.W.3d at p. 336. The *Salazar* court recognized that

> "[***T]he punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate***

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[69] *Salazar* was a non-capital case, but the court applied the principles that govern the admission of victim impact testimony in death penalty cases. *State v. Salazar*, *supra,* 90 S.W.3d at p. 335, fn. 5 ("Although *Payne* concerned victim character and impact evidence offered at the punishment stage of a capital murder trial, its logic applies equally to non-capital cases.")

eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial."

Id. at pp. 335-336 (emphasis added).

While the *Salazar* video was undoubtedly more comprehensive in its coverage of the victim's life than the video in this case, the presentation here is more vivid by an order of magnitude – instead of still photographs as in *Salazar*, in this penalty phase, the video featured a living, breathing human being, engaged in the act of performance for an audience, expressing joy.

Showing this video to the jurors made each individual juror Ron Lee's audience.

And it would be inhuman for a juror not to respond with strong emotion to the sight and sound of this young person, expressing his joy in life and earnestly projecting his appeal to his posthumous audience.

The introduction of evidence that is so unduly prejudicial that it renders the trial fundamentally unfair violates the Due Process Clause of the Fourteenth Amendment. *Payne v. Tennessee, supra,* 501 U.S. 808, 825.

There is an unending conflict, sometimes a battle, in every human heart, between order and disorder, reason and unreason. This fundamental conflict is, no doubt, why the Supreme Court has chosen to emphasize that the decision of a jury or judge to impose the death penalty must be *a reasoned moral judgment*, and not one infected with passion or prejudice of any sort. See *Penry v. Lynaugh* (1989) 492 U.S. 302, 328, 109 S.Ct. 2934,106 L.Ed.2d 256, quoting *California v. Brown* (1987) 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (conc. opn. of O'Connor, J.); *Gardner v. Florida* (1977) 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 ("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.").

Indeed, it is through the search by the high court for a reasoned moral response throughout the decades that it has arrived at the rule of *Payne*. The Supreme Court's analysis in *Payne* is that victim impact evidence may be taken into consideration precisely because it may be significant to a reasoned moral judgment on the question of life or death. *Payne* held that a state could properly authorize the admission of victim impact evidence in order "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness". *Payne v. Tennessee, supra*, 501 U.S. 808, 825; *see id.* at p. 836 (conc. opn. of Souter, J.) ("'If a person is to be executed, it should be as a result of *a decision based on reason* and reliable evidence.'").

In this case, the playing of the videotape of the victim's musical performances – his singing and dancing – was by its very nature an appeal to emotion, not reason. Music speaks by its nature to humankind's Dionysian, primal being. As the American philosopher Allan Bloom wrote:

"[Music] is not only not reasonable, it is hostile to reason."

A. Bloom, *The Closing of the American Mind*, p. 71 (1987). This is not only sound and observant philosophy, but reflects a basic truth about human neural functioning. Music penetrates beyond speech, to the limbic system of the brain, which is the source of emotion. As the eminent neurologist Dr. Oliver Sacks has observed, "[R]esponsiveness to music is an essential part of our neural nature." Oliver Sacks, M.D., "When Music Heals," *Parade Magazine,* March 31, 2002, pp. 4-5. People, including jurors, naturally respond to music. This is true even of performances that are not highly polished.

The presentation of videotapes of live musical performances by a young, attractive victim in a death penalty case is precisely the sort of evidence

that "invites an irrational, purely subjective response." *People v. Haskett* (1982) 30 Cal.3d 841, 864.

The musical performances here injected a high degree of emotionality into the penalty phase, running an unacceptable risk of influencing the jurors by profound, irrational sympathy.

Moreover, the prosecutor presented the videotape evidence in a manner guaranteed to maximize its forceful emotional impact. The videotape was immediately preceded by this testimony of Littell Williams III, the final witness for the prosecution:

> "Q (By Mr. Gold) Before I play it, is there anything else you would like to say or express your feelings. Would you say you have been able to express yourself?
> "A Well, it's just that after this happened I haven't been able to really grasp the idea of his death, you know. It's like I am going day by day, you know, just trying to live for the moment and not trying to -- not trying to think about it. You know, trying to do other things than to put my mind on that.
> *"It's like I haven't got a grip on it yet in this life. Every time that I do, it's like I break down, and I want to try to stop me from thinking about it so hard.* It's taken a toll on me and my family, like for instance the holidays. The holidays don't seem the same with just – does not seem the same than before, because we always did things as a family.
> "You know, Christmas, Halloween, whatever holiday it was, we always did things as a family, but now it's like it's just another day to me now.
> *"I have no joy in Christmas or whatever, you know. It's like I am just living from day to day.*
> "Q Okay. Is there anything else you wanted to express?
> "A No.
> "MR. GOLD: Your Honor, I'd like to play what's been marked as Prosecution number 130. It's about 5 minutes.
> "THE COURT: All right. Play it.
> "(Whereupon the videotape [Prosecution Exhibit 130] was played.)"

RT 4673-4674 (emphasis added).

Thus, the videotape evidence was introduced by the prosecution as the culmination of its case for death, and was immediately preceded by this highly emotional testimony of personal devastation. The evidence of the then-living victim, performing for his family and his school audience, could hardly have been presented in a manner better designed to have an unduly emotional impact.

In closing argument to the jury, the prosecutor stated it was:

"*real hard to watch that video.*"

RT 4883 (emphasis added). This, at least, was true.

This evidence was so inflammatory -- and had such a tendency to prejudice jurors, even on a subconscious level -- that it diverted the jury from a "reasoned moral response to the defendant's background, character and crime." *Penry v. Lynaugh, supra*, 492 U.S. at p. 328. This is particularly true when the evidence is considered in the context of the remainder of the excessive victim-impact evidence presented at trial, which is explored in the following Argument. The admission of the videotape evidence "'so infected the trial with unfairness as to make the resulting [sentence] a denial of due process.'" *Darden v. Wainwright* (1986) 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144.

This is was not a case in which the evidence so overwhelmingly favored a death verdict that no error would likely have made a difference. To the contrary, as we have seen, the prosecutor's argument for death weighed, apart from victim impact considerations, heavily on the "execution-style" killing the prosecutor argued that Vines had committed. See RT 3040, 4874, 4867, 4880-4881. But the jury asked for and received a read-back of the guilt-phase

testimony of Florin Road eyewitness Jeffrey Hickey during the penalty-phase deliberations – an unmistakable signal that lingering doubt about Vines' guilt, on which the jury was instructed (RT 4858), was in play in the jury's penalty-phase deliberations. CT 952.

Moreover, there was substantial evidence that Vines had been physically abused by his violent father as a child, and had grown up watching his father physically assault his mother. RT 4758-4761, Exhibit 101B. Vines had been raised in disadvantaged circumstances, in dangerous environments RT 4705, 4780. Yet he had done well in school, and his behavior showed a positive pattern: he cared for and helped other family members, schoolmates, and people he didn't even know. E.g., RT 4720, 4737, 4804, 4794-4795, 4845. Vines' life was not unremittingly evil.

Sean Vines was in a marching band, the jury heard second-hand. RT 4714-4715. Murder victim Ron Lee was a performer, too. But his live performances were played for the jury. Lee sang and danced, just as he had in life. The comparison could hardly be more plain, or more unfair to Sean Vines. The constitutional balance was skewed, and unreason was invited. The showing of the videotape of the victim's musical performances, in the specific

context of this case, was so unfair and inflammatory as to deny Vines a fair penalty phase trial.[70]

Accordingly, the sentence of death must be reversed.

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[70] Moreover, the same factors discussed above also mandate reversal under the substantively identical state-law penalty phase "reasonable possibility" standard of prejudice of *People v. Brown* (1988) 46 Cal.3d 432, 448. As this Court has explained:

> "State law error occurring during the penalty phase will be considered prejudicial when there is a *reasonable possibility* such an error affected a verdict. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232; *People v. Brown* (1988) 46 Cal.3d 432, 447.) Our state *reasonable possibility* standard is the same, in substance and effect, as the *harmless beyond a reasonable doubt* standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L. Ed. 2d 705, 87 S. Ct. 824]. [Citations.]"

People v. Jones (2003) 29 Cal.4th 1229, 1264 fn. 11 (orig. emphasis).

XVIII. THE PRESENTATION OF EXCESSIVE AND HIGHLY EMOTIONAL VICTIM IMPACT TESTIMONY DENIED VINES A FUNDAMENTALLY FAIR PENALTY PHASE TRIAL.

A. Introduction.

In addition to the videotape evidence discussed in the previous section, four survivors of the victim testified concerning the impact of the crime and the loss of the victim. This testimony was lengthy, taking up approximately thirty-six pages of trial record. RT 4638-4674. The witnesses' descriptions of the effects the crime has had on them were profoundly upsetting.

The victim impact testimony in this case was so overwhelmingly prejudicial that it created a fundamentally unfair atmosphere for the penalty trial and resulted in an unreliable sentence of death. U.S. Const. Amends. V, VIII, XIV; Calif. Const. Art. I, §§ 7, 15, 17 and 24; *Payne v. Tennessee*, *supra*, 501 U.S. 808; *People v. Edwards* (1991) 54 Cal.3d 787.

B. Victim Impact Testimony.

Four victim impact witnesses testified at the penalty phase; the testimony of three – Andrea Clayton, Diane Williams, and Littell Williams III – was particularly emotional.

Andrea Clayton, the mother of Ron Lee's son, described their relationship as very close; they could tell each other anything, and could and act like themselves around each other without worrying about being "cool." RT 4640. She had never met anyone she felt the same about. RT 4642.

She had taken Ron to work the day he died. They had argued the day before about their relationship, and decided they were going to work things

out; they agreed to support each other as much as they could, and not smother each other. They weren't together as boyfriend and girlfriend anymore, though they had come to an understanding. RT 4649.

That night Ron didn't call her. At about 3:00 a.m., Ron's aunt Diane called, and told her he had been shot and was dead. Clayton was in shock. She made the funeral arrangements. RT 4650. She had told their son, who was three at the time of trial, that the mean people shot his daddy, and that his daddy was in heaven with Jesus now. She testified the boy said he loves his daddy, and that his daddy loves him. RT 4651.

At the time of her testimony, Andrea Clayton was a single mother. She was lonely, and wondered how she and Ron would have been together, and what their family would have been like. She spoke of missing his companionship, and everything about him. RT 4652.

Diane Williams was Ron Lee's mother's cousin, and his legal guardian and surrogate mother; Ron called her "Mom." RT 4659. Ron's parents were not part of his life. RT 4660. When Diane Williams took in Ron, she was "extremely happy," because he was such a joy as a "little fellow." Diane Williams also took in Ron's newborn baby brother, another handicapped brother who was mentally retarded and couldn't speak or hear, and two little girls. Ron helped her care for them. RT 4660.

When Ron was 15 he began to work; he told Diane Williams he did so so that she would be able to spend more money on the other kids. RT 4661.

Ron's handicapped brother didn't understand what happened to him, and he would occasionally come to Diane with a picture of Ron. RT 4663. She testified their family has never been the same on holidays, and that since Lee's

death the kids had stopped videotaping, singing and dancing; a void had been left in their family. RT 4663.

Diane Williams described Ron Lee as the "joy of her life". RT 4663. At the proceedings three years after Ron Lee's death, Diane Williams testified:

> "I can be sitting and *all of a sudden I will burst out crying because I just can't accept it. I just can't come to realize that this has happened. It's just so devastating* to be -- because he was so full of life."

RT 4662 (emphasis added).

The testimony of Littell Williams, II, Ron Lee's cousin, was quoted in part and summarized in part in Argument XVII, *supra*. Like Diane Williams, Littell Williams III testified to devastating feelings of loss three years after the event:

> *"It's like I haven't got a grip on it yet in this life. Every time that I do, it's like I break down, and I want to try to stop me from thinking about it so hard."*

RT 4673 (emphasis added).

Littell had a strong bond with Ron Lee. RT 4666. They were raised as brothers. RT 4665. Littell was three years older than Ron (RT 4666), and had known Ron his whole life (RT 4665). When Ron was ten and Littell thirteen, they began living together. They were inseparable; they did everything together. Littell said that Ron was the only one he would talk to or communicate with. RT 4667.

The day Ron died, Littell was supposed to pick him up from work, but Littell's car was stolen. They had seen one another four days earlier, and on that particular day, Ron told Littell, "You know, I love you man," and Littell

told Ron, "Well, I love you too." RT 4670. Although they'd always know how one another felt, they hadn't told each other before then. RT 4669.

The night Ron was killed, Littell found out around 2:00 or 3:00 a.m. It was a shock; he was still trying to learn to accept it (RT 4671); he found himself talking to Ron (RT 4672) on occasion. He testified to the difficulty of grasping the idea of Ron's death, and to how it had taken a toll on him and his family; how the holidays are no longer the same (RT 4673); there was no longer joy in Christmas (RT 4674).

C. The Victim Impact Testimony was Excessive and Unduly Prejudicial Under *Payne v. Tennessee.*

The Supreme Court's decision in *Payne v. Tennessee* did not authorize the admission of all victim impact evidence no matter how irrelevant or inflammatory. Instead, as noted in Argument XVII, *supra*, the Supreme Court recognized in *Payne* that some evidence is so prejudicial and inflammatory in the context of a particular case that its admission can maker the penalty phase fundamentally unfair. *Payne v. Tennessee, supra,* 501 U.S. 808, 825.

The Supreme Court determined in *Payne* that its earlier decision in *Booth v. Maryland*, *supra*, 482 U.S. 496 had been too restrictive as it "barred [the state] from either offering a 'glimpse of the life' which a defendant 'chose to extinguish,' [citation omitted] or demonstrating the loss to the victim's family and to society which have resulted from the defendant's homicide." *Payne v. Tennessee*, *supra*, 501 U.S. at p. 822. The state was entitled to present victim impact bearing on the defendant's moral culpability as a means of balancing the mitigating evidence presented by the defense in capital sentencing. *Payne v. Tennessee*, *supra*, 501 U.S. at p. 822.

But the victim impact testimony presented in this case was far more prejudicial than the testimony presented in *Payne* itself.

In *Payne*, a mother and her two year old daughter were killed with a butcher knife in the presence of the mother's three year old son who survived critical injuries in the attack. The victim impact testimony involved a single response to a question posed to the surviving child's grandmother. When asked about what she had observed in the child after witnessing his mother's and sister's murders, the grandmother testified that the boy cried for his mother and that he missed her and his sister. *Payne v. Tennessee*, *supra*, 501 U.S. at p. 822.

This case is readily distinguishable from *Payne*. The most obvious difference is the amount of victim impact testimony. The objectionable testimony in *Payne* consisted of a single response by one witness, the grandmother.

In this case four witnesses spoke at length about the effects of the crime. The jury in Sean Vines' case heard testimony from the surrogate mother the victim called "Mom," his former girlfriend and the mother of his infant child, his maternal granduncle, and a cousin with whom he was raised as a brother. Thus, the sheer quantity of victim impact testimony in this case thus far outweighed the brief remark the high court found permissible in *Payne*.

The victim impact testimony in this case differed as much qualitatively from *Payne* as it did quantitatively. In *Payne*, the grandmother's response was a very brief observation about the sadness and sense of loss any normal child would experience after losing a parent and a sister. The testimony in this case was far more detailed and the information was related in a highly emotional manner. The witnesses in this case not only provided more

information about the victim but also described a far greater sense of loss in several people as opposed to the one survivor who had been personally present during the crime in *Payne*.

This case concerns victim impact evidence and testimony of a magnitude never contemplated in *Payne v. Tennessee*. The *Payne* decision, therefore, does not support the admission of all of the victim impact testimony received in this case.

Shortly after the decision in *Payne v. Tennessee*, this Court decided *People v. Edwards*, *supra*, 54 Cal.3d 787, 835-836, holding that victim impact evidence and argument could be properly admitted under factor (a) of Penal Code section 190.3. This Court made clear, however, the unacceptable risk of prejudice resulting from excessively emotional victim impact evidence:

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

54 Cal.3d at p. 836. In *Edwards*, this Court stated: "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that [Penal Code section 190.3] factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne* . . ." *Id.* at pp. 835-836.

Neither *People v. Edwards* nor any subsequent case defines the scope of admissible victim impact evidence and argument under California law.

In *People v. Boyette* (2002) 29 Cal.4th 381, 444, this Court rejected an argument that admitting the testimony of family members as victim impact evidence violated due process guarantees in the circumstances of that case. In *Boyette*, "Family members spoke of their love of the victims and how they missed having the victims in their lives." *Id.* But *People v. Boyette* is clearly distinguishable; in *Boyette*,

> "the several family members who testified did so briefly and relatively dispassionately."

People v. Boyette, supra, 29 Cal.4th at p. 445. The same cannot be said here.

In this case the victim impact testimony the jury heard – particularly the testimony of Diane Williams ("*all of a sudden I will burst out crying because I just can't accept it. I just can't come to realize that this has happened. It's just so devastating*" (RT 4662)) and Littell Williams III ("*It's like I haven't got a grip on it yet in this life. Every time that I do, it's like I break down, and I want to try to stop me from thinking about it so hard. . . . "I have no joy in Christmas or whatever, you know. It's like I am just living from day to day.*" (RT 4674-4675)) – was not "relatively dispassionate," but highly emotional, as shown above; no jury could remain emotionally untainted by the self-portraits of personal devastation painted by these survivors, with the prosecutor's assistance.

The deep and sustained depression and emotional upset described by these family members was unduly prejudicial and irrelevant to the jury's determination of the penalty.

Although the witnesses' reactions may be understandable, their descriptions of devastation as a result of the crimes created overwhelming

prejudice to the defense which was wholly improper in the sentencing phase of a capital trial.

Moreover, three critical factors amplified the prejudicial effect of the quantitatively and qualitatively excessive victim impact testimony in this case.

First, the testimony concerning how the witnesses learned of the crime and the victim's death was irrelevant, cumulative and unduly prejudicial.

Here, Andrea Clayton, Diane Williams, and Littell Williams III were each asked to describe how they learned of the death of their loved one, Ron Lee. Each testified about how they learned of his death. RT 4650, 4671. None of them, however, were physically present at the crime scene. Obviously, it would be shocking and traumatic for family members to learn that this 20-year-old had been killed under any circumstances. However, there is no reason to believe that the impact on this family would have been lessened if Ron Lee had been killed in an auto accident. This testimony was not only irrelevant but prejudicial. Testimony which is irrelevant and unduly prejudicial has no place in capital sentencing.

Second, the prejudice was amplified because the prosecutor presented additional forms of improper victim impact evidence – see the discussion of the improperly admitted videotape evidence of the victim's musical performances, in Argument XVII, *supra.*

Third, the prosecutor dwelled at length on the survivor's suffering and loss in his penalty phase closing argument.[71]

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[71] The prosecutor argued:

"Andrea, sixteen years old, she met Ron. Andrea was a person that was having trouble in her life common to a lot of families. Sounds like it was similar to Mr. Vine's family, the stress between the parents, and she needed Ron Lee. She fell in love with Ron Lee, and they bonded. And like Littell, she was someone that could confide in Ron Lee. He had that quality about him, and she said that was her soul mate. Most of us are lucky if in our entire life we ever find anybody that we ever feel that way, and she felt that way.

"Yeah, it is a young age, sixteen, but she felt that way by carrying his baby. She could have chose not to or giving it up for adoption. She kept the baby because she loved Ron Lee.

"She feels that way today. And at seventeen she is a single mother now, and she is making funeral plans. And she has to make a choice. I guess we ought to cremate him, and now because he put her in that position, she is thinking maybe it wasn't the best choice because I wish I could bring my son someplace, some piece of land where I can say this is where your father is.

"She doesn't have that. He took Ron Lee away from her, and he took -- Ron Lee was taken from his son Javon. He will never know his father. Javon was four months old when his father was killed.

"And then there is Littell, Senior, and you could see the warmth of the family. They didn't necessarily have a traditional nuclear type family, but it was cousins and uncles living together, very close knit group, and Littell, Senior, talked about how -- things he would do with him, watching him grow up. He was a good kid, he worked, he took pride in his work.

"He wanted to go to x-ray school, and Littell, Senior, wanted to see Ron Lee grow up, and he doesn't get to. And

(continued...)

Thus, the excessive quantity and highly emotional content of the victim impact evidence erroneously admitted in the penalty phase, reinforced by the prosecutor's closing argument ("real hard to watch that video"), created an atmosphere of prejudice in which emotion prevailed over reason. *Gardner v. Florida*, *supra*, 430 U.S. 349, 358; *Gregg v. Georgia*, *supra*, 428 U.S. 153, 189. Accordingly, the error must be reviewed under the standard set forth in

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(...continued)

> then there is Diane Williams, Ron's cousin who raised him. Ron Lee was abandoned, no natural mother or father in the picture, abandoned, taken in by Diane around ten or eleven. Ron was the head of his siblings, took care of his siblings, and Diane Williams loved him, and he helped her do chores, clean.
>
> "And Littell, III. Littell, a single man in his family, he had sisters, but Ron comes to live with him, and they have a bond. And you could see the bond with the video, real hard to watch that video. They performed together, they would sing together, acappella. They were in sync together, and Littell, like Andrea, could confide in him. He needed him. He depended on him. And Littell was kind of a loner. And now he has nothing except Ron Lee.
>
> "That's what he is left with. He doesn't sing anymore.
>
> "And one interesting thing was the contrast is that Littell was saying, you know, at the Christmas time it was a very good family function. We all came together, and now it is just another day.
>
> "Contrasting to when Myeisha [Vines] was saying there was some inference that because Sonia or Evette was into Jehovah's Witnesses, that the children were somehow not celebrating Christmas. Well, Myeisha set you straight on that. She said we do celebrate Christmas. We go to our other family, and my mother never deprived us of Christmas.
>
> *"Sean Vines deprives this family of Christmas, and he always will. . . ."*

RT 4881-4883 (emphasis added).

Chapman v. California, *supra*, 381 U.S. at p. 24, holding that reversal is mandated unless the state can show that the error was harmless beyond a reasonable doubt. In evaluating the effects of the error, the reviewing court does not consider whether a death sentence would or could have been reached in a hypothetical case where the error did not occur. Rather, the court must find that, in that particular case, the death sentence was "surely unattributable to the error." *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182.

The prosecution cannot satisfy this standard in this case.

As discussed in detail above, and particularly in connection with Argument XVII, the case for the penalty of death was far from overwhelming. There were substantial mitigating factors at work in Vines' life. It is clear that the erroneously admitted victim impact evidence contributed to the penalty verdict in this case. Accordingly, this Court should reverse the sentence of death.

XIX. ASSUMING VINES' TRIAL COUNSEL FAILED TO PRESERVE VINES' FEDERAL CONSTITUTIONAL OBJECTIONS TO THE ADMISSION OF EVIDENCE, TO TRIAL COURT RULINGS, AND TO PROSECUTORIAL MISCONDUCT, COUNSEL'S FAILURE TO DO SO CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT.

Before trial, Vines' counsel filed a written motion stating in part:

> "From time to time during the trial, counsel may interpose objections to the admissibility of evidence, jury selection procedures, conduct of the trial, conduct of the parties or the court, juror conduct, jury instructions, or other matters not currently foreseeable. In addition to the specific grounds stated at the time the objections are made, counsel request[s] that *all such objections also be deemed objections* under article 1, sections 7, 13, 15, and 16 of the California Constitution, and *under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments* to the United States Constitution."

CT 360-361 (emphasis added). The purpose of the motion was to "insure that defendant's rights . . . are adequately protected, and to streamline the trial procedure in this case by obviating the necessity for appending a lengthy recitation of constitutional provisions to each and every objection." CT 361.

The prosecutor did not oppose this motion, either in writing or in open court. RT 2041-2042.

Thereafter, the trial court granted the motion. CT 527; RT 2041-2042.

Assuming, without any concession and only for the purpose of analysis of this argument, that the trial court's order is insufficient to preserve for review federal constitutional objections to the admission of evidence, to other trial court rulings, or to the misconduct of the prosecutor, that were otherwise

objected to by Vines on state law grounds, the failure of Vines' trial lawyer to properly preserve the federal constitutional issues for post-conviction review constitutes ineffective assistance of counsel under the Sixth Amendment.

The standard for ineffective assistance of counsel in contravention of the Sixth Amendment is, as discussed above in Arguments IV and VII, well-established. To prevail on an ineffective assistance claim on direct appeal, an appellant must show that counsel's performance was both deficient under prevailing professional standards, and prejudicial. *Strickland v. Washington supra*, 466 U.S. 668, 687-694. Relief will only be granted on direct appeal if there could be no tactical reason for trial counsel's act or omission. *People v. Burgener, supra*, 29 Cal.4th 833, 880.

It cannot be doubted that an attorney for a defendant who is on trial in a case in which the prosecution seeks the death penalty has the obligation, when he or she objects on state law grounds to prosecution evidence, or prosecutorial misconduct, or trial court rulings, to preserve all federal constitutional grounds for the objection as well as applicable state law grounds.

Indeed, by the time of trial of this case – in 1997 – it was abundantly clear that a defense lawyer in a death penalty case had the obligation to preserve applicable federal constitutional issues for review. Nine years before, in 1989, the American Bar Association issued its Guidelines for attorneys representing persons charged with capital offenses. Guideline 11.7.3 was entitled "Objection to Error and Preservation of Issues for Post-Judgment Review," and it stated:

> "Counsel should consider, when deciding whether to object to legal error and whether to assert on the record a position regarding any procedure or ruling, that post judgment review in

> the event of conviction and sentence is likely, and ***counsel should take steps where appropriate to preserve, on all applicable state and Federal grounds, any given question for review.***"

American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (February 1989), Guideline 11.7.3 (emphasis added).

Long before 1997, this Court had made clear that federal constitutional objections must be raised before the trial court to be raised on appeal. A month before the trial in this case, this Court decided *People v. Ramos* (1997) 15 Cal.4th 1133, 1170:

> "For the first time on appeal, defendant asserts the court's ruling violated various constitutional rights. Because he failed to object on these grounds at trial, the claim is not preserved. (*People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7; see *People v. Jackson* (1996) 13 Cal.4th 1164, 1214, fn. 5; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 135, fn. 10; *People v. Clair* (1992) 2 Cal.4th 629, 661, fn. 6.)"

If this Court determines that the motion and order are insufficient to preserve Vines' federal constitutional objections to the trial court rulings on admission of evidence or other matters or prosecutorial misconduct, then counsel rendered ineffective assistance in violation of the Sixth Amendment in failing to do whatever was necessary to preserve those federal constitutional issues for review.

This Court has noted that "'Whether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence.'" *People v. Williams* (1997) 16 Cal.4th 153, 215, quoting *People v. Hayes* (1990) 52 Cal.3d 577, 621.

This general rule, which is subject to exceptions ("seldom" does not mean "never"), is based on the rationale that counsel may have sound reasons not to object to a given piece of evidence, such as a desire not to highlight certain matters for the jury's attention. *People v. Williams* (1997) 16 Cal.4th 153, 215.

But that rationale has no application here, when counsel did raise state law objections to evidence introduced by the prosecutor and conduct of the prosecutor. Counsel could have had no rational tactical purpose, when objecting to evidence or rulings or misconduct on state law grounds, in failing to preserve every viable federal constitutional objection to the same evidence, rulings and misconduct. Indeed, the record shows that counsel did seek to preserve all such issues. CT 360-361. If he failed to do so, that was negligent.

Accordingly, with respect to the erroneous rulings and misconduct discussed in Arguments I through XVIII, *supra*, that were all objected to on state law grounds, if this Court finds that Vines' counsel failed to preserve the federal constitutional issues for review, the Court should also conclude that such failure violated Vines' Sixth Amendment right to the assistance of competent counsel.

When trial counsel has rendered unprofessional assistance, the Sixth Amendment requires reversal if it is reasonably probable that, absent counsel's failures, the defendant would have obtained a more favorable result. In each of the instances discussed in connection with Arguments I through XVIII, and for the same reasons that appellant suffered prejudice as discussed in those Arguments, if appellant's trial counsel failed to preserve the federal constitutional issues, then appellant also suffered prejudice from ineffective assistance of counsel.

XX. THE JUDGMENT SHOULD BE REVERSED DUE TO CUMULATIVE ERROR THAT DEPRIVED VINES OF A FAIR TRIAL.

Each of the grounds set forth above prevented Vines from receiving a fair capital murder trial as guaranteed by state law and by the Sixth, Eighth and Fourteenth Amendments, and each one warrants reversal of the judgment, the sentence, or both. But even if the Court should conclude that any one of the federal or state law violations shown above is insufficient to require a new trial, the Court should consider the effect of the errors taken together, and reverse due to cumulative error.

As this Court stated in *People v. Hill, supra*, 17 Cal.4th at pp. 844-845:

> ***"a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.*** (*People v. Purvis, supra,* 60 Cal.2d at pp. 348, 353 [combination of 'relatively unimportant misstatement[s] of fact or law,' when considered on the 'total record' and in 'connection with the other errors,' required reversal]; *People v. Herring, supra,* 20 Cal.App.4th at pp. 1075-1077 [cumulative prejudicial effect of prosecutor's improper statements in closing argument required reversal]; see *In re Jones* (1996) 13 Cal.4th 552, 583, 587 [cumulative prejudice from defense counsel's errors requires reversal on habeas corpus]; *People v. Ledesma* (1987) 43 Cal.3d 171, 214-227 [same]; see also *Samayoa, supra*, 15 Cal.4th at p. 844 [prosecutorial misconduct does not require reversal "whether considered singly or together"]; *People v. Bell* (1989) 49 Cal.3d 502, 534 [considering 'the cumulative impact of the several instances of prosecutorial misconduct' before finding such impact harmless]; cf. *People v. Espinoza, supra*, 3 Cal.4th at p. 820 [noting the prosecutorial misconduct in that case was 'occasional rather than systematic and pervasive'].)"

Accord, e.g., *Thomas v. Hubbard, supra*, 273 F.3d 1164, 1179 ("'Errors that might not be so prejudicial as to amount to a deprivation of due process when

considered alone, may cumulatively produce a trial setting that is fundamentally unfair.'").

In this case, as shown above, any of the errors independently provide grounds for reversal. Taken together, the cumulative impact of any two or more of the errors produced an unfair trial under California law, prejudicially deprived Vines of due process of law under the Fourteenth Amendment, and resulted in an unfair and unreliable capital murder trial in violation of the Eighth Amendment. And even assuming cumulative error was not prejudicial at the guilt phase, it was certainly prejudicial at the penalty phase.

XXI. THE DEATH PENALTY IN CALIFORNIA IS ARBITRARILY SOUGHT AND IMPOSED DEPENDING ON THE COUNTY IN WHICH THE DEFENDANT IS PROSECUTED, IN VIOLATION OF THE RIGHT TO EQUAL PROTECTION OF THE LAW.

Appellant's death sentence and confinement are unlawful and unconstitutional. They were obtained in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 7(b) and Article IV, section 16(a) of the California Constitution, because the death penalty in California is imposed arbitrarily and capriciously depending on the county in which the case is prosecuted.

Every person in the United States is entitled to equal protection of the law under the Fourteenth Amendment. U.S. Const., 14th Amend. It is true that since 1976 the Supreme Court of the United States has upheld the death penalty in general against Eighth Amendment challenges and allowed the states to vary in their statutory schemes for putting people to death. See *Jurek v. Texas* (1976) 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (plurality opn.); *Proffitt v. Florida* (1976) 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; *Gregg v. Georgia* (1976) 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859. Cf. *McClesky v. Kemp* (1987) 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262.

Nonetheless, on December 12, 2000, the Supreme Court of the United States recognized that when fundamental rights are at stake, uniformity among the counties within a state, in the application of processes that deprive a person of a fundamental right, is an essential component of equal protection. *Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530-532, 148 L Ed.2d 388. When a statewide scheme is in effect, there must be sufficient assurance "that the

rudimentary requirements of equal treatment and fundamental fairness are satisfied." *Id.* at 532.

This principle must apply to the right to life as well as the right to vote. The right to life is at least as fundamental as the right to vote, and is expressly protected under the Fourteenth Amendment. The right to be free of cruel and unusual punishment, expressly guaranteed by the Eighth Amendment, only fortifies the fundamental nature of the right to life.

In California, the 58 counties, through the respective prosecutors' offices, headed by elected district attorneys, make their own rules, within the broad parameters of Penal Code § 190.2 and § 190.25, as to who is charged with capital murder and who is not. There are no effective restraints or controls on prosecutorial discretion in California. So long as an alleged crime falls within the statutory criteria of Penal Code § 190.2 or 190.25, the prosecutor is free to pick and choose which defendants, if any, will face a possible sentence of death and which will face a lesser punishment.

There is no uniform treatment within the state. In some California counties a life is worth more than in others, because county prosecutors use different, or no standards, in choosing whether to charge a defendant with capital murder. If different and standardless procedures for counting votes among counties violates equal protection, as in the *Bush* case, then certainly different and standardless procedures for charging and prosecuting capital murder must violate the right to equal protection of the law, as well.

This is not merely a matter of abstract interest. If Sean Vines had been tried and convicted for the same robbery not in the County of Sacramento, but in the County of San Francisco, he almost certainly would not have faced the death penalty. The district attorney at the time Vines was tried in 1997 was an

outspoken opponent of capital punishment. Indeed, San Francisco has not sent any prisoner to death row since 1991.[72]

The likelihood of a capital prosecution and sentence of death should not depend on county-by-county differences in administration of the law by local officials. Yet in California, it indisputably does.

This Court should, therefore, in light of *Bush v. Gore*, reexamine its prior precedents which hold that prosecutorial discretion as to which defendants will be charged with capital murder does not offend principles of due process, equal protection or cruel and unusual punishment. See e.g., *People v. Anderson* (2001) 25 Cal.4th 543, 601-602; *People v. Williams* (1997) 16 Cal.4th 153, 278; *People v. Keenan* (1988) 46 Cal.3d 478, 505. Unequal treatment among the California counties violates the Fourteenth Amendment Equal Protection Clause, *Bush v. Gore, supra*, and Article I, section 7(b) and Article IV, section 16(a) of the California Constitution. Accordingly, appellant's sentence of death must be reversed.

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[72] See Egelko, "Top Court Oks Death Sentence," *San Francisco Chronicle*, December 6, 2002, p. A24 (available on LEXIS); (noting that the San Francisco District Attorney, elected in 1995, "has promised not to seek the death penalty in any case his office prosecutes."); see also Stannard, "D.A. won't pursue death in cop slaying," *San Francisco Chronicle*, April 14, 2004, p. B1 (current District Attorney has "pledge[d] not to seek capital punishment.")

XXII. APPELLANT'S EQUAL PROTECTION AND DUE PROCESS RIGHTS ON APPEAL HAVE BEEN PREJUDICIALLY VIOLATED BECAUSE HE HAS BEEN FORCED TO WAIT AN INORDINATE AMOUNT OF TIME – OVER FIVE AND ONE-HALF YEARS – FOR THE APPOINTMENT OF APPELLATE COUNSEL.

A. Introduction.

A judgment of death was entered against Vines on November 7, 1997. CT 1046. His appeal is automatic, and required by California law. Because he is indigent, Vines has a right to appointed counsel on appeal. Yet Vines was compelled to wait on Death Row for over five and one-half years – until May 30, 2003 – before counsel was appointed to represent him on this appeal.

This delay of more than five and one-half years between the pronouncement of a death sentence and the provision of a lawyer was without any constitutionally adequate excuse or justification, and violated Vines' federal constitutional rights to equal protection and due process of law, requiring reversal of the judgment.

B. Equal Protection and Due Process Principles.

This issue involves the right to counsel on appeal, and the right to a speedy appeal.

While there is no federal constitutional right to an appeal, when an appeal as of right is provided, as it is in California, the state is forbidden to discriminate between appellants with the money to hire an attorney and appellants without it. As this Court explained in *In re Barnett* (2003) 31 Cal.4th 466, 472-473:

> "The Fourteenth Amendment and its due process and equal protection guarantees . . . prohibit discrimination against convicted indigent inmates; consequently, an indigent inmate has a constitutional right to counsel appointed at the state's expense where, as here, the state confers a criminal appeal as of right. (*Douglas v. California* (1963) 372 U.S. 353, 356-357 [9 L.Ed.2d 811, 83 S.Ct. 814].) Consistent with these constitutional principles, California provides a statutory right to appointed counsel for both capital and noncapital criminal appeals. (Pen. Code, § § 1239, 1240, 1240.1.)"

A speedy trial, guaranteed to all criminal defendants by the Sixth Amendment, is a fundamental right guaranteed by the due process clause of the Fourteenth Amendment. *Barker v. Wingo* (1972) 407 U.S. 514, 515, 92 S.Ct. 2182, 33 L.Ed.2d 101. An appeal that "is inordinately delayed is as much a 'meaningless ritual,' as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings." *Harris v. Champion* (10th Cir. 1994) 15 F.3d 1538, 1558, quoting *Douglas v. California* (1963) 372 U.S. 353, 358, 83 S.Ct. 814, 9 L.Ed.2d 811.[73]

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[73] Numerous federal appellate courts have found that the right to a speedy criminal appeal is compelled by the United States Supreme Court's due process jurisprudence, thereby ruling that unreasonable appellate delay violates the Fourteenth Amendment's due process clause. Among the federal courts of appeal, the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have recognized the right to a speedy appeal. See *United States v. Pratt* (lst Cir. 1981) 645 F.2d 89, 91; *Elcock v. Henderson* (2d Cir. 1991) 947 F.2d 1004, 1007; *Cody v. Henderson* (2d Cir. 1991) 936 F.2d 715, 718-719; *Burkett v. Fulcomer* (3d Cir. 1991) 951 F.2d 1431, 1445-1446; *Burkett v. Cunningham* (3d Cir. 1987) 826 F.2d 1208, 1221-1222; *United States v. Johnson* (4th Cir. 1984) 732 F.2d 379, 381-382; *United States v. Bermea* (5th Cir. 1994) 30 F.3d 1539, 1568-1569; *Rheuark v. Shaw* (5th Cir. 1980) 628 F.2d 297, 302-304; *United States v. Smith* (6th Cir. 1996) 94 F.3d 204, 206-208; *Dozie v. Cady* (7th Cir. 1970) 430 F.2d 637, 638; *United States v. Hawkins* (8th Cir. 1996)

(continued...)

In ruling on speedy appeal claims, courts often borrow from the four-pronged balancing test deployed in *Barker v. Wingo*, *supra*, 407 U.S. 514, to evaluate speedy trial claims. Applying *Barker* in the appellate context, courts "examine the length of the delay, the reason for the delay, whether the petitioner asserted his or her right to a timely appeal, and whether the petitioner experienced any prejudice as a result of excessive delay." *Harris v. Champion*, *supra*, 15 F.3d at pp. 1546-1547; see *United States v. Tucker* (9th Cir. 1993) 8 F.3d 673, 676 (en banc); *United States v. Antoine*, *supra*, 906 F.2d at p. 1382.

An examination of these factors shows that the more than five-year delay in appointing counsel for Vines violated his federal constitutional rights to equal protection and due process.

C. The Length of the Delay.

In the absence of inordinate delay, no due process claim can be made. Short delays are unlikely to raise due process concerns. See *United States v. Pratt*, *supra*, 645 F.2d at p. 91 [nine-month appellate delay]; *United States ex rel. Harris v. Reed* (N.D. Ill. 1985) 608 F.Supp. 1369, 1376 [seven-and-one-half-month delay processing motion for post-conviction relief]; *Doescher v. Estelle* (N.D. Tex. 1978) 454 F.Supp. 943, 952 [one-year appellate delay]. However, longer delays have been found to raise due process concerns.

In *Harris v. Champion*, *supra*, 15 F.3d 1538, the Tenth Circuit concluded that the passage of two years created "a presumption of inordinate

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(...continued)
78 F.3d 348, 350-351; *Coe v. Thurman* (9th Cir. 1991) 922 F.2d 528, 530-533; *United States v. Antoine* (9th Cir. 1990) 906 F.2d 1379, 1382; *Harris v. Champion*, *supra*, 15 F.3d at pp. 1546-1547.

delay on appeal." *Id.* at p. 1561. Indeed, the court found that "delay substantially beyond two years, at least in a case that does not warrant a lengthier appellate process, will reduce the burden of proof on the other three factors necessary to establish a due process violation." *Id.* at p. 1562. Other courts have found that delays of this length raise due process concerns. *Dozie v. Cady* (7th Cir. 1970) 430 F.2d 637, 638 [seventeen-month delay]; *Burkett v. Fulcomer, supra*, 951 F.2d at p. 1445 [eighteen-month delay]; *Snyder v. Kelly* (W.D.N.Y. 1991) 769 F.Supp. 108, 111 [three-year delay], *aff'd* 972 F.2d 1328 (2d Cir. 1992); *United States ex rel. Hankins v. Wicker* (W.D. Pa. 1984) 582 F.Supp. 180, 185 [two-year delay].

As shown above, Vines was sentenced to death on November 7, 1997, yet counsel was not appointed until more than five and one-half years later, on May 30, 2003. This delay of well over five years for just the appointment of counsel exceeded the two-year time period identified by *Harris* as the maximum time allowed for timely resolution of an appeal in its entirety.

The more-than-five-year delay was inordinate.

D. The Reason for the Delay.

Vines is indigent. Because of his indigency he has had to wait years to obtain a lawyer. If Vines had been a child of privilege able to pay six-figure attorney fees – as the beneficiary of a trust fund, for example – he would not have had to wait. He could have hired an appellate attorney immediately upon entry of judgment against him (if not sooner).

The responsibility for the timely appointment of appellate counsel for the indigent rests with the state. *In re Barnett, supra,* 31 Cal.4th 466, 472-473.

There is no constitutionally supportable justification for a five-year-plus delay in appointing appellate counsel for a person sentenced to death.

This Court has been unable to appoint counsel for every person sentenced to death at the time of sentence or shortly thereafter. But there are many more lawyers in California than there are Death Row inmates, and the problem is far from intrinsically insoluble; if the Legislature wished to assure that every person sentenced to death had prompt assistance of counsel, it could certainly do so.

The Legislature could choose to fund a public agency or quasi-public agency, such as the State Public Defender's Office or the California Appellate Project, so that those offices could hire and train attorneys to directly represent persons sentenced to death. And sufficient compensation, more closely resembling actual market rates for attorneys skilled in complex appellate litigation, could be instituted to attract qualified private counsel to undertake representation of inmates on appeal in greater numbers. This is simply a matter of supply and demand.

Instead, the Legislature has chosen not to take those steps necessary to insure that every capital appellant has an appeals lawyer shortly after sentence is passed. This policy must finally rest on considerations of financial impact – considerations which are insufficient to justify the failure to promptly appoint counsel for indigents on Death Row. See *Douglas v. California, supra,* 372 U.S. 353, 358.

E. Appellant's Assertion of His Right to a Timely Appeal.

The *Harris* court concluded that "absent evidence that a petitioner affirmatively sought or caused delay in the adjudication of his or her appeal,

this third factor should weigh in favor of finding a due process violation." 15 F.3d at p. 1563.

In the present case, appellant was entitled to an automatic appeal pursuant to state statute. Penal Code section 1239, subdivision (b). Appellant took no action to delay the appointment of counsel. To the contrary, Mr. Vines filed filed pro per proceedings to secure legal representation.

On May 4, 2001, appellant filed a petition for writ of habeas corpus in this Court regarding the delay in the appointment of counsel. *In re Vines,* Case No. S097317.

This Court denied the petition on July 27, 2001.

F. Appellant Was Prejudiced as a Result of the Delay.

Prejudice from appellate delay may result from, inter alia, "oppressive incarceration pending appeal" or "constitutionally cognizable anxiety awaiting resolution of the appeal." *Harris v. Champion, supra*, 15 F.3d at p. 1563; see *United States v. Wilson* (9th Cir. 1994) 16 F.3d 1027, 1030.

Prejudice based upon oppressive incarceration "depends upon the outcome of his appeal on the merits, or subsequent retrial, if any." *United States v. Antoine, supra*, 906 F.2d at p. 1382. Thus, if an appellant is properly convicted, "there has been no oppressive confinement: he has merely been serving his sentence as mandated by law." *Id.* As discussed elsewhere in this brief, appellant's appeal is meritorious and, therefore, his excessive incarceration pending appointment of counsel has been oppressive.

In order for prejudice arising from anxiety to be cognizable, "the anxiety must relate to the period of time that the appeal was excessively delayed." *Harris v. Champion, supra*, 15 F.3d at p. 1564. The Ninth Circuit

Court of Appeals requires a showing of "particular anxiety that would distinguish his case from that of any other prisoner awaiting the outcome of an appeal." *United States v. Antoine*, *supra*, 906 F.2d at p. 1383.

In the present case, appellant's five-and-one-half year-plus deprivation of legal assistance created anxiety distinct from that of other inmates who were timely appointed appellate counsel. A death sentence is the state's ultimate punishment. Its imposition demands legal representation, as California law recognizes. Enforced isolation from legal representation by a qualified lawyer while on Death Row for more than five-and-one-half years simply cannot be justified.

The psychological dimensions of a death sentence are unique. They alone distinguish a death sentence from any other. Excessive time served without legal representation on Death Row induces anxiety different from that otherwise associated with prison life. Appellant's deprivation of counsel is necessarily and intrinsically harmful.

G. All Four Factors Lead to the Conclusion that Appellant's Equal Protection and Due Process Rights Have Been Violated.

All four factors support the same conclusion: appellant's speedy appeal right have been violated and his conviction and sentence must be set aside.

Independently, the extraordinary delay in appointing appellate counsel for a condemned inmate establishes the constitutional violation. The delay not only compromised appellant's speedy appeal rights but also sacrificed his federal constitutional rights to assistance of counsel and meaningful appellate review.

Refusing to acknowledge the well-established federal right to a speedy appeal, this Court has summarily disposed of speedy appeal claims in other cases. *People v. Holt* (1997) 15 Cal.4th 619. Moreover, rather than carefully applying the four-part balancing test of *Barker*, or articulating an alternative test, this Court appears to have created a *capital-case exception* to the right to a speedy appeal. 15 Cal.4th at p. 709.

The unique nature of capital litigation must be taken into account when applying the *Barker* criteria. Indeed, appellant has not challenged the reasonably necessary time for record review, record correction, briefing, and court consideration in capital cases. Rather, appellant demonstrates that no justification exists for inordinate delay in appointing appellate counsel. Nothing in the general nature of capital litigation justifies suspending the appellate process for more than five years.

Indeed, the delays inherent in capital postconviction litigation only accentuate the need for prompt appointment of appellate counsel.

The systemic delays in appointing counsel undermine the equitable and reasonable operation of the capital appeals process and likewise offend basic notions of constitutional fairness. Observing in 1997 that 156 of 480 death row inmates did not have lawyers, the San Francisco Chronicle editorialized that "[j]ustice is the casualty of California's inability to provide adequate legal representation for death row inmates." *Inmates on Death Row Have Right to Lawyers*, S.F. Chronicle (Aug. 25, 1997) p. A20. It is a problem that has plagued the court system for many years. Hager, *Counsel for the Condemned* (Dec. 1993) Cal. Law., pp. 33, 34.

Indeed, the Chief Justice acknowledged in his 1996 State of the Judiciary address that the delay of processing death-penalty appeals "causes

confusion and frustration among Californians and is unfair to everyone - victims and their families, defendants, and the public at large." Chief Justice Ronald M. George, *1996 State of the Judiciary Address to a Joint Session of the California Legislature* (May 15, 1996) p. 20.

Once a State

> "has created appellate courts as 'an integral part of the. . . system for finally adjudicating the guilt or innocence of a defendant,' the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."

Evitts v. Lucey (1985) 469 U.S. 387, 393, 105 S.Ct. 830, 83 L.Ed.2d 821, quoting *Griffin v. Illinois* (1956) 351 U.S. 12, 18, 76 S.Ct. 585, 100 L. Ed. 891. California's procedures do not comport with these constitutional demands.

Accordingly, the judgment must be reversed.

XXIII. EXECUTION FOLLOWING LENGTHY CONFINEMENT UNDER SENTENCE OF DEATH WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND INTERNATIONAL LAW.

A. Introduction.

Execution of appellant following his lengthy confinement under sentence of death (now more than seven years) would constitute cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Article I, sections 1, 7, 15, 16, and 17 of the California Constitution; and international law, covenants, treaties and norms.

Appellant was sentenced to death on November 7, 1997, after more than three years of imprisonment in the county jail. CT 1046. At the present time, he has already been continuously confined for almost ten-and-one-half years and under sentence of death for more than seven years. His automatic appeal has been pending continuously during that time.

Appellant's excessive confinement on death row has been through no doing of his own. The appeal from a judgment of death is automatic (Pen. Code section 1239, subdivision (b)), and there is "no authority to allow [the] defendant to waive the [automatic] appeal." *People v. Sheldon* (1994) 7 Cal.4th 1136, 1139. Of course, full, fair and meaningful review of the trial court proceedings, required under the state and federal constitutions and state law, necessitates a complete record (*Chessman v. Teets* (1957) 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed.2d 1253; Penal Code section 190.7; Cal. Rules of Court,

rule 39.5) and effective appellate representation (*see People v. Barton* (1978) 21 Cal.3d 513, 518; U.S. Const. amends. VI, VIII, XIV).

The delays in appellant's appeal have been caused by factors over which he has exercised no discretion or control whatsoever, and are overwhelmingly attributable to the system that is in place, established by state and federal law, which necessitates extremely time-consuming and exhaustive litigation. The delays have nothing to do with the exercise of any discretion on appellant's part. Cf. *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1466-1467 (claim rejected because delay caused by prisoner "avail[ing] himself of procedures" for post-conviction review, implying volitional choice by the prisoner), *adopted en banc*, 57 F.3d 1493. The delays here have been caused by "negligence or deliberate action by the State." *Lackey v. Texas* (1995) 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (mem. of Stevens, J., joined by Breyer, J., respecting the denial of certiorari). The complaint in this case was filed on October 6, 1994. Appellant's judgment of death was imposed on November 7, 1997. Appellate counsel was appointed on May 30, 2003, more than five and a half years later.

The condemned prisoner's non-waivable right to prosecute the automatic appeal remedy provided by law in this state does not negate the cruel and degrading character of long-term confinement under judgment of death.

Execution of appellant following confinement under sentence of death for this lengthy a period of time would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Lackey v. Texas, supra,* 514 U.S. 1045 (Stevens, J., joined by Breyer, J., respecting the denial of certiorari). See *Knight v. Florida* (1998) 528 U.S. 990, 120 S.Ct. 459, 145 L.Ed.2d 370 (Breyer, J., respecting the denial of certiorari); *Ceja v.*

Stewart (9th Cir. 1998) 97 F.3d 1246 (Fletcher, J., dissenting from order denying stay of execution). If appellant is executed, his sentence will be more than ten years of solitary confinement in a tiny cell in San Quentin prison – Death Row– followed by execution.

B. Cruel and Unusual Punishment.

Carrying out appellant's death sentence after this extraordinary delay is violative of the Eighth Amendment's Cruel and Unusual Punishments Clause in at least two respects: first, it constitutes cruel and unusual punishment to confine an individual, such as appellant, on death row for this extremely prolonged period of time. See, e.g., *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461; *Ceja v. Stewart*, *supra*, (Fletcher, J., dissenting from order denying stay of execution). Second, after the passage of such a period of time since his conviction and judgment of death, the imposition of a sentence of death upon appellant would violate the Eighth Amendment because the State's ability to exact retribution and to deter other murders by actually carrying out such a sentence is drastically diminished. *Id.*

Confinement under a sentence of death subjects a condemned inmate to extraordinary psychological duress, as well as the extreme physical and social restrictions inherent in life on death row. Accordingly, such confinement, in and of itself, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

Over a century ago, the United States Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to

which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley* (1890) 134 U.S. 160, 172, 10 S.Ct. 384, 33 L.Ed. 835.

In *Medley*, the period of uncertainty was just four weeks. As recognized by Justice Stevens, *Medley*'s description should apply with even greater force in a case such as appellant's, involving a delay that has lasted over thirteen years. *Lackey v. Texas*, *supra*, (Stevens, J., joined by Breyer, J., respecting the denial of certiorari).

This Court reached a similar conclusion in *People v. Anderson* (1972) 6 Cal.3d 628, 649: "The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."

The penological justification for carrying out an execution disappears when an extraordinary period of time has elapsed between the conviction and the proposed execution date, and actually executing a defendant under such circumstances is an inherently excessive punishment that no longer serves any legitimate purpose. *Ceja v. Stewart*, *supra*, (Fletcher, J., dissenting from order denying stay of execution); see also *Furman v. Georgia*, *supra*, 408 U.S. at p. 312 (White, J., concurring).

The imposition of a sentence of death must serve legitimate and substantial penological goals in order to survive Eighth Amendment scrutiny. When the death penalty "ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with

only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman v. Georgia*, *supra*, (White, J., concurring); *see also Gregg v. Georgia*, *supra*, 428 U.S. at p. 183 ("The sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.").

In order to survive Eighth Amendment scrutiny, "the imposition of the death penalty must serve some legitimate penological end that could not otherwise be accomplished. If 'the punishment serves no penal purpose more effectively than a less severe punishment, *Furman v. Georgia*, *supra* at p. 280, (Brennan, J., concurring), then it is unnecessarily excessive within the meaning of the Punishments Clause."

The penological justifications that can support a legitimate application of the death penalty are twofold: "retribution and deterrence of capital crimes by prospective offenders." *Gregg v. Georgia*, *supra*, at p. 183. Retribution, as defined by the United States Supreme Court, means the "expression of society's moral outrage at particularly offensive behavior." *Id.*

The ability of the State of California to further the ends of retribution and deterrence has been drastically diminished here as a result of the extraordinary period of time that has elapsed since the date of appellant's conviction and judgment of death.

> "It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death . . . . [A]fter such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. . . . [T]he additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years

> on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal."

Lackey v. Texas, *supra*, (Stevens, J., joined by Breyer, J., respecting the denial of certiorari); *see also Coleman v. Balkcom* (1981) 451 U.S. 949, 952, 101 S.Ct. 2031, 68 L.Ed.2d 334 (Stevens, J., respecting denial of certiorari) ("the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself").

Because it would serve no legitimate penological interest to execute appellant after this passage of time and because appellant's confinement on death row for over ten years, in and of itself, constitutes cruel and unusual punishment, execution of appellant is prohibited by the Eighth Amendment's Cruel and Unusual Punishments Clause.

C. International Law.

The United States stands virtually alone among the nations of the world in confining individuals for periods of many years continuously under sentence of death. The international community is increasingly recognizing that, without regard for the question of the appropriateness or inappropriateness of the death penalty itself, prolonged confinement under these circumstances is cruel and degrading and in violation of international human rights law. *Pratt v. Attorney General for Jamaica* (1993) 4 All.E.R. 769 (Privy Council); *Soering v. United Kingdom* 11 E.H.R.R. 439, ¶ 111 (Euro. Ct. of Human Rights). *Soering* specifically held that, for this reason, it would be inappropriate for the government of Great Britain to extradite a man under indictment for capital murder in the state of Virginia, in the absence of assurances that he would not be sentenced to death.

In an earlier generation, prior to the adoption and development of international human rights law, this Court rejected a somewhat similar claim. *People v. Chessman* (1959) 52 Cal.2d 467, 498-500. But the developing international consensus demonstrates that, in addition to being cruel and degrading, what the Europeans refer to as the "death row phenomenon" in the United States is also "unusual" within the meaning of the Eighth Amendment and the corresponding provision of the California Constitution, entitling appellant to relief for that reason as well.

Further, the process used to implement appellant's death sentence violates international treaties and laws that prohibit cruel and unusual punishment, including, but not limited to, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), adopted by the General Assembly of the United Nations on December 10, 1984, and ratified by the United States ten years later. *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984). The length of appellant's confinement on death row, along with the constitutionally inadequate guilt and penalty determinations in his case, have caused him prolonged and extreme mental torture and degradation, and denied him due process, in violation of international treaties and law.

Article 1 of the Torture Convention defines torture, in part, as any act by which severe pain or suffering is intentionally inflicted on a person by a public official. *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Agenda Item 99, U.N. Doc. A/Res/39/46 (1984). Pain or suffering may only

be inflicted upon a person by a public official if the punishment is incidental to a *lawful* sanction. *Id.* Appellant has made a prima facie showing that his convictions and death sentence were obtained in violation of federal and state law.

In addition, appellant has been, and will continue to be, subjected to unlawful pain and suffering due to his prolonged, uncertain confinement on death row. "The devastating, degrading fear that is imposed on the condemned for months and years is a punishment more terrible than death." Camus, *Reflections on the Guillotine*, in *Resistance, Rebellion and Death* 173, 200 (1961). The international community has increasingly recognized that prolonged confinement under a death sentence is cruel and unusual, and in violation of international human rights law. *Pratt v. Attorney General for Jamaica,* 4 All.E.R. 769 (Privy Council); *Soering v. United Kingdom*, 11 E.H.R.R. 439, ¶ 111 (Euro. Ct. of Human Rights) (United Kingdom refuses to extradite German national under indictment for capital murder in Virginia in the absence of assurances that he would not be sentenced to death).

The violation of international law occurs even when a condemned prisoner is afforded post-conviction remedies beyond an automatic appeal. These remedies are provided by law, in the belief that they are the appropriate means of testing the judgment of death, and with the expectation that they will be used by death-sentenced prisoners. Appellant's use of post-conviction remedies does nothing to negate the cruel and degrading character of his long-term confinement under judgment of death.

Appellant's death sentence must be vacated permanently, and/or a stay of execution must be entered permanently.

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

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these constitutional defects require appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code

section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

A. Appellant's Death Penalty is Invalid Because Penal Code section 190.2 is Impermissibly Broad.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the

> death penalty is imposed from the many cases in which it is not.' (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord, Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)"

People v. Edelbacher (1989) 47 Cal.3d 983, 1023. In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> "Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty."

Zant v. Stephens (1983) 462 U.S. 862, 878, 103 S.Ct. 2733, 77 L.Ed.2d 235.

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." *People v. Bacigalupo* (1993) 6 Cal.4th 857, 868.

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-six special circumstances[74] purporting to narrow the

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[74] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-two.

category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. *People v. Dillon* (1984) 34 Cal.3d 441. Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all intentional murders. See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575. These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997). It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders *Ibid.*. Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53, 104 S.Ct. 871, 79 L.Ed.2d 29. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was

convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. *Harris*, *supra*, 465 U.S. at p. 52, fn. 14.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

B. Appellant's Death Penalty is Invalid Because Penal Code section 190.3(a) As Applied Allows Aribitrary and Capricious Imposition of Death In Violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Federal Constitution.

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

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this

Court has never applied a limiting construction to this factor other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[75] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance on the "circumstance of the crime" aggravating factor because three weeks after the crime defendant sought to conceal evidence,[76] or had a "hatred of religion,"[77] or threatened witnesses after his arrest,[78] or disposed of the victim's body in a manner that precluded its recovery.[79]

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988, 114 S.Ct. 2630, 129 L.Ed.2d 750), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those

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[75] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

[76] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10, *cert. den.*, 494 U.S. 1038 (1990).

[77] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[78] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[79] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds[80] or because the defendant killed with a single execution-style wound.[81]

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[82] or because the defendant killed the victim without any motive at all.[83]

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[80] See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[81] See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

[82] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[83] See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

c. Because the defendant killed the victim in cold blood[84] or because the defendant killed the victim during a savage frenzy.[85]

d. Because the defendant engaged in a cover-up to conceal his crime[86] or because the defendant did not engage in a cover-up and so must have been proud of it.[87]

e. Because the defendant made the victim endure the terror of anticipating a violent death[88] or because the defendant killed instantly without any warning.[89]

f. Because the victim had children[90] or because the victim had not yet had a chance to have children.[91]

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[84] See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[85]See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[86] See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[87] See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[88] See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

[89] See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[90] See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[91] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[96]

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[97]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the

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[96] See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips* (1985) 41 Cal.3d 29, 63 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[97] See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[98]

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[99]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[100]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation

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[98] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

[99] See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[100] See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." *Maynard v. Cartwright* (1988) 486 U.S. 356, 363, 108 S.Ct. 1853, 100 L.Ed.2d 372 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398].

C. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to Jury Trial on Each Factual Determination Prerequisite to a Sentence of Death; It Therefore Violates the Sixth, Eighth and Fourteenth Amendments to the Federal Constitution.

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

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death.

Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

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

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 [hereinafter *Apprendi*] and *Ring v. Arizona* (2002) 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 [hereinafter *Ring*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. *Id.* at p. 478.

In *Ring*, the high court held that Arizona's death penalty scheme, under which a judge sitting without a jury makes factual findings necessary to impose the death penalty, violated the defendant's constitutional right to have the jury determine, unanimously and beyond a reasonable doubt, any fact that may increase the maximum punishment. While the primary problem presented by Arizona's capital sentencing scheme was that a judge, sitting without a jury, made the critical findings, the court reiterated its holding in *Apprendi*, that when the State bases an increased statutory punishment upon additional findings, such findings must be made by a unanimous jury beyond a reasonable doubt. California's death penalty scheme as interpreted by this Court violates the federal Constitution.

a. *In the Wake of Ring, Any Aggravating Factor Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.*

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[101] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

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[101] See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990). And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. *People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors. According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" CALJIC No. 8.88; emphasis added.

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh

mitigating factors.[102] 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.[103]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*], and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." *People v. Prieto*, *supra*, 30 Cal.4th at p. 263. This holding is based on a truncated view of

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[102] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" *Id.*, 59 P.3d at p. 460.

[103] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. *People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.

California law. As section 190, subd. (a),[104] indicates, the maximum penalty for *any* first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring* to no avail:

> "In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(c) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. . . . This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151."

Ring, 124 S.Ct. at 2431.

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." *Ring*, *supra*, 122 S.Ct. at p. 2440. Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

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[104] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further finding that one or more aggravating circumstances substantially outweigh(s) the mitigating circumstances. Section 190.3; CALJIC 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. See *People v. Hernandez* (2003) 30 Cal.4th 835 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[105] while California's

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[105]Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[106]

There is no meaningful difference between the processes followed under each scheme. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 124 S.Ct. at 2439-2440. The issue of *Ring*'s applicability hinges on whether as a practical matter, the sentencer must make additional fact-findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is

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[106] California Penal Code section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." In *People v. Brown* (1985) 40 Cal.3d 512, 541, 545, fn.19, the California Supreme Court construed the "shall impose" language of section 190.3 as not creating a mandatory sentencing standard and approved an instruction advising the sentencing jury that a finding that the aggravating circumstances substantially outweighed the mitigating circumstances was a prerequisite to imposing a death sentence. California juries continue to be so instructed. (See CALJIC 8.88 (7th ed. 2003).

appropriate." *Snow*, *supra*, 30 Cal.4th at 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at 589-590, fn.14.

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. The finding of an aggravating factor is an essential step before the weighing process begins.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' *Tuilaepa*, *supra*, 512 U.S. at p. 972. No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." *Prieto*, 30 Cal.4th at p. 263; emphasis added. This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale. The fact that no single factor determines penalty does not negate the requirement that facts be found as a prerequisite to considering the imposition of a death sentence.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase

instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. The presence of at least one aggravating factor is the functional equivalent of an element of capital murder in California and requires the same Sixth Amendment protection. See *Ring*, *supra*, 122 S.Ct. at 2439-2440.

Finally, this Court relied on the undeniable fact that "death is different," but used the moral and normative nature of the decision to choose life or death as a basis for withholding rather than extending procedural protections. *Prieto*, 30 Cal. 4th at 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 . . . extend[ed] to defendants generally, and none is readily apparent." The notion that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

Ring, *supra*, 122 S.Ct. at p. 2442, citing with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at p. 539.

No greater interest is ever at stake than in the penalty phase of a capital case. *Monge v. California* (1998) 524 U.S. 721, 732, 118 S.Ct. 2246, 141 L.

Ed.2d 615 ["the death penalty is unique in its severity and its finality"]. As the high court stated in *Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443:

> "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death."

The final step of California's capital sentencing procedure is indeed a free weighing of aggravating and mitigating circumstances, and the decision to impose death or life is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the facts that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. *The Requirements of Jury Agreement and Unanimity.*

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." *People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord*, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336. Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[107] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the ultimate deliberative process in which normative determinations are made. The U.S. Supreme Court has made clear that such factual determinations must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. *Ring*, *supra*.

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure

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[107] See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51, 112 S.Ct. 466, 116 L.Ed.2d 371 [historical practice given great weight in constitutionality determination].

. . . [its] reliability." *Brown v. Louisiana* (1980) 447 U.S. 323, 334, 100 S.Ct. 2214, 65 L.Ed.2d 159. Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732;[108] *accord, Johnson v. Mississippi* (1988) 486 U.S. 578, 584, 108 S.Ct. 1981, 100 L.Ed.2d 575), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. See, e.g., sections 1158, 1158a. Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra*, 524 U.S. at

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[108] The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J. (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington, supra*, 466 U.S. 668, 704 (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California, supra*, 524 U.S. at pp. 731-732.

p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994, 111 S.Ct. 2680, 115 L.Ed.2d 836), and certainly no less (*Ring*, 122 S.Ct. at p. 2443).[109]

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[110] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" *People v. Medina* (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." *People v. Raley* (1992) 2 Cal.4th 870, 910. The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial on guilt or innocence." (*Monge v. California*, *supra*, 524 U.S. at p. 726; *Strickland v. Washington*, *supra*, 466 U.S. at pp. 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 439, 101 S.Ct. 1852, 68 L.Ed.2d

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[109] Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." 21 U.S.C. § 848, subd. (k).

[110] The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].

270. While the unadjudicated offenses are not the offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, 119 S.Ct. 1707, 143 L.Ed.2d 985, the U.S. Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> "The statute's word 'violations' covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.*"

Richardson, *supra*, 526 U.S. at p. 819 (emphasis added).

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement

among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. *People v. Hawthorne*, *supra*; *People v. Hayes* (1990) 52 Cal.3d 577, 643. However, *Ring* makes clear that the finding of one or more aggravating circumstance that is a prerequisite to considering whether death is the appropriate sentence in a California capital case is precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. *Factual Determinations.*

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are

determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Speiser v. Randall* (1958) 357 U.S. 513, 520-521, 78 S.Ct. 1332, 2 L.Ed.2d 1460.

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* (1977) 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393; see also *Presnell v. Georgia* (1978) 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207. Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt.

b. *Imposition of Life or Death.*

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. *Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323. The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. *Winship*, *supra*, 397 U.S. at 364. Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Santosky v. Kramer* (1982) 455 U.S. 745, 755, 102 S.Ct. 1388, 71 L.Ed.2d 599; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335, 96 S.Ct. 893, 47 L.Ed.2d 18.

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than that of human life. If personal liberty is "an interest of transcending value," *Speiser*, *supra*, 375 U.S. at 525, how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas*(1977) 19 Cal.3d 630 (commitment as narcotic

addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator). The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" *Santosky*, *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 omitted.] The stringency of the 'beyond a reasonable doubt' standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.' "

455 U.S. at p. 756.

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." *Santosky*, *supra*, 455 U.S. at 763.

Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, *supra*, 397 U.S. at 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* (1976) 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944. The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. *Beck v. Alabama* (1980) 447 U.S. 625, 637-638. No greater interest is ever at stake; see *Monge v. California*, *supra*, 524 U.S. at p. 732 ["the death penalty is unique in its severity and its finality"]. In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979)." *Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added). The

sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

3. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. See, e.g.,

Griffin v. United States (1991) 502 U.S. 46, 51, 112 S.Ct. 466, 116 L.Ed.2d 371 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1856) 59 U.S. 272, 276-277, 18 HOW 272, 15 L.Ed. 372 [due process determination informed by historical settled usages].

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.

Accordingly, appellant respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. *Sullivan v. Louisiana*, *supra*. That should be the result here, too.

4. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. *People v. Hayes*, *supra*, 52 Cal.3d at p. 643. However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112, 102 S.Ct. 869, 71 L. Ed.2d 1. It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, *supra*, 428 U.S. at p. 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374, 108 S.Ct. 1860, 100 L.Ed.2d 384) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

5. Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. *Sullivan v. Louisiana*, *supra*. The reason is obvious: Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[111] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. *Sullivan v. Louisiana*, *supra*.

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[111] See, e.g., *People v. Dunkle*, No. S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

6. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. *California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195. And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances *People v. Fairbank*, *supra*), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316, 83 S.Ct. 745, 9 L.Ed.2d 770. Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. *People v. Fauber* (1992) 2 Cal.4th 792, 859. Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances

constituting the State's wrongful conduct and show prejudice flowing from that conduct. *In re Sturm* (1974) 11 Cal.3d 258. The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." *Id.*, 11 Cal.3d at p. 267. The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. *Ibid.*; section 1170, subd. (c). Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. *Harmelin v. Michigan, supra,* 501 U.S. at p. 994. Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. See, e.g., *id.* at p. 383, fn. 15. The fact that the decision to impose death is "normative" *People v. Hayes, supra*, 52 Cal.3d at p. 643) and "moral" *People*

v. Hawthorne, *supra*, 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[112]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3,

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[112] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

7. California's Death Penalty Statute as Interpreted by this Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" *Barclay v. Florida* (1983) 463 U.S. 939, 954, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (plurality opinion, alterations in original), quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251, 96 S.Ct. 2960, 49 L.Ed.2d 913 (opinion of Stewart, Powell, and Stevens, JJ.).

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, 104 S.Ct. 871, 79 L.Ed.2d 29, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed

by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. *Harris*, 465 U.S. at p. 52, fn. 14.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See section A of this Argument, *ante*. Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 206. A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. See *Atkins v. Virginia* (2002) 536 U.S. 304, 122 S.Ct. 2242,

153 L.Ed.2d 335; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831, 108 S.Ct. 2687, 101 L.Ed.2d 702; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22, 102 S.Ct. 3368, 73 L.Ed.2d 1140; *Coker v. Georgia* (1977) 433 U.S. 584, 596, 97 S.Ct. 2861, 53 L.Ed.2d 982.

Twenty-nine of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." Ga. Stat. Ann. § 27-2537(c). The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman* [*v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed 346] . . ." *Gregg v. Georgia*, supra, 428 U.S. at 198. Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." *Profitt v. Florida*, *supra*, 428 U.S. 242 at p. 259. Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[113]

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[113] 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, 03, 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. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b)

(continued...)

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253. The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in

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(...continued)
(West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Also 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. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 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]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

Furman in violation of the Eighth and Fourteenth Amendments. *Gregg v. Georgia*, *supra*, 428 U.S. at p. 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (White, J., conc.). The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or

irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. *Woodson v. North Carolina* (1976) 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944, 304; *Zant v. Stephens*, *supra*, 462 U.S. 862 at 879; *Johnson v. Mississippi*, *supra*, 486 U.S. at 584-585.

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." *Stringer v. Black* (1992) 503 U.S. 222, 235, 112 S.Ct. 1130, 117 L.Ed.2d 367.

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California, supra*, 512 U.S. at p. 973 quoting *Gregg v. Georgia, supra*, 428 U.S. at p. 189 (joint opinion of Stewart, Powell, and Stevens, JJ.) and help ensure that the death penalty is evenhandedly applied. *Eddings v. Oklahoma, supra*, 455 U.S. at p. 112.

D. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution By Denying Procedural Safeguards to Capital Defendants that Are Afforded to Non-Capital Defendants.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. See, e.g., *Monge v. California, supra*, 524 U.S. at pp. 731-732. Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." *People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." *Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass. 440, 449.

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." *Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785. A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. *People v. Olivas, supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655.

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

In *Prieto*,[114] as in *Snow*,[115] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. If that were so, then California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. See, e.g., sections 1158, 1158a. When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See sections C.1-C.5, *ante*. Different jurors can, and do, apply different

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[114] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." *Prieto*, 30 Cal.4th at p. 275.

[115] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." *Snow*, 30 Cal.4th at p. 126, fn. 32.

burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike most states where death is a sentencing option and all persons being sentenced to non-capital crimes in California, no reasons for a death sentence need be provided. (See section C.6, *ante*. These discrepancies on basic procedural protections are skewed against persons subject to the loss of their life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288. There is no hint in *Allen* that the two procedures are in any way analogous. In fact, the decision centered on the fundamental differences between the two sentencing procedures. However, because the Court was seeking to justify the extension of procedural protections to persons convicted of non-capital crimes that are not granted to persons facing a possible death sentence, the Court's reasoning was necessarily flawed.

In *People v. Allen*, *supra*, this Court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws. The Court offered three justifications for its holding.

(1) The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards

in the capital-sentencing process under principles not extended to noncapital sentencing." *People v. Allen*, *supra*, 42 Cal. 3d at p. 1286.

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. *McCleskey v. Kemp* (1987) 481 U.S. 279, 305, 107 S.Ct. 1756, 95 L.Ed.2d 262. Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses (*Coker v. Georgia*, *supra*, 433 U.S. 584) or offenders (*Enmund v. Florida*, *supra*, 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335; *Atkins v. Virginia*, *supra*, 536 U.S. 304. Juries, like trial courts and counsel, are not immune from error. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

While the State cannot limit a sentencer's consideration of any factor that could cause it to reject the death penalty, it can and must provide rational criteria that narrow the decision-maker's discretion to impose death. *McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306. No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes.

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. See section

190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794. The absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

(2) The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." *People v. Allen*, *supra*, 42 Cal. 3d at p. 1287 [emphasis added]. In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Ford v. Wainwright*, *supra*, 477 U.S. at p. 411. "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305 [opn. of Stewart, Powell, and Stephens, J.J.]. The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply its disparate review procedures to capital sentencing.

(3) Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. *Allen, supra*,

at p. 1287. The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. *Bush v. Gore*, *supra*, 531 U.S. 98. In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. *Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.

The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. See, e.g., *Atkins v. Virginia*, *supra*, 536 U.S. 304.

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases (*Allen, supra*, 42 Cal.3d at p. 186) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. *Ring v. Arizona, supra.*[116] California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. *Monge v. California*, *supra*. To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

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[116]Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443.

E. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments.

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." *Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.]. (Since that article, in 1995, South Africa abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.]. Indeed, *all* nations of Western Europe have now abolished the death penalty. Amnesty International, "The Death Penalty: List of Abolitionist

and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website [www.amnesty.org].[117]

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" 1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot*, (1895) 159 U.S. 113, 227, 16 S.Ct. 139, 40 L.Ed. 95; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292, 8 S.Ct. 461, 31 L.Ed. 430; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409, 10 L.Ed. 997.

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." *Furman v. Georgia*, *supra*, 408 U.S. at p. 420 [dis. opn. of Powell, J.]. The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, *supra*, 356 U.S. at p. 100; *Atkins v. Virginia*, *supra*, 122 S.Ct. at pp. 2249-2250. It prohibits the use of forms of punishment not

[117] These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. *Id.*

recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Atkins v. Virginia, supra*, 122 S.Ct. at p. 2249, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. See *Atkins v. Virginia, supra*, 122 S.Ct. at p. 2249. Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. *Hilton v. Guyot, supra*, 159 U.S. at p. 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112, 15 L.Ed. 311.

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."

Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. Cf. *Ford v. Wainwright, supra*, 477 U.S. 399; *Atkins v. Virginia*, *supra*, 536 U.S. 304.

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

CONCLUSION.

For the foregoing reasons, the Court should reverse appellant Vines' judgment of conviction and sentence of death.

DATE: February 17, 2005

Respectfully submitted,

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Attorney for Appellant Sean Vines

CERTIFICATE OF WORD COUNT

I certify that the foregoing Appellant's Opening Brief is in 13-point type, and contains 108,643 words, according to the word-count feature of Corel Word Perfect 12, the word-processing program on which it was produced.

DATE: February 17, 2005

Respectfully submitted,

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PROOF OF SERVICE

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)
COUNTY OF SANTA BARBARA)

I, Gilbert Gaynor, am an attorney, over the age of 18 years and not a party to the within action. My business address is P.O. Box 41159, Santa Barbara, CA 93140-1159. On February 18 2005 I served the document entitled **APPELLANT'S OPENING BRIEF** by placing a true and correct copy of the document in an envelope addressed as indicated on the attached Service List.

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